



REPUBLIC OF KENYA



KENYA LAW
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**Omollo v Wanaswa (Environment and Land Appeal E005 of 2024)
[2025] KEELC 2952 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E005 OF 2024**

**DO OHUNGO, J
MARCH 27, 2025**

BETWEEN

GABRIEL OMOLLO APPELLANT

AND

RICHARD JAPHETH WANASWA RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate's Court at Butere (Hon. B. Ojoo, Senior Principal Magistrate) delivered on 12th January 2023 in Butere MCELC No. 23 of 2020)

JUDGMENT

1. Litigation leading to this appeal was commenced in the Subordinate Court at Butere on 28th August 2020 by the Respondent through Plaint dated 26th August 2020, against Lydia Otenyo Ogero (Lydia) as First Defendant and the Appellant as Second Defendant. The Respondent averred in the Plaint that the Appellant was the registered proprietor of the parcel of land known as Marama/Shiatsala/1223 (suit property) and that the suit property was ancestral land which was initially owned by the Respondent's uncle Makobi Olendo (deceased) who passed away on 14th January 1981.
2. The Respondent averred further that one Benedict Elly Ogero obtained title to the suit property in 1990 after the deceased's death and further that Lydia fraudulently transferred the suit property to the Appellant. Based on those averments, the Respondent sought judgment against Lydia and the Appellant for a declaration that the suit property belonged to the deceased, revocation of the Appellant's title and for costs of the suit.
3. Lydia and the Appellant reacted by filing Statement of Defence dated 28th September 2020. They averred that Lydia inherited the suit property from Benedict Elly Ogero who was her late husband and subsequently sold it to the Appellant. They denied the allegations of fraud and prayed for dismissal of the Respondent's case with costs.



4. Upon hearing the matter, the Subordinate Court (Hon. B. Ojoo, Senior Principal Magistrate) delivered judgment on 12th January 2023 wherein she found merit in the Respondent's case and made the following orders:
 - I. The Entries No. (2), No. (3), No. (4), No. (5), No. (6) and No. (7), respectively, on the register of land parcel number Marama/Shiatsala/1223 are hereby declared unlawful and illegal.
 - II. The Land Registrar Kakamega is hereby directed to reverse the Entries No. (2), No. (3), No. (4), No. (5), No. (6) and No. (7), respectively, on the register of land parcel number Marama/Shiatsala/1223 and to re-instate Makobi Olendo as sole proprietor of title.
 - III. The Defendants to vacate and deliver vacant possession of the suit land to the plaintiff within 100 days from the date of this judgement.
 - IV. Each party shall bear its costs of the suit.
5. Dissatisfied with the outcome, the Appellant sought leave to appeal out of time against the judgment through ELC Misc. Application No. E014 of 2023 (Kakamega). Leave having been granted on 6th February 2024, he filed this appeal on 15th February 2024 through Memorandum of Appeal of even date. He prayed that the judgment of the Subordinate Court be set aside, the Respondent's case be dismissed and that he be awarded costs of both the appeal and of the proceedings in the Subordinate Court.
6. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. That the learned Magistrate erred in law and in fact at arriving at the said decision without taking into consideration that no fraud was ever proved by the plaintiff against the defendant/appellant.
 2. That the learned Magistrate erred in law and in fact at arriving at the said decision by taking into consideration the plaintiff's evidence and failing to consider the evidence of the defendant/appellant who tabled all the required documents to proof his case.
 3. That the learned Magistrate erred in law and in fact at arriving at the said decision by not taking time to scrutinize and or appreciating all the defendants' evidence produced thereby on trial and considering them a tangible evidence to defendant's case.
 4. That the learned Magistrate erred in law and in fact at arriving at the said decision by not considering that the defendant had a valid title.
7. The Appeal was canvassed through written submissions. The Appellant filed submissions dated 7th June 2024. Relying on Section 26 of the *Land Registration Act* and the case of Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR, he argued that the Respondent built his allegation of fraud on the date of the deceased's death as stated in the Certificate of Death against the date of transfer which was on 7th February 1990 but failed to explain the wide gap between the date of death and the date of issuance of the Certificate of Death in 2018. He contended that fraud cannot be inferred and that the Learned Magistrate erred in accepting the Certificate of Death as a genuine record of the date of the deceased's death. The Appellant further argued that the Learned Magistrate did not consider the evidence that he tendered but only relied on the Respondent's evidence. He therefore urged this Court to allow this appeal with costs.
8. In response, the Respondent filed submissions dated 27th August 2024 wherein he argued that the deceased having died on 14th January 1981, the transfer to Benedict Elly Ogero 11 years later on 7th



February 1990 was fraudulent, corrupt and un-procedural since the deceased could not participate in it from the grave. That, in the circumstances, Lydia did not obtain a valid title and could not pass a valid title to the Appellant. The Respondent further argued that although the Appellant claimed that the suit property was sold to Benedict Elly Ogero, no evidence of a sale was produced.

