



**Imboywa v Muhunzu & 2 others (Environment & Land Case  
50 of 2016) [2023] KEELC 17405 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17405 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 50 OF 2016**

**BN OLAO, J**

**MAY 11, 2023**

**BETWEEN**

**GERISHOM ELIJAH IMBOYWA ..... PLAINTIFF**

**AND**

**BENSON IDOYO MUHUNZU ..... 1<sup>ST</sup> DEFENDANT**

**FELISI NEKESA MUHUNZI ..... 2<sup>ND</sup> DEFENDANT**

**SCHOLASTICA AUMA IMBOYWA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. There is a swahili proverb which says “*kikulacho Ki Nguoni Mwako*” which translates to “Whatever Eats You is in Your Clothes” or “That Which Eats at you is Within you”. Simply, it means that some people will pretend to be your friends, eat with you, live with you etc. However, those are the people you need to be wary of. Notwithstanding the fact that Scholastica Auma Imboywa (the 3<sup>rd</sup> Defendant herein) had lived with Gerishom Idoyo Muhunza (the Plaintiff herein) as man and wife for 20 years, it has turned out, as will shortly be clear, that she was among the persons the Plaintiff needed to be very wary of.
2. The Plaintiff has been the registered proprietor of the land parcel No Bukhayo/Kisoko/3271 (the suit land) since April 27, 1995 when he was issued with the title thereto. The 3<sup>rd</sup> Defendant is his second wife but in 2013, he discovered that she had placed a restriction on the suit land which she thereafter fraudulently transferred into her names without his consent. Then on January 21, 2014 again without his consent or any colour of right, she sold the suit land to Benson Idoyo Muhunzu and Felisi Nekesa Muhunzi (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein). All the transactions were executed fraudulently by the Defendants and with collusion with officers at the Busia Lands Registry.



3. The Plaintiff therefore moved to this Court vide his plaint filed on May 26, 2016 in which he pleaded particulars of fraud in paragraph 9 thereof and sought judgment against the Defendants jointly and severally in the following terms:
  1. An order for the cancellation of the title to land parcel No Bukhayo/Kisoko/3271 in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  2. Costs of the suit.
  3. Any other relief.
4. The Plaintiff also filed his statement dated May 25, 2016 in which he said he is a small scale businessman in Kisumu and that the 3<sup>rd</sup> Defendant has been his second wife for the last 20 years although they were not blessed with any children. That on February 17, 2014 while at work in Kisumu, he received a call from his friend that the suit land had been sold. He therefore travelled to the Busia Lands Registry and confirmed that indeed the suit land had been transferred into the 1<sup>st</sup> and 2<sup>nd</sup> Defendants names. He reported the matter to the Lands Registrar Mr Chepkwesi who wrote to the Defendants to appear before him but only the 1<sup>st</sup> Defendant did. The matter was also reported to the Police. It is his case that the 3<sup>rd</sup> Defendant forged his signature to effect the transfer of the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
5. The Plaintiff filed the following documents in support of his case:
  1. Copy of certificate of official search for the land parcel No Bukhayo/Kisoko/3271.
  2. Chief's letter dated April 17, 2014.
  3. Letter by Tom M. Chepkwesi District Land Registrar Busia dated April 8, 2013.
  4. Letter by Tom M. Chepkwesi District Land Registrar Busia dated March 5, 2014.
  5. Receipt for transfer of land parcel No Bukhayo/Kisoko/3271 issued to the 3<sup>rd</sup> Defendant.
  6. Receipt from the National Bank for kshs 2,000 being stamp duty.
  7. Stamp duty declaration and payment slip issued by Kenya Revenue Authority for kshs 2,000.
  8. Copy of transfer of the land parcel No Bukhayo/kisoko/3271 from the Plaintiff to the Defendant dated October 22, 2013.
  9. Copy of the title deed for the land parcel No Bukhayo/Kisoko/3271 issued to the Plaintiff on April 27, 1995.
  10. Copy of Green Card for the land parcel No Bukhayo/Kisoko/3271.
  11. Demand letter dated May 18, 2015 addressed to the Defendants.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed a joint statement of defence on July 11, 2016 in which they denied all the allegations of fraud levelled against them adding that they are the lawful registered proprietor of the suit land which they obtained through a lawful process. They therefore pleaded that the prayers sought by the Plaintiff are not sustainable and sought the dismissal of the Plaintiff's suit with costs.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants counter-claimed for the following reliefs against the Plaintiff:
  1. An order of injunction restraining the Plaintiff from interfering with the land parcel No Bukhayo/Kisoko/3271.
  2. The removal of all restrictions placed on the land parcel No Bukhayo/Kisoko/3271.



