



**Mainga v Mwikya (Environment and Land Appeal E021 of 2022)
[2024] KEELC 4855 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

TW MURIGI, J

JUNE 13, 2024

BETWEEN

PETER NZIKALI MAINGA APPELLANT

AND

PHILIP NDOKO MWIKYA RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 22nd November 2022, the Appellant appealed against the Judgment of Hon. F. Makoyo delivered on 8th November, 2022 in Kilungu MCELC No. E003 of 2021 and set out twelve grounds of Appeal.

Background

2. The Appellant had sued the Respondent by way of an amended Plaintiff dated 9th July 2021 seeking the following orders:-
 1. A declaration that the advanced amount of Kshs 170,000/= to the Plaintiff has fully been recovered by way of set off for the period the Defendant has been using the Plaintiff's land known as Makueni/Uvaleni/1095 or in the alternative an award for mesne profits in favour of the Plaintiff as against the Defendant.
 2. A declaration that any sale agreements executed between the Defendant and the Plaintiff's children over any of the Plaintiff's parcels of land are illegal, null and void.
 3. A declaration that the title deed for L.R. No. Makueni/Uvaleni/1621 is illegally in possession of the Defendant.
 4. An order compelling the Defendant to release the title deed for L.R. No. Makueni/Uvaleni/1621 to the Plaintiff forthwith.



5. A permanent order of injunction restraining the Defendant either by himself, his servants, employees and/or agents from entering, trespassing, alienating, developing and/or in any way dealing with title No. Makueni/Uvaleni/1621, Makueni/Uvaleni/1095 and Makueni/Uvaleni/1724 and or other land belonging to the Plaintiff.
 6. Costs of this suit.
 7. Any such other or further orders as this court may deem fit and just to grant.
3. The Defendant filed an amended Statement of Defence and counterclaim dated 30th August 2021 denying the Plaintiff's claim. In his counterclaim, the Defendant prayed for judgment against the Plaintiff for:-
- a) A declaration that the Plaintiff holds the title deeds in trust for the Defendant to the extent of the 8.7 acres the Defendant occupies to be excised from the parcel of land known as Makueni/Uvaleni/1621, Makueni/Uvaleni/1095 and Makueni/Uvaleni/1724.
 - b) An order directing the Plaintiff to transfer 8.7 acres to be excised from Makueni/Uvaleni/1621, Makueni/Uvaleni/1095 and Makueni/Uvaleni/1724 or in the alternative the District Registrar Makueni to sign the transfer documents.
4. In the proceedings before the lower Court, the Appellant herein was the Plaintiff while the Respondent was the Defendant. After the trial, the Learned Trial Magistrate delivered his judgment on 8th November, 2022 and made the following orders:-
- a. A declaration does hereby issue that the title deed for L.R. No. Makueni/Uvaleni/1621 is illegally in the possession of the Defendant;
 - b. An order does hereby issue compelling the Defendant to release the title deed for Makueni/Uvaleni/1621 to the Plaintiff forthwith;
 - c. A declaration does hereby issue that the Plaintiff holds the title deeds for land parcels Makueni/Uvaleni/1095 and Makueni/Uvaleni/1724 in trust for the Defendant to the extent of the portion the Defendant occupies. Once this portion is determined, the same shall be excised from the parcel of land known as Makueni/Uvaleni/1095 and Makueni/Uvaleni/1724;
 - d. An order does hereby issue directing the Makueni County Surveyor and Land Registrar to carry out a survey to establish the acreage occupied by the Defendant, which portion shall thereafter be excised from the parcels of land known as Makueni/Uvaleni/1095 and Makueni/Uvaleni/1724 and transferred by the Plaintiff to the Defendant, failure to which the Land Registrar Makueni shall sign the transfer documents
 - e. Each party to bear their own costs.
5. The Appellant being dissatisfied with the decision filed the Memorandum of Appeal herein dated 22nd November, 2022 on the following grounds: -
1. That the learned trial magistrate erred in law and fact in failing to frame distinct points/issues for determination and to make decisions thereon thereby reaching wrong conclusions.
 2. That the learned trial magistrate erred in law and fact in failing to appreciate and consider all the points/issues for determination as raised in the Plaintiff's/Appellant's submissions and to make decisions thereon.



