



**Ashitiba v Akafwale (Environment and Land Appeal E027 of 2023)
[2024] KEELC 6038 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E027 OF 2023
DO OHUNGO, J
SEPTEMBER 23, 2024**

BETWEEN

SAMUEL ASHIKOYE ASHITIBA APPELLANT

AND

WYCLIFFE OYONDI AKAFWALE RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate's
Court at Butere (Hon. G. Ollimo, Senior Resident Magistrate)
delivered on 25th May 2023 in Butere MCELC No. E033 of 2022)*

JUDGMENT

1. Litigation leading to this appeal commenced in the Subordinate Court on 22nd August 2022, when the Appellant filed Plaintiff dated 10th August 2022. He averred that the Respondent had obtained title to parcel of land known as Kisa/Mundeku/1757 (the suit property) fraudulently. Consequently, he sought judgment against the Respondent for a permanent injunction restraining the Respondent together with his servants and agents from having any dealings touching on the suit property. He further prayed for eviction of the Respondent from the suit property and for costs of the suit.
2. The Respondent filed Statement of Defence dated 16th September 2022, through which he denied the Appellant's averments and urged the Subordinate Court to dismiss the suit with costs.
3. Upon hearing the matter, the Subordinate Court (Hon. G. Ollimo, Senior Resident Magistrate) delivered judgment on 25th May 2023. The Court found no merit in the Appellant's case and proceeded to dismiss it with no order on costs. The hearing proceeded in the absence of the Respondent who was duly served.



4. Dissatisfied with the outcome, the Appellant filed this appeal on 29th May 2023 through Memorandum of Appeal dated 29th May 2023. He later replaced it with Amended Memorandum of Appeal amended on 8th June 2023.
5. The following grounds of appeal are listed on the face of the Amended Memorandum of Appeal:
 1. That the learned trial magistrate erred in law and in fact in holding that the Appellant's absence of a green card that proves that L.R. No. Kisa/Mundeku/1757 was curved out from the Appellant's L.R. No. Kisa/ Mundeku/801.
 - 1a. The Honourable Court be pleased to allow the Appellant adduce further documentary evidence to wit the green card for L.R. No. Kisa/Mundeku/1757 and Kisa/Mundeku/1528 in the interest of justice.
 2. That the Learned trial magistrate's evaluation of the evidence placed before her was wanting.
 3. That the Learned trial magistrate did not place any weight on the submissions made in support of the appellant's case and mainly is the fact that the title deed obtained fraudulently by the Respondent could not give him a good title.
 4. That no sale agreement was provided in court by the Respondent to prove his purchase neither was he present in court to defend his purchase.
 5. That the Honourable trial magistrate erred in relying on extraneous matters of fact that were not before her for determination.
 6. That the Learned trial magistrate exhibited actual bias.
 7. That the Learned trial Magistrate's decision has caused the appellant a gross miscarriage of justice.
6. Whereas Memorandum of Appeal dated 29th May 2023 had prayers to that the judgment of the Subordinate Court and that judgment be entered for the Appellant as he had prayed in his Plaint together with costs of both the appeal and the proceedings before the Subordinate Court, the Amended Memorandum of Appeal does not have any prayers. Further, even though ground 1a of the Amended Memorandum of Appeal suggests that the Appellant intended to seek leave to adduce additional evidence, no application for leave to adduce additional evidence was placed for determination by this Court prior to the hearing of this appeal.
7. The appeal was canvassed through written submissions. The Appellant argued that the suit property is his ancestral land, and that the Respondent did not produce any sale agreement to justify how he, a total stranger, acquired title thereto. That the Respondent knowingly committed fraud and that all requests to him to produce documents supporting his acquisition of the suit property had not been successful. The Appellant further argued that despite being served with hearing notice, the Respondent did not attend court during the trial. He relied on the definition of fraud in Black's Law Dictionary and further argued that he was saddened to see his case dismissed on the ground that he did not produce a green card. The Appellant also argued that what was before the Learned Magistrate was the weighty question of whether the Respondent obtained his title fraudulently and whether the title could be challenged on that ground. That in the circumstances, this appeal should be allowed so that justice prevails without causing unnecessary hardship to parties and also considering that land is a sensitive matter. He urged the Court to award him costs.



8. The Respondent argued that the Appellant failed to demonstrate any bias on the part of the Learned Magistrate and that the case was dismissed for failure of the Appellant to discharge the burden of proof. He contended that the appeal is defective and urged this Court to dismiss it with costs.
9. This being a first appeal, this Court's duty is clearly delineated. The Supreme Court restated the applicable principles in *Janmohammed (SC) (Suing As The Executrix Of The Estate Of The Late H.E. Daniel Toroitich Arap Moi) & Another V District Land Registrar Uasin Gishu & 4 Others (Petition 17 (E021) & 24 (E027) Of [2022] (Consolidated)) [2024] KESC 39 (KLR) (2 August 2024) (Judgment)* thus:

At this stage, all we can do is to re-state without more, the well-established principle of appellate practice and procedure that, on a first appeal ..., unless the appeal is on a point of law, the [appellate court] is duty bound where circumstances require, to consider and re-evaluate the evidence on record before arriving at a determination. This is all the more important in disputes relating to claims of title to land as recently pronounced by this Court in *Fanikiwa Limited v. Sirikwa Squatters Group & 20 Others (Petition [32 of 2022](#) (consolidated) [2023] KESC 58 (KLR))*.