9. The Respondent went on to argue that Benedict Elly Ogero, Lydia and the Appellant intermeddled in the deceased's estate. He relied on Section 45 of the *Law of Succession Act* and the cases of *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR, *Benson Mutuma Muriungi v C.E.O. Kenya Police Sacco & another* [2016] eKLR and *In re Estate of M'Ngarithi M'Miriti* [2017] eKLR in support of those arguments.
10. The Respondent also submitted that pursuant to Section 26 (1) of the *Land Registration Act*, a title can be impeached if it is shown to have been acquired illegally, un-procedurally or through a corrupt scheme and that he had demonstrated those infractions. Relying on the case of *Republic v Kisumu District Lands Officer & another* [2010] eKLR, he argued that the Learned Magistrate did not err in finding that the Appellant did not have a valid title. In conclusion, he contended that this appeal is misconceived and unmerited. He urged the court to dismiss it with costs.
11. This is a first appeal. The remit of a first appellate court is to re- evaluate the evidence in the trial court both on points of law and facts and to come up with its own findings and conclusions. See *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
12. I have carefully considered the entire record, the grounds of the appeal and the parties' submissions. The issues that arise for determination are whether fraud and illegality were established and whether the Respondent was entitled to the reliefs that he sought.
13. There is no dispute that the Appellant was the registered proprietor of the suit property as of the date of trial before the Subordinate Court. A perusal of the register which was produced in evidence shows that the first registered proprietor of the suit property was Makobi Olendo pursuant to entry number 1 dated 21st April 1967. Entry number 2 dated 7th February 1990 is a transfer to Benedict Elly Olendo for a consideration of KShs 8,000. Subsequently, on 29th October 2017 Lydia was registered as administrator of Benedict Elly Olendo's estate through entry number 4 followed by her registration as proprietor on 27th December 2018 through entry number 5. Thereafter, the Appellant was registered as proprietor on 29th January 2020 through entry number 6 and lastly, a title was issued to him on 12th February 2020 through entry number 7.
14. The law jealously guards the rights of a registered proprietor of land and guarantees protection of his right to property, pursuant to Article 40 of *the Constitution*. To further secure those rights, Section 24 of the *Land Registration Act* makes specific provisions as follows:
Subject to this Act—
 - (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 or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
15. Further, Section 26 of the *Land Registration Act* obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b)



are established. Those provisos lay down the grounds on which a title can be nullified as fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Thus, despite the ironclad protection, title to property which is found to have been unlawfully acquired is open to impeachment.

16. The Respondent grounded his challenge to the Appellant's title on fraud and illegality. Both fraud and illegality are serious allegations which must be established through cogent evidence. Courts have persistently emphasised that a party alleging fraud is required to plead it, particularise it, and strictly prove it to standard higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. Further, where fraud is alleged, it is not enough to simply infer it from the facts. The party alleging fraud has to connect the allegations and the facts in a way that reveals actual fraud. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
17. A perusal of the Respondent's Plea reveals that fraud is mentioned therein lightly at paragraphs 9 and 22. No particulars of fraud were provided, contrary to Order 2 rules 9 and 10 of the Civil Procedure Rules. Overall, the Respondent's approach to pleading fraud and illegality can only be described as lacklustre and oblique. Given its seriousness, a party alleging fraud must do so with agility in his pleading and prove it with determination and finality. He cannot do so in a roundabout manner by way of theories and suppositions. That is the essence of the rule that fraud cannot be inferred.
18. The Respondent built his allegations of fraud and illegality around his claim that the registered proprietor was Makobi Olendo who he averred in his plea passed away on 14th January 1981. He relied on Certificate of Death serial No 0714595. A perusal of the certificate shows that the date of the registration of the death was 10th April 2018, some 37 years after the alleged date of death. Pursuant to Section 8 of the *Births and Deaths Registration Act*, the ordinary period for registration of a death is six months from the date of such death. Thus, the certificate was based on a late registration. The Respondent conceded that he applied for the certificate, obviously for purposes of filing the case.
19. Under both cross examination and re-examination, the Respondent contradicted the date of death stated in the certificate by testifying that Makobi Olendo died in 1991 and not 1981. In view of the position that the Respondent took during cross examination and which he reiterated during re-examination, the Certificate of Death cannot be taken as conclusive that Makobi Olendo died on 14th January 1981. That is particularly so considering that the registration was done 37 years late and at the Respondent's behest.
20. According to the register, the transfer from Makobi Olendo to Benedict Elly Ogero took place on 7th February 1990. If indeed, Makobi Olendo passed away in 1991, then the transfer was during the lifetime of the then registered proprietor. In those circumstances, the Respondent's allegations of fraud and intermeddling with the estate of a deceased's person come to nought. They did not constitute proof of fraud or illegality. I find that the Respondent did not establish fraud and illegality.
21. Even if fraud would have been proven in regard to the transfer from Makobi Olendo to Benedict Elly Ogero, that alone would not be enough to invalidate the Appellant's title. The Respondent would be required to demonstrate that the Appellant was party to the fraud which allegedly took place in 1990. I have not seen such proof. The Appellant only came into the picture, according to the Respondent's averments in the Plea, in the year 2017. Equally missing from the picture was the Respondent, who in his own words as pleaded at paragraph 7 of the Plea, was away in Nairobi and out of touch with issues back at home for 33 years prior to 2014. It seems that upon his return and finding Lydia and



the Appellant in the suit property, the Respondent was at a loss as to what had happened. His loss of orientation does not however prove that fraud or illegality had taken place. That is particularly so in view of his own testimony that Makobi Olendo was alive until 1991, during which time he could have freely transacted on his own property. Having moved the Subordinate Court, he was duty bound to prove his allegations, as opposed to simply demanding that Lydia and the Appellant disprove his claims.

22. In view of the foregoing discourse, the Learned Magistrate erred in concluding that the Respondent had proven his case to the required standard. I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and Replace it with an order dismissing the Respondent's case. The Appellant shall have costs of both this appeal and of the proceedings in the Subordinate Court.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 27TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

The Appellant present in person

Mr Acheru for the Respondent

Court Assistant: B Kerubo

