



REPUBLIC OF KENYA



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**Sawe & another v Kenei & another (Environment and Land Appeal
E030 of 2022) [2024] KEELC 5343 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E030 OF 2022**

JM ONYANGO, J

JULY 16, 2024

BETWEEN

JOHN KIPKOECH SAWE 1ST APPELLANT

ANDREW KIBET RONO 2ND APPELLANT

AND

MICHAEL KENEI 1ST RESPONDENT

PAUL KIPRONO LAGAT 2ND RESPONDENT

*(Being an Appeal from the judgment of Hon. Naomi Wairimu - Senior Principal
Magistrate dated and delivered on 23rd August, 2022 in Eldoret CMC ELC
Case No. 223 of 2018 between John Kipkoech & Ano. Vs Michael Kenei & Ano)*

JUDGMENT

(Being an Appeal from the judgment of Hon. Naomi Wairimu - Senior Principal Magistrate dated and delivered on 23rd August, 2022 in Eldoret CMC ELC Case No. 223 of 2018 between John Kipkoech & Ano. Vs Michael Kenei & Ano.)

JUDGMENT

1. The Appellants, who were the Plaintiffs in Eldoret CMC ELC Case No. 223 of 2018, have lodged an appeal against the entire judgment by Hon. Naomi Wairimu – Senior Principal Magistrate. In summary, vide the Complaint amended on 11th May, 2017 the Appellants averred that the 1st Appellant was the original owner of the parcel of land known as Moiben/Moiben Block 5(Merewet)/273 measuring 4 Acres (the suit property). They averred that the 1st Appellant entered into an Agreement with the 2nd Respondent for sale of the entire suit property but he defaulted in payment of the balance of the purchase price, pursuant to which the 2nd Respondent was given a 2 Acre portion being the portion equivalent to his money's worth.



2. The Appellant's case is that the 2nd Respondent took possession of the 2 Acres and later sold it to the 1st Respondent. It is the Appellants' case that the remaining 2 Acres were given to the late Joseph Kipsat Lang, and upon his death the said parcel was transmitted to his son, Morris Kibet Kipsat (now deceased). The 2nd Appellant is the representative of the Estate of the late Morris Kibet Kipsat, who had received the land through transmission, and the 2nd Respondent has been in occupation and use of the land since 1992 to date. The Appellants claimed that although the 1st Respondent was aware that he had acquired 2 Acres, he transferred the entire 4 Acres through misrepresentation and fraud yet he has no lawful claim over the entire land but only a portion of it.
3. The Appellants asked the Subordinate Court to enter a declaratory Order that the purported transfer of the suit property to the 1st Respondent is null and void having been procured by means of fraud and misrepresentation. They prayed for a declaration that the title deed issued to the 1st Respondent over the suit property was illegally and un-procedurally procured and that the same be cancelled and the status of the register before the transfer be restored. The Appellants also sought a declaration that the 2nd Respondent only bought part of the suit property measuring 2 Acres and the remaining portion devolves to the Estate of Moses Kibet Kipsat. In addition, the Appellants asked for an order compelling the Respondents to grant peaceful possession and enjoyment of the suit property, and restraining them from intermeddling, interfering with, trespassing onto, encroaching into, selling or in any other way dealing with the remaining 2 Acre portion.
4. The 1st Respondent entered appearance and filed a Defence denying all the averments in the Amended Plaintiff. The 1st Respondent averred that the 1st Appellant was indeed the owner of the suit property prior to lawful acquisition thereof by the Respondents. He averred that the 1st Respondent purchased and processed the registration of the suit property into his names with the knowledge, consent and approval of the 1st Appellant. The 1st Respondent stated that the late Morris Kibet Kipsat was not at the time of his demise in possession of the suit property whatsoever. He averred further that the 2nd Appellant had also not been in possession of the suit property as alleged and he did not have any overriding interest known in law over the 2 Acre portion of the suit property or at all.
5. The 1st Respondent also raised a Counterclaim alleging that he had been in occupation of the suit property since he purchased it with full knowledge and authority of the 1st Appellant. He claimed to have been a bonafide purchaser for value and had had open, uninterrupted possession thereof, without interference. The 1st Respondent prayed for judgement in his favour as against the Appellants, asking for a declaration that he is entitled to exclusive and unimpeded right of possession and occupation of the suit property. He also asked for a permanent injunction restraining the Appellants, their agents, servants, employees or any other person acting on their behalf from entering, and/or trespassing over the suit property. He sought a dismissal of the Appellants' claim with costs. The Appellants filed a Reply to the Defence and Defence to counterclaim merely denying the 1st Respondent's averments.
6. Upon hearing the respective parties' cases, the court rendered its judgment on 23rd August, 2022 finding merit in the 1st Respondent's Counterclaim and dismissing the Appellants' claim. The learned magistrate issued the declaratory order and permanent injunction sought in the Counterclaim. The Appellants then filed a Memorandum of Appeal dated 22nd September, 2022 which was filed in court on the same date, seeking to have the judgment of the subordinate court set aside. The Appellants prayed that the said judgment be substituted with orders allowing their claim as prayed in the Amended Plaintiff and dismissing the Respondents' Counter-claim. The Appellants' Appeal is premised on the grounds contained in the Memorandum of Appeal namely;



