



**Aengwo v Aengwo (Environment and Land Appeal E007 of 2023)
[2024] KEELC 5767 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**L WAITHAKA, J
JULY 23, 2024**

BETWEEN

MUSA AENGWO APPELLANT

AND

WINNIE AENGWO RESPONDENT

*(Being an appeal from the judgment of Hon. P. Kosgei SPM delivered
on 5th October 2023 in Kabarnet ELC Case No. E002 of 2022)*

JUDGMENT

1. By a plaint dated 7th February 2022, the plaintiff (now respondent) instituted a suit in the lower court to wit Kabarnet ELC Case No. E002 of 2022 seeking judgment against the defendant (now appellant) for an order of permanent injunction restraining the defendant, his agents and/or servants from evicting her from the parcels of land known as Baringo/Tiriondonin/1484 and 1487 (hereinafter referred to as the suit properties).
2. The plaintiff's suit was premised on the grounds that the suit properties are subdivisions of the original title No.79 which was subdivided among her brothers; that she was excluded from benefiting from the subdivision of the original parcel of land yet she is single and unmarried and that the defendant who is the registered proprietor of the suit properties, has on several occasions threatened to evict her/chase her from the suit properties claiming to be the sole proprietor of the suit properties.
3. The defendant filed a statement of defence and counterclaim, dated 15th February 2022, through which he denied having threatened to evict and/or chase away the plaintiff from the suit properties. The defendant averred that on 3rd August 2021, he requested the plaintiff to cease cultivation on the suit properties to pave way for him to develop them to no avail.
4. Explaining that the plaintiff failed, neglected and/or refused to vacate the suit properties and started laying claim to the suit properties; by way of counterclaim, the defendant sought judgment against the



plaintiff for an order of permanent injunction restraining the plaintiff, her servants and/or agents from entering, trespassing and/or dealing with the suit properties. In the alternative, the defendant sought an order of eviction against the plaintiff.

5. When the case came up for hearing, the parties by themselves and through their witnesses led evidence to the effect that the suit properties are a subdivision of the original parcel of land, parcel number 79, which was registered in the name of the parties' father; that based on customary law and practices, which does not recognize rights of girls to inherit land, the subdivisions were shared amongst the plaintiff's male siblings to the exclusion of the plaintiff despite the plaintiff being unmarried; that neither the plaintiff nor her sisters were involved in the subdivision and sharing of their father's land and that the law was not complied with in subdivision of the original parcel of land, plot No. 79 in that the original title deed was not surrendered to the Land Registrar for cancellation upon subdivision as by law required.
6. The evidence adduced before the lower court also shows that there was a dispute between the plaintiff and the defendant over use and entitlement to the suit properties. The dispute was referred to the area chief by the plaintiff for arbitration/resolution. Arising out of that dispute, on 2nd February 2022, the parties' family agreed that the plaintiff continue staying in her mother's house and plough land that her mother used to plough before her death. The parties' father said that the defendant should desist from disturbing and chasing away the plaintiff from their matrimonial home. It is further indicated that the parties' father said that he had not authorized the defendant to chase the plaintiff away and that he granted the piece of land in dispute to the plaintiff until the day she would get married.
7. On the basis of the evidence adduced before the court, the learned trial magistrate observed/held: -

“...it was therefore imperative upon the Defendant as his acquisition of the land was challenged to go beyond the instrument of title deeds and establish how he acquired the titles and demonstrate that it was done legally. No evidence was led to show that there was consent from his father to subdivide and transfer the suit parcels Baringo/Tiriondonin 1484 and 1487 to himself. No document was produced to show that the process leading to the registration was above board. This is particularly important as his father disputed the subdivision as shown in Pexbt 1. The conclusion on this issue of title deeds obtained by the Defendant for the suit parcels Baringo/Tiriondonin 1484 and 1487 were therefore unlawful. It therefore follows that the Plaintiff who had equal rights to the Defendant as the children of the deceased original owner has lawful claim to the disputed parcels of land. Having found that the Defendant obtained the title deeds to the suit land unlawfully, the court in exercise of the powers given under Section 80 of the *Land Registration Act, 2012* hereby cancels the title issued to the Defendant for Baringo/Tiriondonin 1484 and 1487.

