



**Ronga v Onditi (Environment and Land Appeal E051 of 2022)
[2024] KEELC 14082 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E051 OF 2022
GMA ONGONDO, J
DECEMBER 17, 2024**

BETWEEN

CAREN AUMA RONGA APPELLANT

AND

PETER OTIENO ONDITI RESPONDENT

*(Being an Appeal from the Judgment and decision of Honourable
J.S Wesonga Homa Bay, Principal Magistrate Court ELC Case
No 27 of 2019 delivered on the 26th Day of September 2022)*

JUDGMENT

1. The instant appeal was provoked by the judgment of the trial court (Hon J.S Wesonga, PM) where she dismissed the case of the plaintiff who is the appellant with costs to the defendant, the respondent herein.
2. The appellant generated the appeal by way of the memorandum of appeal dated 5th September 2022 through Obach and Partners Advocates, is premised upon the grounds infra;
 - a. That the Learned Trial Magistrate erred in law and fact by ignoring the Appellants evidence and treating it superficially.
 - b. That in finding and holding that the Appellant failed to prove her case, the Learned Trial Magistrate failed to appreciate and/or discern the veracity of the evidence tendered by the Appellant, which in any way was incredible.
 - c. That the Learned Trial Magistrate failed to cumulatively and or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before her and thus arrived at an erroneous conclusion.



- d. That the learned Trial Magistrate approached and/or dealt with the evidence on record, in a slanted manner and thereby failed to appreciate the tenor of the evidence on record, including but not limited to purporting that the Appellant failed to prove that the Respondent bought a portion of land parcel East/Kanyada/Kanyadier/4284 instead of East/Kanyada/Kanyadier/4286 whereas the respondent in executing transfer in his favour transposed the parcel of land on the ground.
3. Thus, the appellant has sought the following orders;
- a. That the Judgement of the Learned Trial Magistrate dated 26th day of September 2022 be quashed and/or set aside and the same substituted with an order allowing the Appellant's suit in lieu of the reliefs sought in the plaint Homa Bay PMC ELC CASE NO 27 of 2019.
- b. That the costs of this Appeal in the Trial Court be awarded to the Appellant.
4. The appeal was heard by way of written submissions pursuant to the directions of the court given on 15th May 2024.
5. The appellant's submissions dated 27th September 2024 set out the orders including eviction sought in the plaint dated 23rd April 2019 and delineated issues, inter alia, whether the sale agreement dated 2nd January 2010 is enforceable. In discussing the issues, counsel relied upon *Diamond Trust Bank of Kenya Ltd-vs-Said Hamad Shamisi & 2 others* (2015) eKLR as regards sale of goods, section 45 of the *Law of Succession Act* Chapter 45 Laws of Kenya and *Kinyanjui Kamau-vs-George Kamau* (2015) eKLR which applied *Ndolo-vs-Ndolo* (2008) 1 KLR (G & F) 742 that the allegations of fraud must be distinctly pleaded and proved in a case. That in this case, the appellant proved her claim on balance of probabilities and implored the court to allow this appeal.
6. The respondent's submissions dated 5th November 2024 referred to the record of appeal including the grounds of appeal and the impugned judgment, among others. Counsel submitted that the appeal is not competent thus, the same be dismissed with costs. Reliance was made to *Bwana Mohammed Bwana-vs-Silvano Buko Bonaya & 2 others* (2015) eKLR on incompetency and defectiveness of appeal for failing the requirements of the law. That no particulars of trespass were laid out in the plaint by the appellant as held in the case of *Ochako Obinchi-vs-Zachary Oyoti Nyamongo* (2018) eKLR and that the court has the discretion to award on cost as noted in *Republic-vs-Rosemary Wairimu Munene, Ex Parte Applicant-vs-Ihururu Dairy Farmers Cooperative Society Ltd Nyeri High Court Judicial Review Application number 6 of 2014*.
7. Originally, the appellant sued the respondent at the trial court by way of a plaint dated 23rd April 2019 for the principal orders;
- a. A declaration that the land parcel number East Kanyadier/6450 (The portion of the suit land) within land parcel number East Kanyadier/6824 is a fraud.
- b. An order evicting the defendant from land parcel number East Kanyada/Kanyadier/2824 (The original number).
8. By the defence statement dated 24th June 2019, the defendant bought a portion measuring 0.75 acres out of land from the plaintiff and her son, PW3, GORDON OUMA RONGA. That the purpose of the sale was to cover medical expenses of the appellant's daughter, CAROLINE ANYANGO who was then sick and was even a witness to the sale agreement as new numbers were being issued following adjudication process. That the respondent was issued with a new number of the portion of the suit land