- a. That the learned magistrate erred in fact in holding that the 1st Respondent bought and is in occupation of the entire suit land measuring approximately 4 Acres against the weight of the documents and evidence tendered before her which shows that the 1st Respondent is in occupation of 2 Acres only.
 - b. That the learned magistrate erred in law in relying on the Agreement dated 6th April, 2004 which was illegal and unenforceable against the Appellants.
 - c. That the learned magistrate erred in fact in finding that the 1st Appellant had surrendered documents to the 1st Respondent.
 - d. That the learned magistrate erred in law in failing to find that the Appellants' case was predicated on the ground of misrepresentation and improper procedure of transferring the suit land from the 1st Appellant to the 1st Respondent.
 - e. That the learned magistrate erred in law and in fact in failing to consider all the issues raised by the Appellants in their written submissions made before her.
 - f. That the learned magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous judgment.
 - g. That the learned magistrate misapprehended the facts of the case and the law in her judgment.
7. When the appeal came up for directions on 6th May, 2024 the court directed that the appeal be canvassed by way of written submissions. Both parties filed their respective written submissions which I have carefully considered.

Appellants' Submissions

8. The Appellants filed their written submissions dated 26th May, 2024 through the firm of Bitok & Sambu Advocates, who reiterated the Appellants' case. Counsel submitted that the 1st Respondent testified as the only Defence witness thus there was no independent corroboration of his testimony, yet the trial court relied on it without making reference to the testimonies of the Appellants' witnesses. He pointed out that if indeed the 1st Respondent was in possession as alleged, he would have no need to send a village elder to warn the 2nd Appellant's family to stop encroaching on the land in January, 2017 after acquiring title in the year 2016. Counsel submitted that the 1st Respondent was not in possession of the entire suit land but a 2 Acre portion, with the other 2 Acres being in the possession of the 2nd Appellant and PW3. Counsel inferred bias from the fact that the trial magistrate chose to adopt the Respondent's issues without due regard to the law and the analysis made by the Appellants, resulting in wrong findings.
9. Counsel also submitted that the trial court did not make any reference to the Appellants' submissions on the validity of the handwritten agreement dated 6th April, 2004 which had been challenged on points of law. He submitted that the Appellants had raised issues on the validity and enforceability thereof against the 1st Appellant who was not a party to it as this was a contravention of the doctrine of privity of contract. Counsel submitted that the Agreement contravened Section 3(3) of the [Law of Contract Act](#) because it is hand-written and not attested to by any witnesses and thus it is illegal, invalid and unenforceable against the Appellants. Counsel further argued that the 2nd Respondent's failure to enter appearance and file a Defence despite being served with the Amended Plaintiff is an admission of the facts contained therein. Counsel referred the court to the case of Dunlop Pneumatic Tyres vs Selfridge Co. Ltd and Aineah Liluyani Njirah vs Aga Khan Health Services [2013] eKLR on privity of contract,



