



Muruka ((Suing as the Administratrix of the Estate of Amondi Chwala - Deceased)) v Awange  
(Environment and Land Appeal E024 of 2022) [2024] KEELC 1516 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1516 (KLR)

Republic of Kenya

In the Environment and Land Court at Siaya

Environment and Land Appeal E024 of 2022

AY Koross, J

March 21, 2024

Between

Gaudensia Awuor Muruka

Appellant

(Suing as the Administratrix of the Estate of Amondi Chwala - Deceased)

and

Samuel Othieno Awange

Respondent

(Being an appeal from the judgment of the SRM Hon. C.I.AGUTU delivered on 24/06/2022 in Bondo ELC Case No.44 of 2019)

## Judgment

### Background of the appeal

1. In challenge before the trial court was land parcel no. Uholo/Sigomere/371 (suit property) that was registered in the name of the respondent. As the plaintiff in the trial court, the appellant contended in her plaint dated 20/09/2019 that the respondent who was then the defendant had fraudulently acquired the suit property.
2. According to her and in postulating the particulars of fraud and illegality, she alleged the suit property was initially held as a tenancy in common by two brothers-Akal Chwala (Akal) and Amondi Chwala (Amondi) who were all deceased.
3. That being the only beneficiary of Amondi's estate which was yet to be administered, she discovered Akal and the defendant had without conducting probate proceedings on Amondi's estate, transferred the suit property without requisite consents. Consequently, she prayed for the suit property's title to be cancelled and costs of the suit.
4. In a defence dated 11/10/2019, the respondent vehemently denied the allegations made in the plaint and asserted that it emerged from the register of the suit property that even though Akal and Amondi originally held the suit property as tenants in common, Akal had succeeded Amondi's estate and the suit property was entirely transferred to his (Akal's) name.
5. Thus, upon such registration, Akal took a loan with Kenya Commercial Bank LTD (Bank) and charged the suit property as security and upon default, it was publicly auctioned whereby he (respondent) was the highest bidder. Subsequently, he paid the bid sum of KShs. 85,000/- and the bank transferred the suit property to him which he had peacefully occupied for 29 years.
6. The matter proceeded for trial and the appellant, respondent, the respondent's witness who was an assistant chief and land registrar who had been summoned testified. After the respective parties' cases were closed and submissions filed, the learned trial magistrate reserved the suit for judgment.
7. In the impugned judgment, the learned trial magistrate framed one issue for determination; whether there was fraud on the respondent's part. In appreciating the standard of proof of fraud in civil cases, the learned trial magistrate on analysis, found she was not convinced the respondent was culpable. To this end, she dismissed the appellant's suit with costs to the respondent.

## Appeal to this court

8. Discontented with the outcome of this judgment, the appellant moved to this court on 5 grounds of appeal set out in her memorandum of appeal dated 21/07/2022 faulting the learned trial magistrate.

9. These grounds were regurgitative and they can be condensed into a singular ground; the learned trial magistrate erred in law and fact in finding the appellant did not prove his claim of fraud to the required standards.

10. She therefore urged this court to allow the appeal with costs, set aside the impugned judgment and reassess and reevaluate the evidence on record and arrive at an independent decision.

11. Parties agreed to canvass the appeal by written submissions and the firm of Ms. Cecil Kouko & Associates which is on record for the appellant filed written submissions dated 23/01/2023 whereas Mr. Akwala who is on record for the respondent filed written submissions dated 19/01/2023.

#### The appellant's submissions

12. In harnessing his grounds of appeal into a single ground in his submissions, counsel identifies a singular issue for determination; whether or not based on the evidence on record, the transfer of the suit property from the original owners was legal.

13. Counsel contends that no evidence was ever tendered before the trial court to show probate proceedings were ever conducted on the estate of Amondi and that the burden of proof lay with the land registrar to show that indeed such proceedings were carried out.

14. Thus, in counsel's view, this demonstrated fraud which could be challenged under Section 26 of the [Land Registration Act](#). Counsel placed reliance on several authorities including the case of Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another [2013] eKLR.

15. Counsel submits the respondent could not hide under the defence of innocent purchaser without notice and that by the provisions of Sections 107, 109 and 112 of the [Evidence Act](#), the burden of proof lay with the respondent.

#### Respondent's submissions

16. In a similar fashion, his counsel identifies a single issue for determination; whether the transfer of the suit property was fraudulent, illegal and void and if so, whether the title should be cancelled.

17. On this issue, counsel submits the respondent acquired the suit property by public auction and having elucidated the root of his title which was corroborated by the land registrar, the respondent's rights were protected by Article 40 of the [Constitution](#) of Kenya and Sections 24 and 26 of the [Land Registration Act](#).

18. Counsel submits the burden of proof lay with the appellant who was the claimant and relies on the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR. Counsel submits the appellant had failed to so discharge her burden of proof, her claim was suspect and the respondent was an innocent purchaser for value.

19. Further, counsel submits the appellant's claim before the trial court was time barred, an afterthought

and incompetent and urges this court to dismiss the appeal with costs.

#### Issues for determination

20. Having considered the appeal, submissions including provisions of law and authorities relied upon together with applicable law, the following 2 issues commend themselves for determination, namely:

- a. Whether the learned trial magistrate erred in law and fact in finding the appellant did not prove her claim of fraud to the required standards.
- b. In determination of this appeal, what orders ought to be made including orders on costs.

21. This being a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties in the record of appeal and lower court record and to establish if the findings reached by the learned trial magistrate should stand and give reasons if they do not. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.

