



**Onyando (Suing as the legal representative of the Estate of the Deceased Michael Abidha Wahanda) & another v Mbara & another (Environment and Land Appeal E005 of 2023) [2024] KEELC 4720 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4720 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E005 OF 2023  
AY KOROSS, J  
JUNE 13, 2024**

**BETWEEN**

**ELIAZARO ONYANDO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE DECEASED MICHAEL ABIDHA WAHANDA) ..... 1<sup>ST</sup> APPELLANT**

**ROSE ACHIENG & ANN ADONGO OKUMU (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE DECEASED ALFRED ODHIAMBO WAHANDA) ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WILSON OURU MBARA ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF LANDS, BONDO DISTRICT ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the SPM Hon. J.P. Nandi delivered on 14/07/2023 in Bondo SPM ELC Case No.56 of 2018 as consolidated with Bondo SPM ELC Case No. 52 of 2018)*

**JUDGMENT**

**Background of the appeal**

1. Before the trial court, the appellants were the plaintiffs and the respondents the defendants. The dispute revolved around land parcel no. Uyawi/Nyangoma 3717 (suit property) measuring approximately 8.24 ha registered in the 1<sup>st</sup> respondent's name.
2. The 1<sup>st</sup> appellant's suit that is the subject of the appeal was by an order of the trial court of 4/6/2020 consolidated with the 2<sup>nd</sup> appellants' case no. Bondo SPM ELC Case No.52 of 2018 with the lead file being Bondo SPM ELC Case No.56 of 2018.



3. All the appellants are relatives with the 1<sup>st</sup> appellant Michael Abidha Wahanda (Michael) being the patriarch and Alfred Odhiambo Wahanda (Alfred) being his grandson. It emerged all of them were purportedly pursuing Richard Nicolas Omondi Wahanda alias Nicolas Omondi Wahanda's (Nicolas) interests over the suit property. Nicolas was Michael's son and Alfred's father.
4. When the appellants died in the course of the lower court proceedings, they were substituted by their legal representatives. In an amended plaint dated 5/5/2023, the 1<sup>st</sup> appellant contended that though Nicolas was the registered owner of the suit property, Michael in 2010 sold a portion of it to the 1<sup>st</sup> respondent. However, without following due process, the 1<sup>st</sup> respondent secretly and fraudulently had the entire suit property registered in his name.
5. The 1<sup>st</sup> appellant particularized fraud against both respondents for secretly transferring the suit property to the 1<sup>st</sup> respondent, failing to obtain consent to subdivide and transfer from the Land Control Board (LCB), and dealing with the suit property without probate proceedings being conducted.
6. Consequently, he sought for the suit property's title to be cancelled and for it to be reverted to Nicolas, injunctive reliefs, and costs of the suit.
7. The 2<sup>nd</sup> appellants' undated further amended plaint filed on 26/05/2023 was of a similar tone as that of the 1<sup>st</sup> appellant. In addition, they averred for the absence of legal capacity, Michael could not transact over the suit property with the 1<sup>st</sup> respondent and in seeking similar reliefs as the 1<sup>st</sup> respondent also sought damages.
8. The 1<sup>st</sup> respondent who was then acting in person filed a strange document which he described as a "proposed statement of defence" dated 18/01/2019 however when he sought the services of an advocate, his then counsel M/s. Peres Odoyo & Co. Advocates filed a defence dated 20/03/2019. The defence in respect of Bondo SPM ELC Case No.52 of 2018 was also filed by the same law firm and it was dated 28/11/2019.
9. The 1<sup>st</sup> defence was mostly composed of denials and he put the 1<sup>st</sup> appellant to strict proof nonetheless, he admitted that indeed he and Michael entered into an agreement for sale over the entire suit property and all due process was followed towards his registration over the suit property.
10. Further, he averred he was a stranger to the allegations and Michael who benefited from the transaction could not turn around and allege fraud yet he entirely participated in the process towards the registration of the 1<sup>st</sup> respondent's interests over the suit property. He urged the court to dismiss the suit with costs. The 2<sup>nd</sup> respondent did not participate in the proceedings.
11. The matter proceeded to trial and some of the appellants' substitutes testified and they were namely Eliazaro Onyango Awuor and Rose Achieng. Further, the 1<sup>st</sup> respondent testified and his evidence was led by Maurice Anyango Ogumbe who testified as DW2. During their respective testimonies, except DW2, all witnesses produced documents in support of their respective cases.
12. Upon closing parties' cases and submissions being filed, the trial court reserved the suit for judgment. In the challenged judgment, the learned trial magistrate found he did not have jurisdiction to entertain the suit, fraud had not been proved and dismissed the appellants' cases.



