



**Gituma v Kamangara (Environment and Land Appeal E006 of 2023)
[2024] KEELC 5709 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

CK YANO, J

JULY 25, 2024

BETWEEN

ZAKARIA KINORO GITUMA APPELLANT

AND

JOHN MWENDA KAMANGARA RESPONDENT

JUDGMENT

Introduction

1. The respondent in this appeal moved the trial court vide a plaint dated 21st October, 2020 and amended on 24th December, 2020 seeking an order for eviction against the Appellant from land parcel L.R No. N.Tharaka/Marimanti/1236 (the suit land) and an order of permanent injunction restraining the Appellant either by himself, agents, servants, employees or anyone acting on his behalf from entering, encroaching, trespassing, selling, claiming ownership and or in any other manner interfering with the respondent's said land, costs of the suit and any other orders the court may deem fit to grant.
2. The respondent pleaded that he is the registered owner of the suit land having rightful and legally acquired the same on first registration and that the title to his land is indefeasible. That the Appellant herein is the registered owner of land parcel LR NO. N. Tharaka/Marimanti/691 which borders the respondent's land aforementioned.
3. The respondent further pleaded that the Appellant had unlawfully entered, encroached and trespassed into the respondent's land without the authority and/or prior consent of the respondent. That the Appellant was claiming ownership of the said portion and had on several occasions been interfering with the respondent's quiet possession and use of the same and should be restrained by a permanent injunction. That by the acts, omissions and commissions of the appellant, the respondent had suffered irreparably.



4. The Appellant filed a defence and counterclaim dated 17th December, 2020 in which he denied the respondent's claim. The Appellant pleaded that he is the legal owner of all that parcel of land known as N.Tharaka/Marimanti/691. That the respondent in collusion with the land adjudication officers fraudulently and illegally caused the appellant's land parcel aforesaid to be sub-divided and alienated creating a portion known as L.R N.Tharaka/Marimanti/1236 which was registered in the name of the respondent. The appellant averred that he could not be a trespasser on his own land.
5. The Appellant pleaded that land Parcel N. Tharaka/Marimanti/691 before it was sub-divided was bordering Mitunguu Marimanti road on one side, land parcels N. Tharaka/Marimanti/693 & 698 on the other sides and a feeder road and at no point did the same border N.Tharaka/Marimanti/1236 as alleged in the plaint and the sheet map. The Appellant further pleaded that the respondent did not and had never owned any land in the area. That in the 1990's, the Appellant agreed to sell a portion of land to the respondent at a cost of Kshs. 8,500/= whereupon the respondent paid Kshs. 1,200/= leaving a balance of Kshs. 7,300/=. That the said portion was still intact and well-marked. The appellant averred that his efforts to have the respondent clear the balance fell on deaf ears and that the respondent was out to acquire that land illegally.
6. The Appellant's case was that land parcel N. Tharaka/Marimanti/1236 was apportioned to the respondent fraudulently. The appellant enumerated particulars of fraud against the respondent that he did not raise any objection during the adjudication process, colluding with the adjudication officers to have the appellant's land parcel N.Tharaka/Marimanti/691 alienated, causing the resultant parcel N.Tharaka/Marimanti/1236 to be transferred in his name without the consent of the Appellant and accepting to be registered with N.Tharaka/Marimanti/1236 while fully aware that he never owned, occupied and or utilized any land in the area and in particular N.Tharaka/Marimanti/691 as it was then.
7. The Appellant pleaded that by acts of the respondent he had suffered.
8. In the counterclaim, the Appellant prayed for an order of eviction against the respondent from land parcels N. Tharaka/Marimanti/691 & 1236, an order requiring the land registrar, Tharaka to cancel and/or revoke the register of land parcel N. Tharaka/Marimanti/1236 and the same be joined with N.Tharaka/Marimanti/691 in the respondent's name in the register, an order of a permanent injunction restraining the respondent whether by himself, his agents, family members or anyone acting on his behest from entering, cultivating, trespassing, claiming ownership or in any other manner interfering with the appellant's peaceful occupation and possession of all that parcel of land known as N.Tharaka/Marimanti/691, costs and interest of the suit and any other relief.
9. Upon considering the matter, the trial court held that on a balance of probabilities, the respondent had proved his registration and indeed registered interest in parcel N. Tharaka/Marimanti/1236 to the exclusion of all others. That the appellant failed to prove fraud on the part of the respondent. The respondent was granted orders of eviction and permanent injunction against the appellant whose counterclaim failed.
10. The appellant was aggrieved by the judgment and filed this appeal on the following grounds: -
 1. The Learned Magistrate erred in law and facts in failing to find that the appellant had proved on a balance of probabilities his counterclaim.
 2. The learned Magistrate erred in Law and in facts in finding that the respondent has proved his case when the evidence tendered before him was insufficient.



