



Lukongo & 2 others v Ben & 2 others (Environment and Land Appeal E002 of 2023) [2024] KEELC 6089 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
DO OHUNGO, J
SEPTEMBER 24, 2024**

BETWEEN

**JUMA LUKONGO 1ST APPELLANT
MWANZO OBAYE 2ND APPELLANT
PETER MUTEVESI OBAYE 3RD APPELLANT**

AND

**ELIJAH CHIKAMAI BEN 1ST RESPONDENT
JOHN KEYA MWANDO 2ND RESPONDENT
COUNTY LAND REGISTRAR KAKAMEGA 3RD RESPONDENT**

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Butali (Hon. Z. J. Nyakundi, Senior Principal Magistrate) delivered on 12th January 2023 in Butali MCELC No. 24 of 2020)

JUDGMENT

1. Litigation giving rise to this appeal started in the Subordinate Court on 3rd July 2020 when the First Respondent filed Plaintiff dated 3rd July 2020, against Joseph Lukongo Obaye as the First Defendant, Ezekiel Luvonga Lukongo as the Second Defendant, and the First Appellant as the Third Defendant.
2. The First Respondent averred in the Plaintiff that he was the registered proprietor of the parcel of land known as Kakamega/Malava/1840 (the suit property) and that the Defendants trespassed into the property in June 2020, destroyed the fence along the boundary between the suit property and parcel number Kakamega/Malava/448 and cleared part of the suit property. He therefore prayed for judgment against the Defendants jointly and severally for their eviction together with their agents and assigns from the suit property, a permanent injunction restraining them from interfering with



- the suit property, an order compelling the OCS Malava Police Station to ensure compliance with the eviction and permanent injunction orders, costs of the suit, interest thereon and any other relief that the Subordinate Court deemed fit to grant.
3. The Defendants filed a joint Statement of Defence dated 22nd July 2020, which was later replaced with Amended Defence and Counterclaim, amended on 21st July 2021, pursuant to leave subsequently granted by the Subordinate Court on 2nd August 2021. The Amended Defence and Counterclaim added new parties to the case: the Second and Third Appellants as the Fourth and Fifth Defendants respectively as well as the Second and Third Respondents as the First and Second Interested Parties, respectively.
 4. The Defendants averred in the Amended Defence and Counterclaim that the First Respondent obtained title to the suit property fraudulently and through misrepresentation. They therefore prayed that the First Respondent's case be dismissed with costs and for judgment against the First Respondent for his eviction from the suit property; a permanent injunction restraining him together with his agents and servants "from forcibly entering, encroaching and or trespassing onto the land parcel originally known as Kakamega/Malava/445 to create new title numbers Kakamega/Malava/1840 and 1841 respectively"; cancellation of registration of parcel numbers Kakamega/Malava/1840 and 1841 so as to revert to Kakamega/Malava/445 in the name of Rahosa Obaye Paul alias Rasoha w/o Obaye as administratrix of the estate of Paul Obaye Jisiobili alias Wataye Sisiobili. The Defendants also prayed for costs.
 5. Upon hearing the matter, the Subordinate Court (Hon. Z. J. Nyakundi, Senior Principal Magistrate) wrote judgment dated 29th December 2022 which was delivered on 12th January 2023 by Hon. R.S. Kipng'eno, Principal Magistrate. The Learned Magistrate dismissed the counterclaim and entered judgment in favour of the First Respondent by granting the orders sought in the plaint.
 6. Aggrieved with the outcome, the Appellants filed this appeal on 7th February 2023, through Memorandum of Appeal dated 6th February 2023. The grounds of appeal are as listed on the face of the Memorandum of Appeal. The Appellants prayed that the judgment of the Subordinate Court be set aside and that the counterclaim be allowed as prayed. They also sought costs of both the appeal and the proceedings in Subordinate Court.
 7. The appeal was canvassed through written submissions.
 8. The Appellants filed written submissions through which they argued the appeal "wholesomely," without tying the any part of the submissions to any specific ground of appeal. They contended that the Learned Magistrate failed to consider the particulars of fraud and misrepresentation which they pleaded, that the Third Appellant was never a party to Kakamega HC Succession Cause No. 43 of 1985 and Kakamega HCCC No. 202 of 1986 and that in any case there was no order directing the Second Respondent to subdivide Kakamega/Malava/445 into Kakamega/Malava/1840 and 1841. They further argued that the Learned Magistrate disregarded a ruling delivered on 20th November 1986 in Kakamega HC Succession Cause No. 43 of 1985 through which the High Court struck out the Second Respondent's application since he was not a beneficiary to the estate of the original proprietor of Kakamega/Malava/445.
 9. The Appellants further argued that the Second Respondent did not file any defence to the counterclaim and is therefore deemed to have admitted the Appellants' averments. That the evidence of the First and Second Respondents demonstrated that the process of subdivision of Kakamega/Malava/445 into Kakamega/Malava/1840 and 1841 was marred with fraud and misrepresentation. That while Rahosa Obaye Paul alias Rasoha w/o Obaye became registered proprietor of Kakamega/



