



**Mbae (Suing as legal representative of M’Nkanata M’Njiima) v Tharaka  
Nithi County Government (Environment & Land Case E001 of 2022)  
[2024] KEELC 6266 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6266 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND CASE E001 OF 2022  
CK YANO, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**GLADYS KAINDA MBAE (SUING AS LEGAL REPRESENTATIVE OF  
M’NKANATA M’NJIIMA) ..... PLAINTIFF**

**AND**

**THARAKA NITHI COUNTY GOVERNMENT’ ..... DEFENDANT’**

**JUDGMENT**

1. The plaintiff filed the instant suit vide a plaint dated 12<sup>th</sup> January, 2022 seeking for an order for the cancellation of the names of the defendant from L.R No. Mwimbi/Magutuni/1714 and 1225 (the suit property) and the name of the deceased be entered in the two titles and/ or alternatively the defendant do compensate the plaintiff the value of the land at current rates plus cost of the suit.
2. The plaintiff pleaded that at all material times the M’Nkanata M’Njiima (deceased) was the bonafide owner of the suit properties. That the deceased’s family members are in possession of the said parcel of land.
3. The plaintiff further pleaded that the defendant illegally and fraudulently grabbed the suit properties and registered the same in its names. The plaintiff enumerated particulars of alleged fraud by the defendant to be using a corrupt regime to register the deceased’s lands in its names, forcibly excising part of the deceased’s land without his consent or compensation, that the process of issuance of the title deeds was not followed before the deceased’s land was taken away from him and failing to follow the due process before dispossessing the deceased of his land.
4. At the hearing, the plaintiff testified as PW1 and was cross-examined. PW1 adopted her statement dated 4<sup>th</sup> February, 2022. She stated that the suit parcels belonged to the deceased who had bought it before demarcation in 1970 from one Gerald Miriti. That the family of the deceased live on the land.



It was her evidence that defendant herein got registered as owner of the suit parcels of land through a corrupt scheme and without the consent or permission of the deceased. That after the decision of the committee, the plaintiff was dissatisfied and filed an appeal to the minister and then this case. The plaintiff urged the court to grant her the prayers sought in the plaint.

5. PW1 produced copies of the official searches, grant of letters of administration, appeal receipt, demand notice, letters dated 2/11/2007, 11/3/2009 and 7/12/2015 and objection proceedings for Case No. 1271 and 1714 dated 21/5/2015 as P. Exhibits 1-6 respectively.
6. The plaintiff admitted that she did a search dated 25/11/2021 which showed the registered proprietor of the land to be the defendant. She stated that part 2 thereof was a restriction which was registered on the title until the appeal to the Minister is heard and determined. The plaintiff further confirmed that she had produced the receipt for the Appeal to the minister, but not the decision on the appeal. PW1 stated that the appeal is still pending. She denied being a trespasser. She stated that she went through an adjudicating process in which the decision by the adjudication officer did not blame the defendant. The plaintiff further stated that she was dissatisfied with the decision and appealed to the Minister and the court. That this case is an accusation. The plaintiff testified that she had produced evidence to show that the defendant acquired the land fraudulently and illegally. That she has produced an agreement to show that the land was bought and the defendant took it illegally.

#### **Defendant's Case**

7. The defendant entered appearance and filed its statement of defence dated 15<sup>th</sup> February, 2022 wherein they denied the averments contained in the plaint. The defendant averred that it did not illegally and/or fraudulently acquire the suit parcels of land.
8. Ashford Mutembei a county surveyor with the defendant testified as DW1. DW1 stated that has been working at the County for over 20 years. He adopted his statement dated 23<sup>rd</sup> January, 2023 as his evident –in-chief and produced a copy of the proceedings and decision of the Land Adjudication process. He was cross-examined and re-examined.
9. DW1 stated that the defendant was given the land by the community among other parcels within Mwimbi L. East Magutuni section which they consolidated. The parcels Nos. 1225 and 1774 were reserved for market purposes. DW1 testified that during that time, if one felt that his/her land was taken fraudulently, he /she should have raised an objection. DW1 reiterated that the suit parcels were given by the Community for development purposes.
10. When he was cross examined by Mr. Kiara learned counsel for the plaintiff. DW1 stated that he is an employee of the defendant and that previously, he was working with the defunct Chuka Municipal Council. That the land in question according to the records, was contributed by clan members.
11. DW1 stated that the records are in the office, though he had not brought it to court. That he had the inventory of the Public Land. DW1 further stated that the defendant had distributed the land to the Public to create a market. DW1 stated that he had a list of the people in the office and denied that the plaintiff is on the land. He further stated that the people are not on the ground, but the beacons are there. That there are no buildings thereon. That there are beacons and a map that shows how it was allocated. DW1 stated that he did not have the numbers of the plots, but that they are in the office. That when they were given the parcels in 2015 they got a notice from the plaintiff claiming the land and they could not go ahead to develop it. DW1 stated that although he was not from the area in question, there were old men who knew well about the suit land.