3. That the learned trial magistrate, after finding that there were sale agreements executed by the parties, erred in law and fact in failing to consider whether the consideration was paid by the Respondent herein and, if so, the quantum thereof.
 4. That the learned trial magistrate erred in law and fact in failing to make a finding as to whether the Respondent completed the sale by paying the purchase price in full.
 5. That the learned trial magistrate erred in law and fact in failing to make a finding that the Respondent was entitled to a portion of the Appellant's parcel(s) of land equivalent to the consideration paid to the Appellant by the Respondent.
 6. That the learned trial magistrate erred in law and fact in holding that the Respondent had produced three sale agreements as exhibits in the case.
 7. That the learned trial magistrate erred in law and fact in holding that the Appellant had not explained the circumstances under which he was demarcating the suit land.
 8. That the learned trial magistrate erred in law and fact in making a finding that it was common ground that the Respondent took possession of his rightful portion and fenced it off.
 9. That the learned trial magistrate erred in law and fact in making an order directing the Makueni County Surveyor and Land Registrar to carry out a survey to establish the acreage occupied by the Respondent, despite the Respondent's averments and testimony that he had purchased 8.7 acres only and despite the fact that the Respondent had no proof of payment for the full purchase price (Kshs. 391,500/=).
 10. That the learned trial magistrate erred in law and fact in failing to make an order that a portion equivalent to the moneys/consideration paid by the Respondent to the Appellant, at the agreed rate of Kshs. 45,000/= per acre, be excised from the Appellant's parcel(s) of land and be transferred to the Respondent.
 11. That the learned trial magistrate erred in law and fact in failing to grant an order of injunction against the Respondent in relation to the parcel of land known as Makueni/Uvaleni/1621 as sought by the Appellant even after finding that the Respondent was illegally holding the title deed in respect thereof.
 12. That the learned trial magistrate erred in law and fact in failing to find that the Respondent's counterclaim had not been proved.
6. The Appellant prays for: -
- a. This Appeal be allowed.
 - b. The learned trial magistrate's judgment and decree be set aside and the same be substituted with a finding that the Respondent paid the Appellant a consideration amounting to Kshs. 170,000/= and that the Respondent is thus entitled to a portion of the Appellant's land measuring 3.78 acres (at the agreed rate of Kshs. 45,000/= per acre) which should then be excised from the Appellant's parcel of land known as Makueni/Uvaleni/1095 and be transferred to the Respondent.
 - c. The Respondent's counterclaim as against the Appellant in the subordinate court be dismissed with costs to the Appellant.
 - d. The Appellant be awarded costs of the suit in the subordinate court.



- e. Any other or further relief as this Honourable Court may deem fit in the interest of justice.
 - f. Costs of the Appeal be borne by the Respondent.
7. The parties were directed to canvass the appeal by way of written submissions.

The Appellant's Submissions

8. The Appellant's submissions were filed on 10th November, 2023.
- On his behalf, Counsel submitted that the learned trial magistrate did not frame the issues for determination so as to make a finding on each issue. Counsel further submitted that the learned trial magistrate failed to make a determination on whether the Respondent paid any consideration to the Appellant and if so, how much.
9. Counsel submitted that the only orders which commended themselves from the pleadings and the evidence before the trial court were as follows: -
- i. The Appellant transfers a portion of his land measuring 8.7 acre to the Respondent if there was proof of payment of the entire purchase price (Kshs. 391,500/=); or
 - ii. The Appellant transfers a portion of his land being 3.78 acres at the rate of Kshs. 45,000/= per acre, equivalent to the sum of Kshs. 170,000/= received from the Respondent.
10. Counsel submitted that if the learned trial magistrate's decision is upheld, the Respondent will unjustly enrich himself and deprive the Appellant of his land without commensurate consideration. Concluding his submissions, Counsel urged the court to allow the Appeal as prayed.
11. As at the time of writing this judgment, the Respondent had not filed his submissions as directed.

Analysis Ad Determination

12. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another Vs Associated Motor Boat Company and Others* (1968) 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and drive its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.”

13. Although the Appellant raised twelve (12) grounds of appeal, the court is of the opinion that the Appeal may conclusively be determined on the following three grounds: -
- i. Whether the failure to frame issues for determination vitiates the judgment.
 - ii. Whether there existed a loan agreement between the parties herein.
 - iii. Whether there was a valid sale agreement between the parties herein?



- iv. Whether the trial magistrate analyzed the evidence on record before arriving at his decision.