### **Appeal to this court**

13. Being aggrieved by the impugned judgment, the appellant moved this court on 4 grounds of appeal set out in the memorandum of appeal dated 11/08/2023 faulting the learned trial magistrate and they were inter alia:-
  - a. The learned trial magistrate erred in law and fact in finding and holding the appellants failed to distinctly plead particulars of fraud against the respondents.
  - b. The learned trial magistrate erred in law and fact in finding and holding he lacked jurisdiction.
  - c. The learned trial magistrate erred in law and fact by failing to find the suit property had a title deed thus he had jurisdiction.
  - d. The learned trial magistrate erred in law and fact by failing to appreciate the evidence and thus arrived at wrong findings and conclusions.
14. Therefore, in the memorandum of appeal, the appellants urged this court to allow the appeal and set aside, vary, or review the impugned judgment and its consequent decree. They also sought for the suit property's title deed to be cancelled and sought the costs of the appeal and the trial court suit.

### **Parties' submissions**

15. As directed by the court, the appeal was canvassed by written submissions. It is observed just as in the trial court, the 2<sup>nd</sup> respondent did not file any written submissions.
16. The appellants' law firm on record Ms. Ben Aduol Nyanga & Co. Advocates filed their written submissions dated 4/04/2024 while the 1<sup>st</sup> respondent's law firm on record Ms. Owenga Ombuya & Co. Advocates filed the 1<sup>st</sup> respondent's written submissions dated 15/04/2024. The 2<sup>nd</sup> respondent did not file any submissions.
17. The appellants' submissions identified all the grounds of appeal as the issues arising for determination. In arguing all the 4 grounds of appeal, counsel consolidated grounds (b) and (c) as a singular ground.
18. On the other hand, the 1<sup>st</sup> respondent's counsel identified all the grounds of the appeal as issues arising for resolution and recognized costs as a 4<sup>th</sup> issue. However, in the submissions, counsel did not argue ground (a), and on grounds (b) and (c), counsel argued them together.
19. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider each of the counsels' arguments on the particular issue and provisions of law they relied upon.
20. Nevertheless, despite counsels referring to authorities in their submissions, they did not avail them to this court and for this reason, the cited authorities will be disregarded.

### **Issues for determination**

21. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyze the evidence as asserted by the parties in the record of appeal and lower court record and to establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.



22. In line with the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the court must keep in mind that it neither saw nor heard the witnesses and shall make due allowance in that respect. Further, this court is called upon not to be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the learned trial magistrate was wrong because of some misdirection, failed to take into consideration relevant matters, considered irrelevant matters and as a result, arrived at a wrong conclusion or abused his discretion.
23. Having carefully evaluated the records and parties' rival submissions including relevant provisions of law, the issues that arise for resolution are those contained in the grounds of appeal, and grounds (b), (c), and (d) shall be considered together. Furthermore, this court shall consider the issue of costs. These grounds shall shortly be handled sequentially.

