



**Mighulo v Mghalu & 5 others (Environment and Land Appeal E010 of 2023)
[2024] KEELC 6330 (KLR) (Environment and Land) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E010 OF 2023
EK WABWOTO, J
SEPTEMBER 27, 2024**

BETWEEN

WILSON NYANGALA MIGHULO APPELLANT

AND

ADELINE ZIGHE MGHALU 1ST RESPONDENT

ALLEN MSERI MWANYOLO 2ND RESPONDENT

MARY OLYMPIA CHANYA 3RD RESPONDENT

ELIZA MKIWA MWAIKASENYI 4TH RESPONDENT

MARTHA MIGHULO MWANYOLO 5TH RESPONDENT

MACRINA MATUNDA MWAIKASENYI 6TH RESPONDENT

*(From the Judgment of Hon. C. K. Kithinji (PM) delivered on 13th
September 2023 in VOI PMCC ELC No. E042 of 2021 Wilson Nyangala
Mighulo =Versus= Adeline Zighe Mghalu and 5 Others at Voi Law Courts)*

JUDGMENT

1. This appeal is in respect to the judgment and decree of Hon. C. Kithinji PM in Voi PMCC ELC No. E042 of 2021 delivered on 13th September 2023 wherein the Learned Magistrate issued the following orders:-

- i. The property Title Number Mghange/Nyika/429 is part of the estate of the late Joseph Mwanyulo and only subject to administration through succession.



- ii. The sale and transfer to Wilson Nyangala Mighulo and Adeline Zighe Mghalu and other sales are illegal, unprocedural, null and void thus unenforceable.
 - iii. The titles arising from subdivision of Title Number Mghange/Nyika/429 including Title Number Mghange/Nyika/1888 and 1889 are cancelled and title reverts back to the name of the deceased awaiting the succession process.
 - iv. Copy of the judgment to be served to Land Registrar.
 - v. Each party to bear own costs.
2. The Appellant being aggrieved by the said decision filed the instant Appeal vide the Memorandum of Appeal dated 21st September 2023. The following grounds were raised in the Appeal:-
1. The Learned trial Magistrate erred in law and in fact in purporting to cancel the Appellant's title to property known as Mgange/Nyikia/1888 contrary to the provisions of Section 27 of the Land Registration Act No. 3 of 2012 and particularly when no particulars of fraud or misrepresentation or illegality were pleaded and or proved as required by law.
 2. The Learned trial Magistrate erred in law and in fact in basing her judgment and or decision on unpleaded and unproved issues thereby reaching a completely erroneous decision.
 3. The Learned trial Magistrate erred in law and in fact in failing to appreciate that a claim of fraud on how the Appellant acquired property known as Mgange/NYKA/1888 ought to have been distinctly pleaded and distinctly proved and in fact the court ended up inferring fraud contrary to law.
 4. The Learned trial Magistrate erred in law and in fact in holding that the suit property known as Mgange/NYKA/1888 is part of the estate of the late Joseph Mwanyolo when the 2nd to 6th Respondents, who are the Administrators of the estate of the late Joseph Mwanyolo, had no such claim before court for determination.
 5. The Learned trial Magistrate erred in law and in fact in failing to appreciate that the succession in respect of the estate of the late Joseph Mwanyolo Mwadime as gazetted in Gazette Notice No. 10057 of 19th august 2011 was concluded in the absence of contrary evidence and therefore the transfer of property known as Mgange/Nyikia/1888 to the Appellant is lawful subject only to Section 27 of the Registration of Land Act.
 6. The Learned trial Magistrate erred in law and in fact in basing her finding on assumption rather than the pleading on record, the evidence adduced by the respective parties and the law and thereby reached a completely erroneous decision.
 7. The Learned trial Magistrate erred in law and in fact in failing to evaluate the pleadings and the evidence on record and hence failed to decipher the salient issues of the dispute before her and thus arrived at an erroneous conclusion.
 8. The Learned trial Magistrate erred in law and in fact in failing to consider the relevant factors and considered totally irrelevant issues and therefore leading to a completely erroneous decision.
3. The Appellant thus prayed for the following reliefs:-
1. The appeal be allowed.



