



REPUBLIC OF KENYA



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**Maweu v Mbuvi & 2 others (Environment and Land Appeal E008 of 2022)
[2024] KEELC 13301 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E008 OF 2022
TW MURIGI, J
NOVEMBER 20, 2024**

BETWEEN

PATRICK MUASYA MAWEU APPELLANT

AND

HENRY KITONGA MBUVI 1ST RESPONDENT

SALOME KAVULI GICHUHI 2ND RESPONDENT

THE REGISTRAR MAKUENI LAND REGISTRY 3RD RESPONDENT

JUDGMENT

1. By an amended Memorandum of Appeal dated 26th May 2022, the Appellant appealed against the Judgment of Hon. J.N Mwaniki delivered on 25th May, 2022 in Makueni MCELC No. E003 of 2021 and set out seven grounds of Appeal.

Background

2. The Appellant had sued the Respondent by way of a Plaint dated 25th January 2021 seeking the following orders:-
 - a. A declaration that transactions involving transfer of land known as Konza South Block 5(konza) 433 amounted to intermeddling with property of a deceased person and an order do issue for cancellation of the title deed in respect of land Known as Konza South Block 5(konza) 433 fraudulently to Henry Kitonga Mbuvi on 19/02/2019 and later transferred to Salome Kavuli Gichuhi on 18th September 2019 and another title deed reissued in the name of the late John Maweu Mulwa (deceased) pending confirmation of grant in the name of the Plaintiff.
 - b. An order of injunction do issue restraining the Defendants by themselves, their agents, nominees and/or servants from transferring and or selling, alienating and//or interfering



and/or intermeddling with the parcel of land known as Konza South Block 5(konza) 433 measuring approximately 4.3396 ha approximately 10.7189 acres or thereabout in any manner whatsoever.

- c. Any other remedy/relief that this honourable court deems just in the circumstances.
 - d. Costs of the suit.
3. The 1st Defendant filed a Statement of Defence dated 10/02/2021 in which he denied the Plaintiff's claim. He stated that the Plaintiff has no locus standi to institute and prosecute the suit and added that the court lacks jurisdiction to hear and determine the suit. He urged the court to dismiss the Plaintiff's suit with costs.
 4. The 2nd Defendant filed a statement of defence dated 23/02/21 in which she denied the Plaintiff's claim. She stated that she is an innocent purchaser for value and denied having colluded with the other Defendants to fraudulently acquire the suit property.
 5. The 3rd Defendant filed a statement of Defence dated 25/03/2021 denying the Plaintiff's claim. He stated that the contract to transfer any suit land does not involve the Land Registrar when parties are negotiating save for the application for a search and effecting the transfer. The Plaintiff filed a reply to the 1st, 2nd, and 3rd Defendants defence on 17/08/2021, 23/02/2021 and 25/05/2021 respectively and reiterated the contents of the Plaintiff.
 6. In the proceedings before the lower Court, the Appellant was the Plaintiff while the Respondents were the Defendants. After the trial, the Learned Trial Magistrate delivered his judgment on 25th May, 2022 and dismissed the Plaintiff's suit with costs to the 1st and 2nd Defendants.
 7. Being aggrieved, the Appellant appealed to this court on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact in failing to give a concise statement of the case, points of determination, decision thereon and reasons for his judgment.
 - ii. That the learned trial magistrate erred in law and fact in failing to put into consideration the proceedings and evidence on record in advancement of the Appellant case and thereby ignoring relevant guiding facts to enable him reach a fair and reasoned determination in his judgment hence prejudicing the Appellant.
 - iii. That the learned trial magistrate erred in fact and law by failing to appreciate the fact that the Respondents herein had intermeddled with property of deceased person contrary to the provisions of Section 45 of the Law of Succession Act Laws of Kenya thereby giving unfair and unlawful judgment to the detriment of the Appellant.
 - iv. That the learned trial magistrate erred in law and fact by deliberately introducing matters which were not brought before the court by stating that the title deed was issued in the year 2007 while the record and evidence tendered in court was very clear that the title deed was issued in the year 2017 and thus he failed to appreciate by the time the title deed was issued the original owner of the suit property herein John Maweu Mulwa (Deceased) had already passed on and therefore he could not have transferred the property to the Respondents.
 - v. That the learned trial magistrate erred in law and fact by deliberately failing to consider the evidence on record to confirm that the title deed subject of this suit was transferred fraudulently and thereby proceeding to make wrong application of the provision of Section 26 of the Land Registration Act Laws of Kenya.



