



**Ndua & 2 others v Kamau (Environment & Land Case 157 of 2019)  
[2023] KEELC 22658 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 22658 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 157 OF 2019**

**A OMBWAYO, J  
JUNE 29, 2023**

**BETWEEN**

**JAMES MBURU NDUWA ..... 1<sup>ST</sup> PLAINTIFF**

**MARTIN GEOFFREY OWINO ONYANGA ..... 2<sup>ND</sup> PLAINTIFF**

**JUDITH TABU OWINO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JOSEPH NJUGUNA KAMAU ..... DEFENDANT**

**JUDGMENT**

1. James Mburu Ndua, Martin Geoffrey Owino Onyango and Judith Tabu Owino (hereinafter referred to as the plaintiffs) have come to this court against Joseph Njuguna Kamau (hereafter referred to as the defendant), stating that by a sale agreement dated 24th day of March, 1994 the 1<sup>st</sup> plaintiff purchased the property known as Nakuru Municipality Block 11/174 measuring 0.2070 hectares from one John Kiarie Wambura at a total consideration of Kshs.560,000/= and subsequently upon paying full purchase price and satisfying all conditions of the sale he was issued with title of the said property and he took possession of the same and commenced developments thereon.
2. By a sale agreement dated 6<sup>th</sup> December, 1994 the 2<sup>nd</sup> plaintiff bought property known as Nakuru Municipality Block 11/173 from one Samuel Kariuki Kanyoro at a total consideration of kshs650,000/= and upon payment of the said sum and upon satisfying all the conditions of sale and upon obtaining all the necessary legal documents like the 1<sup>st</sup> plaintiff he was issued with title to the same and took possession and commenced development.
3. By an order dated 23<sup>rd</sup> June, 1995 emanating from a finalized suit Nakuru CMCC No.717 of 1998 between the Municipal Council of Nakuru and the defendant herein, the plaintiffs are being required to vacate their parcels of land alleged on ground that their titles have been cancelled by the said court.



Neither the plaintiffs herein nor any of their vendors are or were parties to the said suit in the Resident Magistrate's court hence they were condemned unheard.

4. Upon receipt of the order, the plaintiffs made inquiry from the vendors on the circumstances leading to the issuance of the orders against them. The parcel of land was transferred to the said party and a certificate of lease issued in his favour. Upon the issuance of the certificate of lease, Mr. Samuel Kanyoro subdivided the parcel of land into two portions. Nakuru Municipality Block 2/173 and Nakuru Municipality Block 2/174.
5. In 1994, more than three years after the parcel of land had been subdivided into two, the defendant filed an application seeking to set aside the judgment and decree pursuant to which the parcel of land was sold and transferred to third parties. In filing the application, the defendant never disclosed that the parcel of land had been sold and transferred to third parties.
6. By a subsequent application filed in Nakuru CMCC 717 of 1988 filed in 1995, the defendant sought order that the plaintiffs be evicted from the said parcel of land. At the time of filing the application, the defendant was aware that the parcels of land were in the names of the plaintiffs herein but never disclosed that fact nor enjoined the plaintiffs in that application as affected parties.
7. Further, at the time of filing the said application, the applicable law was the Registered Land Act. At section 143 of the said Act, only the High Court had jurisdiction to revoke a certificate of lease issued under that Act. Therefore, the order cancelling the plaintiff's certificate of lease and rectifying the register was made by a court which had no jurisdiction.
8. According to the plaintiffs, the order for eviction which was obtained by the defendant was obtained through fraud, collusion, and misrepresentation and material non-disclosure. The orders are voidable under the Evidence act at the instance of the plaintiffs. The plaintiffs herein could not file an appeal against the orders issued in Nakuru CMCC717 of 1988 since they were never made parties to the said proceedings. The order was however tendered in evidence in court to challenge the plaintiff's title to that extent, the plaintiffs have a right under the Evidence Act to avoid its effects. The plaintiffs challenge the said decree on the ground that the same was obtained through fraud and from a court which lacked jurisdiction.
9. The plaintiff prays for orders that the cancellation of the plaintiffs' titles Nos : Nakuru Municipality Block 11/174 and Block 11/173 in a suit where they were not parties is null and void and of no legal consequences.
10. The plaintiffs further pray for a declaration that the order issued in Nakuru CMCC 717 of 1988 revoking the certificates of lease Nakuru Municipality Block11/174 and Block 11/173 issued in favor of the plaintiff were obtained through fraud, collusion material non-disclosure of fact and misrepresentation of material facts.
11. Moreover, a declaration that plaintiffs' title can only be cancelled in a substantive suit where they should be joined as parties and being given a chance to be heard and a declaration that the orders obtained by the defendant in Nakuru CMCC 717 of 1988 directing that the parcel registered in the names of the plaintiff be transferred to the defendant effectively revoked the plaintiff's certificates of lease to the said parcel of land and that they were made by a court which had no jurisdiction to issue such orders.
12. The plaintiffs pray for a declaration that the plaintiffs were purchasers for value without notice and they possess indefeasible titles and that the plaintiffs titles are valid and that those possessed by the defendant are un-procedurally and illegally obtained.