- by the Land Registry while the appellant retained the original number. That the appeal be dismissed with costs as no fraud is depicted and that the appellant's claim is baseless.
9. The appellant (PW1) relied on her statement filed on 16th May 2019 and list of documents including copy of green card-PExhibit 1 and sought the prayers in the plaint. During cross examination, she told the court that the forged sale agreement was not reported to the police. That she does not challenged ownership of the portion of the suit land and did not know that it is sub-divided and created from the original number.
 10. PW2, JOHNSON GOR OGOLLA stated that PW1 was wife to his brother and that she sold only one parcel of land to the respondent. Under cross examination, he testified that he is not in good terms with the respondent who caused his sons to be arrested.
 11. PW3, GORDON OUMA RONGA testified that he did not sign any agreement herein while PW4, MAURICE AJWANG AKOMO stated that he never witnessed any sale agreement herein.
 12. PW5, NDEGE TIBERIOUS, Land Registrar referred to the sub divisions resulting from the original number. That there is no challenge to validity of title to the portion of the suit land.
 13. DW1, PETER OTIENO ONDITI relied on his statement dated 13th June 2015, green card for the suit land-DExhibit 1. Also, he referred to Adjudication register-DExhibit 2 and sale agreement-DExhibit 3
 14. Under cross examination, DW1 stated that he bought the portion of the suit land registered in the name of Walter, the appellant's husband from the respondent. That succession could not done and did not follow up with succession but he has valid title for the portion.
 15. The instant appeal is the first one from the trial court in the matter. So, I am entitled to reconsider the evidence on record a fresh and come to my own conclusions and inferences remembering that I neither saw nor heard the witnesses in the case; see Kenya Ports Authority-vs-Kuston (K) Ltd (2009) 2 EA 212.
 16. It must be appreciated that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless the findings are based on no evidence at all, or on a misapprehension of evidence, or the court is shown demonstrably to have acted on wrong principles in arriving at the impugned findings; see Mwanasokoni-vs-Kenya Bus Services Limited 1982-88 1 KAR 278.
 17. Thus, the issues for determination are as contained on the grounds of appeal relating to the trial court's evaluation or treatment of evidence and the salient issues of the suit as well as whether the appellant is entitled to prayers in the appeal? In sum, is the respondent's creation of the portion of the suit land over the original number a fraud?
 18. Notably, the trial court complied with Order 21 Rule 4 of the CPR 2010 in arriving at the impugned finding. Therefore, the learned trial magistrate held as stated in paragraph 1 hereinabove.
 19. The evidence of PW1 and PW3 inclusive of PExhibit 2 and that of DW1 capturing DExhibit 3 show the existence of the portion of the suit land. On further cross examination, PW1 state that she never sold the portion through succession to the respondent who has title thereto.
 20. PW1 Imputed that the creation of the portion of the suit land was by fraud. The respondent stated otherwise.
 21. The respondent (DW1) questioned the plaintiff's pleading as regards fraud. The statement of defence at paragraph 10 reads;

The plaint herein does not depict any particulars of fraud.



22. It is plain that no particulars of fraud are set out in paragraphs 1 to 13 of the plaint.
23. In the case of *Kinyanjui Kamau-vs-George Kamau* (2015) eKLR, the Court of Appeal observed that;
‘.....It is trite law that the allegations of fraud must be pleaded and strictly proved.....’
24. Moreover, in the case of *Gladys Wanjiru Ngacha-vs-Treresa Chepsaat and 4 others* (2013) KLR, the Court of Appeal cited *R.G Patel-vs-Lalji Makani* (1957) EA 314 at 317 held thus;
‘.....Allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.’
25. It is trite law that the existence of fraud cannot be inferred from the facts; see *Vijay Morjaria-vs-Nansingh Madhusingh Darbar and another* (2000) eKLR.
26. Rights and registration in respect of land can be challenged on grounds of fraud, misrepresentation and adverse possession; see *Salim-vs-Boyd* (1971) EA 550 and *Kimani Ruchine and another-vs-Swift Rutherford Company Ltd and another* (1976-80) 1 KLR 1500.
27. Be that as it may, the appellant imputed but did not plead and distinctly prove fraud in the plaint as noted in, inter alia, *Ndolo* and *Ngacha* cases (supra). The same is mere allegation and not proved to the requisite standard.
28. The learned trial magistrate held that the plaintiff was not entitled to the orders sought in the plaint. She declined to grant them.
29. It is the considered view of this court that the learned trial magistrate was guided by the parties’ respective pleadings alongside the evidence and applied correct principles of the law in arriving at the impugned judgment. There are no sufficient grounds not to endorse the same.
30. To this end, the appeal is devoid of merit. Therefore, it fails.
31. Accordingly, this appeal is hereby dismissed with costs to the respondent.
32. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 17TH DAY OF DECEMBER 2024

G. M.A ONG’ONDO

JUDGE

Present;

Ms. E. Apondi learned counsel for the respondent

Ms. B. Ochieng learned counsel for the appellant

Mr. T Luanga, court assistant

