



DM v Okhako ((Suing in His Capacity as the Personal Representative of the Estate of Fibi Nasio Okhako)) (Environment and Land Appeal E018 of 2022) [2025] KEELC 2899 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2899 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E018 OF 2022
A NYUKURI, J
MARCH 26, 2025

BETWEEN

DM APPELLANT

AND

JOHN OTIENO OKHAKO RESPONDENT

(SUING IN HIS CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF FIBI NASIO OKHAKO)

(Being an appeal against the judgment of Ho. B. Ojoo, delivered on 19th May, 2022 in Butere SPMC ELC Case No. 63 of 2018)

JUDGMENT

Introduction

1. This appeal was filed by DM. It is a challenge against the judgment of Hon. B. Ojoo (Senior Principal Magistrate) delivered on 19th May, 2022 in Butere CMCC ELC No. 63 of 2018. In the impugned judgment, the learned trial magistrate declared that parcel known as Marama/Shibembe/1427(suit property) is owned by Jackson Okhako Maende (deceased) and ordered the Land Registrar to transfer the from the defendant DM to the deceased Jackson Okhako and reissue title in the name of the deceased.

Background

2. The appellant and the respondent are step brothers born of one father but from different mothers. Their father was the late Jackson Okhako Maende (hereinafter referred to as the late Jackson). The disputed land is parcel No. Marama/Shibembe/1427 which is subdivision of the parcel of land known as Marama/Shibembe/533 which was owned and registered in the name of the late Jackson. Fibi Nasio



- Okhako (hereinafter referred to as Fibi) the mother of John Otieno Okhako the respondent herein, and wife of the late Jackson filed a claim against her husband the late Jackson vide Kakamega HCC No. 163 of 2009 where the matter was settled by consent, which was adopted by the court on 3rd August, 2010.
3. In the above case, the court adopted the D.O's report as the judgment of the court on 3rd August, 2010. That D.O's report is dated 10th June, 2010. In that report, it was stated that Fibi and the late Jackson had not stayed in peace for a long time although the late Jackson's two families stay in the homestead which was constructed in 1956, Fibi being the "mother of the home". It also stated that Fibi did not have "identical portion" (sic) of land and that the late Jackson had intended to evict Fibi and her only son John Otieno from the homestead. That Fibi's security was not guaranteed as she was being threatened with eviction from her matrimonial homestead and ancestral land.
 4. Further, the D.O's report stated that the D.O "suggested" that Fibi should have a piece of land clearly specified/registered in her name. Lastly the report stated that Fibi should remain in her home and the late Jackson should construct a separate home for the second family so as to guarantee Fibi's security.
 5. The record showed that when the consent was being adopted on 3rd August, 2010, title for parcel No. Marama /Shibembe/533 had already been closed on subdivision leading to title Nos. 1427, 1428 and 1429 which subdivision occurred on 14th July, 2009. As at the time of the consent, Title No. 1427 measuring 0.62 Hectares and title No. 1428 measuring 0.86 Hectares were still registered in the name of the late Jackson while title No. 1429 measuring 0.63 Hectares was transferred to George Okhako on 8th July, 2010. Thereafter, title No. 1428 was transferred to Samuel Oluoch Okhako on 19th April, 2013 while title No. 1427 remained in the name of the late Jackson, until 6th October, 2016 when it was transferred to DM the appellant. Fibi died in January 2016 while the late Jackson Okhako died on 25th December, 2016.
 6. By a plaint dated 16th February, 2017, and filed on 17th February 2017, John Otieno Okhako filed suit against DM vide Kakamega ELC Case No. 53 of 2017, suing as the administrator of the estate Fibi seeking the following orders;
 - a. An order of cancellation of the Kakamega Land Register for Land parcel Marama/ Shibembe/1427 in the names of DM and issuing of fresh title in the names of John Otieno Okhako.
 - b. An order of eviction of the defendant from Land Parcel Marama/Sibembe/1427.
 - c. Retransfer of land parcel no. Marama/Sibembe/1427 to the plaintiff at the defendant's cost.
 - d. Costs of the suit plus interest
 - e. Any other relief that the honourable court shall deem just and expedient to grant in the circumstances.
 7. It was the plaintiff's assertion that the defendant had obtained title for parcel No. 1427 by fraud as he had transferred the suit property to himself after the death of Fibi when he had no proprietary interest therein.
 8. The defendant entered appearance on 2.3.2017 and filed a Preliminary Objection dated even date challenging the plaintiff's capacity to file suit.
 9. Before the defendant filed his defence, he filed another suit being Kakamega ELC No. 81 of 2017, on 13th March 2017, vide a plaint dated even date. In the said plaint, the defendant sought the following orders;



