



**Muturi v Mwangi & 2 others (Environment & Land Case
E002 of 2021) [2023] KEELC 17558 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E002 OF 2021**

LN GACHERU, J

MAY 25, 2023

BETWEEN

JOHN NJARAMBA MUTURI PLAINTIFF

AND

SAMUEL NDUNG’U MWANGI ALIAS JOHN NJARAMBA 1ST DEFENDANT

STEPHEN IRUNGU NGUGI 2ND DEFENDANT

CATHELINE WANJIKU NDUNG’U 3RD DEFENDANT

JUDGMENT

- 1 The Plaintiff herein, John Njaramba Muturi, vide a Plaint dated December 20, 2020, had sought for Judgment against the Defendants herein jointly and severally for Orders that: -
1. That the registration of the Plot No Makuyu/Kimorori/Block 1/1626 to the 1st Defendant and the subsequent transfer and subdivision to plot No 4273 and 4274 by the 2nd and 3rd Defendants and titles issued herein be cancelled, annulled, and revoked and the same revert to the Plaintiff (spent);
 2. That a permanent injunction do issue restraining the Defendants, their agents, employees, and/or servants from offering, re-registering, transferring, trespassing, entering, and remaining, alienating, damaging the plot and/or otherwise interfering with the said plot and they be evicted therefrom;
 3. General damages for trespass;
 4. Costs and interest;
 5. Any other relief this Court may deem fit and just to grant.



- 2 It is the Plaintiff's contention that he is the registered owner of land parcel No Makuyu/Kimorori/BLK 1/1626 (the suit property) having purchased it in 2007 from Ngimu Farm Ltd. The Plaintiff further contended that on November 21, 2019, he was informed that the 1st Defendant had illegally sold the suit property to the 2nd and 3rd Defendants and that the suit property was subdivided into two Plot number 4273 and 4274.
- 3 The Plaintiff averred that he recorded a statement with the police and that the 1st Defendant was arrested and charged. The Plaintiff further averred that the transfer and sub-division of the suit property was illegal, involved the use of forged, fake, and counterfeit documents, and lacked his authority as the registered owner. He prayed for judgement jointly and severally against the Defendants for damages for trespass and the illegal transfer of the suit property.
- 4 In response to the claim, the 2nd and 3rd Defendant filed a Notice of Admission on May 19, 2022, and a Counterclaim against the 1st Defendant. The 2nd and 3rd Defendants admit that the 1st Defendant misrepresented himself as the owner of the suit property and thereafter they entered into a sale agreement with the 1st Defendant as the vendor and the 2nd and 3rd Defendants as joint purchasers.
- 5 The 2nd and 3rd Defendants averred that they were not aware of, or party to the alleged fraud by the 1st Defendant and stated that they paid Kshs 600,000/= to the 1st Defendant only to discover that the transaction was fraudulent. They further claimed to be bona fide purchasers for valuable consideration and victims themselves of the alleged fraud perpetrated by the 1st Defendant.
- 6 The 2nd and 3rd Defendants wholly admitted the Plaintiff's claim and prayed that the suit property revert to its original form and to the true legal owner, subject to the Counterclaim against the 1st Defendant for the refund of the purchase price to the illegal transfer. On May 19, 2022, the 2nd and 3rd Defendants filed a Notice for Indemnity against the 1st Defendant for the refund of Kshs 600,000/= being the purchase price of the suit property.
- 7 The 1st Defendant entered appearance on July 14, 2022 through the Law Firm of Chris Maina & Co Advocates although the matter remained undefended by the 1st Defendant.
- 8 Following the 2nd and 3rd Defendants' admissions, a consent was recorded and adopted as an Order of the Court on March 14, 2023. It was consented and ordered that title No Makuyu/Kimorori/Block 1/4273, in the name of Catherine Wanjiku, and title No Makuyu/Kimorori/Block 1/4274 in the name of Stephen Irungu Ngugi, be and was thereby cancelled and that the land was to revert to the original title No Makuyu/Kimorori/BLK 1/1626, in the name of the Plaintiff. It was further consented and later ordered that the entries in the respective Green Cards to the suit property be deleted from the land records. Lastly, the 1st Defendant whose Interlocutory Judgement was entered on March 24, 2021, was ordered to pay the 2nd and 3rd Defendants' costs.
- 9 The 2nd and 3rd Defendant's Counterclaim was allowed to proceed for hearing and determination.
- 10 The Counterclaim was uncontested by the 1st Defendant as he failed to file a Defense within the requisite time even after Service of Summons.
- 11 On March 14, 2023, the Counterclaim came for formal proof hearing and proceeded by way of *viva voce* evidence wherein the Defence called one witness and called no other witness.