3. The learned Magistrate erred in law and facts in deciding the whole case against the weight of evidence.
11. The appellant prays for the lower court judgment to be set aside and be replaced with an order allowing the counter claim with costs.
12. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 28th November, 2023 through the firm of L.KIMATHI KIARA & Co. Advocates while the respondent filed his dated 25th March, 2024 through the firm of Mugiira & Associates Advocates.

Appellant's Submissions

13. It was submitted on behalf of the appellant that the appeal has merits. That the appellant and his witnesses proved that the respondent had fraudulently obtained title to his land. That the appellant testified that he never sold any land to the respondent. That when the surveyor visited the suit land, he found the two parcels of land but could not verify the acreage of each.
14. It is the Appellant's submission that it was incumbent upon the court to scrutinize every bit of the evidence in order to arrive at the correct decision. That had the trial magistrate scrutinized the entire evidence, he would have found that the respondent had defrauded the appellant his land. That the respondent failed to pay the agreed price for the sale of the land and as such the sale became null and void and therefore could not have qualified for the respondent to be issued with a title deed and therefore the title the respondent holds is vitiated by reason of fraud and ought to be cancelled.

Respondent's Submissions

15. The respondent's counsel gave a brief facts of the case and submitted on ground 1 on whether the Appellant had proved his counterclaim on a balance of probabilities. It was submitted that in his counterclaim at the trial court the appellant pleaded fraud. That he alleged that the respondent colluded with the land registrar to have L.R Tharaka/Marimanti/1236 transferred to the respondent. That, however, the appellant did not lead evidence to show how fraud occurred. The respondent cited Section 107 of the *Evidence Act* which provides that he who alleges must prove. It is the respondent's submission that the burden of proof was upon the appellant to prove that indeed there was fraud and how the fraud occurred. It is submitted that the appellant did not discharge this burden.
16. The respondent cited Section 26 (1) of the *Land Registration Act* and submitted that the legal requirement in order to impeach a title document is thus to demonstrate that the title was acquired through fraud (unprocedurally). That the appellant did not adduce evidence to that effect and in the absence of any evidence, the court could not make inference from the facts.
17. It is the respondent's submission that the appellant failed to discharge his burden of proof in the trial court and therefore that ground of appeal fails. The respondent relied on the case of Eviline Karigu Vs. M'Chabari Kinoro (2022) eKLR.
18. On the allegation that the trial court relied on insufficient evidence, the respondent submitted that during the proceedings at the trial court, a site visit was conducted by the land registrar and the surveyor pursuant to court orders of 24th August, 2022 and a report tendered in court. That the registrar's report was that land parcel N.Tharaka/Marimanti/1236 is owned by the respondent while parcel No. Tharaka/Marimanti/691 is owned by the Appellant. That the registrar attached a sketch map which corresponds with the Appellant's sketch map produced at the trial which shows that the two parcels exist distinctly.



19. The respondent submitted that the report by the land registrar and the surveyor was never challenged and as such it was proper for the trial court to rely on the same. That there is no requirement in law of how many witnesses or documents one should adduce for evidence to be said to be sufficient. That the argument by the appellant that the evidence tendered was insufficient is therefore misplaced and misleading to the court. The respondent submitted that on the strength of the registrar and surveyor's report, that ground is destined to fail and should fail.
20. Regarding the issue whether the learned magistrate decided the whole case against the weight of the appellant's evidence, it was submitted on behalf of the respondent that the appellant neither proved his counterclaim based on fraud in the lower court nor did he challenge the report by the registrar which indicated that the two parcels of land are distinct and separate. That based on the foregoing, the appellant's contention that the learned magistrate decided the whole case against the weight of the evidence is baseless and misplaced and ground 3 must fail.
21. The respondent's submission is that the appeal lacks merit and should be dismissed with costs.