- a. Eviction orders compelling the defendant to vacate land parcel no. Marama/Shibembe/1427/
 - b. Interest and costs.
10. In his suit, the defendant averred that he was the registered owner of the parcel of land known as Marama/Shibembe/1427 measuring 0.62 hectares. That the late Jackson during the lifetime allocated each of his four sons their respective parcels of land. That the plaintiff was given parcel No. 496 measuring 1.21 hectares, and that parcel No. 533 measuring 5.5 acres was subdivided into three portions being parcel Nos. 1427, 1428 and 1429 and that parcel No. 1427 was registered in the name of the late Jackson in trust for the plaintiff who was still a minor, but later transferred to him on 3rd December, 2016.
 11. He averred that after the death of the late Jackson, the plaintiff was without justification or colour of right declined to vacate the suit property on the pretext that it forms part of his mother's estate and demanded that the defendant transfers the land to him. He stated that as the plaintiff had already been allocated parcel No. 496, and had no right to remain on the suit property. According to him, the plaintiff's suit Kakamega ELC No. 53 of 2017 against him was a demonstration of mischief.
 12. Responding to the defendant's suit above, the plaintiff filed a defence dated 20th April, 2017, denying the defendant's claim. He denied being allocated parcel No. 496 and averred that on 3rd August 2010 in Kakamega HCC No. 163 OF 2009, his mother Fibi was awarded parcel No. 1427 which was still registered in the name of the late Jackson. He contented that the deceased had no interest in the suit property capable of being transferred to the defendant and that the transfer was done fraudulently and in secrecy as he could not transfer the property to any one else apart from the plaintiff's mother. He sought that the defendant's suit be struck out as he had already filed a similar suit which was pending.
 13. When dust settled, on 12th October 2017, the defendant in the lower court filed a defence dated 21st May, 2017, in respect of the plaintiff's suit in Kakamega ELC 53 of 2017, wherein he denied the plaintiff's claim and also denied obtaining registration of the suit property by fraud. He maintained that the orders made in Kakamega HCC No. 163 of 2009 were directed at the late Jackson and that the same was to ensure peaceful co-existence within their polygamous family but was not to transfer land to one of his wives. He took the position that the plaintiff has never had an interest in the land which belongs to the defendant as the same was allocated to him by his father.
 14. He also averred that parcel No. Marama/Shibembe/496 which is also family land was allocated to the plaintiff and therefore he should never lay claim on the defendant's land. He challenged the plaintiff's capacity as the legal representative of Fibi and argued that the suit offends sections 79 and 82 of the *Law of succession Act*. He argued that he was not the legal representative of the late Jackson's estate and that he the suit should not have been against him. He sought the dismissal of he suit.
 15. It is apparent from the record that Kakamege ELC Case No. 53 of 2017 was transferred to Butere SPM's Court for hearing and determination and the same was registered as Butere SPMC ELC No. 63 of 2018.
 16. On 1st October 2019, parties filed a consent dated 5th September, 2019, in Kakamega ELC No. 81 of 2017 to the effect that Kakamega ELC Case No. 81 of 2017 be transferred to Butere SRM's Court for consolidation with Butere ELC NO. 63 of 2018 formerly Kakamega ELC No. 53 of 2017, for hearing and disposal. The alternative prayer in the consent was that the court be pleased to transfer Butere SRM ELC No. 63 of 2018 from Butere to the ELC Kakamega for consolidation with Kakamega ELC 81 of 2017 for hearing and final disposal.



17. Vide an order made in Kakamega ELC 81 of 1017 on 1st October, 2019, the court adopted the consent dated 5th September, 2019 in terms of prayer 1 which means that ELC case No. 81 of 2017 was transferred to Butere SPM's court and consolidated with Butere Case No. 63 of 2018 formerly Kakamega ELC 53 of 2017. Upon transfer of Kakamege ELC Case No. 81 of 2017 to Butere SPM's Court, the same was registered as Buteres SPMC ELC NO. 38 of 2019.
18. In an order dated 31st October, 2019, the trial court in Butere ordered that Butere SPMC ELC Case No. 53 of 2018 be consolidated with Butere ELC 38 of 2019 and that Case No. 53 of 2018 became the lead file, while the claim in case No. 38 of 2019 became the counter claim.
19. At trial, the matter proceeded by way of viva voce evidence. The plaintiff presented one witness while the defendant presented two witnesses.

