



**Theuri (Suing as legal representative of the Late John Theuri Mathenge) v Mutiga & 2 others  
(Environment & Land Case 343 of 2017) [2023] KEELC 17549 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17549 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 343 OF 2017**

**YM ANGIMA, J**

**MAY 18, 2023**

**BETWEEN**

**ANN WANJIRU THEURI (SUING AS LEGAL REPRESENTATIVE OF THE  
LATE JOHN THEURI MATHENGE) ..... PLAINTIFF**

**AND**

**JANES NJURE MUTIGA ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN MAINA MUKUNYA ..... 2<sup>ND</sup> DEFENDANT**

**MICHAEL MWANGI THUITA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. The Plaintiff's Case**

1. By a plaint dated 31.03.2017 the Plaintiff sought the following reliefs against the Defendants:
  - a. A declaration that the transfer of LR No. Nyandarua/Silibwet/3230, 3231, 3920 (New Numbers 4662 and 4663) from John Theuri Mathenge (deceased) to the Defendants was fraudulent and illegal.
  - b. An order for cancellation of title numbers Nyandarua/Silibwet/3230, 3231, 3920, 4662 and 4663 and for the same to be registered to John Theuri Mathenge (deceased).
  - c. Eviction of the Defendants from the suit properties.
  - d. Costs of the suit plus interest.
  - e. Any other or further reliefs that this honourable court may deem fit and just to grant.
2. The Plaintiff who filed suit as the legal representative of the estate of her deceased father John Theuri Mathenge (the deceased) pleaded that the deceased was at all material times the owner of Title No.



Nyandarua/Silibwet/285. It was pleaded that in or about 2003 the deceased caused parcel 285 to be sub-divided into parcels Nos: 3229, 3230, 3231, 3232 and 3233.

3. The Plaintiff further stated that during his lifetime the deceased transferred Parcel No. 3233 to his second wife and Parcel 3232 to his daughters whereas he subdivided Parcel 3229 into three Parcels namely, 3920, 3921 and 3922. It was pleaded that whereas Parcel Nos. 3921 and 3922 were sold the deceased did not sell Parcel 3920. The Plaintiff pleaded that the 1<sup>st</sup> Defendant had illegally and fraudulently caused parcel 3230 and 3920 to be transferred to himself whereas the 2<sup>nd</sup> Defendant had fraudulently acquired Parcel 3231. It was the Plaintiff's further case that the 1<sup>st</sup> Defendant had subdivided Parcel 3920 into Parcels Nos. 4662 and 4663 which he fraudulently transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. The Plaintiff enumerated various particulars of fraud, illegality and forgery against the Defendants.
4. The Plaintiff pleaded that as a result of the Defendants' fraudulent acquisition of the said parcels of land which rightfully belonged to the deceased they had wrongfully evicted the deceased's 1<sup>st</sup> wife and her children therefrom through dubious means. It was contended that despite demand and notice of intention to sue given the Defendants had failed to make good the Plaintiff's claim hence the suit.

### **B. The Defendants' Response**

5. The Defendants filed a joint statement of defence dated 15.05.2017 denying liability for the Plaintiff's claim. Although they admitted knowledge of sub-division of Parcel 285 by the deceased, they denied having acquired the suit properties through fraudulent or illegal means. They consequently denied all the particulars of alleged fraud, illegality and forgery pleaded in the plaint and put the Plaintiff to strict proof thereof.
6. The 1<sup>st</sup> Defendant stated that he lawfully acquired Parcel 3231 from the deceased for valuable consideration whereas the 2<sup>nd</sup> Defendant stated that he similarly acquired Parcel 3230 from the deceased during his lifetime. The 1<sup>st</sup> Defendant further pleaded that on a later date he also legally and procedurally acquired Parcel 3920 from the deceased for valuable consideration which parcel he later sub-divided into two portions which he sold and transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Defendants therefore prayed for dismissal of the Plaintiff's suit with costs.

### **C. The Plaintiff's Reply**

7. There is no indication on record of the Plaintiff having filed any reply to defence. In the absence of a reply there is a joinder of issue upon the defence by operation of law under Order 2 rule 12 of the [Civil Procedure Rules, 2010](#).

### **D. Summary of Evidence at the Trial**

#### **(a) The Plaintiff's Evidence**

8. At the trial hereof, the Plaintiff testified as PW1 and adopted her witness statement as her evidence in-chief. She also produced the documents in her list of documents dated 31.03.2017 as exhibits in support of her claim. The gist of her evidence was that the deceased had never sold or transferred Parcel Nos. 3230, 3231 and 3920 to any of the Defendants and that the Defendants had fraudulently and illegally undertaken the transfers through forgery of documents and signatures.
9. The Plaintiff also called an Assistant County Commissioner from OlJoro Orok Division who testified as PW2. He produced copies of minutes of the Land Control Board (LCB) held on 23.02.2010 which did not show that any consents were granted for transactions with respect to the parcels in dispute. He



further stated that he could not trace the original minute book bearing handwritten minutes despite a diligent search.