- submitting that neither the trial court nor the 1st Respondent could rely on the contract dated 6th April, 2004.
10. Counsel added that the 2nd Respondent had not cleared the balance of the purchase price for the entire suit property, and that there is no evidence that the 2nd Respondent paid the balance of the purchase price. Counsel submitted that the 2nd Respondent took possession of 2 Acres which he surrendered to the 1st Respondent, with the remainder being used by the 2nd Appellant's family and PW3 a neighbour of the 1st Respondent. Counsel argued that the contention that the 1st Respondent is in occupation of the entire suit property on the strength of the Agreement dated 6th April, 2004 is unsustainable. Counsel argued that the court cast aspersions on the payslip produced in support of the averment that it is the 1st Appellant who repaid the loan. Counsel opined that the trial court was wrong in discrediting the document on grounds that it was not certified, and that there was still a balance of KShs.18,000/- as at July, 2006 furthering its bias against the Appellants' evidence. Counsel pointed out that the 1st Respondent had not disputed that the 1st Appellant had taken a loan to pay for the land, which fact was acknowledged in the agreements between the 1st Appellant and the 2nd Respondent.
 11. Counsel submitted that the finding by the trial court that the 1st Appellant had surrendered completion documents to the 1st Respondent a misapprehension of facts. He submitted that the title deed and the completion documents, including blank forms he signed in the year 2010, were deposited with Nyairo & Company Advocates who were the Appellants Advocates, but the 1st Respondent waited until 2016 to transfer the land. Counsel pointed out that the forms the 1st Appellant signed in 2010 could not be used to transfer the land since the laws changed in 2012 and new forms introduced. Counsel argued that the 1st Respondent approached the 1st appellant to sign way leave forms in 2016 when he had eye problems to have him sign the transfer documents. Counsel further argued that since there was no privity between the 1st Appellant and the 1st Respondent, the 1st Respondent had no right to call for completion documents and the 1st Appellant had no obligation to surrender the same. Counsel relied on the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, arguing that the process through which the completion documents were executed and subsequent title deed issued were as a result of misrepresentation on the part of the 1st Respondent.
 12. Counsel cited Section 80 of the *Land Registration Act* on the power of the court to revoke and cancel a title that is acquired illegally. He also cited Section 26(1) of the said Act, which provides that a title to property can be impeached on grounds of fraud, misrepresentation, illegality, un-procedural or through a corrupt scheme. Counsel submitted that the Appellants had outlined the grounds upon which they believed the transfer was obtained by fraud and misrepresentation. Counsel further relied on *Wambui v Mwangi & 3 Others (Civil Appeal 465 of 2019)* [2021] KECA 144 (19 November 2021) (Judgment). Counsel denied the assertion that the 1st Respondent is an innocent purchaser for value, since apart from the foregoing, the 2nd Respondent had no right to sell the suit property since he had not completed payment of the consideration.
 13. Counsel also submitted that the mere holding of a title does not in itself limit the power of the court as was held in *Alberta Mae Gacci v Attorney General & 4 Others* [2006] eKLR. Counsel relied on the cases of *Republic v Minister for Transport & Communication & 5 Others Ex parte Waa Ship Garbage Collector & 15 Others*; *Mombasa HCMA No. 617 of 2003* [2006]1 KLR (E&L), as cited in *Kenya National Highway Authority v Shalien Masoud Mughal & 5 Others* [2017] eKLR and *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR. Counsel submitted that Section 26 is meant to protect real title holders from unscrupulous persons. Further, that the real title holders had led evidence that they neither sold nor transferred the land to the 1st Respondent, which is prima facie evidence that the 1st Respondent obtained the land un-procedurally. He pointed out that the 1st



Appellant was never called to appear before the Land Control Board and the 1st Respondent never exhibited any consent that he obtained to transfer the land. He concluded that the title held by the 1st Respondent was obtained illegally and it ought to be revoked. Counsel urged the court to allow the appeal with costs.