Plaintiff's evidence

20. PW1 was John Otieno Okoko. He adopted his witness statement filed with the plaint. It was his evidence that he had obtained grant of letters of administration ad litem on 31st January, 2017 for purposes of filing suit on behalf of the estate of his mother Fibi who died on 6th January, 2016. He stated that by the orders of Kakamega HCC No. 163 of 2009 made on 3rd August, 2010, Fibi was awarded parcel No. Marama/Shibeme/1427 which was by then registered in the name of the late Jackson. That he placed a caution on the said title on 28th January, 2016 due to actions of his step family.
21. That his father died on 25th December, 2016 before transferring the land to his mother in compliance with orders of 3rd August, 2010 and that upon the demise of his father he planned to transfer the suit property to the successors of his mother's estate but that on conducting search on 3rd January, 2017, he realized that the suit property was registered in the name of DM. He stated that he has three sisters who also have a claim over his mother's estate and that he moved to court to protect his family members interest.
22. He produced the Limited Grant; proceedings in Kakamega HCC No. 163 of 2009; the D.O's report; green card; caution; and demand letter.
23. On cross-examination, he stated that he had not produced a search for parcel No. 533 and stated that his father subdivided parcel No. 533 in 2009 into three portions. That his mother died on 6th January, 2016 and as of that date there had been no transfer of the land to his mother and that his mother had complained of his father's disobedience of the court orders.
24. He further stated that he had not produced consent from his sisters to pursue the matter on their behalf. He stated that he owned parcel No. Marama/Shibembe/496 but the same was not given to him by his father but his paternal grandfather. That he did succession for the same. He stated that he did not know whether his father transferred the land to the defendant or that his signature was forged and that his father died months after the transfer. He stated that the D.O ordered that Fibi should have land in her name but that the specific number was not given.
25. In re-examination, he stated that the transfer to the defendant was a forgery as there was a caution on the title and that the court order is still valid. That marked the close of the plaintiff's case.

Defendant's evidence

26. DW1 was DM. He adopted his statement of 13th March, 2017 as his evidence in chief. His evidence was that his father the late Jackson died on 25th December, 2016 having had two wives, the first wife being Fibi and the second wife being Risper Wamanya Okhako.



