



**Chemjor v Chepkwony (Environment & Land Case 34 of 2022)
[2023] KEELC 16864 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 34 OF 2022**

**L WAITHAKA, J
APRIL 19, 2023**

BETWEEN

WESLEY KENTEL CHEMJOR PLAINTIFF

AND

JOSEPH CHEPKWONY DEFENDANT

JUDGMENT

1. By a plaint dated March 14, 2016 and filed on September 2, 2016 the plaintiff herein instituted this suit seeking an order of eviction against the defendants from the parcel of land known as Baringo/ Kapkiamoi/3041, (hereinafter referred to as the suit property). The plaintiff also sought an order of permanent injunction to restrain the defendants by themselves and/or agents from interfering with his peaceful enjoyment of the suit property. It is noteworthy that at the inception of the suit there were 10 defendants. The case against nine of the defendants was later withdrawn leaving Erick Aengwo, the 6th defendant, as the sole defendant.
2. The plaintiff pleaded that he is the registered owner of the suit property; that the defendants had without his consent/ permission encroached on the suit property and put up structures thereon and that his efforts to get the defendants wilfully vacate the suit property were fruitless.
3. The defendants filed a statement of defence denying the allegations levelled against them and contending that they were in use and occupation of their own parcels of land namely Baringo/ Kapkiamo/3038, 3039, 3042, 2507, 2524, 2508 and 1319.
4. The 6th defendant, Erick Aengwo, claimed that he had purchaser's interest in the suit property and accused the plaintiff of having wrongfully transferred the suit property to himself in disregard of his purchaser's interest therein.
5. The 6th defendant pleaded that he bought the suit property from the plaintiff's father, Chemjor Chebon, in 1997; that the plaintiff's father had excised the suit property and given him actual



possession thereof and that he had been in occupation of the suit property since 1997. The 6th defendant further pleaded that the plaintiff's father died before transferring the suit property to him; that the plaintiff's suit is time barred and that he had become entitled to the suit property by adverse possession.

Evidence

The Plaintiff's case

6. When the case came up for hearing the plaintiff who testified as PW 1, relied on his statement recorded and signed on March 14, 2016 after it was adopted as his evidence in chief. He produced the title deed for the suit property (Pexbt 1); demand notice dated August 19, 2015 (Pexbt 2); certificate of search dated November 4, 2015 (Pexbt 3) and the report of the County Surveyor dated April 14, 2021 (Pexbt 4).
7. The plaintiff informed the court that the 6th defendant entered the suit property in 2010 and planted grass therein. He asked the 6th defendant to vacate the suit property but he refused. He issued him with a demand notice (Pexbt 2). Pursuant to a court order issued by the court directing the County Land Registrar to visit suit property and file a report concerning the suit property, the County Surveyor and the County Land Registrar visited the locus and filed a report (Pexbt 4). He stated that according to the report of the Land Registrar, the owner of Baringo/Kapkiamo/2524 and another person had encroached on the suit property. (The owner of 2524 is the 6th defendant).
8. Terming the 6th defendant's defence and counterclaim untrue, the plaintiff stated that he obtained title deed to the suit property in 2012 long before his father died (his father died on October 26, 2013).
9. Concerning the sale agreement relied on by the 6th defendant in support of his claim to the suit property, the plaintiff acknowledged that it states that his father sold land parcel number 272 from which the suit property was derived upon subdivision but contended that his father had not at anytime informed him about the said sale.
10. In cross examination, the plaintiff acknowledged that his brother's signature appears in the sale agreement; that the plot being sold was plot number 272 which belonged to his father and from which the suit property is derived but denied the 6th defendant's contention that subdivision of plot number 272 into two parcels in 2002 was meant to transfer plot number 3041 (the suit property to the 6th defendant). He maintained that he did not know that the suit property had been sold to the 6th defendant when he transferred it to himself. He acknowledged that he has not filed an application for land control board's consent or even a transfer form but maintained that the 6th defendant entered the suit property in 2010 and has planted napier grass therein.
11. The plaintiff further stated that he was given the suit property by his father on February 6, 2012 and that he does not recognize the agreement between his father and the defendants, including the defendants he had withdrawn the case he had preferred against.
12. In re-examination, the plaintiff stated that he was not aware that his father had entered into any agreement with the 6th defendant; that parcel number 3042 which a subdivision of 172 was sold to Kibiet Chesire by his father and that parcel number 3041 remained in his father's name until he gave it to him in 2012; that he had not heard the 6th defendant asking for title deed from his father; that there is no fence on the portion of the suit property occupied by the 6th defendant.
13. The plaintiff further stated that the 6th defendant's claim for adverse possession is not maintainable because he was in occupation of the suit property for about 6 years when the instant suit was filed.



