



**Omondi v Manyala (Environment and Land Appeal E010 of 2023)
[2024] KEELC 13874 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E010 OF 2023
NA MATHEKA, J
DECEMBER 18, 2024**

BETWEEN

DOMINICUS OMONDI APPELLANT

AND

SAMWEL OCHIENG MANYALA RESPONDENT

JUDGMENT

1 This is an Appeal from the Judgment and Decree of the Principal Magistrate Hon. Lesootia Saitabu dated 15th February, 2023 and delivered by Hon. HON. D.O. Mbeja Principal Magistrate on 8th March, 2023 in the Chief Magistrate's court at Mombasa. The Appellant Dominicus Omondi being dissatisfied with the aforesaid Judgment appeals against the entire Judgment and Decree of the Lower Court on the following grounds.

1. The Learned Trial Magistrate erred in law and in fact by failing to properly evaluate, weigh and appreciate the evidence on record and delivered Judgment that was contrary to and against the weight of evidence on record.
2. The Learned Trial Magistrate wholly misapprehended and misapplied and or misunderstood the law applicable to the dispute and the evidence rendered thus rendering a Judgment that was in effect worthless to the issues which remain outstanding and unresolved.
3. The Learned Trial Magistrate erred in law and in fact by failing to consider and appreciate DW2's evidence which was uncontroverted, un rebutted and unchallenged.
4. The Learned Trial Magistrate erred in law and in fact by failing to consider that the Appellant paid the Purchase price and the funds to procure the registration of Plot No. MombasaShanzu Squatter 351 and Plot No. MombasaShanzu Squatter352.



5. The Learned Trial Magistrate erred in law and in fact by failing to consider that the Appellant developed and enjoyed quiet possession and occupation of MombasaShanzu Squatter 351 and Plot No. MombasaShanzu Squatter352 before survey and upon registration of titles and is still in occupation of the suit property.
 6. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Respondent acquired Plot No. MombasaShanzu Squatter 351 by fraud, misrepresentation, illegalities and impersonation.
 7. The learned Trial Magistrate erred in law and in fact by failing to appreciate that the Respondent had no financial capacity and ability to purchase and procure registration of Plot No. MombasaShanzu Squatter 351 and was employed housed and hosted by the Appellant.
 8. The learned Trial Magistrate erred in law and in fact by failing to appreciate that the agreement dated 7th January 2007 was procured by threats, fraud, intimidation and coercion and thus it was illegal and null and void ab initio.
- 2 The Appellant prays court for:
1. The subordinate Court's Judgement and Decree herein be set aside.
 2. The Appellant be declared the absolute ownerproprietor of Plot No. Mombasa Shanzu Squatter 351 respectively.
 3. The Land Registrar Mombasa do rectify the register to reflect the Appellant as the registered owner and proprietor of the suit property.
 4. Costs.
- 3 The appellant submitted that he bought the suit property for Kshs. 120,000= and constructed a residential house for Kshs. 850,000=. He invited the respondent to occupy one of the rooms as he had just been newly married. The respondent fraudulently procured the registration of the title in his name when the appellant sent Kshs. 13,000= through his wife from his rural home to go and pay dues to the Settlement Fund Trustees to get letters of allotment and registration. That the respondent deceitfully and fraudulently had one of the properties MombasaShanzuSquatter351 registered in his name.
- 4 This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;
- I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
- 5 In the trial court, the respondent averred to be the registered proprietor of Land Parcel No MombasaShanzuSquatter351 having purchased the same from one Benedict F. Makadu. He produced the sale agreement dated 6th September 2007, letter of allotment, the Certificate of Title MombasaShanzuSquatter351 dated 30th October 2007 and payment receipts to the Settlement Funds



Trustee. The respondent also produced an agreement between the appellant and the himself that the appellant would vacate the respondent's house once the construction of his unit was complete.

- 7 Having produced a certificate of title, the respondent established himself as the registered proprietor of the suit property. A certificate of title is conclusive evidence of proprietorship and the respondent having produced a title in their name, I find that he is the absolute and indefeasible owner of the suit property. Section 26 of the *Land Registration Act* states;

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.”

- 8 The appellant has stated that the respondent fraudulently acquired title to the suit property and prayed to court to cancel the title and rectify the register. To succeed in claiming fraud, the appellant not only need to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of *Kuria Kiarie & 2 Others vs Sammy Magera* (2018) eKLR where it was held:

The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

- 9 The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, this court in the case of *Kinyanjui Kamau vs George Kamau* (2015) eKLR expressed itself as follows;

...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...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

- 10 The appellant is challenging title to the suit property and claims that he developed the same. That the respondent fraudulently procured the registration of the title in his name when the appellant sent Kshs. 13,000= through his wife from his rural home to go and pay dues to the Settlement Fund Trustees to get letters of allotment and registration. He did not call any other witness to corroborate his evidence.
- 11 The respondent as the registered proprietor is protected by the doctrine of indefeasibility of title as established under the Torrens system of registration anchored on Section 26 of the *Land Registration Act*. His title to the suit property as a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation and proved he is a party to that fraud. The appellant did not present any evidence before the learned magistrate to challenge the respondent’s title to the suit property within the confines of the law. The learned Magistrate did not err in finding the respondent is the legal owner of the suit property. I find no probable reason to disturb the judgement of the trial Court and this appeal is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.

N.A. MATHEKA

JUDGE