27. He stated that Fibi had one son, namely; John Otieno Okhako while Risper had 3 sons namely; George Okhako, Samwel Okhako and DM. He stated further that his father had two parcels being parcel No. Marama/Shibembe/496 which is their ancestral land measuring 3 acres which was registered in the name of his grandfather Nicodemus Maende Nyendwa and parcel No. Marama/Shibembe/533 measuring 5.5 acres registered in the name of the late Jackson. That Nicodemus Maende had two sons; the late Jackson and Miruka Maende and that the latter was not survived by any child.
28. He stated that in 2001, Mr. Jackson Maende decided that parcel No. 496 would devolve to John Otieno through succession and that parcel No. 533 would be for his other sons. That parcel No. 533 was subdivided into parcel Nos. 1427, 1428 and 1429 and that 1429 was transferred to George Nyende in 2010; 1428 transferred to Samwel Okhako in 2013 while 1427 was retained by his father in trust for him as he was a minor, but later transferred to him in 2016. That this was done with the full knowledge of John Okhako the plaintiff.
29. He asserted that his father had always insisted that since John was the first born, he should relocate to his parcel but that John resisted this stating that it was an attempt to chase his mother away. According to him, John fronted his mother to file Kakamega HCC No. 163 of 2009 so as to prevent his father from evicting her from parcel Marama/Shibembe/533. That upon the death of their father in 2016, John began causing trouble alleging that the subdivision was unfair and refused to relocate to parcel No. 496 as he could not leave his mother's graveyard. He stated that John's mother's graveyard was located on the land on which he was given by his father. That John now claims that parcel No. 496 is not his but holds it in trust for the family of their grandfather and that he had began threatening him demanding that he transfers the suit property to him claiming it as part of his late mother's estate. He sought that John be restrained from harassing them and be forced to relocate to parcel No. 496.
30. He produced title deeds for 533 and 1427; green card for parcel 533; green card for parcel 496, letters from ACC Shiatsala; letter from Assistant Chief Shibembe sub-location and a consent.
31. In cross-examination, he stated that Fibi was the wife of the late Jackson. That she had children and that one was a son. He also stated that Fibi had a right to intent her husband's land. He averred that Fibi died and was buried on parcel No. 1427. He stated that he was not aware of a decision of the High court giving parcel No. 1427 to Fibi. That he was present when she was buried. That she was his father's wife and he could not stop her from being buried on that land. In re-examination, he stated that when Fibi died, he had not obtained title to the suit property.
32. DW2 was Samuel Oluoch Okhako, a brother to DW1. He adopted his witness statement filed on 13th March, 2019. His evidence reiterated the evidence of DW1. He stated that the plaintiff having been given parcel No. 496, the late Jackson sought the help of the District Officer Shiatsala Division to evict John from the suit property, which the latter disobeyed. He rehashed word for word all the averments made by DW1. On cross-examination, he stated that his father inherited parcel No. 496 and he is the one who passed it over to the plaintiff and that it was their father's inheritance. That marked the close of the defence case.
33. On considering the pleadings, evidence and submissions, the trial court found that the defendant failed to establish that the root of his title was clean. The trial court subsequently found that the legitimate holder of the property is the late Jackson, and that having been survived by his children including the parties herein, all children have a legitimate claim in his estate and that the rightful heirs of the suit land will be determined by succession cause. Consequently, the trial court entered judgment for the plaintiff declaring that the deceased Jackson Okhako Maende is the registered proprietor of all that land parcel No. Marama/Shibembe/1427. She also directed the Land Registrar Kakamega to rectify the register and cancel the defendant's registration and re issue title in the name of the late Jackson.



34. Aggrieved with the trial court's decision, the appellant herein instituted this appeal vide a Memorandum of Appeal dated 14th June, 2022 citing the following grounds of appeal;
- a. The trial magistrate erred grossly both in law and fact by misconstruing the facts and the case before her.
 - b. The learned magistrate erred in law by failing to uphold the doctrine and principle of sanctity of title under statute.
 - c. The learned magistrate grossly erred in holding that the appellant failed to rebut fraud when he produced all the relevant transfer documents.
 - d. The trial magistrate erred in law by shifting the burden of proof to the Appellant against the trite law of he who alleges proves.
 - e. The trial magistrate erred in law and fact by recording evidence not given by the appellant and specifically the allegation of a trust.
 - f. The learned magistrate grossly erred by exercising her discretion unjudicially by awarding costs to the respondent and interest on the costs from the date of filing suit.
 - g. The trial magistrate erred grossly by failing to consider and uphold family ties and consider the age parity between the parties who are brothers and thereby abstain in awarding costs.
35. Consequently, the appellant sought the following orders;
- a. Setting aside of the judgment delivered in Butere PM ELC No. 63 of 2018 in the entirety.
 - b. Eviction of the respondent from land parcel no. Marama/Shibembe/1427.
 - c. Costs of the appeal.
36. The appeal was disposed by way of written submissions. On record are submissions by the appellant dated 4th May, 2023 and those filed by the respondent dated 25th October, 2023.

Appellant's submissions

37. Counsel for appellant submitted that none of particulars of fraud alleged by the respondent were proved. Counsel argued that the appellants evidence clearly showed that he was given the suit property by his father while he was alive. It was argued for the appellant that as the appellant had produced a consent to transfer and a title deed, it was demonstrated that he did not obtain the suit property through fraud.
38. It was further contended for the appellant that the trial court was wrong in overlooking the doctrine of sanctity of title as stipulated in Section 26 of the *Land Registration Act*. Counsel also submitted that the D.O's report which was adopted as judgment in Kakamega HCC No. 163 of 2009 on 3rd August, 2010, suggested that the plaintiff in that suit should have a piece of land clearly specified/registered in her name and that she should remain in her home and the defendant should construct a separate home for the 2nd family. Counsel argued that Fibi remained where she was and buried where she was staying. Counsel submitted that there was no mandatory requirement that the land be registered in Fibi's name and that since the number of the suit property was not stated, the respondent failed to show that it referred to parcel No. 1427.
39. Counsel submitted that there was evidence of bad blood between the respondent and his father, which is the reason he was moved to parcel No. 496. It was further contended for the appellant that Fibi died



before Jackson and there is no reason why the respondent waited for the father to pass on before suing the appellant.

