



**Muriithi v Makena & another (Environment and Land Appeal
E035 of 2022) [2024] KEELC 6936 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6936 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E035 OF 2022
CK YANO, J
OCTOBER 24, 2024**

BETWEEN

M'CHABARI MURIITHI APPELLANT

AND

HELLEN MAKENA 1ST RESPONDENT

DOREEN KANANU GIKUNDA 2ND RESPONDENT

JUDGMENT

Introduction

1. This appeal emanates from the judgment and decree of Hon. S. Ndegwa SPM in Githongo SPMC ELC case no. 4 of 2020 that was delivered on 23rd May 2022 in which the trial court dismissed the appellant's suit. Being aggrieved and dissatisfied with the said judgment, the appellant filed this appeal and set out the following grounds:-
 1. The learned trial magistrate erred in law and facts in misdirecting himself, misrepresented and misunderstood the evidence before court leading to making wrong conclusions and decision.
 2. The learned trial magistrate erred in law and facts failing to find that the appellant was not a competent witness due to his old age and ill health (suffering from dementia).
 3. The learned trial magistrate erred in law and facts by failing to find that there was fraud committed by the 1st respondent.
 4. The decision of the trial magistrate is against the weight of evidence produced before court.
 5. The decision of the trial magistrate is bad in law and case laws.
2. The appellant prays that the appeal be allowed with costs here and the court below.



3. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 14th August 2024 through the firm of Maitai Rimita & Co. Advocates while the respondents filed theirs dated 3rd September, 2024 through the firm of Munene Kirimi & Co. advocates.

Appellant's Submissions

4. It was submitted on behalf of the appellant that this being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. The appellant's counsel relied on the case of *Selle Vs Associated Motor Boat Co. & others (1968) EA 123* and *Mbogo and Another Vs Shah (1968) EA 93*.
5. The appellant identified the issues for determination to be whether the appellant has proved his burden of proof over entitlement of LR No. ABOTHUGUCHI/KARIENE/4346 (the suit property) and its subdivisions being ABOTHUGUCHI/KARIENE/5763, 5764 5765 AND 5766. The appellant pointed out that this matter relates to proprietorship rights over title to land. Learned counsel for the appellant cited Section 26(1) of the [Land Registration Act, 2012](#), Sections 107 and 112 of the [Evidence Act](#).
6. It is the appellant's submission that he has always been the proprietor of the suit land. The appellant submitted that to discharge the legal burden of proof, he submitted a copy of the Green Card to the suit land as part of his list of documents. That the green card is a land register in itself and by virtue of Section 7 of the [Land Registration Act](#), it houses the historical record of the land. That the green card which was filed in court on 20th May 2020 is clear that the appellant herein was registered as proprietor of the suit land on 15th April 2013 while the 1st respondent herein was registered as proprietor of the land on 8th May 2013.
7. The appellant submitted that in his pleadings, he averred that he is the proprietor of the suit land and discharged the burden by availing a copy of the register of the land and search certificates of the 4 subdivisions thereof. That from the evidence, it is clear beyond peradventure that the 1st and 2nd respondents were at the epicenter of fraudulent scheme of depriving the appellant ownership of the land. It is submitted that whereas the 1st respondent in her defence alleged that the appellant willingly transferred the suit land to her, the legal burden of proof shifted to her and which she never discharged. The appellant's counsel pointed out that this is oftenly known as the evidential burden of proof which keeps shifting between the parties. Learned counsel for the appellant relied on the case [Anne Wambui Ndiritu Vs Joseph Kiprono Ropkoi & another \[2004\] EKLR, Civil Appeal No. 345 of 2000](#) where the Court of Appeal considered the import of legal burden under Section 107 of the [Evidence Act](#) and the evidential burden within Section 109 and 112 of the same Act. It is the appellants submissions that the 1st respondent did not avail any iota of evidence to support her averment that the land was transferred to her by the appellant. The appellant also relied on the case of [Mbutia Macharia Vs Annah Mutua Ndwiga & another \[2017\] eKLR, Civil Appeal No. 297 of 2015](#).
8. The appellant stated that during examination in chief, the 1st respondent stated that she was 20 years old in 2013 when the suit land was transferred to her, but could not answer substantively where she had gotten the consideration for the transfer. That she only alleged that she used to work on the appellant's land (the suit land), and as a result raised money to enable her purchase the land. That she also could not substantiate how much she bought the land. It is the appellant's submission that these gaps in the 1st respondent's evidence were so huge that they cast doubt on the propriety of the 1st respondent's case. The appellant added that the 1st respondent could not avail a copy of the alleged transfer documents, minutes of the meeting where the transfer of the land is alleged was discussed and could not give an explanation why her own father placed a caution on the suit land sometime in 2017. The appellant