- vi. That the trial magistrate erred in law and fact by failing to appreciate the spirit behind the provisions of Article 159 of *the Constitution* and ignored important facts by dismissing Appellant's arguments summarily without consideration of distinctive nature of the case before him for consideration.
 - vii. That the trial magistrate erred in law and fact by failing to appreciate and/or to capture and/or record the evidence tendered before the court by the Appellant and his witnesses during the hearing and thereby missing out on relevant evidence thus delivering judgment which didn't factor the evidence tendered in court.
8. The Appellant prays for:
1. This Appeal be allowed and judgment against the Appellant be set aside.
 2. The order dismissing the Appellant's suit be reviewed and/or revised accordingly and judgment be entered in favour of the Appellant.
 3. Costs in the Appeal.
 4. Any other order this Honourable court may deem fit to grant.
 5. That an order do issue for retrial of this case before the High Court or another court of competent jurisdiction as this court may direct.
9. The parties were directed to canvass the appeal by way of written submissions.

The Appellant's Submissions

10. The Appellant filed his submissions on 11th March, 2024.
11. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the trial court failed to give a concise statement of the case, points for determination, reasons of the decision thereon and the failure to consider the Appellant's submissions;
 - ii. Whether the trial court failed to take into consideration that the Respondents had intermeddled with the property of a deceased person contrary to the provisions of Section 45 of the *Law of Succession Act*;
 - iii. Whether the trial court failed to capture the evidence as tendered in court and whether the trial court introduced matters which were not before the court thereby failing to uphold Article 159 of *the Constitution*.
12. On the first issue, Counsel submitted that the judgment of the trial court lacked a concise statement of the case, points for determination, the decision thereon and the reasons for the judgment which made it fatal. Counsel submitted that the introduction part of the judgment is very shallow and does not include the details as per the chronology of the events laid down during the hearing.
13. With regards to the second issue, Counsel submitted that the learned trial magistrate failed to take into consideration that the Respondents had intermeddled with the property of a deceased person contrary to Section 45 of the Law of Succession. Counsel submitted that the suit property belonged to John Maweu Mulwa who died on 9/11/2014 and added that any dealings with his property by any person other than the administrator amounts to intermeddling with the property of the deceased.



14. Counsel further submitted that the transfer form purportedly executed by the 1st Respondent and the late John Maweu Mulwa not only amounts to intermeddling with the property of a deceased person but also amounts to a fraudulent activity by the 1st Respondent. Counsel further submitted that the trial court failed to consider the fact that the transfer forms for the suit property were purportedly signed by the late John Maweu Mulwa in the year 2019 while at the same time acknowledging that the deceased died in the year 2014. Counsel argued that since the title deed issued to the 1st Respondent was a nullity ab initio, the decision to uphold the title issued to the 2nd Respondent arising from a void transaction was unlawful and amounted to miscarriage of justice. To buttress this point, Counsel relied on the case of *Martha Wangui Thurura & another v Henry Gitahi & 3 others* (2021)eKLR where the court held that:-

“...However, inspite of the 2nd Defendant meeting the criteria for innocent purchaser for value, the 1st Defendant’s title was null and void ab ignition as it contravened the provisions of Section 45 of the Law of Succession Cap 160. If this court were to validate the end Defendant’s title it would amount to abetting a criminal act under section 45(2) Cap 160. The 2nd Defendant claim will thus lie against the 1st Defendant but not against the estate of Christine Wangechi Thurura deceased. Innocent purchaser for value is an equitable remedy that cannot override the provisions of the law.”

15. Counsel further submitted that the learned trial magistrate failed to consider the exceptional circumstances that can cause a certificate of title to be nullified. Counsel argued that the learned trial magistrate misdirected his mind by stating that the Appellant did not prove the exceptions to Sections 26 of the *Land Registration Act* as he failed to call the Land Registrar Makueni to testify as a witness. Counsel argued that the court ought to have deemed the failure by the 1st and 3rd Respondents to attend the hearing as an admission of the particulars of fraud enumerated in the *Plaint*. To buttress this point, Counsel relied on the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* [2012] eKLR where the court stated as follows:-

“Although the Defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff case stand unchallenged but also the claims made by the defendant in his defence and counter claim are unsubstantiated.....where a party fails to call evidence in support of its case, that party’s pleadings remain mere statement of facts since in so doing the party fails to substantiate its pleadings.”