40. Counsel also argued that the trial court in paragraph 13 of the judgment found that there was no evidence of fraud but went ahead to shift the burden of proof to the appellant requiring him to establish the root of his title. It was further submitted that the trial court ignored the counter claim and that the court did not take into account the fact that in this matter two suits had been consolidated and the appellants suit became the counter claim.
41. Counsel termed as baseless the trial court's finding that the transfer of the suit property having been done after the death of Fibi was questionable, on the basis that it is the late Jackson who transferred the land to the appellant. Counsel faulted the trial court's orders that the cost of corrections of the title in the name of the appellant be done by the appellant and also submitted that the trial court was biased against the appellant whereof it arrived at a wrong decision.

Respondent's submissions

42. The respondent submitted that the appeal be dismissed as the decision of the trial court had already been executed. He further argued that the memorandum of appeal is based on misapprehension of facts. He further submitted that the High court in Kakamega HCC 163 of 2009 ordered that Fibi be given parcel No. 1427 which should be registered in her names but that the appellant violated the said order and got himself registered as proprietor of the suit property hence his registration having been fraudulently obtained should be nullified. He submitted that the decision in Kakamega HCC No. 163 OF 2009 was on merit and that the appellant does not hold that decision with the regard it deserves just because Fibi was not his mother and that that was the reason he grabbed the suit property. He urged this court to dismiss the appeal

Analysis and Determination

43. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. The role of this court as a first appellate court is to re-assess, re-evaluate and re-analyze the evidence on record and make its own independent conclusions, bearing in mind that it had no advantage of seeing or hearing the witnesses, and make due allowance for that.
44. Section 78 of the [Civil Procedure Act](#) grants this court in the exercise of its appellate jurisdiction extensive jurisdiction as follows;

78. Powers of appellate court

1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - a. To determine a case finally;
 - b. To remand a case;
 - c. To frame issues and refer them for trial;
 - d. To take additional evidence or to require the evidence to be taken;
 - e. To order a new trial.
2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.



45. Therefore, this court as an appellate court has extensive jurisdiction including the jurisdiction to perform the same duties as the trial court by retrying the matter and making its own independent conclusions on all issues in the case, but keeping in mind that it had no advantage of observing the demeanour of witnesses.
46. The duty of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, where the Court of Appeal stated as follows;
- An appeal to this court from a trial 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 consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
47. While a first appeal is decided on facts and the law, the first appellate court is ordinarily the final court on facts and therefore on appeal, parties deserve a full, fair and independent evaluation of the evidence as anything short of that would amount to an injustice. Therefore, the role of this court being the first appellate court is to apply its mind to the entire case, re-evaluating both questions of fact and law and considering all issues arising from the case.
48. I must however, at this earliest opportunity point out that although the dispute before me is a land dispute, from the record, it is clear that it has been interwoven with other family matters and disputes. This court being an Environment and Land court and not a family court, will steer clear of all family matters and disputes and only focus on the facets of the dispute that fall within the scope of its jurisdiction as delineated within the provisions of Article 162 (2) (b) of *the Constitution* of Kenya, which in this case is the question regarding the lawful owner of title to the suit property.
49. I reiterate with tremendous empathy, that this is not a family court, and although family matters raised by the parties herein are understandably important to them, which is why they spent a considerable amount of time passionately submitting on which party inherited what property from which parent, those arguments, as long as they have no bearing on the question of title within the ambit of this court's jurisdiction, are irrelevant and outside this court's jurisdiction.
50. Having considered the appeal herein, the parties rival submissions and the entire record, four issues arise for this court's determination, namely;
- a. Whether the consent judgment entered in Kakamega HCC No. 163 of 2009 on 3rd August 2010 conferred proprietary interest in the suit property to Fibi.
 - b. Whether fraud was proved as against the appellant in the transfer of the suit property into his name.
 - c. Whether the appellant bore the burden of proving that the transfer of the suit property from the late Jackson to his name met the legal threshold set out in section 26 of the *Land Registration Act*, and if yes, whether indeed that threshold was met.
 - d. What orders should this court make in the circumstances of this case.
51. A court's judgment which has not been stayed, reviewed or set aside, is a conclusive determination of the rights of parties regarding the questions which had been in controversy between them.
52. In the instant matter, the respondent's claim was founded on the consent Judgment in Kakamega HCC No. 163 of 2009, made on 3rd August 2010. In that case, Fibi had sued her husband Jackson