Whether the failure to frame issues for determination vitiates the judgment

14. The Appellant lamented that the trial magistrate erred in law and fact by failing to frame the issues for determination. He further contended that the learned trial magistrate failed to frame the issue on whether consideration was paid in respect of the suit property.
15. Order 21 Rules 4 and 5 of the Civil Procedure Rules provides as follows:-
- 4)) Judgments in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for the decision.
- 5) In suits in which issues have been framed, the court shall state its findings or decision with the reasons therefore upon each separate issue.
16. In the case of *Rukidi vs Iguru and Another* (1995-1998) 2 EA 318 the court held that:-
- “Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus oriented and saves the time of the court”
17. In *Norman vs Overseas Motor Transport (Tanganyika) Limited* Civil Appeal No.88 of 1958(1959) EA 131 the court held that:-
- “If though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed.....”
18. Similarly in the case of *Peter Ngumi Gichoho alias Pete Ngumi Gichoho Ngugi vs Ambrose Wanjohi Migwi T/A Migan Hardware Store Nyeri HCCA NO. 138 OF 2003* the court held that:-
- “The deficiency in failing to frame the issues can be corrected by the first appellate court”.
19. In the matter at hand, the trial magistrate did not frame the issues for determination which he was enjoined to do under Order 2 Rule 5 of the Civil Procedure Rules. However, a perusal of the record shows that the trial magistrate analyzed the evidence presented before him. This court finds and holds that failure to frame the issues was an irregularity which can be cured in the present appeal.

Whether there was a loan agreement between the parties herein

20. PW1 testified that he is the registered owner of land parcels Nos. Makueni/Uvaleni/1621, 1095 and 1724. It was his testimony that sometimes in the year 2007, the Defendant advanced to him a loan of Kshs 170,000/- to enable him to settle a medical bill. He testified that the terms of the agreement stipulated that in the event that he defaults to repay the loan, the debt would be settled by the sale of 3.78 acres comprised in the Plaintiff's land at rate of Kshs 45,000 per acre.
21. PW1 testified that when it became apparent that he could not refund the loan, he agreed to transfer a portion of land parcel No. Makueni/Uvaleni/1095 which was equivalent to the total advance to him by the Defendant at the rate of Kshs 45,000/=. That subsequently thereafter, the Defendant organised for the demarcation of the said portion and that it was during the exercise that he noted that the Defendant was demarcating 8.7 acres.



22. He asserted that the Defendant has fully recovered the amount advanced by way of set off for the period of 13 years that he has used his land.
23. On his part, the Defendant testified that in the year 2007, he entered into a sale agreement with the Plaintiff for the sale of 8.7 acres comprised in land parcel Nos, Makueni/Uvaleni/1095 and 1724 for a consideration of Kshs 391,500/=. It was his testimony that he paid the purchase price in full leaving a balance of Kshs.11,250/= being the amount that he was to pay in exchange for the title deed.
- He further testified that immediately after the sale, he took possession of the land and fenced it off.
24. According to the Defendant, the Plaintiff's suit is motivated by greed as he wants him to vacate the property so that he can sell it to another person. The Respondent denied having loaned the Appellant any money as alleged.
25. The Appellant alleged that he entered into a loan agreement with the Respondent. The law requires that the Appellant must discharge the burden of proof as set out in Section 107 (1) and (2) of the Evidence Act which stipulates as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
26. The Appellant had a duty to prove that there existed a loan agreement between him and the Respondent herein. However, he did not adduce any evidence to show that the Respondent advanced to him a loan of Kshs. 170,000/= as alleged. He did not discharge the burden of proving that there existed a loan agreement between him and the Respondent. This court therefore finds and holds that learned trial magistrate was correct in holding that the Appellant had not adduced evidence in support of his claim.

Whether there was a valid sale agreement between the parties herein.