The Defendants case

14. Joseph Chepkwong, who testified as DW 1, relied on his statement recorded and signed on June 24, 2022, after it was adopted as his evidence in chief. He was substituted in place of his father, Erick Aengwo, who passed on during the pendency of this suit. He stated that his father purchased the suit property from the plaintiff's father. He produced the agreement entered into between his father and the plaintiff's father, dated May 24, 1997, as Dexbt 1. He stated that the agreement was witnessed by the plaintiff's brother Zakayo Chemjor; that his further bought the suit property at Kshs 90,000/- which he paid in instalments. His father finished paying for the suit property on September 3, 1999.
15. He stated that his father took possession of the suit property immediately after he purchased it and began planting maize.
16. They had been planting maize in the suit property from the time his father bought the suit property to the year preceding his testimony when they began planting napier grass. From 1997 when they took possession of the suit property they have never been removed/displaced from the suit property.
17. Explaining that they were never asked to move out of the suit property, DW 1 informed the court that problems began after the plaintiff filed the instant suit.
18. In cross examination, DW 1 stated that his father died in 2021 and that he joined the suit as representative of his father's estate.
19. Concerning their statement of defence and counterclaim, he acknowledged that the counterclaim is not accompanied by a verifying affidavit. He also acknowledged that when his father filed his list of documents in 2018, he did not file the sale agreement he produced in evidence (Dexbt 1). He could not tell why the sale agreement was not filed when his father filed his defence and counterclaim. He further acknowledged that the sale agreement refers to plot number 272 and that the plot number is cancelled without countersigning.
20. He acknowledged that the agreement does not show the size of land bought. He could also not tell the size of the portion of the suit property they occupy. He disagreed with the report of the surveyor (Pexbt 4), which shows that they occupy a small portion of the suit property.
21. In re-examination, he stated that he does not believe that they have encroached into the suit property. He maintained that they are in occupation of the suit property and explained that their occupation is the basis of their plea to be declared owners of the suit property on account of having been in adverse possession thereof.
22. Regarding the contention that they have encroached a small parcel of the suit property, he stated that the report of the surveyor does not show the extent of encroachment.
23. At close of hearing parties filed submission which I have read and considered.

Analysis and Determination

24. From the pleadings, the evidence adduced in respect thereof and the submissions, I find the issues for the court's determination to be:-
 - i. Whether the plaintiff acquired title to the suit property unlawfully/fraudulently;
 - ii. Whether the plaintiff's suit is time barred?



- iii. Whether the 6th defendant's counterclaim is maintainable the same having not been accompanied by a verifying affidavit as by law required?
 - iv. Whether either of the parties has made up a case for being granted the orders sought?
 - v. What order(s) should the court make?
25. On whether the plaintiff acquired the suit property unlawfully/fraudulently, the 6th defendant in his statement of defence, paragraph 5 and 8 thereof, contends that the plaintiff wrongfully transferred the suit property to himself while aware of his purchaser's interest therein. Terming the transfer fraudulent and claiming that it was done secretly, the defendant contends that the plaintiff's title to the suit property had been extinguished by his possession of the suit property which he contends was adverse to the plaintiff's interest in the suit property.
26. It is noteworthy that whilst the defendant has attributed fraud and/or wrongfulness in the transfer of the suit property by the plaintiff to himself, he has not provided any particulars of fraud or wrongfulness in the transfer. That being the case, his pleadings of the alleged fraud, wrongfulness in the transfer of the suit property fell short of the threshold of pleading fraud/wrongfulness set down in Order 2 Rule 4 of the Civil Procedure Rules which provides as follows:-
- ' A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality-
- a. Which he alleges makes any claim or defence of the opposite party not maintainable;
 - b. Which, if not specifically pleaded, might take the opposite party by surprise; or
 - c. Which raises issues of fact not arising out of the preceding pleading.
2. Without prejudice to subrule(1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be enough.'
27. In this case, the defendant merely pleaded wrongfulness and/or fraud in the transfer of the suit property by the plaintiff to himself but failed to provide any particulars of the alleged wrongfulness or fraud. Being the one who desired judgment on the basis of the alleged wrongfulness and/or fraud, it behooved the defendant not only to specifically plead the alleged wrongfulness/fraud with particulars thereof provided but also prove the alleged wrongfulness on a standard slightly higher than on a balance of probabilities but less than beyond reasonable doubt. In that regard see the case of [Kuria Kiarie & 2 Others -vs- Sammy Magera \[2018\] eKLR](#) where the Court of Appeal held:-
- ' The law is clear and we take it from the case of Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:
- 'It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.'
- As regards the standard of proof, in the case of [Kinyanjui Kamau -vs George Kamau \[2015\] eKLR](#) it was stated:-



'It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo – vs- Ndolo [2008]1 KLR (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 that 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.'