**(b) The Defendant's Evidence**

10. The 1<sup>st</sup> Defendant who testified as DW1 testified on behalf of all the Defendants. He similarly adopted the contents of his witness statement dated 02.06.2017 as his evidence in-chief. He also produced the documents in his list of documents dated 02.06.2017 as exhibits. Among the documents he produced were copies of sale agreements with the deceased for the sale of the parcels in dispute and applications for LCB consent and consents for the transactions.
11. The gist of the 1<sup>st</sup> Defendant's evidence was that he lawfully acquired the suit properties for valuable consideration from the deceased during his lifetime and that due process was followed in their transfer including procurement of the consent of the LCB. The Defendants called the Deputy County Commissioner – Nyandarua West who testified as DW2. He produced minutes of the LCB meeting held on 23.02.2010 in which consents for parcels Nos. 3230, 3231 and 3920 were approved among other documents.

**E. Directions on Submissions**

12. When the trial was concluded, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on 10.05.2023 whereas the Defendant's submissions were filed on 13.03.2023. The Plaintiff also filed further submissions on 10.05.2023.

**F. Issues for Determination**

13. It is evident from the material on record that the parties did not file an agreed statement of issues for determination in the suit. In the premises, the court shall frame the issues for determination in accordance with the provisions of Order 15 rule 2 of the *Civil Procedure Rules*, 2010.
14. Under the said rule a court may frame issues from any of the following:
  - a. The allegations contained in the pleadings.
  - b. The allegations made on oath by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
15. The court has perused the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination:
  - a. Whether the Defendants illegally and fraudulently acquired Parcel Nos. 3230, 3231 and 3920 from the deceased.
  - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
  - c. Who shall bear costs of the suit.



## G. Analysis and Determination

### (a) Whether the Defendants illegally and fraudulently acquired Parcel Nos. 3230, 3231 and 3920 from the deceased

16. Whereas the Plaintiff submitted that she had proved that the Defendants had illegally and fraudulently acquired the said parcels from the deceased through fraud and forgery the Defendants contended otherwise. The Plaintiff submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had failed to call any of the witnesses to the sale agreements dated 04.12.2009 to demonstrate that indeed they were purchasers for value. It was also submitted that they had failed to demonstrate payment or full payment of the purchase price as well as the mode of payment. The Plaintiff further submitted that there were various discrepancies in the Defendants' documents which made their defence improbable.
17. The manner of pleading and proving allegations of fraud were considered by the Court of Appeal in the case of *Vijay Morjaria v Nansingh M. Darbar and Another* [2000] eKLR as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of fraud 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 those 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.”
18. As to the standard of proof required in such matters the same was considered in the case of *Koinange and 13 Others v Koinange* [1986] KLR 23 and the case of *Evans Otieno Nyakwara v Cleophas Bwana Ongaro* [2015] eKLR. In the latter case, Majanja J held, inter alia, that:
- “In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote *Central Bank of Kenya Limited v Trust Bank Limited and 4 Others* Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;
- “The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.”
19. In paragraph 7 of the plaint, the Plaintiff enumerated the following particulars of fraud, illegality and forgery against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants:
- a. Forging the deceased's signature in the sale agreements and transfer documents.
  - b. Forging letters of consent before the Land Registrar.
  - c. Presenting forged documents before the Land Registrar in order to acquire title deeds.
  - d. Obtaining registration of titles through false pretences.
20. The court is unable to find any credible and cogent evidence on record to demonstrate that the signature of the deceased on the sale agreements dated 04.12.2009 were forgeries. There was evidence



or written report by a handwriting expert or document examiner which was tendered before court to demonstrate the alleged forgery. Similarly, the impugned transfer forms were not produced at the trial and there was no evidence that whatever signatures were appended thereon were forgeries.