- also questioned the whereabouts of the Land Control Board consent for the transfer of the land and concluded that the 1st respondent's actions were fraudulent from the word go. The appellant argued that his evidence, including that of his 3 witnesses, was not impeached by the defence, even on cross-examination. He submitted that he discharged his burden of proof and urged the court to find as much.
9. On whether the respondents' actions amounted to fraud, the appellant answer in the affirmative. He submitted that those averments were particularized in the plaint in the manner in which fraud is ensued. It was submitted on behalf of the appellant that it is not in doubt that the appellant is an old man. That a mental assessment report was conducted and a psychiatrist made a finding that the appellant, an elderly man of 100 years of age, was suffering from dementia and a report was filed in court on 8th September, 2021. That the appellant nonetheless testified in court. It is the appellant's submissions that the respondents took advantage of the appellant's old age and conspired to take and transfer the suit land to themselves. That the respondents working in cohorts even proceeded to subdivide the land into 4 portions, each taking 2 subdivisions. The appellant relied on the case of *Vijay Morjaria Vs Nausingh Madhusingh Darbar & another [2000] EKLR, Civil Appeal No. 106 of 2000*. He stated that P.W 2 testified that she noticed the fraudulent actions of the respondents in 2019 and this was corroborated by P.W 3 who testified that he became aware of the respondents' fraudulent schemes when they visited the lands office and discovered that the land had already been subdivided. That again, in his witness statement, the appellant stated that the 1st respondent lured him into signing some documents at the government offices, and while he was away on treatment, the respondents brought surveyors and subdivided the suit land. The appellant termed those actions fraudulent and relied on the case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) Vs Stephen Njoroge Macharia [2020] eKLR, Civil appeal No. 411 of 2018*.
 10. It is the appellant's submissions that he has on a balance of probabilities, proved his case that he is indeed the rightful proprietor of the suit land and that the same together with the resultant subdivisions, had been procured fraudulently by the respondents. That it is clear that there was no transfer that legally transferred the land to the respondents. The appellant urged this court to find merit in his case and issue a declaration that the appellant is the proprietor of the suit land and further make an order of transfer of the land and the subdivisions to the appellant as prayed in the plaint. In short, the appellant urged the court to allow the appeal, set aside the judgment and decree of the lower court and issue the orders sought in the plaint. The appellant also prays for costs of the appeal and of the case at the trial court.

Respondents' Submissions.

11. The respondents gave a background of the matter and identified the issues to be whether the appellant has proved that he was the registered owner of LR. NO. ABOTHUGUCHI/KARIENE/4346 prior to it being transferred to the 1st respondent and later on mutating to LR. NOS. ABOTHUGUCHI/KARIENE/5763 – 5766, whether the appellant and his witnesses have adduced evidence demonstrating that indeed the subject parcel passed on into the names of the respondents illegally and fraudulently, whether or not the respondents and their witnesses adduced evidence to demonstrate that the subject matter passed on to the respondents legally, whether or not the appellant's evidence as presented before the Honourable court was consistent, whether or not the burden of proof shifted from the appellant to the respondents in this matter, whether the evidence of the appellant's late wife Sabella Chabari was shaken by the appellant on how the respondent acquired the subject parcel/s, and whether the appellant's suit should be dismissed with costs to the respondents.