Final Orders

1. It is hereby declared that the registration of title of the properties known as Baringo/Tiriondonin 1484 and 1487 to the Defendant is illegal, null and void;
2. The Land Registrar Baringo county is hereby ordered to cancel the title of the suit properties Baringo/Tiriondonin 1484 and 1487 issued to the Defendant and to have both parcels revert to the name of the deceased original owner Aengwo Chepchieng awaiting the succession of his estate;
3. The Plaintiff is entitled to use 1 acre and 0.1 ha of Baringo/Tiriondonin 1484 and 1487 respectively awaiting succession of the estate of the deceased Aengwo Chechieng;



4. The Defendant is entitled to use the remaining portions of the suit parcels Baringo/ Tiriondonin 1484 and 1487 respectively awaiting the succession of the estate of the deceased Aengwo Chepchieng;
 5. An order of injunction is hereby issued to both the Plaintiff and the Defendant restraining them from interfering with the occupation and use as set out under order (3) and (4) above awaiting succession process
 6. Each party shall bear their own costs.”
8. Dissatisfied by the decision of the lower court, the defendant appealed to this court on the grounds that the learned trial magistrate erred by: -
1. Finding that the appellant illegally caused himself to be registered as the proprietor of the suit properties when there was evidence that in 2015 his father subdivided his parcel of land No. 1469 into 17 portions and distributed the portions to his sons and daughters in law;
 2. Failing to find that the respondent did not plead any fraud and/or illegality on the part of the appellant in her plaint and give particulars thereof to warrant granting the orders issued;
 3. Failing to find that the respondent in her pleadings and evidence had expressly acknowledged that her late father had subdivided his property among his sons and daughters in law in exclusion of his daughters;
 4. Failing to find that the respondent had not imputed any fraud and/or illegality on the part of the appellant leading to the appellant’s failure to tender documentary evidence in the form of applications for consents, mutations and transfer executed by his late father in his favour and in favour of the other beneficiaries;
 5. Finding that the appellant’s ownership of the suit properties had been challenged by the respondent when there was evidence to the contrary that the respondent had not challenged the acquisition and/or ownership of the suit properties;
 6. By shifting the burden of proving the respondent’s allegations to the appellant thereby arriving at a manifestly wrong conclusion that the appellant acquired the title deed to the suit properties illegally and/or unlawfully and/or that the respondent had proved her case on a balance of probabilities;
 7. By finding that the deceased had disputed and/or not authorized the subdivision and/or transfer of the suit properties when there was evidence to the contrary that the deceased had subdivided his land parcel No. 1469 into 17 portions and transferred the subdivisions to his sons and daughters in law and remained with two portions;
 8. Relying on respondent’s exhibit1 to arrive at the conclusion that the appellant had obtained title deeds for the suit properties unlawfully when it was clear from the pleadings that the issue in dispute was the allegation that the appellant had chased the respondent away from their late mother’s house and not acquisition and/or ownership of the suit properties;
 9. Relying on purported statement of the deceased in Dexbt 1 in arriving at the conclusion that the deceased had not authorized the subdivision of his land when there was evidence to the contrary that the deceased was implying that the respondent was entitled to occupy her late mother’s house;



10. Failing to find that it was unsafe to rely on the averment of the deceased in Dexbt 1 when there was evidence to the contrary that the deceased was either senile, unwell and/or did not comprehend what was going on;
 11. Disregarding the appellant's defence and/or submissions thereby arriving at a manifestly wrong conclusion that the appellant had not proved his counterclaim;
 12. Negating the distribution of the deceased's properties by ordering the cancellation of the appellant's title deeds and ordering for a succession cause;
 13. Finding that it is not clear which parcel the suit properties emanated from when there was evidence that they emanated from subdivision of parcel number 1469 and not 79 which had been extinguished through a legal process; and
 14. Granting and/or issuing orders not pleaded and/or sought for by the respondents.
 15. The appellant prays that the appeal be allowed with costs and that the judgment delivered on 5th October, 2023 be set aside.
9. Pursuant to directions given on 21st May 2024, the appeal was disposed of by way of written submissions.

