



REPUBLIC OF KENYA



**Olaka v Wekesa & 2 others (Environment and Land Appeal
E010 of 2023) [2025] KEELC 3116 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E010 OF 2023
EC CHERONO, J
MARCH 27, 2025**

BETWEEN

WILSON HAGAI OLAKA APPELLANT

AND

JUSTUS WANYONYI WEKESA 1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION 2ND RESPONDENT

JOSRICK MERCHANTS 3RD RESPONDENT

*(being an Appeal from the Judgment of Hon. T.M. OLANDO, Principal
Magistrate delivered on 11/08/2023 in BUNGOMA CM-ELC Case no. 50 of 2019)*

JUDGMENT

1. This appeal arises from two consolidated cases being Bungoma ELC Case NO. 99 of 2016 and Bungoma CM-ELC NO. E50 of 2019. The first case was between Justus Wanyonyi Wekesa v Agricultural Finance Corporation, Josrick merchants & Wilson Haggai Minab Olaka while the second case was between Wilson Haggai Minab Olaka v Justus Wanyonyi Wekesa. The two suits were subsequently consolidated with CM-ELC NO. 99 of 2016 being the lead file. In the first case N. 99 of 2016, the plaintiff Justus Wanyonyi Wekesa commenced the suit vide a plaint dated 14th August 2016 seeking the following orders;
 - i. A declaration that the sale of L.R NO. Bungoma/Naitiri/518 by the 1st and 2nd Defendant to the 3rd Defendant and the transfer together with the title deed issued was illegal, null and void.
 - ii. An order directing the Land Registrar Bungoma to cancel the title issued to the 3rd Defendant and restore the plaintiff's title of land parcel NO. Bungoma/Naitiri/518 and 3rd Defendant be restrained from interfering with the peacefully occupation of the plaintiff in the land parcel No. Bungoma/Naitiri/518



- iii. Costs of this suit.
 - iv. Any other relief this Honourable Court may deem fit and just to grant.
2. In the second suit, the plaintiff Wilson Haggai Minab Olaka vide a plaint dated 12th July 2016 where he sought the following orders;
- i. That the Defendant be permanently restricted by himself, his servants or agents or otherwise from interfering with the plaintiff's quiet, lawful possession and occupation of the parcel No. Bungoma/Naitiri/518
 - ii. Costs of the suit.
3. After consolidation of the two cases, directions were taken and parties agreed that the lead file could be the plaint while the plaint in the second file could be treated as a counterclaim. After compliance with order 11 CPR, the matter proceeded by viva-voce evidence where the plaintiff alone testified and closed his case. The defendant also testified alone and closed his case.

Plaintiff's Case.

4. The plaintiff (PW1) was referred his witness statement dated 14/08/2016 which he adopted in his testimony-in-chief. According to the plaintiff, he borrowed a sum of Kshs 200,000/ from the 1st Defendant (Agricultural Finance Corporation) in June 2006 payable at monthly instalment of Kshs 19,206. He stated that he dutifully repaid the loan by instalments for the next three months but because the crops he had planted were destroyed by disease, he was unable to continue repaying as he had committed himself. He stated that he approached the 1st Defendant through Kimilili Branch where he explained his predicament and later wrote a follow up letter to their headquarters requesting to allow him get a private person to purchase part of the land so that he could pay the outstanding principal loan of Kshs 160, 000/= plus interest thereon. He said that he did not get any response and he wrote another letter demanding to know the outstanding principal balance and the accrued interest but he did not receive any communication on 26/6/2015, he was shocked when the 3rd Defendant in company of surveyors came to his house claiming that he was now the owner of land parcel NO. Bungoma/Naitiri/518 having purchased through a public auction.
5. The plaintiff further stated that the 1st Defendant never issued him the three (3) months' notice as required by law and that the 2nd defendant never advertised the sale of his land and sold his land at low price of kshs 720,000/ when the market value was Kshs 1.8million. He stated that the 1st and 2nd Defendants did not follow the procedure and that the 3rd Defendant colluded with the 2nd Defendant to buy the suit land at extremely low price. He referred to his list of documents being a copy of title deed, two letters dated 20/8/2008 and 15/9/2002, and a valuation report and produced as P-Exhibits 1, 2, 3 & 4 respectively.