Okwako claiming part of parcel No. 533. While this case was pending, the same was arbitrated by the D.O of Shiatsala and parties agreed to have the D.Os report dated 10th June 2010 adopted as judgment of the court. That report was adopted as the judgment of the court on 3rd August 2010. As stated hereinabove, the D.O observed that Fibi and the late Jackson had not stayed in peace for a long time although the two families stay in the homestead which was constructed in 1956 and that Fibi was the “mother of the home”. It also stated that Fibi did not have identical (sic) portion of land and that Jackson Okhako had intended to evict Fibi and her only son John Otieno from the homestead. That Fibi’s security was not guaranteed as she was being threatened with eviction from her matrimonial homestead and ancestral land. Further that Fibi should have a piece of land clearly specified/registered in her name. Lastly, the D.O stated that Fibi should remain in her home and the late Jackson should construct a separate home for the second family so as to guarantee Fibi’s security.

53. Essentially therefore, the D.O ordered that Fibi should be given land registered in her name and that there ought to be a difference between Fibi’s land and the land owned by the 2nd family and more importantly that Fibi’s land be registered in her name. That judgment, not having been stayed, reviewed or set aside, remains valid to date.
54. Therefore, by the consent judgment dated 3rd August 2010, the rights of Fibi as against the late Jackson were conclusively determined and that determination was binding on both parties to the matter. Therefore, the appellant’s argument that the same was not binding on the late Jackson is untenable. While in one instance the D.O used the term “I suggest” it is my considered view that whatever was suggested to be done should be done as the consent was adopted as was, without any reservation from the parties and the suggestion by the D.O was not contested by any of the parties, hence they were both bound by the D.O’s suggestions, directions and orders, because they voluntarily accepted the D.O’s decision as the court’s judgment.
55. Besides, the argument that the suit property was not mentioned in the consent is immaterial as there is no dispute that the disputed property at the time of filing suit was parcel No. 533, which had been intact as at the time the suit was pending but which was subdivided before the D.O’s decision on 10th June 2010. The appellant confirmed that Fibi was staying on the suit property, and upon death was buried there. While the D.Os verdict was written in a layman’s language, in adopting it as a judgment of the court, the intentions of the parties are discernible. Considering the D.O’s decision which required the late Jackson to give Fibi her own parcel separate from the second family, which parcel should be registered in Fibi’s name and the conduct of the late Jackson of subdividing the suit property into 3 portions and transferring two portions to two sons in the second family and leaving one portion in his name, it can only be deduced that the remaining portion which is about 1.5 acres, out of the entire parcel No. 533 measuring 5.5 acres, were indeed meant for Fibi in compliance with the consent judgement.
56. The late Jackson transferred two parcels being subdivisions of parcel 533 to the appellants brother’s and the allegation that he held the suit property in trust for the appellant is not supported by any evidence. Besides, the allegations that the respondent agreed to take and or that as first born he was given the ancestral land as the second family got parcel No. 533, is immaterial in the circumstances of this dispute, as the suit filed by the respondent in the lower court was not filed in his own personal capacity or for his own benefit, but as the administrator of the estate of Fibi and for the benefit of Fibi’s estate. In any event, Fibi was given the land about 9 years after the respondent had already been registered as proprietor of parcel No. 496, hence the land owned by the respondent whether or not he lawfully inherited the same, has no bearing on Fibi’s estate’s claim. The appellants are at liberty to contest matters of inheritance between themselves and their siblings including the respondent, in the family court as this court has no jurisdiction to try such claims.