1st Respondent's Submissions

14. In the 1st Respondent's Submissions dated 4th June, 2024 Counsel submitted that there was no evidence that the 2nd Appellant was in possession of the suit property, which in any event does not equate to ownership. Counsel submitted that the Sale Agreement dated 6th April, 2004 proved that the 1st Respondent purchased the land from the 2nd Respondent, who the 1st Appellant admitted selling the suit property to the 1st Respondent. He added that there is therefore no illegality in the Agreement, and that the Appellants did not object to its production as an exhibit. Counsel opined that the 1st Appellant confirmed that he gave the 1st Respondent all documents pertaining to the transfer of the land because he knew the 1st Respondent had purchased and was in occupation thereof. That there is thus no error on the part of the magistrate in that respect.
15. Counsel for the 1st Respondent asserted that there was no evidence of misrepresentation, fraud and improper procedure in transferring the land. He relied on the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR, where it was held that fraud must be specifically pleaded and particulars thereof stated on the face of the pleadings. In addition, that fraudulent conduct must be distinctly alleged and distinctly proved. He submitted that the Appellants did not specifically plead nor state the particulars of fraud on the face of their pleadings. Counsel referred the court to the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR and *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742. Counsel lauded the trial magistrate for making a finding on all the issues raised by the Appellants in their submissions, adding that the trial magistrate correctly applied the facts and law without irrelevant factors, giving a well-analysed judgment on each issue raised.
16. Counsel cited Section 24(a) of the *Land Registration Act* which provides that the registration of a person as the proprietor of land vests in that person absolute ownership as well as rights and privileges appurtenant thereto. It was argued that the Appellants had failed to tender evidence challenging the 1st Respondent's ownership of the suit property, thus he was declared the rightful owner thereof. Counsel submitted that the 1st Appellant had failed to prove his assertion that he did not receive the full consideration from the 2nd Respondent, and only raised it after he entrusted the 1st Respondent with all the documents towards the transfer. He added that the 1st Appellant ought to have pursued the 2nd Respondent for the balance of the purchase price, especially since he was aware that the land was sold to the 1st Respondent and with his approval. He pointed out that despite the Appellants' allegation that he only sold 2 Acres, their Agreement indicates that the whole portion was sold.
17. Counsel further alluded that the pay slips before the court did not indicate the loan the 1st Appellant was paying for, which issue the trial magistrate clearly analysed. Counsel specified that the transfer of the land to the 1st respondent was done willingly by the 1st Appellant. That it was done through a legal process, the completion of which made the 1st Respondent the rightful owner of the suit property and through which he obtained rights and interests thereunder. Counsel urged that the title in the 1st Respondent's name is proper, and in the absence of evidence to the contrary from the office of the Land Registrar there is nothing fraudulent and the Appellants had therefore, failed to prove the alleged fraud. Counsel concluded by submitting that the Appeal lacks merit and prayed that it be dismissed with costs.



Analysis and Determination

18. This court has considered the grounds urged in support of the appeal, submissions by parties, the judgment of the learned trial magistrate as well as the record of appeal. In this case, the court frames the following issues for determination:
- a. Whether the trial court displayed bias in favour of the 1st Defendant
 - b. Whether the 1st Respondent obtained ownership of the 4 Acres comprised in title deed to the suit property by fraud and misrepresentation
 - c. Whether the 1st Appellant sold 2 Acres of the suit property or the entire suit property
19. This is a first appeal, and the duty of a first appellate court was set out in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where this Court pronounced itself as follows: -
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”
20. This Court is therefore allowed to re-evaluate and consider afresh the evidence tendered before the trial court and come to its own conclusion on the same.

Whether the trial court displayed bias in favour of the 1st Defendant

21. The Appellants have submitted that the trial court displayed bias in favour of the 1st Respondent. To support this ground, the Appellants submitted that the trial magistrate deliberately discredited the Appellants evidence being the payslip produced in support of the contention that the 1st Appellant repaid the loan over the suit property. This court has considered the said payslip and agrees with the finding of the trial magistrate that the payslip the 1st Appellant seeks to rely on is not certified. Further, that it showed an outstanding balance of KShs.18,000/-, and also indicated that the 1st Appellant was paying a shamba loan but did not indicate which shamba exactly was being paid for. These are all facts that can be ascertained from one glimpse at the said document and cannot be used as a basis to infer bias on the part of the trial magistrate.
22. The Appellants also averred that the court failed to consider or make reference to the Appellants’ submissions on the issues raised, stating that this also pointed towards the learned magistrate’s bias. This allegation is however moot for two reasons. The first being that the learned magistrate in her judgment indicated:-
- “Having considered the 2 sets of issues, I would adopt the issues as presented in the Defendant’s submissions since in my considered vies they are a reflection of what requires to be established in order to determine the matter herein”
23. I have perused the record and have seen the submissions filed by both the Appellants and the 1st Respondent in the trial court and note that the Appellants only raised 3 issues, whereas the 1st Respondent raised a total of 5 issues. On close inspection, this court is convinced that a determination



of the 1st Respondent's issues adequately covered the issues raised by the Plaintiff. This court finds no credit in the allegation that in adopting the 1st Respondent's issues, the trial court displayed bias in his favour.