Wilson Haggai Minam Olako (DW1)

6. The 1st defendant referred to his witness statement dated 18/01/2016 and adopted it as his testimony-in-chief. He also referred to his list of documents also dated 18/01/2016 and produced as D-Exhibits 1, 2, 3, 4 & 5 respectively. He stated that he went to the Auctioneers who confirmed that they were selling the suit land. He stated that he also confirmed with the 1st Defendant that they were selling the suit land. He said that he attended the auction on 21/02/2013 and was declared the highest bidder after bidding for Kshs 720,000/. He stated that he paid a down payment of Kshs.180,000/ and was given a certificate of sale by the 2nd Defendant. He stated that he visited the suit land before auction



and there was no house but there was only sugarcane. He visited the land after the auction and the plaintiff chased him with a panga.

7. After considering the testimony of the parties and the evidence adduced, the trial Magistrate rendered himself by allowing the plaintiff's suit and dismissed the Defendant's counterclaim with costs to be paid by the 1st Defendant to the plaintiff and the 3rd defendant.
8. Aggrieved by the said judgment and decree, the Appellant preferred the current appeal vide a Memorandum of Appeal dated 21st March, 2024 on the following five (5) grounds;
 1. The learned trial Magistrate erred in law and in fact in holding that the Appellant had failed to prove his case against the 1st defendant despite overwhelming evidence to the contrary.
 2. The learned trial Magistrate erred in law and in fact in holding that the 1st Respondent had proven his case against the Appellant, the 2nd Respondent and the 3rd Respondent despite overwhelming evidence to the contrary.
 3. The learned trial Magistrate erred in law and in fact in failing to give reasons for his decision.
 4. The learned trial Magistrate erred in law in failing to appreciate the applicable law therefore arriving at a wrong decision.
 5. The learned trial Magistrate erred in law in failing to consider Appellant's submissions thereby arriving at a wrong decision.

Appellants Written Submissions

9. The Appellant through the Firm of Hermatton Maloba & Company Advocates framed two issues which they submitted as follows;
 1. Whether the learned Magistrate erred in law in failing to appreciate the applicable law therefore arriving at a wrong conclusion
 2. Whether the learned trial Magistrate erred in law and in fact in holding that the Appellant had failed to prove his case against the 1st Defendant while the 1st Respondent had proved his case against the Appellant, the 2nd Respondent and the 3rd Respondent.
10. On the first issue, the learned Counsel referred to section 99 of the Land Act and averred that same section protects a purchaser of a charged property and spells out the remedy available to a disgruntled chargor prejudiced by 'unauthorised, improper or irregular exercise of the power of sale' i.e damages. He submitted that section 99 of the Land Act gives the 1st Respondent a remedy in damages only as against the chargee regardless of the irregularities noted, if any. He argued that in his Judgment, the trial Magistrate fell into error when he nullified the sale and ordered cancellation of the Appellant's title. He submitted that in granting these reliefs, the trial Magistrate went against the express provisions of section 99 of the Land Act which places such remedies beyond the reach of the 1st Respondent unless the 1st Respondent is able to demonstrate that the sale was fraudulent and the Appellant had knowledge of the fraud.
11. He further submitted that Courts have consistently protected purchasers in holding that the chargor's remedy in circumstances such as the present one lies in damages. Reliance was placed in the following cases; Bomet Beer Distributors Limited & Another –v- Kenya Commercial Bank Limited & 4 Others (2005) eKLR, Kitur & Anor-v- Standard Chartered Bank & Anor (NO.2) (2002) 1KLR 640, Joyce Wairimu Karanja –v- James Mburu Ngure & 3 Others (2018) eKLR; Simon Njoroge Mburu-v



Consolidated Bank of Kenya Ltd (2014) eKLR; Nancy Kahoya Amadiva-v- Expert Credit Limited & Anor (2015) eKLR.