57. For the above reasons, it is therefore my finding that in so far as the D.O stated that Fibi should not be evicted but should be given her own land registered in her name, and that there ought to be a difference between Fibi's land and the land for the second family, and the appellant having confirmed that Fibi had been staying on the suit property, which the D.O stated as having started from 1956, I am satisfied that the consent judgment in Kakamega HCC No. 163 of 2009 conferred proprietary right of the suit property on Fibi. That proprietary right survives the demise of Fibi and is a right that extends to Fibi's estate. Therefore, the respondent being the administrator of Fibi's estate, rightly sought to protect that which Fibi had been declared as lawful owner. It is on record that besides the respondent, Fibi had other children and therefore his estate goes beyond the respondent.
58. On the question as to whether the appellant bore the burden of proving that his acquisition of the suit property met the threshold of section 26 of the [Land Registration Act](#), section 107 of the [Evidence Act](#) places the burden of proof in a suit on the Plaintiff. In this case, the appellant filed Kakamega ELC Case No. 81 of 2017 which was consolidated with the respondent's suit case No. 53 of 2017. Therefore, the appellant being a plaintiff in his suit claiming lawful ownership of the suit property, and the respondent in his defence having alleged fraud and illegality in the appellant's acquisition of the same, the appellant bore the legal burden of proving lawful acquisition of the suit property as envisaged in section 26 of the [Land Registration Act](#). In that regard therefore, I find and hold that the trial court did not shift the respondent's legal burden to the appellant. The burden to prove the appellant's claim rested with the appellant.
59. Section 26 of the [Land Registration Act](#) provides for conclusiveness of title as follows;
- “26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) 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.”
60. Therefore, registration of title vests in the proprietor absolute and indefeasible rights, unless it is proved that the proprietor obtained such registration by fraud, misrepresentation, illegality, improper procedure, or corruption; whether or not the registered proprietor was party thereto.
61. In the case of [Munyu Maina v Hiram Gathiba Maina Civil Appeal No.239 of 2009](#), the Court of Appeal held that:-
- “We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality



of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

62. Similarly, in *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the court held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

63. Therefore, it is not enough to have title to land, where legality of acquisition of title is contested, the title holder is obligated to demonstrate that they acquired their title lawfully.

64. It is trite that to succeed where fraud is pleaded, it must also be strictly proved. The standard of proof for fraud in civil cases is higher than the standard required in ordinary civil matters of the balance of probabilities, but slightly lower than the standard of proof required in criminal cases of beyond reasonable doubt.

65. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR the court held as follows;

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (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 the 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 case where fraud is alleged it is not enough to simply infer fraud from the facts.”

66. In the instant matter, it is not in doubt that the appellant is registered as proprietor of the suit property, having been registered as such on 3rd December 2016. While the appellant sought in his plaint for eviction orders against the respondent, the latter sought to have the appellant’s registration of the suit property cancelled and the same registered in his name as he is the administrator of the estate of



Fibi. The appellant's argument was that his father the late Jackson held the suit property in trust for him as he had been a minor at the time of registration, while the respondent accuses the appellant of obtaining registration of the suit property by fraud and further argues that the late Jackson had no proprietary interest in the suit property which he could lawfully transfer to the appellant. Essentially, the respondent raised a question of both fraud and illegality in the registration of the suit property to the appellant.

67. I have considered the particulars of fraud listed by the respondent, his evidence and the trial court's finding on the question of fraud. In his plaint, the respondent specified the particulars of fraud as defrauding the plaintiff; obtaining title by cheating; stealing from the plaintiff; forcible detainer; purporting to transfer the land without proprietary interest; bad faith and malice and greed and grabbing. Having considered the evidence, it is my considered view that while allegations of transferring land when the transferor had no proprietary interest would point to the late John Okhako's conduct and not the appellant's, the other allegations including stealing, cheating, forcible detainer, bad faith and malice, greed and grabbing, were not proved by the respondent. Fraud must be clearly proved by cogent evidence and cannot be presumed. It is either there is fraud or there is no fraud. There can be no middle ground, assumption or presumption. Therefore, the trial court's finding that "on the face of it, the claim of a fraudulent transfer, in my view, is not far-fetched" was erroneous as the court did not base its conclusions on proof of specific particulars of fraud as pleaded by the respondent, yet parties are bound by their pleadings.
68. In addition, section 109 of the [Evidence Act](#) places the burden of proof of a particular fact on the person who alleges its existence and provides as follows;