28. In the instant case, no evidence was adduced capable of proving the alleged wrongfulness/fraud in the transfer of the suit property by the plaintiff to himself.
29. The plaintiff gave evidence to the effect that he was given the suit property by his father. That evidence was not in any way controverted by the defendant and cannot be said to have been controverted by the defendant's claim that the suit property had been sold to him by the plaintiff's father. No evidence was led capable of showing that the suit property was at any time registered in the name of the defendant or that the plaintiff's father intended to transfer the suit property to the defendant. Whilst the original parcel of land from which the suit property was derived was subdivided sometime in 2002 to create the suit property, 3041, and another parcel, 3042, no evidence was adduced capable of showing that the subdivision was done in order to transfer one of the subdivisions therefrom to the defendant. The sale agreement on which the defendant has based his claim does not help things as it does not describe the size of the land bought or identify the defendant's entitlement from plot number 272 which bore the suit property, plot number 3041 and another, 3042. A review of the original agreement shows that the parcel of land being bought or sold was added with a different pen bringing doubt concerning the authenticity of the document. It is also noted that the document was introduced into the suit way after the suit was filed. Why was it not filed when the suit was filed, if the defendant had it then? I think I have said enough to demonstrate that the defendant has not proved that the plaintiff acquired the suit property wrongfully and/or fraudulently.
30. On whether the plaintiff's suit is time barred, whereas the defendant has hinged his plea on the time he allegedly took possession of the suit property, the plaintiff's title having been obtained in 2012, I am of the considered view that time for purposes of the alleged time bar against the title held by the plaintiff could only start to run in favour of the defendant in 2012 when the plaintiff obtained title thereto. From 2012 to 2016 when the instant suit was filed, the plaintiff had held title to the suit property for only 4 years. The threshold of 12 years provided for under Section 12 of the Limitation of Actions of Act has not been met. For that reason, I return a negative verdict to that issue.
31. Tied to the issue of time bar is the claim by the defendant that he has acquired rights to the suit property by having been in adverse possession of the suit property. The claim for adverse possession is pleaded in the defendant's counterclaim introduced through the defendant's amended defence and counterclaim filed on December 21, 2010.
32. During hearing, it emerged that the counterclaim was not accompanied by a verifying affidavit as required under Order 7 Rule 5 of the [Civil Procedure Rules](#). The rule provide as follows:-

' The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-

- a. An affidavit under order 4 rule 2 where there is a counterclaim.'



Order 4 Rule 2 provides as follows:-

' The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in rule 1 and (f) above.'

33. A plaint/counterclaim not accompanied by a verifying affidavit is defective. In that regard see the case of [Salim verjee v AG and 3 others 2021 eKLR](#) where it was held:-

' The filing of the counterclaim without a verifying affidavit renders the counterclaim as being defective.'

34. The requirement for filing of a verifying affidavit is critical to plaints. A plaint or counterclaim not accompanied by a verifying affidavit is untenable. See the case of [Miriam Wanja Muchiri vs Emmah Wangechi Macharia & another 2016 eKLR](#) where it was stated:-

' I agree with the trial magistrate that the appellant did not have a valid suit before the court as the plaint was not supported by any valid verifying affidavit. That being the case the appeal, as well as the primary suit are candidates for striking out having been incompetent.'

35. Although failure to file a verifying affidavit alongside a plaint or a counterclaim has in many cases being held to be a curable defect if raised before the hearing and determination of the suit, in the circumstances of this suit, where the defendant did not move the court for leave to remedy the defect in his counterclaim, I do find the counterclaim to be bad in law and strike it out of the court's record.

36. As to whether either of the parties has made up a case for being granted the orders sought, the evidence adduced in this case shows that the plaintiff is the registered proprietor of the suit property and that the defendant has encroached on a portion thereon.

37. As the registered proprietor of the suit property, and the defendant having failed to demonstrate that the plaintiff acquired the suit property wrongfully and/or fraudulently, the plaintiff is entitled to the rights and privileges of a registered proprietor of land envisaged under Article 40 of the [Constitution](#) of Kenya and Section 25 of the [Land Registration Act](#), 2012.

38. Those rights and privileges cannot be defeated by a trespasser like the defendant. The defendant having failed to prove sufficient interest or claim to the suit property, should be evicted therefrom and permanently restrained from interfering with the plaintiff's proprietary interest in the suit property.

39. The upshot of the foregoing is that the plaintiff has made up a case for being granted the orders sought in his plaint dated March 14, 2016 and filed on September 2, 2016 which I hereby grant him as sought.

40. Orders accordingly.

Judgment read, delivered, dated and signed at Iten this 19th day of April, 2023.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Esikiru for the Plaintiff

Ms. Salim for the Defendant

Court Asst.: Thomas



