



**Mwanganda v Mwadime (Environment and Land Appeal E001 of 2024)
[2024] KEELC 5351 (KLR) (Environment and Land) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

EK WABWOTO, J

JULY 19, 2024

BETWEEN

MARTHA WANJALA MWANGANDA APPELLANT

AND

ERIC GODWIN MWADIME RESPONDENT

(From the Judgment of Hon. T. N. Sinkiyian (PM) delivered on 7th December 2023 in ELC Case No. E049 of 2021 Martha Wanjala Mwanganda vs Eric Godwin Mwandime at Voi Law Courts)

JUDGMENT

1. At the heart of contention before the trial court was land parcel number Taita-Taveta/Modambogho/2807. As the Plaintiff in the trial court, the Appellant contended in her amended plaint dated 16th March 2022 that the Respondent bought the suit land when she was already in possession of the same on the eastern side despite the Respondent's portion being on the western side.
2. According to the Appellant's particulars of facts, the suit property was purchased from Mwengu Ikutu (now deceased) in the year 1989 at a sum of Kshs. 2,500/= At that time the land owned by the Respondent was owned by the late Mwakale Manyonge. A dispute arose in the year 1996 and on 9th August 1996, the dispute was adjudicated upon by the then Chief M. W. Mwanyasi whereby parties agreed to share out the land with the Appellant taking the eastern side and Mwakale the western side upto the Voi – Mwatate Road. During the actual survey while the Appellant was away, the Respondent fraudulently misrepresented to the land offices that the portion of the suit property measuring approximately 0.225Ha was his as a result of which it was registered in his name as Taita Taveta/Modambogho/2807 completing alienating the Appellant's impugned portion. It was also averred that consequent to the Respondent's fraudulent and illegal acts, the portion measuring



approximately 0.225Ha was excised from her land and a title deed issued in her name over land parcel No. Taita Taveta/Modambogho/2806 measuring approximately 0.18Ha as opposed to 0.405Ha.

3. The Respondent denied the allegations made in the plaint and filed a statement of defence dated 13th May 2022. It was stated that no consent was required nor expected from the Appellant for the purchase and registration of Parcel Number 2807 into his name as the Appellant was not and has never been the owner of the suit parcel or any parcel in the area. The Respondent also stated that at no point did the Appellant own any or part of the suit parcel, demarcation was effected in the presence of all land owners thus would have been impossible for anyone to lose their land or even a portion thereof, the Respondent had nothing to disclose to the land officers and the officers are not as gullible as the Appellant's paints them to be as they verify ownership with existing records. At no point did the Respondent make a claim for any parcel other his own and the whole parcel registered in the name of the Respondent to him.
4. The matter proceeded for trial wherein the Appellant and Respondent testified. The parties cases were closed, submissions filed and the matter reserved for judgment by the Learned Magistrate.
5. In the impugned judgement, the Learned Magistrate framed four issues for determination; whether the Appellant was the legal owner of the disputed portion of the suit property measuring approximately 0.225Ha, whether the Respondent acquired title to the disputed portion of the suit property fraudulently and whether the Respondents registration as owner of the suit property should be cancelled and who should bear costs of the suit. In her finding the Learned Magistrate arrived at the decision that the Respondent is the legal owner of the suit property, and that the Appellant's ownership of the suit property has not been proved and she proceeded to dismiss the Appellant's suit with costs.

Appeal to this court

6. Being aggrieved by the impugned judgment the Appellant moved this court on 2 grounds of appeal as set out in the Memorandum of Appeal dated 9th January 2024 faulting the decision of the Learned Magistrate. The grounds in summary were that the trial court erred in finding that the Appellant had not proved her case to the required standard and further that she did not prove ownership of the disputed portion against the weight of the evidence on record.
7. In the Memorandum of Appeal, the Appellant urged this court to allow the appeal and set aside and or vary the decision of the Learned Magistrate. The Appellant also sought for costs of the Appeal.
8. The Appeal was canvassed by way of written submissions. The Appellant filed her written submissions dated 3rd June 2024 while the Respondent filed his written submissions dated 5th June, 2024.