2. The judgement of Hon. C. Kithinji in Voi Pmc Elc No. E042 of 2021 – Wilson Nyangala Mighulo v Adeline Zighe Mghalu & 5 Others delivered on 13th September 2023 be set aside and substituted by the following orders:-
 - a. A declaration that the Appellant is entitled to enjoy the right to peaceful and quite occupation of the property known as Mgange/Nyikia/1888.
 - b. A permanent injunction to restrain the Respondents and/or their agents from trespassing or in any other manner interfering with the Appellants peaceful and quite occupation of the property known as Mgange/Nyikia/1888.
 - c. An order directing the Respondents and their agents to forthwith vacate property known as Mgange/Nyikia/1888, and deliver vacant possession to the Appellant.
 - d. An order directing the Respondents to demolish all structures that they have erected on property known as Mgange/Nyikia/1888, and that the Respondents do remove the debris therefrom at their own cost so as to render the property in the same condition as it was prior to the Respondents carrying out the aforesaid wrongful works. In default of the Respondents doing so, the Court Bailiff be authorized to carry out the said demolition and removal of works relating to property known as Mgange/Nyikia/1888, and the costs therefrom be borne by the Respondents.
 - e. General damages for trespass, loss and damage and mental anguish suffered by the Appellant.
 - f. Costs of the suit and interest thereon at such rate and period of time as this Honourable Court will deem fit.
4. The appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 7th June 2024 while the 1ST Respondent urged court to rely and adopt their written submissions that had been filed before the trial court. The 2nd to 6th Respondents did not file any written submissions and neither did they participate in this Appeal.
5. The Appellant submitted that he had produced a certificate of title issued in his favour on 8th December 2020 which was at page 57 of the Record of Appeal. It was submitted that the same was prima facie evidence that he was the indefeasible owner of the land. It was further submitted that the Appellant had also produced various sale agreements for the purchase of the land.
6. In respect to the 1st Respondent's defence, it was submitted that the 1st Respondent filed a statement of defence and a section of a document that appeared to be a counterclaim. It was argued that the 1st Respondent did not plead any particulars at all as against the Appellant to enable him respond to the same. It was also argued that a party cannot depart from its pleadings and the cases of Daniel Otieno Migure v Sultan Nyonza Suga Company Ltd (2018) eKLR and In the Estate of David William Kiguri Kimemia (Deceased) (2021) eKLR was cited in support.
7. It was further argued that the averments by the 1st Respondent do not amount to any specific accusation of fraud neither was the same proved. The 1st Respondent did not mention any fraud or forgery of title deed of Mgange/Nyikia/1888 by the Appellant and neither was the 1st Respondent a beneficiary and/or dependant of the estate of Joseph Mwanyolo.
8. It was contended that the trial court greatly erred in law and in fact by making a finding that the burden of proving the elements of fraud shifted from the 1st Respondent to the Appellant.



9. In respect to ground 4 and 5 of the Memorandum of Appeal, it was submitted that the trial Magistrate erred in law and in fact in holding that the suit property known as Mgange/Nyikia/1888 is part of the estate of the late Joseph Mwanyolo when the 2nd to 6th Respondents who are the Administrators of the estate of the late Joseph Mwanyolo had no such claim before the court for determination. It was further argued that the 1st Respondent in her pleadings did not at all plead and/or deny that the 2nd to 6th Respondents actually took up Letters of Administration in respect to the Estate of the late Joseph Mwanyolo Mwadime for which the subject suit property Mgange/Nyikia/1888 was hived off.
10. It was the Appellant's submission that the trial court ought to have appreciated that the succession in respect of the Estate of the late Joseph Mwanyolo Mwadime as gazetted in Gazette Notice No. 10057 of 19th August 2011 was concluded in the absence of any contrary evidence and therefore the transfer of the property known as Mgange/Nyikia/1888 to the Appellant is lawful subject only to Section 26 of the *Land Registration Act*, 2012.
11. The Appellant concluded his submissions by urging the court to allow the Appeal, set aside the judgment of the trial court and grant the reliefs sought in his Memorandum of Appeal.
12. The 1st Respondent had urged the court to consider their written submissions filed before the trial court dated 13th August 2023. The court has considered the said submissions and noted that the 1st Respondent had submitted that the Appellant's testimony before the trial court had not established him being the owner of the entire parcel. The evidence from the first 1st Respondent to the effect that she bought a parcel of land from the 2nd – 6th Respondents had not been controverted.
13. It was also submitted that the 1st Respondent had counter claimed against the Appellant as well as the 2nd – 6th Respondents for fraud and had specifically pleaded fraud at paragraph 3(a) of her defence and counter claim filed before the trial court.
14. It was also submitted that there was fraud involving the Appellant and 2nd to 6th Respondent in respect to the acquisition of the property. The said purchase was made without reference to the grant when the title to the property was registered in the name of the deceased person of whom the 2nd to 6th Respondent were beneficiaries.
15. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyze the same, and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify a benefit this court lacks. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
16. The court has considered the record of appeal, the Appellant and 1st Respondent's written submissions and the salient issues for determination are as follows:-
 - i. Whether the Appeal is merited.
 - ii. Whether the trial court was justified based on the law and facts in granting the orders issued vide its judgment delivered on 13th September 2023.
 - iii. What are the appropriate reliefs to grant in respect to this Appeal.
17. The Appellant's case before the trial court was that in December 2012 he met one Mariselima Mghoi Mwaisakenyi the then wife to the late Joseph Mwanyolo the registered owner to land Title No. Mgange/Nyika/429. She offered to buy and he accepted to purchase a portion of the said property. In 2013 he engaged a surveyor to quantify the portion. He entered into a sale agreement with the said Mariselima Mghoi Mwaisakenyi together with her children the 2nd to the 6th Respondents herein. The