12. On the second issue, the learned Counsel submitted that the Appellant's case is that the 2nd Respondent through its agent the 1st Respondent advertised the sale of the suit land in the Daily Nation newspaper and he subsequently attended the public auction and was declared the highest bidder. He stated that he paid Kshs 720,000/ and was issued with a certificate of sale and he was subsequently registered as owner and a title deed issued in his name. When he attempted to take to take possession and use of the suit land, he was chased by the 1st Respondent. He stated that from the excerpt of the impugned decision, the trial Magistrate dismissed the Appellant's suit for sole reason that the allegation regarding service of statutory notices to the 1st Respondent was not challenged. He submitted that the trial Magistrate was required to apply the applicable law to the facts presented before him and failure to apply the applicable law resulted to an error which ought to be corrected by this honourable court. He submitted that as a purchaser, the Appellant was not obligated to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular. He submitted that the only instance where a chargor can have recourse against a purchaser of a charged property is when he is able to demonstrate fraudulent conduct of the chargee or his agent in the conduct of the sale to which the Appellant had actual or constructive notice to lift the protection installed by the law. He submitted that despite failure by the 2nd Respondent to call a witness during the proceedings, the 1st Respondent was still required to prove his case to the required standard.
13. The learned Counsel also submitted that claims of fraud must be strictly proved to succeed and that Courts have held time and again that it is not enough to merely allege fraud and that the standard of proof required to satisfactorily convince the court of existence of fraud was set out by the Court of Appeal in the case of; R.G Patel -v- Lalji Makanji (1957) E.A 3114. He submitted that the use inference was cautioned by Tanui JA as the wrong approach in Vijay Morjaria v Nansigh Madusingh Darbar & Anor (200) eKLR.
14. In conclusion, the Appellant submitted that to succeed in the claim for fraud, the 1st Respondent was required to not only plead and particularize fraud, but also lay a basis by way of evidence upon which the court could make a finding. He submitted that there being no such evidence, the trial Magistrate erred in concluding that the 1st Respondent had proved his case to the required standard. He argued that the conclusion taken by the trial Magistrate in dismissing the Appellant's case and allowing the 1st Respondent's claim did not stem from the evidence tendered and the applicable law

1st Respondent's Submissions

15. The 1st Respondent submitted on the five grounds of appeal in clusters as follows;

Ground 1 & 2 Of The Appeal

16. The 1st Defendant through the Firm of M/S Wamalwa Robert submitted that before the charged land is sold in an auction, due process must be followed and that the 2nd and 3rd Respondents never followed the procedure. He submitted that the 1st Respondent contend that no statutory notice was issued as required under section 96 (3)(h) of the *Land Act*. He stated that the 1st Respondent was never served with a 45 days redemption notice and notification of sale as required in law. It was submitted that the 1st Respondent was denied information as provided under Article 35(1) of *the constitution* of Kenya 2010 and that the statement of defence, witness statements and list of documents filed by the 2nd and 3rd Defendants/Appellants are just flowers in the court file as nobody was called to testify and produce the



same in evidence. He argued that unless defence on record is defended by availing witnesses and unless filed documents are produced, they are just flowers in the court file. The Learned Counsel further submitted that the Appellant did not produce any evidence of payment of sell price and that the sale was not advertised as required in law. The learned Counsel further submitted that the Appellant on cross-examination conceded that he did not personally go to the land control Board for transfer of land. Reliance was placed in the following cases; South Nyanza Sugar Co. Ltd v Mwita & Anor (1018) eKLR; Jane Wairimu Ngure(suing as administratrix of the estate of Peter Tharao Ngure (deceased) v National Bank of Kenya Limited & 2 Others (2019) eKLR.

Grounds 3 & 4 Of The Appeal .