10. I have carefully considered the pleadings, the evidence and the submissions in this matter. The issues that arise for determination are whether the Appellant established fraud and whether the Appellant was entitled to the reliefs that he sought.
11. To put everything in context, it is important to appreciate the Appellant's case as he pleaded it and prosecuted it. The Appellant averred that the Respondent is the registered proprietor of the suit property. According to the Appellant, he donated a 0.07 hectare portion of his land parcel number Kisa/Mundeku/801 in the year 2014 to Salvation Army Eshiangwe Church and handed over his title deed to the Church to facilitate the subdivision. That the Church did the subdivision and acquired parcel number Kisa/Mundeku/1756 but in the process colluded with the Respondent and assisted him to fraudulently acquire the suit property without the Appellant's consent and without consent of the Land Control Board.
12. From the copy of Certificate of Official Search dated 28th July 2022 which the Appellant produced, it is manifest that the Respondent became the registered proprietor on 12th March 2014 and title deed was issued to him on 17th March 2014. Since the Appellant was challenging the Respondent's proprietorship, he must have been aware of the rights of a registered proprietor of land, which are well spelt out by the law. 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 courts 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. 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.
13. A perusal of the Complaint shows that the Appellant did not seek nullification of the Respondent's title. He was content to cite fraud and, on that basis, to seek eviction of the Respondent from the suit property and a permanent injunction restraining the Respondent together with his servants and agents from having any dealings touching on the suit property.
14. The Appellant chose to challenge the Respondent's title on allegations of fraud. As the courts have consistently stated, fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *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. See Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR.
15. The Appellant has faulted the Learned Magistrate for holding that he ought to have produced the green card. The Learned Magistrate rendered herself on the issue thus:
 - (12) In the instant case, it is curious why the plaintiff alleges fraud on the part of the defendant yet LR NO. KISA/MUNDEKU/1757 is registered in the names of the defendant and he (the plaintiff) has failed to tender evidence to this court to show that the original title was registered in his name. It would have been (sic) prudent if the plaintiff produces (sic) the green card to show the history of the land and at what point the defendant carved out a portion of his title No. KISA/MUNDEKU/1757 from the plaintiff's original title No. KISA/MUNDEKU/801 and at what point the same became registered in the defendant's name.
 - (13) In the absence of the green card that proves that LR. NO. KISA/MUNDEKU/1757 was carved out from the plaintiff's original title No. KISA/ MUNDEKU/801, it is my finding that the plaintiff has not been able to prove his case on a balance of probabilities.
 16. The Appellant's case was that the suit property was created following subdivision of land parcel number Kisa/Mundeku/801 which he asserted he was the registered proprietor of. Considering the higher standard of proof applicable to allegations of fraud, it was incumbent upon the Appellant to demonstrate that he was the registered proprietor of land parcel number Kisa/Mundeku/801 and that the suit property was created following subdivision of the said parcel. The Appellant did not offer that evidence. He only produced copies of Certificates of Official Search in respect of the suit property and parcel number Kisa/Mundeku/1755.
 17. A perusal of the Certificate of Official Search in respect of the suit property shows that the suit property is a subdivision of parcel number Kisa/Mundeku/1528. The Appellant did not establish any connection between parcel numbers Kisa/Mundeku/801, Kisa/Mundeku/1528 and the suit property. He could have achieved that by producing the respective certified copies of registers or green cards. The Learned Magistrate cannot therefore be faulted for holding in the manner she did.
 18. The Appellant seems to labour under the false notion that his case should have somehow coasted to success since the Respondent neither attended the trial nor testified. That, of course, is an erroneous view. A party claiming title to registered land must succeed on the strength of his case and not on the weakness or indeed absence of defence. See Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR. That burden becomes heavier when the case is grounded on allegations of fraud.
 19. In view of the foregoing, I find and hold that the Appellant failed to establish fraud. That resolves the first issue for determination.
 20. The last issue for determination is whether the Appellant was entitled to the reliefs that he sought. Having failed to prove fraud, the Appellant's case was doomed to collapse. There is however one more reason why the reliefs that the Appellant sought could not issue to him.
 21. It is plain enough that parties are bound by their pleadings. See Raila Amolo Odinga & Another vs. IEBC & 2 others [2017] eKLR. Having not sought cancellation of the Respondent's title, the Appellant ought to have been aware that the Subordinate Court was obligated under Section 26 of the Land Registration Act, to accept and uphold the Respondent's certificate of title as conclusive evidence of proprietorship. The Subordinate Court could not grant any relief that was not sought and certainly, could not grant any relief such as eviction of the Respondent or a permanent injunction restraining



the Respondent from dealing with the suit property, since such orders would not only be unlawful but also inconsistent with the Respondent's proprietorship.

22. In view of the foregoing discourse, I find no merit in this appeal. I dismiss the appeal with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF SEPTEMBER 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Ogonji holding brief for Mr Obura for the Appellant

Mr Getanda holding brief for Mr Ombito for the Respondent

Court Assistant: M Nguyayi