12. When he was re-examined, DW1 stated that as per the register of the land, the defendant is in possession of the land. That he had not seen a case to evict the defendant and had also not seen any police report to evict the defendant.
13. Ambutu Alex testified as DW2. He adopted his statement dated 23<sup>rd</sup> January, 2023 as his evidence in-chief and was cross-examined and re-examined. He stated that he is a member of Mugacinga Clan. That the plaintiff is his nephew.
14. DW2 stated that the land belongs to the County Government of Tharaka Nithi. That the land was set aside by way of donation by the clan to the then Meru South County council for the sole benefit of the community. That in or about 1989, all clan elders of Mugacinga, Ukima, Igakarimba, Gana na Njuki which are all located in East Magutuni area consented to donating the suit parcels of land to the public to be used in establishing government projects for the benefit of the community. That the community publicly participated and the land was donated to the defendant.
15. DW2 stated that in the year 2015, the plaintiff lodged an objection claiming four acres out of parcel No. 1225. That the committee awarded her 2 acres. That the plaintiff and her family have never lived or used the suit parcels. DW2 denied that the defendant acquired the land fraudulently. He stated that no one is currently using the land. That after subdivision, parcel No. 1225 was given to the defendant and the plaintiff was given the rest of the land.
16. DW3 was Mauris Mutua Josia who adopted his statement dated 23<sup>rd</sup> January, 2023 as his evidence-in-chief. He too was cross-examined and re-examined. He stated that he is the chairman of Mugacinga Clan. He too testified that the defendant was given the suit parcels of land by clans located with East Magutuni area. That the land was expected to be used in establishing projects that would benefit the community. He basically reiterated what DW2 stated.

### **Plaintiff's Submissions**

17. In her submissions dated 4<sup>th</sup> March, 2024, the plaintiff gave a background of the matter and a summary of the evidence adduced. The plaintiff submitted that her evidence remained uncontroverted. She cited Section 107 of the *Evidence Act* which provides that he who alleged must prove. It was the plaintiff's submission that she had proved her case. The plaintiff relied on the case of Samuel Odhiambo Oludhe & 2 Other v Jubilee Jumbo Hardware Ltd & Another [2018]eKLR and the case of Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwa.
18. The plaintiff further submitted that the title to property is very well protected by *the Constitution*. That this protection is removed and the title can be impeached if it is procured through fraud or misrepresentation to which the person is proved a party.
19. It is the plaintiff's submission that her deceased husband bought his parcels of land before demarcation, only for the defendant to fraudulently register them in its names during demarcation without the knowledge of the plaintiff. That from the evidence adduced during trial, it is evident that the plaintiff's deceased husband died while fighting his Constitutional rights to ownership of property.
20. The plaintiff urged the court to come to her aid and cancel the titles herein as prayed. The plaintiff urged the court to allow her suit as prayed.