16. Counsel further submitted that it is not in dispute that the title issued to the 1st Respondent was obtained fraudulently as John Maweu Mulwa had died on 9th November 2014, whilst the transfer form dated 19th February 2019 between Henry Kitonga Mbuvi and John Maweu Mulwa deceased was executed after his death. Counsel further submitted that the title issued to 1st Respondent was invalid and as such, he did not have a good title to pass to the 2nd Respondent. In this regard, Counsel urged the court to cancel the title issued in favour of the 2nd Respondent. To buttress this point, Counsel relied on the case of *Alice Chemutai Too v Nickson Kipkirui Koriri & 2 others* (2015) eKLR where the court stated as follows:-

“...Having considered all arguments, I frankly do not see how the title of the 1st Respondent, the star fraudster can be upheld and having nothing to charge, I do not see how the charge in favour of the bank can be upheld.....”



17. On the third issue, Counsel faulted the learned trial magistrate for failing to capture the evidence tendered by the parties during the trial. Counsel submitted that despite parties having filed detailed statements which were adopted at the hearing, the proceedings contain scanty recordings of evidence on the issues which were raised in cross examination by the rival parties. Counsel also faulted the learned trial magistrate for introducing new matters which were not brought before the court. Counsel argued that the judgment of the trial court held that John Maweu Mulwa (Deceased) was issued with the title in the year 2007 while the evidence demonstrates that the same was issued in the year 2017 after the demise of the Appellant's father. Counsel argued that the period of issuance of the title is of great essence in considering the aspect of intermeddling with the property of the deceased who passed away of 9/11/2014. Counsel argued that the learned trial magistrate deliberately changed the period from 2017 to 2007 thereby technically terminating the issue of intermeddling with the property of the deceased to the detriment of the Appellant. Concluding his submissions, Counsel urged the court to allow the Appeal as prayed. To buttress his submission counsel relies on the Applicant's bundle of authorities dated 11th March, 2024.

The 2Nd Respondent's Submissions

18. The 2nd Respondent filed her submissions dated 26th September 2024. Submitting on grounds 1 and 2 of the memorandum of appeal, Counsel argued that the trial magistrate addressed all the issues raised by the parties in their pleadings, oral evidence and submissions in compliance with Order 21 Rule 4 of the Civil Procedure Rules. Counsel further argued that the 2nd Respondent led evidence on how she carried out due diligence before purchasing the suit property. Counsel contended that the 2nd Respondent is an innocent purchaser for value and cannot be said to have colluded with the other Respondents to fraudulently acquire the suit property. Counsel concluded that there was no error of law and fact on the part of the trial magistrate in respect of grounds 1 and 2.
19. On grounds 3 and 4, Counsel argued that the Appellant had not presented evidence of intermeddling by the 2nd Respondent. Counsel submitted that the 1st Respondent produced transfer forms that were executed by the late John Maweu Mulwa before his demise in addition to the production of a sale agreement between the Appellant's father and the 1st Respondent. Counsel further submitted that the 2nd Respondent had proved that she is the absolute owner of the suit property having legally acquired it from the 1st Respondent.
20. On ground 5, Counsel submitted that the onus of proving fraud, illegality and irregularity on the part of the 2nd Respondent was on the Appellant. Counsel argued that the Appellant did not prove fraud at the trial court as no forensic or investigative report was produced to show that the transfer and registration of the title deed was tainted with fraud.
21. On grounds 6 and 7, Counsel submitted that the Appellant did not adduce evidence to prove that the 2nd Respondent intermeddled with the estate of the deceased. That the trial court dismissed the Appellant's claim on the basis that the 2nd Respondent is the legal owner of the suit property. Counsel submitted that this court is vested with the power to determine the case fully in accordance with Section 78 of the *Civil Procedure Act*. Counsel further submitted that the trial magistrate considered the Appellant's evidence and determined that he had failed to prove his case on a balance of probabilities.
22. To buttress his submissions, Counsel relied on the list of authorities dated 26th September, 2024.