Malava/445 through transmission, it was not clear how the Second Respondent became registered proprietor of the said parcel without the knowledge and consent of while Rahosa Obaye Paul alias Rasoha w/o Obaye and the Appellants. The Appellants also argued that the Third Respondent testified that the Second Respondent fraudulently and secretly subdivided Kakamega/Malava/445 and that he (the Third Respondent) neither signed any transfer document nor appeared before the Land Control Board.

10. Relying on Section 26 (1) of the [Land Registration Act](#) as well as the cases of Joyce Kemunto Osoro (Suing as the legal representative of Stephen Obonyo-Deceased) v Attorney General & 9 others [2020] eKLR and Dixon Okindo Mageto & another v Dinah Mageto [2022] eKLR, the Appellants went on to argue that the Learned Magistrate failed to take into account the pleadings and evidence before him with the result that there was miscarriage of justice. They therefore urged this court to allow the appeal.
11. On their part, the First and Second Respondents argued that the Appellants merely pleaded fraud but failed to prove fraud to the required standard and that transfer of Kakamega/Malava/445 in favour the Second Respondent and other documents were executed on behalf of Rasoa Obaye by the Executive Officer of the Court pursuant to an order made by the High Court on 4th November 1987 in Kakamega HCCC No. 202 of 1986. That upon the Second Respondent lawfully obtaining title, he proceeded to subdivide Kakamega/Malava/445 into Kakamega/Malava/1840 and Kakamega/Malava/1841 which is registered in the Third Appellant's name.
12. They further argued that having obtained title in respect of Kakamega/Malava/1840 (the suit property), the First Respondent's proprietorship is protected under Section 26 (1) of the [Land Registration Act](#) and Article 40 (3) of [the Constitution](#). Relying inter alia on the cases of Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR and Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR, they argued that the First Respondent is a bona fide purchaser and that his title cannot be impugned since there was no proof of fraud or misrepresentation in the process leading to his proprietorship.
13. Based on the foregoing submissions, the First and Second Respondents argued that this appeal is without merit. They urged the court to dismiss it with costs.
14. The Third Respondent filed a document titled "Memorandum of Appearance," dated 26th October 2023, but neither attended court nor filed any submissions.
15. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial Magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR and Selle & Another v Associated Motor Boat Co. Ltd & Others (1968) EA 123.
16. I have considered the pleadings, evidence and submissions on record. The issues that arise for determination are whether the Appellants established their allegations of fraud and misrepresentation and whether the reliefs sought by the parties were available.
17. The First Respondent moved the Subordinate Court on the contention that he was the registered proprietor of the suit property and that the Appellants had trespassed into the suit property. In their Amended Defence and Counterclaim, the Appellants in effect conceded the First Respondent's proprietorship but went ahead to attack it on grounds that the First Respondent obtained the title



fraudulently and through misrepresentation. There is no dispute that the First Respondent is still the registered proprietor.

18. From material that was availed before the Subordinate Court, the First Respondent became the registered proprietor of the suit property on 20th April 2016. A title deed was issued to him on 22nd April 2016.
19. A registered proprietor of land is entitled to protection of his right to property, pursuant to Article 40 of *the Constitution*. Further, such a proprietor is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Additionally, Section 26 of the Act obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. Indeed, pursuant to Article 40 (6) of *the Constitution*, protection of right to property does not extend to any property which is found to have been unlawfully acquired.
20. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
21. In view of his registered proprietorship, the only way to deprive the First Respondent of his rights, privileges, and benefits in regard to the suit property through nullification of his title. The Appellants opted to challenge his title on allegations of fraud and misrepresentation.
22. Both fraud and misrepresentation are serious allegations which must be established through cogent evidence. Courts have persistently emphasised that fraud is a serious allegation. The party alleging it is required to plead it, particularise it, and strictly prove it to standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. There are many decisions to that effect. Suffice it to cite *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. The party alleging fraud has to connect the allegations and the facts in a way that reveals actual fraud. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
23. There is no dispute that the suit property was created upon subdivision of Kakamega/Malava/445 into Kakamega/Malava/1840 (the suit property) and Kakamega/Malava/1841. The register in respect of Kakamega/Malava/445 shows that the said title was closed on 13th May 1988 upon the said subdivision. The first registered proprietor of Kakamega/Malava/445 was Wataye Sisiobili, who was registered as proprietor on 3rd June 1975. On 2nd March 1982, a caution was registered in favour of the Second Respondent, who was claiming a purchaser's interest. Subsequently, Rosoha w/o Opaye was registered as proprietor on 25th July 1986, in her capacity as administrator of the deceased's estate.
24. Further entries in the register show that on 7th January 1987, a transfer was registered in favour of Rosaha Opaye Paul. Next, two instruments were registered on 9th December 1987: firstly, withdrawal of the above caution and secondly, a transfer in favour of the Second Respondent. Thereafter, a land certificate was issued to the Second Respondent on 1st August 1988 followed by closure of the title on 13th May 1988, as narrated above.
25. The register in respect of Kakamega/Malava/1840 (the suit property) shows that the Second Respondent was registered as its first registered proprietor on 13th May 1988. Later, a transfer in favour of Julia Nandi was registered on 25th July 2008 and a transfer in favour of the First Respondent on 20th April 2016.