13. The plaintiffs pray for an order revoking the certificates of lease for Nakuru Municipality Block 11/174 and Block 11/173 held by the defendant and an order directing the land registrar, Nakuru County Land Registry to rectify the register to reflect the plaintiffs as the registered owners.
14. Lastly, the plaintiffs pray for a permanent injunction restraining the defendant by himself his servants and/or agents from evicting the plaintiffs from their parcel of land or demolishing any building and/or structure built by them or interfering with them in any manner whatsoever.
15. In the amended defence and counter-claim, the defendant states that the land in question has been subject to a suit serialized Nakuru CMCC. No 717 of 1988 where the court decided that the land belonged to the defendant and no appeal has been filed and that the Chief Magistrate directed that the suit properties be transferred in the names of the defendant and therefore the purported sale to the plaintiffs was unlawful and fraudulent. The defendant contend that the eviction order was lawful and that no appeal was filed.
16. In the counter-claim the defendant asserts that he is the lawful and registered owner of the parcel of land known as Nakuru Municipality Block 2/173 and Nakuru Municipality Block 2/174 arising from LR 451/638. The defendant states that he was lawfully allocated the suit land and enjoyed possession until he discovered that the land had been subdivided and the plaintiffs registered as the proprietors.
17. In a suit serialized as Nakuru CMCC No. 717 of 188 the defendant was sued by the Municipal Council of Nakuru for recovery of rent arrears on the suit property and judgment was entered against him exparte the properties were sold but the filed an application to set aside the judgment which was allowed and also the title registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were cancelled and eviction orders issued against the plaintiffs and the defendant was to be placed in possession of the suit properties. The plaintiffs filed the present suit property to have bought the land from unknown individuals.
18. The defendant avers that the plaintiffs' occupation of the land is illegal and fraudulent and prays for judgment in terms of a declaration that the defendant is the legal rightful and absolute registered owner of the parcel of land known as Nakuru Municipality block 2/173 and Nakuru Municipality Block 2/174.
19. Further an order of perpetual injunction restraining the plaintiffs now defendants by themselves, their employees, agents and/or servants from trespassing upon, entering, remaining, dealing in, constructing on, disposing of or in any other manner whatsoever interfering with use of the defendant now plaintiff in respect of Nakuru Municipality Block 2/173 and Nakuru Municipality Block 2/174.
20. Lastly, an order of eviction against the plaintiffs now defendants to vacant the defendant now plaintiff's parcels of land known as Nakuru Municipality block 2/173 and Nakuru Municipality Block 3/173 and Nakuru Municipality Block 2/174 to its original form plus Costs and interest of this suit.
21. In defence the counter claim, the plaintiff states that parcels number Nakuru/Municipality /Block 2/174 and 173 are not subdivision and that they are not aware of subdivisions of LR No. 451/638 into Nakuru/Municipality Block 2/13 and 2/14. The plaintiffs aver that they obtained title to land in dispute legally through transfer by Samuel Kanyoro. At the time of making the application to set aside the orders in CMCC No.717 of 1988 the property was already in the names of the plaintiffs hence there was fraud and misrepresentation of facts. The plaintiff avers that the counter-claim is barred by statute as it is filed out of time.
22. When the matter came up for hearing, PW1, James Mburu Ndua testified that he was the owner of NM/ 11/174 and that he bought the land on 24<sup>th</sup> March 1994 from mr John Kiarie Wambura at a price of Ksh 560, 000. The land was vacant but the title was charged to Kenya Commercial Bank Ltd.