Factual Background

The Appellant's Case



23. The Plaintiff, Patrick Muasya Maweu testified as PW1 and called one witness in support of his case. He testified that his late father John Maweu Mulwa died on 09/11/2014. He further testified that his late father was a member of Konza Farmers Ranching Cooperative Society Limited where he was allocated agricultural land and a commercial plot in Konza. That during the succession proceedings in respect of his late father's estate, he discovered that the agricultural plot belonging to his late father had been transferred and a title deed had been issued to the 1st Defendant after the demise of his father. He denied the allegations that his late father had sold the suit property to the 1st Defendant and added that he would have known if he had sold the suit property as he was in constant touch with his father. He further testified that he had reported a case of forgery to the police and the same was pending under investigation as at the time of hearing of this case.
24. In cross examination, he admitted that the photograph and signature appearing on the allotment letter belonged to his late father and denied that the photograph and signature appearing on the transfer document belonged to his late father. It was his testimony that the transfer documents signed in the year 2019 in favour of the 1st Respondent were forgeries.
25. PW2 David Mulwa testified that he wrote a letter confirming that land parcel No. 433 belongs to Member No. 1483, John Maweu Mulwa. He testified that the title deeds were issued in October 2017.
26. The 1st Defendant did not attend the hearing and closed his case on 2/3/2022.

The 2nd Defendant's Case

27. The 2nd Defendant Salome Kavuli Gichuhi testified as DW1 and called one witness in support of her case. She adopted her witness statement dated 26th July 2021 as her evidence in chief. She also produced the documents in her list of documents as DEX 1 – 7 in support of her case. It was her testimony that prior to purchasing the suit property, she conducted due diligence by conducting a search and inspecting the suit property and further established that the 1st Respondent had purchased the suit property from John Maweu Mulwa She further testified that she purchased the suit property from the 1st Defendant for Kshs 14million and after she completed payment of the purchase price, she attended the Land Control Board together with the 1st Defendant where he gave her the original title deed and subsequently thereafter the suit property was transferred to her name. She insisted that she is an innocent purchaser for value and denied having colluded with the other Defendants to fraudulently acquire the suit property.
28. DW2 Edward Gichuhi the husband to the 2nd Defendant adopted his witness statement dated 26th July 2021 as his evidence in chief. He echoed the evidence of DW1.

Analysis And Determination

29. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another Vs Associated Motor Boat Company and Others* (1968) 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;

“An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and drive its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the



evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.”

30. Although the Appellant raised seven (7) grounds of appeal, the court is of the opinion that the Appeal may conclusively be determined on the following three grounds: -

- i. Whether the learned trial magistrate erred in law and fact by failing to give a concise statement of the case, points for determination, decisions thereon and reasons for the judgment;
- ii. Whether the trial magistrate analyzed the evidence on record in arriving at his decision.
- iii. Whether the learned trial magistrate introduced matters which were not before the court.

Whether The Learned Trial Magistrate Erred By Failing To Frame The Issues For Determination

31. The Appellant faulted that the Learned trial magistrate for failing to give a concise statement of the case, the points of determination, the decision thereof and reasons for the decision.

32. Order 21 Rules 4 of the Civil Procedure Rules provides that:-

4. Judgments in defended suits shall contain a concise statement of the case, the points of determination, the decision thereon, and the reasons for the decision.

33. In the case of *Rukidi vs Iguru and Another* (1995-1998) 2 EA 318 the court held that:-

“Framing of the issues is an important step in the determination of a case as it defines the areas of controversy and narrows down the scope of inquiry. It makes the hearing of the case more focus oriented and saves the time of the court”

34. I have perused the impugned judgment and I find that the learned trial magistrate did not frame the issues for determination which he was enjoined to do under Order 21 Rule 4 of the Civil Procedure Rules. In light of the above, I find fault with the judgment for failure to comply with the provisions of Order 21 Rule 4 of the Civil Procedure Rules.

Whether The Learned Trial Magistrate Analyzed The Evidence On Record Before Arriving At His Decision.

35. The Appellant contended that the court ought to have deemed the failure by 1st and 3rd Respondent to attend the hearing as an admission of the particulars of fraud enumerated in the Plaintiff. Although the 1st and 3rd Respondents did not contest the Appellant’s suit during the hearing, the Appellant had a duty to formally prove his case on a balance of probabilities as is required by the law.

36. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the *Evidence Act* provides that:-

107(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.

37. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.