12. On whether the appellant proved that he never transferred the suit land to the 1st respondent prior to its subdivision, the respondents cited Section 107 of the *Evidence Act* and relied on the case of *Mbuthia Macharia Vs Annah Mutua & another* [2017] eKLR and submitted that the appellant failed to meet the threshold espoused in section 107 of the *Evidence Act* and above case. The respondents also relied on the case of *Vijay Marjaria Vs Nausingh Madhusingh Darbar & another* [2000] eKLR and *Kinyanjui Kamau Vs George Kamau* [2015] eKLR and pointed out that neither the appellant nor his witnesses disputed that there was a meeting attended by the appellant and his wife where the appellant dictated on how he had distributed his land to his children including the 1st respondent. That the appellant never adduced any reports from the investigative agencies demonstrating that the 1st respondent fraudulently acquired the suit land. That the appellant never reported the alleged fraud to the relevant investigative agencies nor did he report the office which conspired with the 1st respondent to have the suit land transferred into her name and also failed to adduce evidence demonstrating that the Land Control Board was fraudulent in issuing the consent for transfer of the land, nor did he cite the land registrar for irregularly issuing title deed to the 1st respondent. The respondents argued that the appellant should have adduced documents used to transfer the suit land into the name of the 1st respondent and demonstrate that the signature specimen or thumbprint in those documents and belonging to him are not his, that he never attended the Land Control Board for consent and that he never executed the application for Land Control Board consent.
13. Regarding the issue whether the appellant and his witnesses adduced evidence demonstrating that the suit land was passed into the name of the respondents illegally and fraudulently, the respondents submitted that the appellant's witnesses gave contradictory testimonies. The respondents again cited Section 107 of the *Evidence Act* and relied on the decision of the Supreme Court in presidential petition No. 1 of 2017 between *Raila Amolo Odinga & another Vs IEBC & 2 others* [2017] eKLR, *Benson Owenga Anjere Vs Kivati Nduota & Another* [2013] eKLR, *Ngengi Muigai & another Vs Peter Nyoike Muigai & 4 other* [2018] eKLR which quoted *Mwathi Vs Mwathi* [1996] eKLR and *Nabio Properties Limited Vs Sky Structures Limited* [1986] eKLR, and submitted that the evidential burden has not shifted to warrant the 1st respondent adduce additional evidence to controvert the evidence adduced by the appellant since his evidence was oral and not anchored on any documentary evidence. That the appellant's evidence and that of his witnesses cannot stand the test of time and the same cannot be relied upon.
14. As to whether or not the respondents and their witnesses adduced evidence to demonstrate that the suit land passed on to them legally, the respondents gave a summary of the evidence given by them and their witnesses and submitted that the evidence they adduced during trial was never shaken during cross-examination though the threshold to make the respondents, especially the 1st respondent, testify in rebuttal had not been met by the appellant's case. The respondents cited the *Halbury's Laws of England Vol 13 Paragraph 1* which was captured by *Havelock J in Concord Insurance Co. Limited Vs NIC Bank Limited*, Nairobi High court case 175 of 2011 [2013] eKLR. The respondents also made reference to the provisions of Orders 11, 4,7 and 14 of the Civil Procedure Rules and submitted that they ably demonstrated on how the subject matter passed from the appellant to the 1st respondent. That the appellant did not prove that what was done by him was done by a person purporting to be the appellant.
15. The respondents concluded by submitting that the appellant failed to either prove his case or adduce sufficient evidence. That the evidence of the appellant's witnesses were inconsistent. In the respondents view, the appellant ought to have produced before the court the application for Land Control Board consent, the consent for transfer of the land by the appellant to the 1st respondent, the duly signed transfer documents demonstrating that he was not in any way connected to the same and a report



emanating from the relevant investigative agencies indicating that he was not the author of the documents in question and that the same was done fraudulently. That the appellant also ought to have sued the chairman of the Land Control Board for purportedly illegally issuing consent for transfer and the land registrar for allegedly issuing a title in the name of the 1st respondent after he/she was issued with transfer instruments. The respondent prayed for the appeal to be dismissed with no order as to costs owing to the special relationship between the appellant and the 1st respondent.

Analysis And Determination

16. The court has perused the record of appeal and the grounds of appeals. I have also considered the submissions made and the authorities cited. As rightly submitted by the appellant, this being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another Vs Associated Motor Boat Co. Ltd* (Supra)
17. The issues I find for determination are-;
 - i. Whether the appellant has proved that the suit land was transferred to the respondents fraudulently
 - ii. Whether the decision of the learned trial magistrate was against the weight of the evidence adduced.
 - iii. Whether the appeal is merited.
 - iv. Who will bear the costs of the appeal?
18. In his plaint dated 19th May 2020, the appellant pleaded that at all material times, he was the proprietor and owner of LR. NO. ABOTHUGUCHI/KARIENE/4346 measuring one (1) acre or thereabouts. The appellants stated inter alia, that he subdivided his bigger land and transferred portions to all his children leaving him with the suit land. The appellant accused the respondents herein for fraudulently transferring the suit land (and its subsequent sub-divisions LR NO. ABOTHUGUCHI/KARIENE/5763 – 5766) to themselves. The appellant enumerated various particulars of fraud against the respondents. The appellant sought a declaration that the said parcels of land are his properties and an order of transfer of the same to the appellant.
19. At the hearing, the appellant testified as P.W 1 and called two witnesses. The appellant adopted his statement filed on 1st April, 2020 as his evidence in chief and was cross-examined and re-examined.
20. In his statement, the appellant reiterated that he owned land where he lived together with his family, and due to his advanced age, and to avoid disputes in case of his demise, he subdivided the land and gave a share to each of his children. The appellant testified that he left one (1) acre of the land where his home is. That sometime, the 1st respondent approached him and took him to some advocate and government offices where he signed some documents to confirm that L.R NO. ABOTHUGUCHI/KARIENE/4346 was his. That he later got surprised when the respondents brought surveyors and sub-divided the said land among themselves, hence the filing of the suit.
21. 2 was Rose Kanyore Mbaabu a daughter to the appellant who adopted her statement dated 11th February, 2021 as her evidence in chief and was cross examined and re-examined. P.W 2 stated that in the year 2012, the appellant called all his children and told them that he wanted to share his land to them, but would retain one (1) acre where his homestead stood. P.W 2 confirmed that the 1st respondent is