17. On these two grounds of appeal, the learned counsel submitted that this court cannot blindly close its legal eyes and rely on section 99 of the Land Act to have appeal allowed. He argued that land is precious and that even if the court would have awarded damages to the 1st Respondent, the same could not be an equalizer to the 1st Respondent's interest in land. He submitted that irregular and illegal sell of the 1st Respondent's land cannot be covered by compensation and that section 99 encourages rogue moneylenders and Auctioneers to flout the law and do mischief to the 'wananchi'. He argued that section 99 of the Land Act is an affront to Article 10 (1) (b) of the constitution of Kenya, 2010 which champions 'equity'. The learned Counsel invited this court to wear brave legal glasses and declare section 99 of the land Act unconstitutional. He stated that the Appellant was a party in fraudulently for the purported sale of the 1st Respondent's land and even failed to produce an advertisement of the sale. They cited te case of; Willy Kimutai Kitilit v Michael Kibet (20180 KLR; Jane Wairimu Ngure(supra)

Ground 3 & 5 Of The Appeal

18. On these last two grounds, the learned Counsel submitted that having analysed the serious grounds above, it's also false for the Appellant to state that the court did not give reasons of his decision. He submitted that the court gave reasons of his judgment at page 9 of the record of appeal.

Legal Analysis And Decision

19. I have considered the memorandum of appeal, the record of appeal, the pleadings and proceedings before the trial court, the submissions by the parties, the authorities cited and the relevant law. This being a first appeal, my duty is to reconsider, re-evaluate and re-analyse the evidence afresh and draw my own conclusion as was succinctly put in the case of Paramount Bank Limited v First National Bank Limited & 2 Others (2023) eKLR where the court held;

“ --A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on question of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

20. In his Memorandum of Appeal dated 21st March 2024, the Appellant challenged the trial Magistrate's judgment/decree on five (5) which in my view can be collapsed into three issues for determination as follows;



1. Whether the Learned Trial Magistrate erred in law and in fact by failing to consider the weight of the evidence and submissions of the defendant/Appellant thereby arriving at a wrong conclusion.
 2. Whether the Learned Trial Magistrate erred in law and in fact in holding that the Plaintiff/1st Respondent had proved his claim against the 1st, 2nd, and 3rd Defendants/Appellants while the Appellant failed to prove his counter-claim against the Plaintiff/1st Respondent.
 3. Who will bear the costs of this appeal.
21. To put the issues into context, it is imperative to examine the pleadings and evidence adduced before the trial Court.
22. At paragraph 10 of his plaint dated 14th August 2016, the 1st Respondent averred as follows;
10. ‘‘ It’s the plaintiff’s case that the purported public land sale auction carried out on 21/2/2013 and other preliminary steps that led to sale of Land parcel NO. Bungoma/Naitiri/518 by 2nd Defendant to the 3rd Defendant on instruction of the 1st Defendant was tainted with illegality, fraud and bad faith on the part of all Defendants jointly and severally.
 1. Particulars of illegality, fraud and bad faith on the part of 1st defendant.
 - I. Refusing to disclose the outstanding loan balance owed to them by the plaintiff.
 - II. Refusing to allow the plaintiff to look for a potential buyer of the charged land so that the outstanding loan could be known.
 - III. Failing to issue 3 Months’ Notice to the Plaintiff as required by law.
 - IV. Failing to appreciate that the crops that had been planted by the Plaintiff was destroyed by the crops disease.
 - V. Instructing the 2nd defendant to sale land Parcel NO. Bungoma/Naitiri/518 in bad faith.
 - VI. Generally being malicious and selling the land in question fraudulently.
 2. Particulars of illegality, fraud and bad faith on the part of the 2nd defendant
 - i. Failing to notify the Plaintiff over the sale as required by the law.
 - ii. Failing to notify the potential persons affected by the purported sale including the District Commissioner as required by the law.
 - iii. Failing to advertise the sale of the land in question as required by law.
 - iv. Selling the land in question fraudulently and in secrecy to the 3rd defendant.
 - v. Selling the land in question at a gross low price of Kshs 720,000/ when the value of the land was about Kshs 1.8 million.
 - vi. Failing to invite the plaintiff to participate in the sale or look for a potential buyer who could purchase the land in question at the best price.
 - vii. Generally acting in bad faith.