## Defendant's Submissions

21. The defendant filed submissions dated 12<sup>th</sup> July, 2024 wherein it gave a brief background of the matter. The defendant identified one issue for determination, being whether the plaintiff has made out a case for grant of the orders sought.
22. It is the defendant's submission that the plaintiff has failed to prove her case. The defendant cited sections 107,108 and 109 of the Evidence Act and submitted that it is trite law that he who alleges must prove.
23. The defendant pointed out that the Plaintiff produced documents which included an official search that was conducted at the land's registry on 25<sup>th</sup> November 2021 (a month before the suit was filed). That from that search, it is manifestly clear that the proprietor of parcel of land known as Mwimbi/L.E Magutuni/1714 is the County Government of Tharaka Nithi. That there was a restriction on the land restricting any dealings on the land until the appeal to the minister is heard and determined. That there was also a Court order to the effect that no dealings should be registered until the case is heard and determined.
24. As regards ownership of the suit land, the defendant submitted that the search dated 25<sup>th</sup> November 2021 from the land registry clearly shows that the proprietor of the suit land is the County Government of Tharaka Nithi. The defendant cited Section 26 of the Land Registration Act.
25. The defendant submitted that until fraud, misrepresentation or procedural illegalities or corruption have been specifically proved, no title to land can be cancelled and or revoked. It is the defendant's submission that the plaintiff failed to produce any evidence to support the alleged corruption and/or fraud. The defendant relied on the case of Republic v Land Registrar Taita Taveta District & another [2015]eKLR.
26. It is the defendant's submission that being the registered proprietor of the suit properties it is entitled to enjoy its rights and privileges as a proprietor as provided in Section 24(a) of the Land Registration Act. The defendant also cited Section 25(1) of the same Act which protects the rights of a proprietor and can only be defeated as per the law.
27. It is the defendant's submission that as the registered proprietor, the Defendant has legal rights protected under the provisions of the Land Registration Act. That the Defendant is entitled to enjoy its rights as a proprietor of the suit property and these rights include exclusive use, possession and enjoyment of the same without interference by any third party. That in any event, the property is to be utilized for the general good of the entire public, the Plaintiff included.
28. The defendant submitted that the Plaintiff did not produce any document whatsoever to show that prior to the registration of the suit land in the name of the Defendant, the suit land was previously registered in the name of her deceased parents. That clearly, the Plaintiff has never had any registrable rights in the suit properties.
29. It is the defendant's submissions that the Plaintiff has not proved her case and or produced any evidence to cause the Court to cancel the Defendant's titles to the suit property. That the suit properties belong to the Defendant.
30. As to whether the suit is rightly before this Court, the defendant submitted that from the search produced by the Plaintiff, it is manifestly clear that an appeal had been lodged by the Plaintiff to the minister and the same was to be heard by the Chief Land Registrar. That during trial, the Plaintiff was put to task to provide and or lead the Court to any evidence which showed that the appeal lodged



before the minister had been heard and determined. That the Plaintiff unequivocally stated that she had no evidence to show that the appeal had been heard and determined. It is the defendant's submission that flowing from the above, it is manifestly clear that the jurisdiction of the Court is under question. That indeed, Article 159 of *the Constitution* of Kenya implores the Court to be guided and to promote alternative forms of dispute resolution. That further, Section 30 of the *Land Adjudication Act* provides that except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final. That this dispute relates to adjudication and the suit was therefore, prematurely filed.

31. The defendant submitted that the Court ought to be guided by the doctrine of Kompetenz Kompetenz which primarily implores the Court to acknowledge the ability of the Chief Land Registrar to hear and determine the instant dispute.
32. The defendant further implored the Court to take into consideration the decision of the Plaintiff who elected to appeal to the Minister pursuant to the provisions of Section 29 of the *Land Adjudication Act*. That the Plaintiff cannot, therefore, be left to be cherry picking forums she so wishes to adjudicate her dispute. That she cannot be jumping from one forum to another. The defendant submitted that flowing from the above, it is their submission that Section 30 of the *Land Adjudication Act* limits the Court from entertaining the present suit. That in view of the foregoing they submit that the Plaintiff has not proved ownership of the suit properties. That she has neither proved the allegations of fraud and corruption on the part of the Defendant and it is manifestly clear that the instant dispute is the subject of appeal before the minister and therefore the defendant prays that the Plaintiff's case be dismissed with costs.

### **Analysis & Determination**

33. The court has considered the pleadings, the evidence adduced and the submissions by the parties. The issues for determination are:
  - i. Whether the court has jurisdiction to deal with the matter.
  - ii. Whether the plaintiff has proved fraud.
  - iii. Whether the plaintiff is entitled to the orders sought.
  - iv. Who bears the costs of the suit.