“ 109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

69. In view of provisions of section 109 of the [Evidence Act](#), and the fact that it was the respondent who alleged fraud as against the appellant, it was the respondent who bore the legal duty of proving fraud and therefore the trial court was wrong in finding that the evidentiary burden of disproving fraud rested with the appellant. Consequently, I find and hold that the evidence on record did not satisfy the threshold for proof of fraud as none of the particulars of fraud stated by the respondents was proved, and some of the particulars, although if proved would be unlawful acts, like forcible detainer, in my view cannot be held as amounting to fraud.
70. On whether the appellant's registration of the suit met the threshold under section 26 of the [Land Registration Act](#), in respect of the legality of the transfer of the said transfer, the court has considered the respondent's argument that the late Jackson had no proprietary interest in the suit property capable of being transferred to the appellant and the appellant's argument that the late Jackson had held the suit property in trust for him. On the issue of trust, as earlier pointed out, the appellant did not present any evidence to show that the suit property was held in trust for him as alleged or at all. When the late Jackson registered the two parcels from parcel No. 533 in his other two sons' names, the other parcel where Fibi stayed remained in his name between 2011 up to 2016. There is no evidence that during this period the suit property was held in trust for the appellant. In any event, in view of the fact that the High Court in Kakamega HCC No. 163 of 2009 had already declared that Fibi should have her own parcel registered in her name, and the suit property having been held by the late Jackson from the date of the consent judgment up to 2016 after the death of FIBI, it is clear that Jackson held the suit property in trust for Fibi as the same belonged to her and hence he had no proprietary interest



therein capable of being transferred to the appellant. That being the case, it follows that the acquisition of the suit property by the appellant having been done by a person who had no capacity to transfer the suit property to the appellant because it was not his, means that the said transfer did not meet the threshold set out in section 26 of the *Land Registration Act*. The late Jackson had no land to transfer to the appellant, because the land he held and where Fibi stayed had been ordered to be transferred into Fibi's name by the High Court. Essentially, the process by which the appellant got himself registered as proprietor of the suit property was unlawful for want of capacity on the part of the transferor. In the premises, it is my considered view that the trial court was wrong in finding that the suit property belongs to the late Jackson because the deceased had already transferred his part to the second family and the remaining part, which was the suit property belonged to Fibi, and could only be registered in Fibi's name. Since the respondent herein is the administrator of the estate of Fibi, it follows that the registration of the appellant should be cancelled and the respondent should be registered as proprietor thereof in his capacity as administrator of the estate of Fibi.

71. It is also clear from the record that the trial court did not consider the suit filed by the appellant being formerly Kakamega ELC Case No. 81 of 2017, which in my view was an error of law. It is therefore my finding that the trial court's failure to take into account the fact that the suit before her consisted of two consolidated suits and having only considered the suit filed by the respondent, and failed to consider the appellant's counter claim, erred in law.
72. Ultimately, this appeal is allowed. This court finds that in view of the evidence on record, justice demands that the findings and judgment of the trial court ought to be set aside. In that regard, this court finds that the appellant failed to prove his counterclaim and the same is hereby dismissed. This court further finds that the respondent proved his claim on the required standard and the same is hereby allowed. Consequently, this court sets aside the findings and judgment of the trial court and substitutes the same with the following orders;
 - a. The appellant's counterclaim as filed in Kakamega ELC Case No. 81 of 2017 and later transferred to Butere SPM's court as Butere SPMC ELC Case No. 38 of 2019 is hereby dismissed.
 - b. The respondent's claim as filed in Kakamega ELC 53 of 2017 and later transferred to Butere as Butere SPMC ELC Case No. 63 of 2018 is hereby allowed as follows;
 - i. The registration of DM as proprietor of the parcel of land known as Marama/Shibembe/1427 is hereby cancelled. The title held by DM in regard to the said parcel of land is declared as null and void. The Land Registrar Kakamega is directed to register the name of John Otieno Okhako as proprietor of parcel known as Marama/Shibembe/1427 and subsequently issue him with a title deed in that regard.
 - ii. The appellant is ordered to vacate the Parcel of land known as Marama/Shibembe/1427 in 90 days from the date of this judgment, and in default eviction to issue.
73. In view of the fact that the trial court's determination has been set aside, albeit in favour of the respondent, and the fact that the parties herein are siblings, I order that each party shall bear its own costs of this appeal as well as the costs in the court below.
74. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF MARCH, 2025 AT KAKAMEGA IN OPEN COURT/ VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM



A. NYUKURI

JUDGE

In the presence of;

Ms Omar for the appellant

Mr. John Otieno Okhako the respondent respondent in person

Court assistant – M. Nguyai