## **Analysis and Determination**

### **a. Ground (a)**

24. The 1<sup>st</sup> respondent's counsel did not submit on this issue but this court agrees with the appellants' counsel's argument that it is trite law that fraud must be specifically pleaded and strictly proved. Counsel's argument is anchored in Order 2 Rule 10 (1) (a) of the *Civil Procedure Act* which provides as follows: -
  - "(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
    - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies;"
25. This settled principle of law was elucidated in the Court of Appeal decision of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR where the court expressed itself as follows: -

"As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained."
26. The learned trial magistrate appreciated this principle of law and upon consideration of the appellants' pleadings stated thus in his obiter: -

"...however looking at their pleadings they have not distinctly pleaded the particulars of fraud as against each defendant... The plaintiffs in their plaints only generalized particulars of fraud in paragraphs 7 and 8 of their respective plaints"
27. It must be noted that in claims of fraud, precision, and sufficiency of allegations must be set so clearly in the claim that the persons being sued must know without any doubt the cases they have to answer.



28. In revisiting paragraph 7 of the 1<sup>st</sup> appellant's plaint, I must agree with the appellants' counsel that the learned trial magistrate erred in making this statement since it manifests they particularized allegations of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> respondents with precision.
29. However, this cannot be said of the 2<sup>nd</sup> appellants' claim. Paragraph 8 of their claim is generalized, and it is uncertain against which respondent the claims are being directed against.
30. The highlighted statement by the learned trial magistrate in the impugned judgment was made in passing and did not affect his findings. I find it an orbiter dictum and inconsequential to the outcome of the impugned judgment or to this appeal for that matter.

**b. Grounds (b) (c) and (d)**

31. Section 13 (1) of the [Land Adjudication Act](#) states as follows: -

“Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.”

32. It follows that following the declaration of an area as an adjudication section and on the application of this Section 13 (1), every person who has an interest in land whether as a purchaser as the 1<sup>st</sup> respondent alleges he was could assert their rights. The essence of this was to ascertain the rights and interests of persons in an adjudication section.
33. In his decision, the learned trial magistrate was categorical that the suit property emanated from an adjudication section and his findings were supported by the 1<sup>st</sup> respondent's counsel's arguments against the appeal.
34. Yet, the appellants' counsel was of a contrary view, in their submissions, the counsel was emphatic that the learned trial magistrate misunderstood the appellants' case since they were not questioning the adjudication process but rather the alleged illegal and fraudulent transfer of the suit property from Nicolas' name who was the original owner to that of the 1<sup>st</sup> respondent.
35. Given the firm and opposing positions taken by counsels, to assuage the appellants' contestations, it is paramount that this court examines two very crucial documents that were produced by the 2<sup>nd</sup> appellant as Pex. 5 and Pex. 6 which were respectively the suit property's adjudication record and green card. The adjudication record was also produced by the 1<sup>st</sup> respondent.
36. Moreover, it is crucial for this court to outline the procedure by which these documents are acquired as this will answer whether the learned trial magistrate had jurisdiction and whether he misapprehended the appellants' case.
37. The land adjudication process to which the suit property was subjected before its registration is one of the ways of land acquisition in Kenya and it provides an elaborate mechanism for resolving disputes that arise during the process of ascertainment of the rights and interests in land.
38. As can be seen from Pex. 5, according to Section 23 (2) of the [Land Adjudication Act](#), the land adjudication officer (LAO) was satisfied Nicolas was the owner of the suit property and recorded him as such.
39. However, aggrieved, the 1<sup>st</sup> respondent lodged his objection as per Section 26 of the said Act. Upon hearing the dispute, the LAO was satisfied with the 1<sup>st</sup> respondent's claim and recorded him as the



owner of the suit property. The LAO cancelled Nicolas' name and replaced it with that of the 1<sup>st</sup> respondent. This Section 26 states: -

- “(1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- (2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.”