### **Whether the court has jurisdiction to deal with the matter.**

34. Whereas the defendant submitted that this court lacks jurisdiction to deal with the matter in view of the appeal lodged by the plaintiff to the minister, this court notes that the same issue was raised by the defendants through a notice of preliminary objection dated 1<sup>st</sup> February, 2022. In a ruling delivered on 15<sup>th</sup> July, 2022, this court was of the view that it had the requisite jurisdiction over the matter because the claim is one based on alleged fraud over the suit parcels of land which are already registered. Consequently, that preliminary objection was dismissed with costs to the plaintiff. There is no evidence to show that that ruling was set aside or reviewed on appeal. Therefore, the same is still in force and this court cannot revisit the issue of jurisdiction as urged by the defendant. Doing so would be res judicata.

### **Whether the plaintiff has proved fraud**

35. The plaintiff has enumerated particulars of alleged fraud by the defendant. They include using a corrupt regime to register the deceased's lands in its names, forcibly excising part of the deceased's



land without his consent or compensation, that the process of issuance of the title deed were not followed before the deceased's land was taken away from him and failing to follow due process before dispossessing the deceased his land.

36. In her evidence, the plaintiff testified that her family is the one occupying the parcels of land. That she had documents showing that her father bought the land. She produced the documents marked P. Exhibits 1-6.
37. To succeed in claiming fraud, the Plaintiff not only need to plead but also particularize it and by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. In this regard I am guided by the Court of Appeal decision in case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR where it was held:
- “The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
38. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in *Bullen & Leake & Jacobs, Precedent of Pleadings* 13<sup>th</sup> Edition quoting with approval the cases of *Wallingford Mutual Society* [1880]5 App.Cas.685 at 697,701,709, *Garden Neptune v Occident* [1989] 1 Lloyd, S Rep.305,308, *Lawrence v Lord Norreys* [1880]15 App.Cas.210 at 221 and *Davy v Garrett* [1878] 7 ch.D.473 AT 489 it is stated that:
- “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 the 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 as distinctly proved. General allegations, however strong may be words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”
39. Locally, the above principles have been stated in a number of cases. Therefore, as to whether there was fraud is a matter of evidence. The same cannot be inferred from the facts.
40. In the case of *R.G Patel v Lalji Mjakani* cited in the case of *Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 others* [2013] eKLR, the court of Appeal held that “allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court”.



41. In *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* [1996] eKLR proof of fraud was held as being beyond that of a balance of probabilities. In that appeal, the court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in the ordinary civil case.”

42. In the present case, the plaintiff has alleged fraud on the part of the defendant. However, the same has not been demonstrated nor substantiated. The proof of allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere balance of probabilities is required and it is not enough for the plaintiff to have pleaded fraud. The law required the plaintiff to adduce watertight evidence to prove the alleged fraud. In this case, the plaintiff did not discharge that burden.

### **Whether the plaintiff is entitled to orders sought**

43. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Section 24 of the *Land Registration Act* 2012, gives the registered proprietor absolute rights over land. It provides as follows:

“Subject to this Act—

- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

44. Further, section 26 of the same Act provides that the certificate of title is to be held as conclusive evidence of proprietorship. It provides thus:

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

45. Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of title as long as he/she can show that the title was acquired procedurally. The circumstances when title can be cancelled or revoked have been enumerated in Section (26(1) (a) & (b) of the *Land Registration Act*. This court will only be guided by the evidence availed and in the absence of evidence, the court cannot cancel a title based on alleged fraud that has not been proved to the required standard.



46. The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012:- Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR stated;

“Allegations of fraud are allegations serious in nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.

47. I have perused the evidence and am not satisfied that the plaintiff has proved her case on a balance of probability to warrant this court to issue the orders sought. Moreover, it also came out from the evidence adduced that there was an objection filed in respect to the suit properties. Being dissatisfied by the outcome of the said objection, the plaintiff filed an appeal to the minister which appeal was said to be still pending. As it stands unless and until the said appeal overturns the decision made during the objection, the defendant no doubt remains the rightful owner of the suit parcels of land.

48. Consequently, this court find that the plaintiff has not proved her case on a balance of probabilities. The plaintiff's suit is hereby dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF SEPTEMBER, 2024.**

In the presence of:

Court Assistant – Moses

Kimathi Kiara for Plaintiff

Shisanya Edwin for Defendant

**C. K. YANO**

**JUDGE.**