21. The court has noted that the Plaintiff and the Defendants tendered conflicting evidence on the issue of the consent of the LCB. Whereas both sides called witnesses from the office of the Deputy County Commissioner – Laikipia West Sub-County, those witnesses produced two different sets of minutes of the same LCB meeting purportedly held on 23.02.2010. Whereas the minutes produced by PW2 did not include any dealings with Parcel Nos. 3230, 3231 and 3920, the minutes produced by DW2 indicated that applications for consent in respect thereof were approved by the LCB. Neither PW2 nor DW2 could produce the original handwritten minute book of the LCB meetings hence it was virtually impossible to tell with certainty which of the 2 sets of minutes was authentic.
22. The court is of the opinion that the Plaintiff has not sufficiently discharged her burden of proof to demonstrate that the minutes produced by DW2 were forgeries and that the ones produced by PW2 were the genuine ones in the absence of the original minute book. The court is thus not satisfied that the consents which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants utilized in their acquisition of the 3 parcels were actually forged.
23. The 3<sup>rd</sup> and 4<sup>th</sup> particulars of alleged fraud were obviously dependent upon the Plaintiff proving the 1<sup>st</sup> and 2<sup>nd</sup> particulars to the required standard. The Defendants cannot be properly accused of presenting forged documents to a land registrar unless those documents are shown to be forgeries in the first place. Similarly, they cannot be properly accused of obtaining registration through false pretences unless it is first demonstrated that the sale agreements, transfer forms and LCB consents used in the acquisition of the suit properties were forged.
24. The court does not agree with the Plaintiff's submission that the Defendants were obligated to prove that they paid the full purchase price for the 3 parcels because it was not her case that the Defendants had failed to pay the agreed consideration stated in the 3 sale agreements. The Plaintiff's case was there was no sale by the deceased whatsoever and that the said sale agreements were mere forgeries. In those circumstances, it was not necessary for the Defendants to specifically prove payment or full payment of the purchase price for the 3 parcels.
25. The mere fact that there were some discrepancies in the Defendant's documentation could not, without more, constitute evidence of fraud, forgery and illegality. There is some evidence on record to demonstrate that the deceased was aware of the Defendants' registration as proprietors of the suit parcels during his lifetime. However, there was no evidence to demonstrate that he had protested the Defendants' registration or even sought to recover those parcels from them. There is no evidence that he ever reported the alleged forgery of his signature to the Directorate of Criminal Investigations or government administrators for necessary action. There is no evidence that he ever issued a demand letter or sued the Defendants for allegedly grabbing his land.
26. The court has noted from the copy of the supporting sworn on 12.10.2010 by the 1<sup>st</sup> wife of the deceased, Virginia Muthoni Theuri, in Nakuru HCCC No. 261 of 2010 (OS) – *Virginia Muthoni Theuri v John Theuri Mathenge* that she had sought some interim orders to restrain the deceased from continuing to sell, charge, transfer or adversely deal with parcel 285. It was claimed in the said affidavit that the deceased had sub-divided parcel 285 and sold some of the sub-divisions whilst he had transferred some portions to his children and the second wife known as Mary Wairimu Theuri. It is evident from the contents of the said affidavit that as far back as 2010 the family members of the deceased were aware that he was selling and transferring portions of Parcel 285 to his family members



and purchasers. The Plaintiff cannot, therefore, assert with certainty that the deceased never sold Parcel Nos. 3230, 3231 and 2920 during his lifetime.

27. The court does not believe the Plaintiff's evidence to the effect that the 1<sup>st</sup> wife of the deceased was residing on the disputed properties at the time they were sold by the deceased. The affidavit of the 1<sup>st</sup> wife sworn on 12.10.2010 stated in paragraphs 8 and 9 as follows:

8. That we lived together with the Defendant until sometime in October, 1996 when we separated with him after he viciously assaulted and threw me out of the matrimonial home.

9. That we have since lived separately.”

It is thus apparent that the Plaintiff was being economical with the truth when she stated on oath that the 1<sup>st</sup> wife of the deceased was residing on the disputed properties when they were sold or transferred to the Defendants. She was also not entirely truthful when she asserted that she (the 1<sup>st</sup> wife) and her children had resided on the properties since 1968 until 2016 when they were allegedly evicted.

28. The Plaintiff has raised an interesting issue in her submissions on the manner in which the Defendants conducted the defence hearing. It was submitted that since the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants neither filed witness statements nor personally testified at the trial then the Plaintiff's case against them should be deemed to have been admitted. It is evident from the record that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were sued jointly in one suit. They elected to engage one firm of advocates to act for them which filed a joint statement of defence on their behalf. The court is of the opinion that the Defendants were entitled to have one or more of them to testify on behalf of all of them. They were not obligated to record and file witness statements individually or to testify personally. They were perfectly entitled to choose how many witnesses to call in their defence and to be in charge of their defence strategy.

#### **(b) Whether the Plaintiff is entitled to the reliefs sought in the suit**

29. The court has already found and held that the Plaintiff has failed to prove the particulars of fraud, illegality and forgery which were pleaded in the plaint. The court has found that the Plaintiff has failed to prove her claim against the Defendant to the required standard. In the premises, it would follow that the Plaintiffs are not entitled to the reliefs sought in the suit, or any one of them.

#### **(c) Who shall bear costs of the suit**

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigants should not be awarded costs of the suit. Accordingly, the Defendants shall be awarded costs of the suit.

#### **H. Conclusion and Disposal Order**

31. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove her claim against the Defendants to the required standard. Consequently, the Plaintiff's suit is hereby dismissed with costs to the Defendants.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 18<sup>TH</sup> OF MAY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**



In the presence of:

Ms. Wanjiru Muriithi for the Plaintiff

Mr. Nderitu Komu Defendants

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