Analysis And Determination

22. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another Vs. Associated Motor Boat Co. Ltd (1968) EA 123*.
23. The issues I find for determination are:
 - i. Whether the Appellant had proved his counterclaim on a balance of probabilities.
 - ii. Whether the respondent proved his case based on the evidence tendered.
 - iii. Who bears the cost.

Whether the Appellant had proved his counterclaim on a balance of probabilities.

24. The Appellant pleaded in the counterclaim that he is the legal owner of all that parcel of land known as N.Tharaka/Marimanti/691. That the respondent in collusion with the land adjudication officers fraudulently and illegally caused the appellant's land parcel aforesaid to be alienated creating a portion known as LR N. Tharaka/Marimanti/1236 which was registered in the name of the respondent.
25. In his evidence during cross examination, the Appellant testified that the respondent stole his land while he was in Githongo. The Appellant testified that he did not call the respondent when the adjudication commenced. It was the Appellant's further evidence that he never sold any land to the respondent in 1984. That the land had been adjudicated and it is in his name.
26. The Appellant testified that he did not have a title deed. That he refused to take his title deed from lands office when he realized some portion had been hived off by the respondent.
27. The Appellant further testified that he reported to the Chief and Assistant Chief but he did not have any number from either the chief or his assistant. The Appellant stated that it was not true that in 2005, the respondent took the Appellant to the chief's office for trespassing into his land.
28. The Appellant had one sole witness, Elija Kijogi who testified as DW2. He testified that he was a resident of Marimanti and he knew the land in dispute belongs to the Appellant. It was also his evidence



that he did not know if the land had a title deed. He stated that he knew that the land belongs to the appellant because he is the one who has been using it for about 30 years.

29. DW2 further testified that he did not know the outcome of the adjudication process and did not know if the land was registered to the Appellant or the respondent upon conclusion of the adjudication process.
30. In the pleadings, the Appellant enumerated particulars of fraud against the respondent to the effect that he did not raise any objection during the adjudication process, colluding with the adjudication officers to have the appellant's land parcel N. Tharaka/Marimanti/691 alienated, causing the resultant parcel N.Tharaka/Marimanti/1236 to be transferred in his name without the consent of the Appellant and accepting to be registered as owners of N.Tharaka/Marimanti/1236 while fully aware that he never owned, occupied and/or utilized any land in the area and in particular N.Tharaka/Marimanti/691 as it was then. The appellant pleaded that the respondent fraudulently acquired title to the suit property as outlined above and prayed to court to cancel the title.
31. To succeed in claiming fraud, the Appellant not only needed to plead but also particularize it and by laying out water tight evidence upon which the court would make such findings. It is trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of Kuria Kiarie & 2 Others Vs. Sammy Mugeru [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vujjay Morjaria Vs. Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

32. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, the court in the case of Kinyanjui Kamau Vs. George Kamau [2015] eKLR expressed itself as follows: -

“...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...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

33. In the instant case, I am not persuaded that the Appellant proved his case based on the evidence he presented at the trial court. The appellant left it to the court to infer fraud from the facts, which is not acceptable. It is my finding that the appellant failed to prove his counterclaim and the trial court was right in its finding.



Whether the respondent proved his case based on evidence tendered.