38. In the case of *Kirugi and Another vs Kabiya & 3 others* (1987) KLR 347 the Court of Appeal held that;
- “The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”
39. Similarly, in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that;
- “It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
40. Further, in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR the Court of Appeal held that: -
- “It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”
41. This therefore means that the Appellant had the burden to prove his case notwithstanding the fact that the 1st and 3rd Respondents did not contest the Plaintiff's evidence.
42. The Appellant faulted the learned trial magistrate for failing to appreciate the fact that the Respondents had intermeddled with the property of the deceased contrary to Section 45 of the [Law of Succession Act](#). In his *Plaint*, the Appellant had sought for a declaration that the transaction involving the suit property amounted to intermeddling with the property of a deceased person. I have carefully perused the judgment and I note that the learned trial magistrate did not address or determine the issue of whether the Respondents had intermeddled with the property of a deceased person. The Appellant sought for an order for the cancellation of the suit property on the grounds that it was fraudulently transferred to the 1st Respondent on 19/02/2019 and subsequently thereafter to the 2nd Respondent on 18/09/2019. According to the Appellant, the learned trial magistrate did not consider the fact that 1st Respondent had no title to pass to the 2nd Respondent as the suit property was fraudulently transferred to him. At paragraph 10 of his *plaint*, the Appellant pleaded particulars of fraud as follows:
- a. Deliberately intermeddling with the property of a deceased person without justification while the succession process is pending
 - b. That the 1st defendant being adamant and proceeding to transfer the property of a deceased person.
 - c. Fraudulently conspiring to frustrate the plaintiff by denying him an opportunity to list the property as part of the estate by altering the green card to reflect the name of the 1st defendant and later the name of the 2nd defendant.
 - d. Deliberately forging the transfer documents of land while the original had already died.
43. It is trite law that fraud must be specifically pleaded and proved.



44. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)* Tunoi JA 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.”

45. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau [2015] eKLR* the Court of Appeal held that:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo [2008]1 KLR (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 that 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 cases, 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 Cases...”

46. The Appellant faulted the trial magistrate for failing to appreciate that the transaction leading up to the registration of the 2nd Respondent as the proprietor of the suit property was marred with fraud. It was his testimony that his late father did not sell the suit property to the 1st Respondent. He further testified that the transfer to the 1st Respondent was fraudulent as it was executed long after his father’s death. The dispute herein revolves around the transfer of the suit property to the 1st Respondent who subsequently transferred the same to the 2nd Respondent. In support of his evidence, the Appellant produced the following documents contained in the list of documents dated 25th January 2021:-

1. Limited grant of letters ad litem
2. Allotment letter from Konza Ranching and Cooperative Society) for agricultural and commercial plot issued to his late father John Maweu Mulwa.
3. Letter dated 10/2/2020 from Konza Ranching and Farming Cooperative Society Limited confirming ownership of title deed of parcel No Konza South Block 5(konz) 433.
4. Copy of official search Konza South Block 5(konza)433 showing that the title deed for the suit property belongs to society member No. 1483 John Maweu Mulwa.
5. Certified copy of green card for the suit property.
6. Demand letter dated 12th August 2020.
7. Copy of death certificate of the late John Maweu Mulwa (deceased).

47. He also produced a letter dated 19/08/2021 contained in the further list of documents dated 24th August 2021 in support of his case.

48. The 2nd Respondent on the other hand testified that she conducted due diligence prior to purchasing the suit property from the 1st Respondent. She produced the following documents contained in the list of documents dated 26/07/2021 in support of her case:-



1. Agreement for sale dated 19th July 2019.
2. Official search dated 22nd July 2019.
3. Transfer form.
4. Letter of consent dated 30th January 2019.
5. Letter of consent dated 25th July 2019.
6. Application for registration of tile form.
7. Copy of title deed.

49. In his judgment, the learned trial magistrate stated as follows in part:-

“In his statement of defense the first defendant stated that the sale and transfer of the land from the deceased and subsequent transfer was legitimate. In his affidavit sworn on 1-/2/2021 in opposition to the Plaintiff’s application dated 25/1/2021 for injunction against him and the other defendants, he did annex the sale agreement and seven acknowledgment of payment of the purchase price by instalments the last one being one dated 13/12/2013. All these documents were prosecuted by the law firm of R.M.Matata & Co Advocates. Though the first defendant never testified in court the affidavit being itself in nature of evidence and also the annexures thereto cannot be disregarded by the court”.

50. The record shows that neither party sought leave to have the affidavit of the 1st Respondent admitted as evidence. It is a tenet of fair trial that a party should be granted an opportunity to challenge the evidence tendered by his opponent. The 1st Respondent was not cross examined on the averments contained in his affidavit in opposition to the application dated 25/01/2021. Similarly, the Appellant was not granted an opportunity to challenge or interrogate the sale agreement and seven acknowledgments relied upon by the learned trial magistrate. The 1st Respondent’s case was closed without adducing any evidence. I therefore find that the learned trial magistrate erred by holding that the 1st Respondent’s Affidavit formed part of the evidence in the trial.