The Appellant's submissions

9. Counsel submitted on the following issues:-
 - a. Whether the Honourable Magistrate erred in finding that the Appellant had not proved her case to the required standard.
 - b. Whether the Honourable Magistrate erred in finding that the Appellant did not prove ownership of the disputed portion against the weight of the evidence on record.
 - c. What are the orders as to costs?
10. It was submitted that the Appellant is the lawful owner of the land parcel Taita Taveta/Modambogho/2807 including the disputed section since 1989, having purchased the same from Mwengu Ikuu for Kshs. 2,500/= and that the Appellant has been in continuous possession since 1996.



11. It was submitted that the Respondent had acknowledged that he never utilized the disputed land and that based on the evidence presented the Appellant's case had been proved to the required standard.
12. It was further submitted that under the principles of property in ownership and possession the Appellant is the legal owner of the disputed portion by virtue of the letter dated 9th August 1996 which the Learned Magistrate erred in failing to consider the same.
13. Citing Section 26 of the [Land Registration Act](#) 2012 it was argued that the sanctity of title can be subject to challenge on grounds of fraud or misrepresentation and the same had been clearly demonstrated by the Appellant.
14. The Appellant concluded her submissions by urging the court to allow the appeal and grant her costs of the same.

The Respondent's submissions

15. Counsel for the Respondent's submitted on the following issues:-
 - i. Whether the Respondent is legal owner of Plot No. Taita-Taveta/Modambogho/2807.
 - ii. Whether the Appellant has proved fraud, illegality and/or misrepresentation on the Respondent's part.
 - iii. Who should bear costs of the Appeal.
16. On the first issue, Counsel submitted that no evidence was adduced by the Respondent to demonstrate that she was legal owner of the suit property or any part thereof. The Respondent contended that he had provided a copy of the title deed to the suit property as confirmation that he is in fact is the legal owner of the suit property. It was submitted that he had laid his chain of possession of the suit property through Exhibit 4 being the Agreement for Sale dated 19th September 1999, Exhibits 11, 12 and 14 being receipts demonstrating payment of the purchase price and Exhibit 9 being the Title Deed issued on 14th November 2016. Reliance was also placed to Section 26(1) of the [Land Registration Act](#) in support of his case.
17. Relying on the case of R. G. Patel =Versus= Lalji Makanji (1957) EA 314, Central Bank of Kenya Limited =Versus= Trust Bank Limited & 4 Others (1996) eKLR, Moses Parantai & Peris Wanjiku Mukuru sing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) =Versus= Stephen Njoroge Macharia (2020) eKLR, it was argued that the Appellant failed to demonstrate the existence of an omission, fraud or mistake in the registration in favour of the Respondent and that the Respondent had no knowledge of the omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
18. The court was urged to dismiss the appeal with costs.

Analysis and Determination

19. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse 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.
20. 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 should 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 clearly 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.
21. It is also worth noting that pursuant to Section 78 (2) of the *Civil Procedure Act*, first appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.
 22. This court has considered the entire record of appeal, the Appellant and Respondent's submissions and the issues that commend themselves for determination are as follows: -
 - i. Whether the Learned Magistrate erred in not finding the Appellant had proved her claim of fraud.
 - ii. What are the appropriate reliefs to be made including orders as to costs.
 23. Order 2 Rule 10 1(a) of the Civil Procedure Code provides as follows:-
 - (1) Subject to sub rule (2) every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded, including 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.”
 24. In her claim, the Appellant particularized fraud as against the Respondent as follows at paragraph 6B of her amended plaint: -
 - i. Causing the portion of the Plaintiff's land measuring approximately 0.225Ha to be registered in his name as part of Land Parcel No. Taita Taveta/modambogho/2807.
 - ii. Misrepresenting to the Land Officers during demarcation and survey that the portion measuring approximately 0.225Ha was his.
 - iii. Failing to disclose to the Land Officers that the Plaintiff was the owner of all the parcel of land on the Eastern Side demarcated by sisal plants.
 - iv. Misrepresenting himself as a bona fide owner of the whole of the suit property including the Plaintiff's portion therein.
 - v. Accepting to have the whole of the suit property registered in his name while fully aware that the disputed portion was lawfully owned by the Plaintiff.
 25. During trial, the Appellant when being cross-examined stated that they each had their portions side by side and that the Respondent trespassed in her land. She conceded of not having proof of the agreement between Mwengu and herself. She also stated that she did not have any letter from Land Registrar indicating that the registration of 2807 was fraudulent. She also stated that the dispute with Manyonge had not been resolved.
 26. The Respondent on the other hand denied encroaching on the Appellant's land. He stated that he was not aware of any agreement about Mwanyonge and Mutua.
 27. David Muthui Kariuki who testified as DW2 stated that the land in dispute initially belonged to Rufus Mwanyonge and the Respondent had bought from him. Thomas Mboya testified as DW3 and he stated that the Appellant bought a road reserve and was not present when the beacons were placed. He