27. The Appellant denied to having entered into any agreement for the sale of the suit properties with the Defendant. It was his testimony that the Respondent fraudulently caused his children to execute agreements for sale without his knowledge or consent. He testified that his children colluded with the Defendant to defraud him of his land. On his part, the Respondent contended that he purchased 8.7 acres from land parcels Nos. Makueni/Uvaleni/1095 and 1724 and paid the purchase price of Kshs 391,500/= leaving a balance of Kshs. 12,500/= which he was to pay upon receipt of the title document.
28. DW2 testified that his father sold portions of parcel Nos. Makueni/Uvaleni/1095 and 1724 to the Defendant and allowed him to take possession thereof. He further testified that the Appellant paid the purchase price leaving a small balance which was to paid upon receipt of the title deed.
29. Section 3 (3) of the Law of Contract Act provides as follows: -
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and



- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
30. The Respondent produced the sale agreement dated 20/09/07 in respect of Plot No. 1095 (Uvaleni Sub-location) and the sale agreement in respect of Plot No. 1725(Uvaleni Sub-location) dated 23/2/08. Both agreements were in writing and were signed by the parties thereto. The sale agreements were also attested by witnesses in accordance with the provisions of Section 3 (3) of the *Law of Contract Act*.
31. The Appellant denied to having signed the sale agreements and asserted that the Respondent colluded with his children to defraud him of his land. In paragraph 13 of the amended Pleint, the Plaintiff pleaded particulars of fraud on the part of Defendant as follows:-
- a. Drawing and entering into agreements between the Defendant and the Plaintiff's children.
 - b. Collecting the Plaintiff's title deed in respect of the parcel of land known as Makueni/Uvaleni/1621 without the Plaintiff's permission
 - c. Retaining the Plaintiff's title deed in respect of parcel of land known as Makueni/Uvaleni/1621 without the Plaintiff's authority
 - d. Forging the Plaintiff's signature.
32. It is trite law that any allegations of fraud must be specifically pleaded Black's law dictionary defines fraud as:-
- “A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
33. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) held as follows: -
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
34. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the Court of Appeal held that;-
- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”
35. Although the Appellant pleaded fraud against the Respondent, he did not tender any evidence in support of the claim. The trial magistrate correctly held that the Plaintiff did not report to the police that the Defendant colluded with his sons to defraud him of his land. Despite alleging fraud on the



part of the Respondent, the Appellant did not adduce any evidence to show that the Defendant forged his signature.

36. The Appellant lamented that the trial magistrate did not establish whether the Respondent paid the purchase price in full. The Respondent testified that he paid the purchase price of Kshs. 391,500/= and was allowed to take possession of the suit property. His evidence was corroborated by DW2, Samson Munyao Nzikali, who confirmed that the Respondent paid the purchase price leaving a small to be paid upon receipt of the title deed. The sale agreements clearly show that the Appellant allowed the Respondent to take possession of the suit property.

37. At paragraphs, 7 and 9 of the amended plaint, the Appellant pleaded that the Respondent has been in possession and use of the suit property for the past thirteen years prior to the filing of the suit. Section 116 of the *Evidence Act* provides as follows: -

‘When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.’

38. From the pleadings and the evidence on record, it is crystal clear that the Respondent is in exclusive possession of the suit property.

39. The Appellant did not adduce any evidence to show that he sued the Plaintiff for vacant possession or made any demands to repossess the suit property in the thirteen years that the Respondent was in possession. It is therefore immaterial at this point for the Appellant to allege that the trial magistrate failed to determine whether the Respondent paid the purchase price in full.

40. From the evidence on record, the court can safely conclude that the Respondent paid the full purchase price of the portion of the suit property which he currently occupies.

41. The Appellant faulted the trial court for failing to grant an injunction against the Respondent in regards to land parcel No. Makueni/Uvaleni/1621 after holding that the Respondent was holding his land illegally. The order of injunction will not serve any purpose as the trial magistrate granted an order compelling the Respondent to release the title deed for land parcel No. Makueni/Uvaleni/1724 to the Plaintiff forthwith.

42. I also find that the trial magistrate evaluated the evidence presented before him in arriving at his decision. In *Mohamed Mohmoud Jabane v Highstone Butty Tongoi Olenja* (1986) eKLR the Court of Appeal observed as follows: -

“More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who has had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or on a misapprehension of the evidence, or the judge is shown to demonstrably to have acted on wrong principles in reaching the findings he did.”

43. No evidence was adduced to show that the trial magistrate considered extraneous matters in arriving at his decision. I find that the Learned Trial Magistrate properly analyzed and evaluated the evidence presented before him in arriving at his decision

44. In the end, I find that the Appeal herein is devoid of merit and the same is hereby dismissed. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13TH DAY OF JUNE, 2024.

IN THE PRESENCE OF:

Court assistant Kwemboi.

Wambua for the Appellant.

Nzioki J.T. for the Respondent.