agreement was dated 7/7/2013 in regard to the portion of land from the said property. The agreement was varied vide the sale agreement dated 24th October 2017 and again by that dated 12th October 2018 increasing the portion being purchased. In 2020 he learnt of constructions going on in the land. He confirmed that there was encroachment on the portion purchased. He placed a caution on the suit premises. The constructions were being done by the 1st Respondent who refused to vacate the suit premises. He entered into an agreement dated 9th April 2021 with the 2nd to the 6th Respondents confirming full payment of the purchase price with 2nd to 5th Respondents acknowledging receipt and agreeing to give vacant possession by 9th April 2021.

18. It was also the case of the Appellant that title No. Mghange/Nyika/429 was subdivided to Title Nos. 1888 and 1889 with the latter being registered in the names of the 2nd to 6th Respondents and held by the Appellant's advocate on record pending nomination of someone to collect the same.
19. He produced the sales agreement entered as stated between himself and the 2nd to 6th Respondents as beneficiaries of the estate of Josephat Mwanyolo Mwadime. These were tendered in evidence together with various correspondences between his advocate and copies of the title deeds.
20. The 1st Respondent contested the Appellant suit before the trial court and pleaded fraud on the part of the Appellant and 2nd to 6th Respondents at paragraph 3(a) of the defence and also counterclaim that was filed before the trial court. The following orders were sought in the counter claim: -
 - a. Dismissal of the Plaintiff's suit with costs.
 - b. General damages for fraud.
 - c. Nullification of the Plaintiff's Title No. Mghange/Nyika/1888.
21. From the evidence that was tendered before the trial court the Appellant commenced purchase of a portion of the property title No. Mghange/Nyika/429 in December 2012 from one Mariselima Mghoi Mwaisakenyi (deceased) the then wife to the late Joseph Mwanyolo. He entered into agreement with the beneficiary of the estate of the estate being the 2nd to 6th Respondents who confirmed receipt of full purchase price and agreed to give vacant possession by 9th April 2021 and he subsequently procured title on 18th December 2020. The 1st Respondent equally bought the property measuring 50 by 50 feet from the family of the 2nd Respondent.
22. From the evidence on record, it is evident that the Appellant acquired the property known as Mgange/Nyikia/1888 through purchase from the estate of the deceased. The evidence on record equally confirmed that the 1st Respondent also acquired the property vide purchase.
23. Section 26 of [Land Registration Act](#) directs Courts to take the certificate of title as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner contained or endorsed in the certificate subject to limitations permitted in law. The law is clear that a title can only be challenged on two grounds; fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.
24. Section 107 (1) and (2) of the [Evidence Act](#) states as follows;
 - “(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.”

26. In the instant case the 1st Respondent pleaded and particularised fraud on the part of the 2nd Respondent at paragraph 3 (a) of the defence and counterclaim. It was pleaded that the Appellant and 2nd Respondent their servants and or agents connived with the surveyor and disinherited the 1st Respondent.
27. Fraud It is trite law that 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 v 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”.
28. Section 45 of the *law of Succession Act* does not allow one to intermeddle with the Estate of the deceased. The analysis of the evidence tendered before the trial court shows that no grant of the letter of admiration had been referred by either party. There was no confirmation of grant to empower distribution of property in the estate. It therefore follows that the 1st Respondent had been able to prove and demonstrate fraud on the part of the Appellant towards the acquisition of the said property.
29. In respect to the 1st Respondent’s counter claim, it is trite law that a counter claim is just like any other suit and the same also ought to be proved to the required standard. The evidence adduced before the trial court which has been analysed by the court equally showed the 1st Respondent acquired the suit property from the family of the deceased before succession could be completed and hence did not acquire the same lawfully. The beneficiaries of the Estate lacked the capacity to sell before the completion of the succession process. Equally once cannot sell any party of the deceased Estate until after distribution. It is trite law that property of the deceased person cannot be dealt with or transferred without the grant of letters of administration and both the Appellant and the 1st Respondent ought to have been aware of the said risks while proceeding with the said transaction.
30. In view of the foregoing, it is the finding of this court that the trial Magistrate did not err in law and in fact in arriving at her decision and it is therefore not open for this court to interfere with the same.
31. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, it is the finding of this court that the Appeal is unmerited.
32. Consequently, the appeal fails and is hereby dismissed with an order that each party to bear own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 27TH DAY OF SEPTEMBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-



Mr. Weloba for Appellant.

Mr. Mwanyumba for 1st Respondent.

N/A for the 2nd to 6th Respondents.

Court Assistants: Mary Ngoira and Norah Chao.