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- 12 DW1, Stephen Irungu Ngugi adopted his witness statement and bundle of documents as part of his evidence in chief. He testified that he knew the 3rd Defendant Catherine Wanjiku Ndungu who was



his cousin. He produced a list of documents dated January 24, 2022, as his Exhibit in Court. Since the claim was not against the Plaintiff, there was no cross-examination by the Plaintiff.

- 13 The 2nd and 3rd Defendants through the Law Firm of Kirubi, Mwangi Ben & Co Advocates, filed written submissions in support of the Counterclaim on March 21, 2023. They submitted that the Plaintiff is the legal owner of the suit property as admitted in the recorded consent between the Plaintiff and the 2nd and 3rd Defendants. They further submitted that the 1st Defendant fraudulently misrepresented himself as the registered owner of suit property. That the 2nd and 3rd Defendants thereafter purchased the suit property and sub-divided it after the 1st Defendant procured the consent from the Land Control Board. That following the discovery of the fraud, the 1st Defendant was arrested and charged.
- 14 The 2nd and 3rd Defendants submitted that they were innocent and bona fide purchasers who trusted the 1st Defendant who illegally and falsely misrepresented himself as the owner of the suit property. Lastly, the 2nd and 3rd Defendants submitted that they seek a refund of the consideration of Kshs 600,000/= paid for the illegal sale of the suit property by the 1st Defendant which is the basis of their Counterclaim and damages of Kshs 300,000/= to cater for expenses and punitive measures.
- 15 The above being the available evidence since the Counterclaim remained uncontested, the Court makes the following rendition: -
- 16 This Court has considered the pleadings, the evidence adduced in court, the submissions and the relevant provisions of law and finds that the issue for consideration is: -

Whether the orders sought are merited?

- 17 The Plaintiff herein sought the cancellation of title No Makuyu/Kimorori/Block 1/4273 in the name of the 2nd Defendant and title No Makuyu/Kimorori/Block 1/4274, in the name of the 3rd Defendant, and that the suit property reverts back to the original title No Makuyu/Kimorori/Block 1/626, in his name following a fraudulent transfer of land and subsequent sub-division.
- 18 The 2nd and 3rd Defendants in their response admitted that the transfer and sub-division of the suit property was irregular and that the 1st Defendant was not the rightful owner of the suit property. Consequently, a consent was arrived upon between the Plaintiff and the 2nd and 3rd Defendants dated March 14, 2023, which was adopted as an Order of the Court. The said consent settled, the Plaintiff's claim and the Court thereby ordered the cancellation of the two titles and reverted the suit property back to the Plaintiff.
- 19 Following the adoption of the consent as requisite orders of the Court ordering cancellation and reversion of title, the remaining matter for determination relates to the Counterclaim against the 1st Defendant for the refund of Kshs 600,000/= being the purchase price paid to the 1st Defendant by 2nd and 3rd Defendants and who fraudulently misrepresented himself as the owner of the suit property.
- 20 The 1st Defendant did not contest the Counterclaim for the liquidated sum and neither did he participate in the proceedings save for his counsel entering appearance.
- 21 Despite the Counterclaim being uncontested, this Court is still required to look at the weight of the evidence adduced by the 2nd and 3rd Defendants even where the same is uncontroverted. This was held in case of *Gichinga Kibutha VS Caroline Nduku [2018] eKLR*, where the Court held as follows;

The hearing referred to above is the one commonly known as 'Formal proof'. The Civil Procedure Rules do not define 'Formal Proof'. Black's Law Dictionary defines 'Formal' as



including 'rules established by an institution according to certain processes'. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.'