51. The learned trial magistrate held and correctly so that:-

“It is not in dispute that the suit property belonged to John Maweu Mulwa deceased. It is also not in dispute that the same was later transferred and registered in the name of the first defendant. Its further not in dispute the same was subsequently transferred in the names of the second Defendant following a sale agreement between her and the first Defendant.

52. At paragraph 7 of the Plaint, the Appellant averred that the 1st Respondent conspired with the 3rd Respondent to transfer the suit property in his name notwithstanding that it formed part of the estate of John Maweu Mulwa and subsequently thereafter transferring the same to the 2nd Respondent. The genesis of this dispute is centered around the transfer of the suit property from John Maweu Mulwa deceased to the 1st Respondent. The Appellant denied that his father sold and transferred the suit property to the 1st Respondent. The learned trial magistrate relied on the sale agreement and the acknowledgement receipts which were not tested by way of cross examination. The learned trial magistrate did not address the issue of whether there was a sale agreement between the 1st Respondent and John Maweu Mulwa Deceased, whether the transfer of the suit property to the 1st Respondent was marred by fraud or whether the 1st Respondent conspired with the 3rd Respondent to fraudulently



transfer the suit property in his name. In my view, these are the issues that are at the center of this dispute which the trial magistrate ought to have addressed but failed to do so.

53. A cursory look of the judgment shows that the learned trial magistrate addressed and determined the sale and transfer process with regards to the transaction between the 1st and 2nd Respondents with regards to the suit property. The trial magistrate found that the 2nd Respondent conducted due diligence prior to purchasing the suit property from the 1st Respondent and concluded by stating that there was no fraud in the transaction between the 1st and 2nd Respondents. He further held that the 2nd Respondent is a bona fide purchaser for value. From the judgment, it is crystal clear that the learned trial magistrate did not address or determine the sales transfer process with regards to the transaction between the 1st Respondent and John Maweu Mulwa Deceased.
54. The learned trial magistrate faulted the parties for failing to call the evidence of the Land Registrar. In his judgment, the learned trial magistrate stated as follows in part:-

“But perhaps the most glaring omission of crucial evidence is the failure of the two parties to call the evidence of the land registrar Makueni. Though the registrar was named as a defendant and never participated in the litigation his evidence was of paramount importance”.

55. The trial magistrate acknowledged that the Land Registrar was a party in the suit. The Appellant had no obligation to call the Land Registrar as a witness in support of his case since he was a party to the suit. In holding that failure to call the Land Registrar was a glaring omission of the two parties, I find that learned trial magistrate shifted the burden of proof to the 2nd Respondent as she was not bound to prove the Plaintiff's. I therefore find that the learned trial magistrate misdirected himself by stating that in the absence of the evidence of the land Registrar the Plaintiff did not prove the exception to the provision of Section 26 of the *Land Registration Act*.

Whether The Learned Trial Magistrate Introduced Matters Which Were Not Before The Court

56. The Appellant faulted the learned trial magistrate for introducing new matters which were not before the court. Counsel submitted that the date of issuance of the title was of essence in considering the aspect of intermeddling with the property of the deceased. The Appellant complained that the learned trial magistrate deliberately changed the period when the title was issued from 2017 to 2007 thereby terminating the issue of intermeddling to the detriment of the Appellant. At page 2 of the judgment it states as follows:-

‘He said titles to the lands were issued in 2007 and taken to Land Registrar Makueni’.

57. According to the green card, John Maweu Mulwa was issued with the title deed for the suit property in the year 2017.
58. The learned trial magistrate therefore erred in his judgment by stating that the title was issued in the year 2007.
59. From the foregoing, I find that the Appellant has demonstrated merit in the appeal. The upshot of the foregoing is that the Appeal is hereby allowed in the following terms:-
1. The Judgment of the trial court dated 25th May, 2022 is hereby set aside.
 2. An order be and is hereby issue for retrial of the suit before another magistrate court of competent jurisdiction.
 3. Each party to bear its own costs.



.....

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF NOVEMBER, 2024.

In The Presence Of:

Ms muia holding brief for Kitindiiiio for the Appellant

Odthiambo holding brief for Ms Okoth for the 2nd Respondent