a granddaughter to the appellant and that it is the appellant who brought her up. The same applied to the 2nd respondent.

22. 3 was Dominic Nkamani Chabari who adopted his statement 11th February, 2021 as his evidence in chief and was also cross-examined and re-examined. P.W 3 is a son to the appellant and his evidence mirrored that of P.W 2
23. The 1st respondent testified as D.W 1. The respondents also called two witnesses namely, Sabera Chabari (D.W 2) and Peter Kaburu (D.W 3). It was the 1st respondent's evidence that she was brought up by her grandfather, the appellant and treated more as a daughter and not a granddaughter. That the suit land was lawfully transferred to her by the appellant himself as he did to his other children and accused P.W 2 and her husband for influencing the appellant to change his mind over the transfer of the land to the 1st respondent and filing suit since they did not want the 1st respondent to get any land.
24. In this case, it is not in dispute that the suit properties are registered in the name of the respondents. Section 24, 25 and 26 of the [Land Registration Act](#) provides as follows-;

24.

- (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 thereto.

25.

- (1) the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrance set in this section.

26.

- (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.

25. It is clear from the above provisions of law that a title to land may be impeached on the ground that the same has been acquired fraudulently as alluded to by the appellant in the present case. The question



however, is whether the appellant has proved the alleged fraud. In other words, has it been proved that the respondents acquired the suit land fraudulently? It is trite law that he who alleges must prove.

26. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. Fraud was specifically pleaded in the plaint herein and the particulars thereof itemized. The Court of Appeal in *Vijay Marjario Vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held that:-

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. The act 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.”

27. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others Vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that: “When fraud is alleged by the plaintiffs the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required”. Also in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs 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 case, 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 case...” In case where fraud is alleged it is not enough to simply infer fraud from the facts.
28. Under the provisions of Section 107 to 109 of the *Evidence Act*, the burden of proof is on the appellant to prove that the transfer of the suit land to the respondents was fraudulent. Whereas the appellant alleged fraud on the part of the respondents, the appellant in my view, has failed to substantiate the same. From the evidence and material on record, it is the appellant himself who called all his children where he subdivided and shared out his land. This, according to the appellant, was because of his advanced age and “to avoid disputes” in case of his demise. The appellant admitted that he is the one who brought up the 1st respondent. The same evidence was stated by the appellant’s own witnesses. Further, the appellant admitted that he together with the 1st respondent went to an advocate and government offices where he signed some documents. The appellant did not deem it fit to report to the relevant investigative agencies including the DCI to investigate the alleged fraud after learning that the documents he had signed were in fact transfer documents for the suit land. Further, the appellant did not even deem it necessary to join the land Registrar who issued titles in favour of the respondents as a party to the suit. It was the appellant who was alleging fraud and the burden to prove that allegation squarely lay on him. To succeed in claiming fraud, the appellant not only needed to plead, but also lay out watertight evidence upon which the court would make a finding. The law is that the standard of proof required of the appellant in such a case is obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities, though certainly not one beyond a reasonable doubt as in criminal cases. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts as the appellant wants the court to do in this case. In this case, the appellant failed to adduce



sufficient evidence to prove the alleged fraud, and therefore failed to prove his case on a balance of probabilities and was rightly dismissed by the learned trial magistrate.

29. Having reviewed and considered all the evidence and material placed before the court, I find and hold that the learned trial magistrate was justified in arriving at the decision she made. The findings and holdings of the trial court were sound and well founded and I find no reason to interfere with the same.
30. In the result, it is my finding that the appellant's appeal has no merit and the same is dismissed.
31. Owing to the relationship of the parties who are close relatives, I make an order that each party bears its own costs.
32. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF OCTOBER, 2024

C.K YANO

ELC JUDGE

In The Presence Of

Court Assistant – Tupet

Munene Kirimi for respondents