Appellant's Submissions

10. In the appellant's submissions filed on 18th June 2024, an overview of the parties' pleaded case is given and pointed out that the respondent neither pleaded any fraud nor gave particulars of fraud against the appellant in the acquisition of the suit properties and/or try to impeach the process of acquisition of the suit properties. It is pointed out that the respondent simply averred that the original title number 79 was subdivided among her brothers to her exclusion.
11. The appellant also gives a background to the case presented before the lower court and from the grounds of appeal identifies six issues for the court's determination. These are: -
 - i. Whether the respondent pleaded fraud to warrant grant of the orders issued;
 - ii. Whether the appellant fraudulently acquired the suit properties;
 - iii. Whether the burden of proof of acquisition of the suit properties was shifted to the appellant;
 - iv. Whether the deceased disputed the appellant's ownership of the suit properties;
 - v. Whether the appellant's defence was disregarded; and
 - vi. Whether the respondent was granted orders not sought in the plaint.
12. On whether the respondent pleaded fraud to warrant grant of the orders issued, it is pointed out that the plaintiff filed a simple plaint devoid of any pleading on fraud on the part of the appellant; that the plaintiff did not provide any particulars of fraud committed by the appellant in the acquisition of the suit properties; that the plaintiff had alleged that the appellant had threatened to evict her from the suit properties on account of ownership and that the original title No.79 was subdivided among her brothers to their exclusion (exclusion of herself and her sisters).
13. It is submitted that such averments do not contain any imputation of fraud on the part of the appellant to warrant him demonstrating the process of acquisition of the suit properties by production of consents, mutations, transfer forms and/or proceedings in Kabarnet ELC Case No. 37 of 2018



between Francis Argut Chesaina and Thomas Aengwo where the deceased had demonstrated how he had subdivided his property (Plot No. 79) into parcel No. Baringo/Tiriondonin/1469; that the respondent in her pleadings and evidence did not impeach the process of acquisition of the suit properties by the appellant.

14. It is further submitted that the plaintiff never sought any order and/or declaration to the effect that the suit properties were fraudulently acquired by the appellant. It is pointed out that the plaintiff's claim was centered on the contention that the appellant had evicted her from the portions of the suit properties, which her late mother was previously cultivating before her demise.
15. Based on the provisions of Order 2 Rule 4 of the Civil Procedure Rules and the decision in Nairobi Civil Appeal No.132 of 2005-Kinyanjui Kamau v George Kamau Njoroge (unreported) and Vijay Morjaria v Nansingh Madhusingh Darbar & another (2000)e KLR, the appellant submits that the respondent's pleadings did not comply with the legal edit that fraud must be specifically pleaded and that particulars of fraud must be stated on the face of the pleadings.
16. It is the appellant's case that fraud cannot be inferred from pleadings and that it must be strictly proved.
17. In the circumstances of this case, the learned trial magistrate is said to have inferred fraud from the evidence tendered on the basis of the respondent's allegation that the original title deed was not surrendered during subdivision yet there was evidence to the contrary that the title had been extinguished and that the suit properties emanated from parcel number 1469 and not 79. The learned trial magistrate is also said to have inferred fraud on the basis of the minutes of 3rd February 2022 where it is indicated that the deceased said he did not authorize subdivision of his property yet, according to the appellant, there is evidence that the deceased was in a bad state of health hence the allegation needed to be tested through cross examination before it could be accepted.
18. It is the appellant's case that fraud could not be imputed on the appellant on the ground that the original title for title No.79 was not surrendered and/or on the ground that it is not clear which title the suit properties emanated from.
19. The appellant further submits that failure by the respondent to plead fraud on the onset disadvantaged him in that, he was not able to discern that her claim was founded on fraud. Consequently, he failed to provide evidence to prove acquisition of the properties and/or tender any submissions on fraud as it was not an issue.
20. On whether the appellant fraudulently acquired the suit properties, the appellant refers to Section 26(1) of the [Land Registration Act, 2012](#) and based on the factual background hereinabove, submits that it is manifestly clear that the respondent was aware of the subdivisions and transfer to beneficiaries by the deceased since she acknowledges that fact in her pleadings.
21. The appellant reiterates her contention that the respondent did not, in her pleadings ascribe and/or impute any fraud on his acquisition of the suit properties and maintains that if she had done so, he would have dispelled them through production of consents, mutations, transfer forms duly executed by the deceased and proceedings in Kabarnet ELC No.37 of 2018 which were available but the pleadings by the respondent did not necessitate their production in evidence as the respondent had not attempted to impeach his titles.
22. Maintaining that the respondent's major concern was to be allowed to continue cultivating the portions her late mother had been cultivating before her demise in 2018, the appellant submits that, in her evidence, the respondent imported extraneous issues which were not part of her pleadings like, challenging the manner in which the deceased's distributed his property.