26. The Appellants' case as pleaded in the Amended Defence and Counterclaim was that Rosaha Opaye Paul was the administratrix of the estate of Wataye Sisiobili and that she was registered as proprietor of Kakamega/Malava/445 through transmission pursuant to a certificate of confirmation of grant issued in Kakamega HC Succession Cause No. 43 of 1985. They further contended that the Second Respondent obtained title to Kakamega/Malava/445 fraudulently, subdivided it and transferred the suit property to the First Respondent who equally obtained title through fraud and misrepresentation.
27. The particulars of fraud pleaded included that the Respondents subdivided Kakamega/Malava/445 and effected transfers secretly, that they did so without following due process and without going through succession proceedings in Kakamega HC Succession Cause No. 43 of 1985, that they did so contrary to a ruling delivered in Kakamega HC Succession Cause No. 43 of 1985 on 20th November 1986, that they forged the signature of Rosaha Opaye Paul and that they used forged documents.
28. The Respondents' case was that the Second Respondent acquired Kakamega/Malava/445 through an order issued in Kakamega HCCC No. 202 of 1986. Pleadings and proceedings in the said file were produced before the Subordinate Court. A perusal of the said pleadings and proceedings shows that the indeed the Second Respondent was the Plaintiff in the case while Rasoa Opaye and the Second Appellant herein were First and Second Defendants, respectively. An order was made in the matter on 17th March 1987 referring it to arbitration by four elders selected by the District Officer Kabras. The Panel of Elders heard the dispute and returned a verdict that the Second Appellant herein and his late father had sold 8.5 acres of Kakamega/Malava/445 to the Second Respondent. It ordered that the 8.5 acres be transferred to the Second Respondent.
29. The pleadings and proceedings further show that the verdict was filed in court and was read to the parties on 15th July 1987 by A. Mbogholi-Msagha, J. (as he then was). Any aggrieved party was given 30 days from the said date to file an application for setting aside. It seems no setting aside was ever granted.
30. Ultimately, the Second Respondent filed Notice of Motion dated 30th July 1987, seeking adoption of the verdict as a judgment of the court and a further order that the Executive Officer of the court signs relevant documents on behalf of Rasoa Opaye and the Second Appellant herein. The application was scheduled for hearing on 4th November 1987, on which date it was allowed as prayed.
31. I note that the Second Respondent testified before the Subordinate Court that transfer of Kakamega/Malava/445 was effected pursuant to the order of 4th November 1987. Indeed, the register of the said parcel shows that transfer was effected 9th December 1987, about a month after the order. The Second Respondent then proceeded to subdivide the parcel.
32. The Appellants have not shown that the orders in Kakamega HCCC No. 202 of 1986 were ever set aside. Any complaints as to the circumstances under which the orders in Kakamega HCCC No. 202 of 1986 and Kakamega HC Succession Cause No. 43 of 1985 were made and whether parties were served cannot be leapfrogged to this matter. Such issues should be raised and resolved in the specific cases.
33. I have gone through the record, and I have not seen any proof of the alleged fraud and misrepresentation. More importantly, under Section 26 (1) (a) of the *Land Registration Act*, it is a mandatory requirement that in addition to proving fraud or misrepresentation, it must also be demonstrated that the registered proprietor was party to it. The Appellants have not demonstrated that the First Respondent was party to any fraud or misrepresentation.
34. I find no merit in this appeal. I dismiss it with costs to the First and Second Respondents.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF SEPTEMBER 2024.



D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Osango for the Appellant

Mr Mbaka for the First and Second Respondents

No appearance for the Third Respondent

Court Assistant: M Nguyayi