also stated that when the dispute arose, the Registrar came and fixed boundaries after all parties had been notified. He also stated that the disputed portion is at the Respondent's land.

28. Stephen Rophus Mwakale testified as DW4 and he stated in cross-examination that the Appellant bought a road reserve and was evicted from there and he also stated that the Respondent did not use the disputed portion despite it being in his land.
29. From the pleadings, the Appellant pleaded fraudulent misrepresentation.
30. It was the Appellant's line of evidence that she purchased the suit property 2807 from Mwengu and had a dispute with Manyonge before titles were issued. It was also her line of evidence that it was resolved by dividing the land between Manyonge and her such that each portion touched the Mwatate – Taveta road and they remained peaceful until 2020 when the Respondent came to the picture claiming she had built on part of his land. The Registrar visited the disputed property and the findings were that part of her parcel had not been encroached by the Respondent who had demolished her hay barn.
31. From the evidence that was adduced herein which the court has analysed, the Appellant herein did not adduce any sale agreement between her and Mwengu Ikutu, she did not have any letter from Land Registrar stating that the Respondent had fraudulently taken her land.
32. The evidence adduced herein before the trial court and which is on record showed that the standard area where hay barn had been and which she was claiming was within Parcel 2807 owned by the Respondent. The Land Registrar report which was produced herein showed the following key observations; on the ground the area claimed by the proprietor of Parcel No. 2806 does not correspond with the Registry Index Map, the destroyed hay barn falls within Parcel No. 2807, though it is claimed by the proprietor of Parcel No. 2806 and the graded area has by the proprietor of Parcel No. 2807 not encroached on Parcel No. 2806.
33. The Respondent produced title deed which under Section 26 of the *Land Registration Act* is to be taken as prima facie evidence of ownership in the absence of contrary evidence.
34. A party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud. In the case of *Vijay Morjaria Vs Nansign Madhusihn Darbar & Another (2000) eKLR*, the Court of Appeal stated 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”.

35. The same procedure goes for allegations of misrepresentation and illegally as outlined under Order 2 rule 4 of the Civil Procedure Rules. As regards the standard of proof, the court of Appeal 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) 2 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”.

36. The law is, and has always been that he who alleges must prove, which finds statutory expression in sections 107(1), 108 and 109 of the *Evidence Act*. The court has gone through the particulars of fraud and illegality pleaded by the Appellant. It is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof. See *Magutu Electrical Services Ltd vs Miriam Nyawira Ngure & Anor* [2019] eKRL.
37. From the evidence that was tendered herein, the Appellant was unable to prove the particulars of fraud, misrepresentation and illegality to the required standard and in the considered view of the court, given the facts and evidence tendered and the law, the Learned Magistrate arrived at the correct conclusion and cannot be faulted.
38. The upshot is that after careful review and analysis of all the grounds of appeal and entire record, this court finds no fault with the decision of the Learned trial Magistrate. Consequently, the appeal fails and it is for dismissal.
39. On the issue of costs, the same is the discretion of the court and in any event are to be awarded to the successful party. However, considering that the Respondent did not participate in the Appeal, this court directs each party to bear own costs.

Final orders

40. In conclusion, the final orders of this court are as follows:-
 - a. The appeal is devoid of merit and is dismissed in its entirety.
 - b. Each party to bear own costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 19TH DAY OF JULY, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mutinda for the Appellant.

Mr. Wachenje for the Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