23. The appellant asserts that he demonstrated where the suit properties emanated from by leading evidence to the effect that the original title deed for Baringo/Titiondonin/79 was declared lost and that it was extinguished through subdivision by the deceased of parcel number 79 giving rise to land parcels 1469 and 1470.
24. In view of the foregoing, the learned trial magistrate is said to have erred when she held that it is not known where the suit properties emanated from.
25. It is the appellant's case that it is not possible that he acquired the suit properties fraudulently yet there are other 15 titles held by his step brothers, sisters in law, the deceased and a third party which have not been impeached.
26. Arising from the foregoing, the appellant submits that the respondent did not prove the allegation of fraud labelled against him but the same were inferred from the evidence tendered.
27. On whether the burden of proof of acquisition of the suit properties was shifted to the appellant; the appellant makes reference to Sections 107 and 108 of the *Evidence Act*, Cap 80 Laws of Kenya and submits that in the circumstances of this case, the trial court shifted the burden of proof of acquisition of titles to the suit properties to the appellant yet the respondent had not impeached the titles in her evidence.
28. Arguing that the respondent was merely casting aspersions on his acquisition of the suit properties, the appellant submits that the respondent did not lay a basis upon which he would be prompted to produce documentary evidence of proof of process of acquisition of his titles.
29. The appellant further submits that any imputed fraud or illegality was forcefully rebutted by him and his witnesses.
30. On whether the deceased disputed the appellant's ownership of the suit properties, the appellant reiterates that the deceased had distributed his land parcel No.1469 into 17 portions in 2015 and distributed it to the beneficiaries who included the appellant. The appellant submits that taking into account that there were other beneficiaries to the deceased land, he (appellant) could not have fraudulently acquired the suit properties.
31. The learned trial magistrate is said to have erred by relying on the minutes of the local administration dated 3rd February 2022, to extinguish the appellant's titles yet there was evidence in the said minutes to the effect that the deceased was in a very bad state of health at the time he is alleged to have uttered the words, "I did not authorize the subdivision".
32. The appellant further submits that the deceased did not state that he had not authorized the appellant to subdivide his parcel of land. The deceased is said to have stated that the appellant should not disturb and/or chase away the respondent from their matrimonial home and that the deceased did not repudiate the subdivisions and/or acquisition of the suit properties by the appellant.
33. The learned trial magistrate is said to have erred by placing too much weight on the statement allegedly made by the deceased in the face of his ill health.
34. It is the appellant's case, that it was unsafe for the trial court to take the said averments on face value (without authentication and/or being tested on cross examination), since there was no statement from the deceased to corroborate them.
35. On whether the appellant's defence was disregarded, the appellant submits that DW-2 and DW-3 gave cogent evidence on acquisition of the suit properties by the appellant; that DW-2 and DW-3 gave



precise evidence on how the deceased shared out his property in 2015 and that nobody had harassed the respondent who is comfortably living in her late parents' house.

36. The appellant submits that he gave a robust defence to the respondent's case which was erroneously disregarded by the trial court in favour of the purported statement made by the deceased in the minutes of 3rd February 2022.
37. The appellant maintains that the learned trial magistrate erred by determining that he did not demonstrate how he acquired the suit properties.
38. On whether the respondent was granted orders not sought in the plaint; the appellant points out that the learned trial magistrate granted the parties orders not sought in their pleadings and based on the legal edit that parties are bound by their pleadings and the decision in Kisumu Civil Appeal No.60 & 62 of 2017-Ragot & Company Advocates vs. National Bank of Kenya Ltd, submits that the learned trial magistrate erred by granting orders that were not pleaded and/or sought for by the respondent thereby greatly prejudicing him as he had no opportunity to address them in his defence.
39. The appellant urges this court to allow the appeal, set aside the lower court judgment, dismiss the respondent's suit with costs and enter judgment for him as sought in the counterclaim.
40. Despite being given an opportunity to file written submissions, the respondent did not file written submissions and if she did, they were not placed in the file.