3. Costs.
4. Any other relief.

The basis of their counter-claim is that they are the lawful owners of the suit land which they obtained lawfully by purchase from the 3<sup>rd</sup> Defendant after obtaining the relevant consent from the Land Control Board.
8. They also filed separate un-dated statements.
9. In his statement, the 1<sup>st</sup> Defendant stated that he bought the suit land at a consideration of kshs 287,500 and after obtaining the necessary consent, the title was transferred to him. He denied having obtained the title deed to the suit land fraudulently adding that he followed all the legal procedures.
10. On her part, the 2<sup>nd</sup> Defendant confirmed that the suit land was sold by the 3<sup>rd</sup> Defendant and the title deed was issued to them procedurally.
11. They filed the following documents in support of their case:
  1. Copy of sale agreement dated December 26, 2013 between the 2<sup>nd</sup> Defendant as purchaser and the 3<sup>rd</sup> Defendant as vendor in respect of the land parcel No Bukhayo/Kisoko/3271.
  2. Copy of application for consent.
  3. Copy of consent.
  4. Copy of transfer.
  5. Copy of mutation form.
  6. Copy of Green Card for the land parcel No Bukhayo/Kisoko/3271.
12. The Plaintiff filed a reply to the defence and a defence to the counter-claim. He joined issues with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and reiterated the contents of his plaint adding that the defence was a mere denial, frivolous and vexatious. He sought the dismissal of the counter-claim with costs.
13. The 3<sup>rd</sup> Defendant did not file any defence and there is nothing on the record to show that she was served with the plaint herein. She therefore did not participate in the proceedings.
14. On February 6, 2023, the case against the 2<sup>nd</sup> Defendant was marked as having abated following her demise on September 28, 2021.
15. The hearing commenced before Omollo J on October 22, 2020 when the Plaintiff testified. He adopted as his evidence the contents of his statement filed herein. He also produced as his documentary evidence the documents filed together with his plaint.
16. The trial was then adjourned for various reasons.
17. I then took over the hearing on October 12, 2022 and it was agreed that the case would continue from where Omollo J had reached.
18. On February 6, 2023, the Plaintiff's counsel Mr Paul Juma closed his case and Mr Ashioya counsel for the 1<sup>st</sup> Defendant informed the Court that the 1<sup>st</sup> Defendant would not be offering any evidence.
19. Submissions were thereafter filed by both counsel.
20. I have considered the evidence on record and the submissions by both counsel.



21. As neither the Defendants testified, the Plaintiff's testimony remains un-rebutted. And since the 2<sup>nd</sup> Defendant died in the course of the trial and the case against her was marked as having abated while the 3<sup>rd</sup> Defendant was never served, the 1<sup>st</sup> Defendant was left to shoulder the burden of the Plaintiff's case. He however opted not to testify in opposition to the Plaintiff's claim against him and in support of his counter-claim.
22. It is not in doubt that the suit land was first registered in the names of the Plaintiff on April 27, 1995. He produced a copy of the title deed as proof. The copy of Green Card to the suit land shows that the 3<sup>rd</sup> Defendant placed a restriction thereon June 19, 2013 which she removed on October 8, 2013 and on January 21, 2014, she sold it to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants having transferred it to herself. It is the Plaintiff's evidence that the transfer of the suit land by the 3<sup>rd</sup> Defendant to herself and subsequently to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was procured fraudulently. That evidence has not been rebutted. Mr Ashioya counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has in his submissions sought to protect the registration of the suit land in their names citing the provisions of Sections 24 and 26 of the [Land Registration Act](#) as well as Articles 40(1), (2) and (3) of the [Constitution](#). However, the same Section 26 of the [Land Registration Act](#) is clear that a title to land can be challenged if it is shown to have been obtained:
- a. through fraud or misrepresentation.
  - b. illegally, unprocedurally or through a corrupt process.

Article 40(6) of the [Constitution](#) on the other hand goes on to state that the rights to property

“do not extend to any property that has been found to have been unlawfully acquired.”

The Plaintiff's evidence alleging fraud on the part of the Defendants remains un-rebutted. In the circumstances, this Court must find that the threshold set out in the case of [Vijay Morjaria -v- Nansingh Madhusing Darbar & another](#) [2000] eKLR as to how fraud must be proved has been met. Fraud was pleaded in paragraph 9 of the plaint and was distinctly proved as required.

23. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has also made a valiant attempt to submit that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were bona fide purchasers for value and has cited the well known case of [Katende -v- Haridar & Company Ltd](#) 2008 2 E.A. 173. Notwithstanding the verve and vigour exhibited in those submissions, in the absence of testimony from the Defendants rebutting the Plaintiff's testimony and supporting the counter-claim, those submissions do not aid the defence case at all. Neither submissions nor pleadings can take the place of evidence. That was made clear by the Court of Appeal in the case of [Daniel Toroitich Arap Moi -v- Mwangi Stephen Muriithi & another](#) 2014 eKLR where it stated:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

Emphasis added.

24. Further, since the Defendants did not testify, all we have are the pleadings by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their defence and counter-claim. Again, those pleadings cannot assist the Defendants because they



are not evidence. As Madan J (as he then was) delivered himself in the case of *CMC Aviation Ltd -v- Cruisair Ltd* No 1 1978 KLR 103 [1976-80 I KLR 835]:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved or there is an admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; grounds for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth”. Emphasis added.

25. In view of all the above, it must be obvious that the Plaintiff’s case is not controverted. It is for allowing while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ counter-claim is for dismissal.
26. I started this judgment with the quote that what eats you is in your clothes. It is clear that while the Plaintiff was busy toiling in Kisumu, his wife the 3<sup>rd</sup> Defendant and who should have been his first confidant was busy “eating” the suit land with strangers. Perhaps she feared, that being the second wife and with no child, her marriage was on shaky ground. I can understand those fears which, however, do not justify what she did.
27. Having considered the evidence herein, there shall be judgment for the Plaintiff against the 1<sup>st</sup> Defendant in the following terms:
  1. The 1<sup>st</sup> Defendant’s counter-claim is dismissed with costs.
  2. The title No Bukhayo/Kisoko/3271 in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is cancelled and the same to revert to the Plaintiff.
  3. The Plaintiff shall have the costs of his suit to be met by the 1<sup>st</sup> Defendant.

**JUDGEMENT DATED, SIGNED AND DELIVERED ON THIS 11<sup>TH</sup> DAY OF MAY, 2023 BY WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO**

**JUDGE**

**MAY 11, 2023**

**Right of Appeal.**

**BOAZ N. OLAO**

**JUDGE**

**11<sup>TH</sup> MAY 2023**