24. Secondly, there are numerous decisions all pointing to the fact that the ruling or judgment of a case is never based on submissions. It is trite that submissions are not evidence but only the marketing language of the parties in the case. Submissions are not evidence, they may be heard or dispensed with because the main basis of a decision in a case, is the claim properly laid, evidence fully presented and the law applicable as was held in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR. The Court of Appeal in that case further held that:-

“Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

Whether the 1st Appellant sold 2 Acres of the suit property or the entire suit property

25. On this issue, the court has seen an agreement dated 12th January, 1999 between the 1st Appellant and the 2nd Respondent which was attested but one A.K. Nyairo Advocate. This agreement clearly indicates that the 1st Appellant was selling the Moiben/Moiben Block 5(Merewet)/273 measuring 1.6 Ha, which is approximately 4 Acres and comprises the entire suit property to the 2nd Respondent. This fact was admitted by the 1st and 2nd Appellant in their testimonies, only claiming that the 2nd Respondent never cleared the balance of the purchase price. In addition, Clause 3 of this Agreement provided that the purchaser could take possession of the land sold as well as execute transfer documents in favour of the purchaser on signing of the Agreement. The 1st Appellant testified that he signed the transfer documents, not in 1999 when the Agreement was signed, but in the year 2010.
26. There is a payment note dated 12th August, 1999 for payment of part of the purchase price. Another acknowledgment note dated 30th August, 1999 which was more of an addendum stated that the 2nd Respondent was to pay KShs.86,000/- instead of the earlier sum agreed of KShs.127,000. This addendum was signed by the 1st Appellant and the 2nd Respondent, and further witnessed by the late Morris Kipsat who is the 2nd Appellant's father as well as a gentleman called Christopher K. None of these documents indicated any change to the effect that the land sold to the 2nd Respondent had been reduced.
27. Notably, the 1st Appellant did not dispute the addendum dated 30th August, 1999 or deny that he executed it or the contents thereof. The addendum provided that the remaining sum would be paid once the 1st Appellant had settled the loan with the Kenya Post & Telecommunication Company. The only indication that the loan was settled is the fact that the title was discharged and a transfer effected to the 1st Respondent. According to the Addendum, the balance to the purchase price was to be paid after clearance of the loan. If indeed the balance was not settled as between the 1st Appellant and the 2nd Respondent, the 1st Appellant ought to have pursued the 2nd Respondent for payment of the balance of the purchase price. There is no indication that he ever did, even after the 2nd Appellant informed him that he was selling the suit property to the 1st Respondent.
28. Vide an Agreement dated 6th April, 2004 the 2nd Respondent then sold the entire suit property to the 1st Respondent and the 2nd Respondent acknowledged that he had received the full consideration from the 1st Respondent and had no other claim thereto. This Agreement clearly indicates that the parties thereto had met the 1st Appellant, who had agreed with the transfer of the property to the 1st



Respondent. This is corroborated by the 1st Appellant who testified that the 2nd Respondent went to see him with the 1st Respondent and told him that he wanted to sell the land to the 1st Respondent. The 1st Appellant again did not make a claim for the purported outstanding balance from the 2nd Respondent, which affirms my belief that there was in fact that there was no balance in the purchase price as alleged. But even if there was, the 1st Appellant's dispute in that regard is with the 2nd Respondent and possibly subject of a separate claim, not this instant suit.

29. The above series of events sets out the paper trail of how the suit property moved from the 1st Appellant to the 1st Respondent. That aside, it also shows that the 2nd Respondent bought 4 Acres of land, being the entire suit property from the 1st Appellant, which he sold to the 1st Respondent. The trial magistrate rightly cited Section 107 of the Evidence Act, CAP 80 Laws of Kenya which is clear that:

“ 107. Burden of proof.

- (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.”