22. In line with the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, the court must keep in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. Further, this court is called upon not to be quick to interfere with the discretion of the lower court unless it is satisfied that the decision of the learned trial magistrate was clearly wrong because of some misdirection, failed to take into consideration relevant matters, considered irrelevant matters and as a result arrived at a wrong conclusion or abused her discretion.

#### Analysis and determination

23. Having earlier in this judgment identified the issues that arise for resolution, I will proceed to handle them in a sequential manner.

a. Whether the learned trial magistrate erred in law and fact in finding the appellant did not prove her claim of fraud to the required standards.

24. The legal framework on legitimacy of title documents is governed by Sections 24, 25 and 26 of the [Land Registration ACT](#). Section 24(a) thereof recognizes the registered owner as the absolute owner of land. This section provides as follows; "The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto".

25. This absolute right is limited by Section 25 which provides that land shall be held by the registered proprietor together with all other privileges appurtenant thereto but subject to charges, leases, encumbrances, restrictions, liabilities, rights and interests as stipulated in Section 28.

26. Section 26 states courts shall prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

27. Order 2 Rule 10 (1) (a) of the [Civil Procedure Act](#) provides as follows: "(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies;"

28. It is trite law fraud must be proved on parameters beyond a balance of probabilities but below reasonable doubt. This principle of law was well elucidated in the well cited Court of Appeal decision of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR where the court expressed itself as follows: -“As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained.”

29. In the impugned judgment, the learned trial magistrate concluded thus before arriving at her finding that the appellant had not proved her case: -“The court is swayed by the defendant’s counsel submission that the plaintiff’s (sic) has failed to prove before court that the defendants (sic) was a party or was involved in any fraudulent act in transferring the title into his names.”

30. From the appellant’s submissions, it is apparent he is contending the burden of proof shifted to the respondent to prove he did not commit fraud. Nay, that is an erroneous position. Provisions of Sections 107, 109 and 112 of the [Evidence Act](#) that counsel for the appellant relies upon were applicable to the appellant as the claimant and not the respondent who was the defendant before the trial court. The respondent as a defendant was only called upon to discharge the root of his title.

31. The legal basis for this burden of proof is found in Section 107 of the [Evidence Act](#) which states thus: -“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. In paragraph 6 (i)- (iv) of the plaint, the appellant particularized fraud against the respondent thus; (i) consciously intermeddling with the estate of Amondi (ii) transferring the suit property without consent/knowledge of beneficiaries (iii) transferring the suit property to his name without consent and (iv) absence of succession on Amondi’s estate prior to the transfer of the suit property to the respondent. Having so alleged, the appellant was called upon to adduce sufficient, credible and admissible evidence in proof other allegations of fraud.

33. The documents the appellant produced to prove fraud were the limited grant, Amondi and Akal’s death certificates and the suit property’s greencard.

34. A scrutiny and reassessment of these documents do not prove fraud to the required standards and I say so for several reasons. Amondi died prior Akal and the greencard shows his estate was succeeded by Akal on 12/09/ 1972. At that time, the [Law of Succession Act](#) had not been enacted. Therefore, the appellant’s submission that the procedures in this Act should have been followed does not hold water.

35. The [Law of Succession Act](#) commenced on 1/07/1981 and prior to it, a cocktail of laws applied to administration of assets of deceased persons including customary law, African Wills Act, Hindu Succession Act, Indian Succession Act and Mohammedan Marriage and Divorce Act and the appellant did not lead evidence on the applicable laws that were allegedly contravened.

36. In addition, from the greencard, the actors towards registration of the suit property to Akal’s sole name were the land registrar and Akal yet none of them including Akal’s estate were joined as a party to these proceedings. On this basis, any particulars of fraud touching on modalities of succession of Amondi’s estate was bound to fail against the respondent. Further, the appellant did not disclose which consents were not obtained by the respondent.

37. Although prima facie the respondent was the registered owner of the suit property, he needed to prove how he acquired it. In the case of *Munyu Maina v Hiram Gathiha* [2013] eKLR, the Court of Appeal expressed itself thus; “We have stated that when a registered proprietor’s 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.”

38. From the record, the respondent led evidence that he acquired the suit property by public auction from the bank after Akal failed to service a loan. Upon payment of the bid sum of KShs. 85,000/-, the bank transferred the suit property to him and he had occupied it peacefully for 29 years.

39. His period of occupancy of the suit property and acquisition was corroborated by government officers who included an area chief and land registrar. The greencard substantiated that indeed, the respondent acquired the suit property by public auction from the bank and the bank transferred it to him by “transfer by charge” upon payment of KSh. 85,000/-. This took place on 23/04/1990 which was during Akal’s lifetime.

40. Thus, I am satisfied the respondent proved the root of his title. From my evaluation of the evidence on record, the learned trial magistrate cannot be faulted for the finding that she arrived at.

41. The evidence adduced by the appellant to prove her allegations of fraud fell far short of what was required to prove fraud as required by law and it appears she was on a fishing expedition. I must conclude, find and hold the learned trial magistrate did not err in arriving at her decision. b. What orders ought to be made including orders on costs.

42. In the end and for the reasons stated above, I find no reason to interfere with the judgment of the trial court. The appeal lacks merit and since it is trite law costs follow the event, the appeal is accordingly dismissed with costs to the respondent. It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 21<sup>ST</sup> DAY OF MARCH 2024. HON. A. Y.**

**KOROSSJUDGE21/3/2024** Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of: Mr. Okoth Odera for the appellant Miss Nanjala h/b for Mr. Akwala for the respondent Court assistant: Ishmael Orwa



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