Analysis and Determination

41. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see the cases of *Selle & Another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123, *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
42. From the grounds of appeal and the submissions by the appellant, I find the issues for the court's determination are: -
 - i. Departure from pleadings;
 - ii. Issuance of orders not sought by the parties;
 - iii. Whether either the plaintiff or the defendant made up a case for being granted the orders sought in the case before the lower court.
 - iv. What orders should the court make?
43. On departure from pleadings and issuance of orders not sought by the parties, a review of the pleadings filed in the lower court shows that the plaintiff/respondent departed from her pleaded case leading to granting of orders that were not sought in her pleadings by the trial court.
44. Upon review of the plaintiff/respondent's case and the totality of the evidence adduced before the lower court, I find as a fact that registration of the defendant/appellant is subject of a trust in favour of the plaintiff/respondent in that his registration of the suit property is subject to the plaintiff's right of use and possession of certain portions, thereof, particularly the portions that were being used by her late mother. That being the case, it is the considered view of this court, that the plaintiff/ respondent's



suit, ought to have succeeded to the extent of finding that plaintiff/respondent has right of use and possession of the suit properties, as pleaded in her plaint.

45. Arising from that finding, the trial court should have granted an order of permanent injunction restraining the defendant/appellant, his agents and/or servants from evicting the plaintiff/respondent from the suit properties as that is what she had sought in her pleadings/plaint.
46. The trial court should not have ordered cancellation of the titles held by the defendant/appellant since the plaintiff/respondent had not sought such a relief.
47. In that regard, see the case of *Karin Annechallis vs. Attorney General & 6 others* (2002) e KLR where it was held that it is a cardinal principle of the court that it will only grant reliefs sought by a party. The court further held: -

“Indeed where a court has proceeded to grant a relief not contained in prayers in the pleadings or not regularly sought by a party expressly or impliedly, the appellate courts have no hesitation in annulling or overturning orders granting such reliefs and that “using the same principle, I do hold that in this case, where a party requires a cancellation or rectification or an amendment of a title such a party must specifically plead such relief before a court of law can grant it.

48. The principle was also applied in the case of *Lamba v. National Social security Fund & another (Civil appeal E168 of 2021)*(2023)KECA 124 (KLR) 3 February 2023)(Judgment).
49. In the case hereto, the learned trial magistrate violated that principle by granting reliefs that were not sought by the parties, like cancellation of the title deeds issued to the defendant in respect of the suit properties; an order reverting the suit properties to the parties’ father; an order for succession of the estate of the deceased parties’ father comprised in the suit properties when the same were not sought in the parties’ pleadings. Arising out of the principle espoused in the case of *Karin Annechallis vs. Attorney General & 6 others supra*, those orders cannot stand as they did not arise from parties pleadings but evidence and submissions by the plaintiff.
50. It is a cardinal principle of law that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. In that regard, see the case *Daniel Otieno Migore v. South Nyanza Sugar Co. Ltd* (2018) e KLR where the court quoted the decision of the Supreme Court of Kenya in *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017)e KLR thus:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

51. The upshot of the foregoing is that the appeal partially succeeds in that the final orders of the learned trial magistrate are set aside and substituted with an order granting the reliefs sought in the plaintiff/respondent’s plaint dated 7th February 2022, that’s to say, a permanent injunction do issue and is hereby issued restraining the defendant (now appellant), his agents and/or servants from evicting the plaintiff (now respondent) from the parcels of land known as Baringo/Tiriondonin/1484 and 1487.



The plaintiff's use and occupation of the suit parcels is restricted to the 1 acre and 0.1ha the trial court determined that she is entitled to use and possession only.

52. This being a family dispute, parties shall bear their own cost of the appeal and the suit in the lower court.

53. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 23RD DAY OF JULY, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. M. K. Chebii for the appellant

N/A for the respondent

Court Assistant: Ian