22 The burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof is undoubtedly higher, owing to the nature and extent of the orders sought, namely for cancellation of registration of title and the refund of the purchase price.

23 The 2nd and 3rd Defendants must prove the allegations as set out under Sections 107 and 108 of the [Evidence Act](#) which provides as follows;

107

(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.

108. 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'

24 The 1st Defendant is accused of fraudulently misrepresenting that he was the registered owner of the suit property in order to sell the suit property to the 2nd and 3rd Defendants. This Court appreciates that allegations of fraud are grave and it is only fair that evidence be tendered. The Court had the privilege of analysing the evidence presented to it and determine that there was indeed fraud. The Court of Appeal in Mombasa [Civil Appeal No 312 of 2012: - Emfil Limited VS Registrar of Titles Mombasa & 2 others \[2014\] eKLR](#) stated;

Allegations of fraud are allegations of a serious in nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities'.

25 Based on the evidence produced and the consent adopted by this Court, it was held that the Plaintiff had proven his case against the 1st Defendant for the fraudulent transfer of the suit property to the 2nd and 3rd Defendants. It is trite law that he who alleges must prove, and the Plaintiff has indeed discharged this duty. Therefore, this Court reaffirms the orders issued for the cancellation of title issued to the 2nd and 3rd Defendants and that the title revert back to the Plaintiff.

26 With the transfer and title to the suit property having been cancelled, this Court will now address the 2nd and 3rd Defendants' counterclaim against the 1st Defendant for the reimbursement of Kshs 600,000/- being the purchase price of the suit property.

27 The 2nd and 3rd Defendants alleged that the 1st Defendant misrepresented himself as the owner of the suit property. This claim was corroborated through the presentation of the sale agreement dated October 10, 2015, the mutation forms, consents, and the land search records which prove that the Plaintiff was the registered owner of the suit property. It was also established that the 1st Defendant had obtained title fraudulently before transferring the suit property to the 2nd and 3rd Defendants.



The Plaintiff's claims were similarly admitted by the 2nd and 3rd Defendants leading to a consent being recorded.

28 This Court having found that the 1st Defendant was not the registered owner of the suit property and ordered for the cancellation of title, it follows that there was a breach of contract by the 1st Defendant, as he sold land to 2nd and 3rd Defendants which did not belong to him. He sold what he did not own.

29 It has been settled that a party cannot give that which he does not have; therefore, the 1st Defendant could not have given title to land he did have. The same was held in the case of *MWK VS SKK & 5 others [2018] eKLR* - Murang'a ELC No 32 of 2017 where the Court held as follows:

The 2nd Defendant did not possess a valid legal title neither did the 3rd Defendant on account of proven fraud, illegality and procedural improprieties on the part of the 2nd, 3rd, 4th, and 5th Defendants.'

30 In the present case, the 1st Defendant did not have good title to transfer the suit property to the 2nd and 3rd Defendants and thus the agreement between the parties was illegal and void. The remedy available for the 2nd and 3rd Defendants is for compensation for breach of contract and a refund of the purchase price. The contract having become incapable of being enforced thus putting the parties in the position they were before the contract. (See *Joseck Ikai Mukuha VS James Irungu Kanyuga [2021] eKLR*).

31 Having now carefully considered the available evidence, the Court finds that the 2nd and 3rd Defendants have proved their Counterclaim on the required standard of balance of probabilities.

32 For the above reasons, the Court enters Judgment against the 1st Defendant for a refund of Kshs 600,000/= to the 2nd and 3rd defendants as the purchase price or consideration received by the 1st defendant.

33 Further the 2nd and 3rd Defendants are awarded general damages of Kshs 300,000/= for breach of contract.

34 Further, the 2nd and 3rd Defendants are entitled to costs of the Counterclaim and Interest thereon.

35 It is so ordered.

DATED, SIGNED AND DELIVERED IN MURANG'A THIS 25TH DAY OF MAY 2023.

L. GACHERU

JUDGE

25/5/2023

Delivered online in the presence of:

Absent Plaintiff

Absent 1st Defendant

Mr Mwaniki H/B Mwangi Ben 2nd Defendant

3rd Defendant

Joel Njonjo - Court Assistant