30. This court adds Section 108 and 109 of that same Act which provide that:

“ 108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

31. The Appellants desired this court to make a finding that the 1st Appellant only sold a 2 Acre portion of the suit property to the 2nd Respondent, and consequently that the 2nd Respondent could only sell the 2 Acre portion that was sold to him. The 1st Appellant failed to prove this allegation to the required standard. On the contrary, the 1st Respondent was able to prove through evidence adduced that the 1st Appellant in fact sold the entire suit property which comprises 4 Acres. The 1st Appellant then alleged that he was not paid the full purchase price and the parties agreed that the 2nd Respondent would only be given 2 Acres which was his money's worth. There was also no proof of this further agreement to reduce the acreage of the property sold. If the 1st Appellant was wise enough to reduce the addendum on payment of the purchase price into writing, I see no reason why he did not bother to reduce any change in the acreage sold into a written document, if at all there was one. Again, the Appellants failed to prove this allegation to the required standard.
32. Furthermore, on possession, the 2nd Appellant admitted on cross examination that his father was in fact buried on another parcel of land and not the suit property as had earlier been claimed. This is also the 1st Respondent's testimony, that the late Morris Kipsat was buried on his land being Moiben/Moiben Block 5(Merwet)/272. This is a totally different parcel of land from the suit property. Nicholus Kotut, PW3 had also claimed that he also occupied part of the suit property measuring 1 Acre that he had purchased from Joseph Kipsat Land. PW3 clarified that he did not write an agreement when he bought



the land, and that he later left the said portion and now only cultivates it. The Appellants' witnesses are all in agreement that they were asked to stop their dealings with the land in the year 2017 after the 1st Respondent obtained title in 2016. Appellants submitted that this is backed by the evidence that the dispute was escalated to the area chief, the police and eventually the court. This court can only presume that the 1st Respondent could only take action over the occupation of the suit property by third parties after he had become registered as the owner thereof, because it is only then that his rights and privileges as the registered proprietor had crystallized.

Whether the 1st Respondent obtained ownership of the 4 Acres comprised in title deed to the suit property by fraud and misrepresentation

33. Fraud has been defined in Black's Law Dictionary 11th Edition as:-

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

34. It is well established in law that fraud must be specifically pleaded and proved. This is a requirement under Order 2 Rule 10(1)(a), which provides that:-

“ 10. Particulars of pleading [Order 2, rule 10]

(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, willful default or undue influence on which the party pleading relies; and...”

35. This rule has found light in many judicial decisions such as *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, where Tunoi, JA (as he then was) 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.”

36. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. It must be demonstrated that the party claiming fraud has proved the purported fraud to the required degree. In *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR, the court held that:-

“There is no doubt that fraud is a serious accusation. It must be pleaded and proved. Bullen, Leake & Jacobs on Pleadings 13th Edition provides as follows: -

Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. ‘General allegations, however strong may be by words in which



they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice’.”

37. Courts have held that the standard of proof required for claims based on fraud is higher than in the ordinary civil cases. This was the holding of the court in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, where it was stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008]1KLR (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 the 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’.”

38. I have had a look at both the original Complaint and the Amended Complaint filed by the Appellants. They did allude to the fraud in their averments as set out therein, however they did not particularise the said fraud as required by the law. The effect of failure to specifically plead or particularise fraud is to be found in the *Ahmed Mohammed Noor Case* (Supra), where the court pronounced itself as follows:-

“62. In *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR the Court of Appeal in dismissing an allegation of fraud held that: -

‘27. We have examined the appellants’ amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a consent for transfer cannot be obtained on the same day is well below the standard of proof..... We need not belabor this issue as we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.’

63. Properly guided, the Respondent herein is in a similar position as the Appellant in *Kuria Kiarie & 2 Others v Sammy Magera* (supra). In this case the Respondent only stated in passing in paragraph 8 of the Statement of Defence that his signature was obtained fraudulently. That was all. There were no particulars of fraud. No evidence of fraud was even availed. As held by the Court of Appeal aforesaid the claim of fraud was ‘therefore stillborn and no evidence could be tendered’.”

39. Nevertheless, this court has considered the instances of fraud as alleged by the Appellants. The Appellants’ case is that the 1st Appellant never surrendered completion documents in favour of the 1st Respondent. He asserted that he did sign blank transfer forms in the year 2010 but that the law changed in the year 2012, and new forms were introduced hence those signed transfers could not be used to have the 1st Respondent registered as proprietor of the suit property. He alleged that in 2016, the 1st Respondent approached him to sign what he referred to as wayleave forms to enable him obtain power installation to the suit property. The Appellants alleged that the 1st Respondent used this opportunity to trick him into signing new transfer forms since he had lost his eyesight at the time.