40. There is no evidence the LAO's decision was challenged by an appeal to the minister as envisaged by Section 29 of the [Land Adjudication Act](#) meaning the adjudication register was amended to reflect the 1<sup>st</sup> respondent as the owner of the suit property and this is provided for in Section 27 of the said Act.
41. To conclude the process and as provided by Section 28 of this Act, the land registrar registered the 1<sup>st</sup> respondent as the owner of the suit property and this was done by Sections 6 and 7 of the [Land Registration Act](#).
42. It must be observed the 2<sup>nd</sup> respondent's office plays a very minimal role during adjudication process and as aptly pointed out by the learned trial magistrate, the proper person to have been sued was the LAO.
43. The suit property has never changed hands ever since its registration in the 1<sup>st</sup> respondent's name and the advanced particulars of fraud were bound to fail as they all applied either in scenarios of transmission after confirmation of grant or transfer but not during an adjudication process as the case herein. It is obvious the appellants misconstrued their case.
44. The registration vested the 1<sup>st</sup> respondent with rights and ownership of the land. See Sections 24 and 25 of the [Land Registration Act](#). However, even as a 1<sup>st</sup> registration, this title could be challenged under Section 26 (1) of this Act if it was acquired using fraud, misrepresentation, illegality, unprocedural means, or through a corrupt scheme.
45. This provision is a departure from Section 143 of the repealed Registered [Land ACT](#) which provided that upon 1<sup>st</sup> registration of land, a claim of fraud or mistake was unsustainable.
46. The question that suffices and which was before the learned trial magistrate is does Section 26 (1) mean that a court can blanketly entertain a claim of fraud notwithstanding the intricate mechanisms of the [Land Adjudication Act](#)?
47. This has been the subject of interpretation and courts have held that the court shall only entertain such a case if it was a new cause of action. In the decision of *Nicholas Njeru v Attorney General & 8 others* [2013] eKLR which I hereby adopt and binding on this court, the Court of Appeal stated: -

“However we do not entirely agree with the learned Judge's observation that the court had no jurisdiction to grant a declaratory order... We agree with the trial Judge that during the various proceedings the issues in this appeal were perhaps thrashed almost to the pulp and the dispute over which clan owned the suit property had long been determined. We will also look at what the appellants referred as 'the new cause of action.'”



48. A similar position was taken by the well-cited persuasive decision of Dume Deri Mumbo & 19 others (suing on their behalf and on behalf of Wandarari Clan v Cabinet Secretary of Lands, Housing & Urban Development & 6 others [2016] eKLR which held: -

“...although a litigant can file a suit in a matter where the adjudication register, pursuant to the provisions of the *Land Adjudication Act*, has been closed and a title deed issued... Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then, and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings.”

49. In the impugned judgment, the learned trial magistrate reasoned the LAO had already rendered a decision and ultimately found that he was bereft of jurisdiction.

50. Given the decisions of Nicholas Njeru (Supra), Dume Deri Mumbo (Supra) and evidence adduced before the trial court which demonstrated the LAO had determined the dispute between Nicolas and the 1<sup>st</sup> respondent, the same issues could not be raised in the subsequent suit. Accordingly, I must agree with the learned trial magistrate’s findings and find he did not err.

51. Ultimately, I find and hold that this appeal is devoid of merit. I hereby uphold the judgment of the learned trial magistrate delivered on 14/07/2023.

52. Accordingly, the appeal fails and it is hereby dismissed. It is trite law costs follow the event and costs are awarded to the 1<sup>st</sup> respondent. For the reason the 2<sup>nd</sup> respondent did not participate in the proceedings, costs are not awarded to it.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 13<sup>TH</sup> DAY OF JUNE 2024**

**HON. A. Y. KOROSS**

**JUDGE**

13/6/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Nyanga for the 1<sup>st</sup> appellants

Miss. Ruth Abir for the 2<sup>nd</sup> appellants

Miss Owenga for the 1<sup>st</sup> respondent

N/A for the 2<sup>nd</sup> respondent

Court assistant: Ishmael Orwa