34. The respondent pleaded that he is the registered owner of the suit land reference No. N. Tharaka/Marimanti/1236 having rightfully and legally acquired the same on first registration and that the title to his land is indefeasible. That the Appellant herein is the registered owner of land parcel L.R No. N.Tharaka/Marimanti/691 which borders the respondent's land aforementioned.
35. The respondent further pleaded that the Appellant had unlawfully entered, encroached and trespassed into the respondent's land parcel L.R No. N.Tharaka/Marimanti/1236 without the authority and/or prior consent of the respondent. That the Appellant was claiming ownership of the said portion and has on several occasions been interfering with the respondent's quiet possession and use of the same and should be restrained by a permanent injunction. That by the acts, omission and commissions of the appellant, the respondent has suffered irreparably.
36. The respondent testified during the hearing wherein he relied wholly in his statement dated 21st October, 2020 as his evidence in chief. He also produced his lists of documents dated 21st October, 2020 which are a title deed, sketch map, green card, Chief's letter and official search marked exhibit 1-5. The respondent testified that he bought the land from the Appellant before the land was adjudicated. That it has since been adjudicated and the size is 17 acres.
37. It was the respondent's evidence that he sued the Appellant because after he bought from him, he started selling to other people the portion which he had a title, which is the same portion he sold to him before the land was adjudicated.
38. The respondent testified that his title deed is for Tharaka Nithi/Marimanti/1236 measuring approximately 6.94 Ha. That at the time he bought the land, they planted euphorbia trees to mark the boundary and when the adjudication was done and the survey done the beacons and the boundary lines were congruent to what he had bought before adjudication and that is the extent to which his title deed covers. During cross examination the respondent testified that in 1984 the Appellant sold land to him. That he came with his father and told him that he wanted to marry. That he paid the Appellant 15 goats as the 1st instalment. That in 1987 he gave the Appellant the remaining 4 goats and Kshs. 1,200/=.
39. The respondent stated that one goat was Kshs. 1,200/-. That the Appellant's father and another man called Toma were present. The respondent further testified that when the adjudication process began, it was the Appellant who notified him and he came with his ID card and the 17 acres were registered to him.
40. The respondent further testified that the Appellant had intimated in his defence that he did not pay the full amount. That he did not sign anywhere that he had finalized the payment because the transaction had been done in good faith.
41. The respondent reiterated that the Appellant called him and informed him of the adjudication process which upon finalization led to the title deed being issued in his favour.
42. PW2, was Mary Gakundi who testified in support of the respondent. She stated that the respondent was known to her. That the respondent bought the land from the Appellant and they did not use any dimensions, but they agreed it was 15 acres. PW2 testified further that she was present with her father who has since died and the Appellant was present with his father. That at the time, the Appellant had just married and he was given 15 goats each valued at Kshs. 1,200/=.
43. PW2 stated that that at the time one acre was going for Kshs. 1,600/=. That the father-in-law to the Appellant went to respondent for completion of dowry and the Appellant went to the respondent for



- more goats. That the respondent gave the Appellant 4 goats and Kshs. 1,200/= as completion payment for the purchase. And since then they have never heard of anyone complaining about the land.
44. Pursuant to an order of the trial court dated 24th August, 2022, the land Registrar and the Sub County Surveyor in the presence of both parties visited the parcels in dispute. The registrar reported that L.R Tharaka/Marimanti/1236 is owned by the respondent while L.R N. Tharaka/Marimanti/691 is owned by the Appellant and a sketch map was attached to that effect.
45. Article 40 (1) of *the Constitution* entitles individuals to own property. Under sub article (b) any property that is lawfully acquired enjoys the protection of law. Section 24, 25 and 26 of the Registration of Lands Act 2012 also confirm that a title deed is prima facie evidence of absolute ownership and the attendant rights provided it is not proved that the title holder was privy to any fraud, corrupt scheme, irregularity or failure to follow any procedure.
46. The certificate of title in the name of the respondent is to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per Section 26 of the *Land Registration Act*. Title documents are prepared and issued by the Land Registrar. In the absence of contrary documents from the office of the Land Registrar, the court has no reason to find the title documents to be fraudulent. The Appellant, in my view failed to prove the alleged fraud against the respondent. In this case, the appellant has not tendered sufficient evidence that prove the particulars of fraud against the respondent to the satisfaction of the court.
47. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the Appellant had not proved his case against the respondent on a balance of probabilities, and the trial court was justified in dismissing the counterclaim.
48. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holdings of the learned trial magistrate were well founded and I find no basis to interfere with it.
49. In the result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH JULY, 2024

In the presence of:

Court Assistant – Kiruja

Mugiira for Respondent

No appearance for Appellant

C.K YANO,

JUDGE