40. The 1st Respondent testified that he indeed had problems obtaining an electricity connection to the suit property as the Kenya Power and Lighting Company needed a title deed to install the connection. He told the court that he went to the Firm of Nyairo & Company Advocates who wrote a letter to assist him, and further explained that this happened in 2015 while the transfers were signed in 2016.
41. The 1st Respondent testified that when the 1st Appellant signed the transfer forms in his favour, he had no eyesight problems. Stephen Sitienei, who testified as PW4 in his witness statement dated 28th August, 2017 states that the 1st Respondent informed him that he had obtained transfers from the 1st Appellant. The 1st Appellant in his witness statement of the same date stated that it is not the 1st Respondent who gave him the alleged wayleave documents to sign. That he went to his Advocates office and was given forms to sign and he did, but he now suspects that they were land transfer forms.
42. On the allegation of fraud, the learned magistrate made a finding that:
- “The Plaintiff alluded to the fact that the 2nd Defendant used tricks to get a title for the 4 Acres of land. However, the 1st Plaintiff did not call any witness to prove that at the time he transferred the land to the 1st Defendant he was blind as alleged.”
43. The court agrees with this finding, and further notes from the proceedings that the 1st Appellant had indicated that he was to call a doctor to come and testify as to his eye condition, but that doctor never came. Under the provisions of sections 107 to 109 of the *Evidence Act*, the burden of proof is on the Appellants to prove that the transfer to the 1st Respondent done fraudulently. The 1st Appellant failed to prove that he could not see what he was signing and was tricked into signing transfer forms instead of way leave forms as he was led to believe or at all. The allegation that the 1st Respondent took advantage of the 1st Appellant’s purported eye problems remains mere suspicion. I say this because there has been no evidence adduced or testimony given that the documents the 1st Appellant was given to sign were transfer forms and not way leave forms.
44. As to the question of surrender of completion documents, as indicated earlier, under Clause 3 of the Agreement for sale dated 12th January, 1999 the 1st Appellant was required to execute all transfer documents in favour of the purchaser. However, this court noted also that in the 1st Appellant’s testimony, he confirmed that before he left the country in the year 2010, the 1st Respondent approached him and enquired what would happen if he wanted to transact. He testified that he left his ID, PIN and Photos, with the title deed still at the Advocate’s office. For starters, I do not see how he would leave all this documents to aid the 1st Respondent in case he wanted to transact if he did not acknowledge the 1st Respondent’s rights/interests in the suit property. Aside from that, the 1st Appellant admitted to signing blank transfer forms and all this he did voluntarily, the very definition of surrender. He cannot at this point be heard to deny that he surrendered the completion documents voluntarily to aid the transfer of the property to the 1st Respondent. As a ground of the alleged fraud on the part 1st Respondent, this also fails to pass muster.
45. Additionally, if indeed no consent was issued by the Land Control Board Consent for transfer of the land, the Appellants ought to have called the Land Registrar to come and testify that the 1st Respondent had not complied with that requirement. As provided under Section 108 of the *Evidence Act*, it is the Appellants who would fail if no evidence were given at all. On the allegations of fraud and misrepresentation, the Appellants once more failed to discharge the burden of proof that was placed on them by the law.
46. With regards to the Agreement dated 6th April, 2004 the Appellants took issue with the fact that it was only handwritten and not attested to by any witnesses thus it cannot be used against the Appellants.



They raised the doctrine of privity of contract, submitting repeatedly that since they were not parties to the said agreement, it could not be enforced against them. The requirement for writing under Section 3(3) of the Contract Act only requires that the Agreement is written, it is irrelevant whether it is handwritten or typed. Secondly, the 1st Respondent did not produce the Agreement seeking to enforce it against the Appellants. It was produced as evidence of how the 1st Respondent came to acquire interests over the suit property. Since, as they rightly submitted, the same could not be enforced against them by reason of the doctrine of privity of contract, they similarly cannot be heard to seek to invalidate it not being parties thereto.

47. Although the 2nd Respondent failed to enter appearance or file a Defence, the court made its decision based on the pleadings filed by the Appellants and the 1st Respondent, as well as the evidence and testimonies adduced by the parties on record. This is clear in that the decision made did not make any orders directed at, or orders for or against the 2nd Respondent. The submission that the failure by the 2nd Respondent failed to file a defence and/or controvert the Appellants' allegation, cannot hold any water.
48. For the above reasons, this court finds that the court below properly directed itself to the evidence placed before it and reached the correct conclusions. Consequently, the appeal herein is devoid of merit, and is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JULY 2024

J.M ONYANGO

JUDGE

In the presence of;

- 1. Miss Kayeli for Mr. Sambu for the Appellant**
- 2. Mr. Isiji for Ms. Khayo for the Respondent**

Court Assistant: Brian