3. Particulars of illegality, fraud and bad faith on the part of the 3rd defendant.
 - I. Colluding with the 2nd Defendant to secretly purchase the land in question at extreme low price.
 - II. Purchasing the land in question when he knew or ought to have known that the due process of the law and or procedure was not followed by the 1st and 2nd defendants when the subject land parcel NO. Bungoma/Naitiri/518 was privately sold.
 - III. Purchasing the land in question at Kshs 0.72m when the market value of the land was Kshs 1.8m.
 - IV. Fraudulently registering himself as the owner of land Parcel NO. Bungoma/Naitiri/518 without following the laid down procedure.
22. From his suit CM-ELC NO. 99 of 2016 which was subsequently consolidated with the Appellant's suit NO. Bungoma CM-ELC NO. 62(50) of 2016 and treated as the lead file in the former suit, the 1st Respondent was challenging the Appellants purchase of the suit land through public auction on grounds of fraud, illegality and bad faith.
23. In his evidence on record, the 1st Respondent admitted that sometime in January 2006, he borrowed Kshs 200,000/ from the 2nd Respondent payable at a monthly instalment of Kshs 19,206 and used title to the suit land as security. He stated that he paid two instalments and did not make any further payments. He said that he later learnt that the 2nd and 3rd Respondents sold the suit land to Wilson Haggai Olaka, the Appellant herein and title deed issued in his name. He produced a title deed and copies of letters dated 20/8/2008 and 15/9/2002 as P-Exhibits 1, 2 & 3. He also produced a valuation report as P-Exhibit 4.
24. In Bungoma CM-ELC NO. 99 of 2016, the record of appeal indicates that Agricultural Finance Corporation who was the 2nd Defendant filed defence on 23/05/2017 and averred that the plaintiff/1st Respondent applied for a loan on 13/04/2006 for purposes of purchase and sale of steers and was advanced a loan of Kshs 200,000/ by the 2nd Defendant/Respondent. The 2nd Defendant/Respondent further averred that the loan was payable for a period of one year at a monthly rate of Kshs 19,206.30 secured by a legal charge over all that land known as L.R NO. Bungoma/Naitiri/518 which was registered in the name of the plaintiff/1st Respondent. The 2nd Respondent averred that the Plaintiff/1st Respondent misapplied the loan and failed to honour loan repayment obligations. That on 17/08/2007, the 1st Respondent was issued with a demand letter for Kshs 227,500/being outstanding loan amount plus interest which went unheeded. That on 25/11/2008, the 2nd Respondent wrote another demand letter for Kshs 252,000/ and realising that the 1st Respondent was not prepared to pay, the 2nd Respondent issued a statutory Notice dated 19.01/2009 which the 1st Respondent acknowledged receipt when he sought to be allowed to sell a portion of the suit land to offset the loan balance.
25. The 2nd Respondent further averred that when the 1st Respondent refused to settle the loan arrears, it instructed the 3rd Respondent to advertise the suit land for sale and realize it in the event that the 1st Respondent failed to redeem it. It was averred that on 13/12/2012, the 3rd defendant served the 1st Respondent with the Notification of sale together with the 45 days redemption Notice which documents the 1st respondent duly acknowledged receipt thereof. It also averred that on 28/01/2013, the suit land was advertised in the Daily Nation newspaper paving the way for public auction on 21/2/2013 where the Appellant attended and after bidding Kshs 720,000/, he was declared the highest bidder and was issued a certificate of sale and subsequently registered as the proprietor of the suit land.



The 2nd Respondent also filed a list of documents dated 22/05/2017 comprising a loan agreement dated 13/4/2006, Notification of charge dated 25/04/2006, several demand letters, several statutory Notices, copy of the 45 –days redemption Notice dated 18/12/2012, copy of postage certificate, copy of valuation report of the suit land, newspaper cutting and a copy of certificate of sale.

26. Section 99 of the *Land Act*, 2012 sets out the sanctity of a title issued to a purchaser of land in a public auction and provides as follows;

“99. Protection of purchaser.

1. This section applies to-
 - a. A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
 - b. A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the charge if the charge and the person so claiming obtained the charged land in good faith and for value.
2. A person to whom this section applies;
 - a. Is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
 - b. Is not obliged to see to the application of the purchase price;
 - c. Is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
3. A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
4. A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”

27. What can be gleaned from the above provisions of the law is that a purchaser of a charged property is protected from any improper, irregular and unauthorized exercise of the power of sale except in the case of fraud or misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice. It provides that any person prejudiced by such irregular, improper and unauthorized exercise of a power of sale by a chargee can seek remedy through damages. That was the holding in *Joyce Wairimu Karanja v James Mburu Ngure & 3 Others* (2018) eKLR where the court stated;

“ 33. In my view, there is little reason to belabour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under section 99 of the Act. Thirdly, a mortgagor’s equity



of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagor re-issues the statutory notice if a planned auction is temporarily stopped by the court and then permitted to proceed through the lifting of the temporary orders.”

28. Again in *Simon Njoroge Mburu v Consolidated Bank of Kenya Limited* (2014) eKLR, J.B Havelock held as follows;

“ That section 99 now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the plaintiff’s remedy lies in this case. In this regard, the plaintiff would do well to note the powers of the Court in respect of remedies and reliefs set out in under section 104 of the *Land Act*, 2012.... What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chagor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages..’

29. I agree with the findings of the Court in the two decision and add that the 1st Respondent could have done well to note the powers of the Court in respect of remedies and reliefs set out under section 104 of the *Land Act*, 2012. I therefore find that the trial Magistrate erred in law by failing to give effect to section 99(3) and (4) of the *Land Act*, 2012.

30. On the second issue, the Appellant in his testimony before the trial court stated that he saw an advertisement by the 2nd Respondent in the daily Nation Newspaper for the sale of the suit property and after attending the auction, he tendered his bid and he was declared the highest bidder. He further stated that he made a deposit of Kshs 180,000/ and later paid the balance making a total of Kshs 720,000/ in consideration and was issued with a certificate of sale. He stated that he was subsequently registered as proprietor of the suit land but when he attempted to take possession of the land, he was chased by the 1st Respondent. In his brief Judgment delivered on 11th August 2023, the trial Magistrate held as follows;

“The plaintiff stated that he was never given a demand letter nor a notice of sale of the land by the 2nd and 1st Respondents who never testified to rebut the evidence by the plaintiff.

From the above, I find that the evidence by the plaintiff was not challenged. The 3rd Defendant only said that he saw the advertisement and he bought the property during the auction but there was no evidence tendered to prove that the statutory notice was issued to the plaintiff.

....I thus find that the plaintiff’s has proved his case on a balance of probabilities and the same is allowed.”

31. From the excerpt of the Judgment, it is clear that the only reason the trial Magistrate allowed the 1st Respondent’s suit was on grounds that no statutory notice was served upon the 1st Respondent. I agree with Counsel for the Appellant that the dispute between the 1st Respondent and the Appellant lied on the applicable law which the trial Magistrate failed to apply. Failure to apply the applicable law resulted in the trial magistrate falling into an error which ought to be corrected by this Honourable Court. The reasons given by the trial Magistrate in allowing the 1st Respondent’s suit are irregularities for which remedy lied in the award of damages. It is clear that despite pleading fraud and setting out particulars in his plaint dated 14th August 2016, the 1st Respondent did not lead any evidence to prove the same.



32. It is also imperative to note that despite failure by the 2nd Respondent to call a witness during the hearing did not relieve the 1st Respondent from his obligation to prove his claim of fraud to the required standard. It is trite that a claim of fraud is a serious offence and must be proved strictly to succeed as was observed in the case of; R G Patel v Lalji Makanji (1957) E.A 3114, where it was held;

“Allegations of fraud must be strictly proved; although the standard of ‘proof may not be as heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required....”

33. Upon reconsidering, re-evaluating the and re-analysing the evidence of the parties as contained in the record of Appeal as well as the applicable law, I come to the irresistible conclusion that this appeal is merited and the same is hereby allowed as follows;

1. This appeal be and is hereby allowed.
2. The Judgment by the trial Magistrate allowing the 1st Respondent’s suit be and is hereby set aside and/or dismissed and substituted with an order allowing the Appellant’s counterclaim
3. The costs of this appeal and the Appellant’s counterclaim in the lower court shall be borne by the 1st Respondent.

34. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 27TH DAY OF MARCH, 2025

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Maloba for the Appellant

Mr. Wamalwa R. for the 1st Respondent.

Bett C/A.