- The certificate of lease to the land was issued on 25<sup>th</sup> July 1994 and he started to develop the property in January 1995 by putting up a 4 bedroomed residential house built of stones and cement including servant quarters. He later learnt that there was a court order in respect of the property cancelling the certificate of lease issued to him and ordering his eviction. He came to this court for the restoration of his title.
23. PW2, Judith Tabu Owino stated that Geoffrey Martin Owino Onyango was her husband. He is deceased. She produced a limited grant to prove that she has the capacity to file the suit. . Before his death he had acquired the suit property in Milimani- Nakuru. She produced a certificate of lease for Nkr No. Block11/173- registered in the name of her late husband. He purchased the property from Mr.Kanyoro- for Ksh 650,000/= Transfer was effected. There is a building on the property – a residential house built in 1995. Rates were paid and clearance certificate issued. Mr. Kamau has been laying a claim to the property. He has not shown her any documents to entitle him. On cross examination by Mr Karanja, learned counsel for the defendant, she states that her late husband bought the property from Mr Kanyoro but she does not know from whom Mr. Kanyoro bought the land.
  24. The defendant Joseph Njuguna Njoka on his part relied on his witness statement and further testified that he is the registered owner of the suit properties. There was an order where his titles were reinstated. He is aware that the plaintiff went to court to challenge the proceedings in case number NKR 163 of 1995. They were asking for orders of certiorari. He is not aware of the outcome of the application as it was never prosecuted. The parcel of land known as Nakuru/Municipality/Block 11/13 was his. In 1988 he was sued by the municipal council of Nakuru for non-payment of rates. The case was registered as Nakuru CMCC 717 of 1988 between himself and the Municipal of Nakuru. He was not aware of the sale of the land by public auction but came to learn later that the property was sold by public auction by the municipal council. The property was sold to Samuel Kariuki Kanyoro who divided it into 2 parts and transferred the two parcels to plaintiffs. The title was issued to 1<sup>st</sup> plaintiff on 25/7/1994. He did not join the defendants in the application. At the time of proceedings Samuel Kanyoro had a title. He got an order of eviction against the plaintiffs.
  25. James Mburu Ndua had title issued on 25/7/1994 whereas the 2nd plaintiff had title issued on 16/1/1995. Effectively, the titles were cancelled by the Magistrates court. None of the plaintiff signed transfer to his favour. There was no other case for cancellation other than Nakuru CMCC number 717 of 1988
  26. The plaintiffs submit that the order made in the Chief Magistrate Court Civil case number 717 of 1988 setting aside judgment which had been entered in favour of the Municipal Council and the order revoking the plaintiffs certificate of lease and an order of eviction against the plaintiffs were entered fraudulently as it was never disclosed that the property was registered in the names of 3<sup>rd</sup> parties. The 3<sup>rd</sup> parties (plaintiffs) were not enjoined in the suit despite knowledge that they were registered owners. The plaintiffs submit that a party who approaches the court is bound to conduct himself within the law and in good faith. The plaintiff refers to section 47 of the Evidence of the *Evidence Act* that provides that one can prove that a judgment is incompetent or obtained by fraud or collusion.
  27. The plaintiffs argue that the only way to challenge an incompetent judgment or judgment obtained through fraud is by filing suit based on fraud. Particulars of fraud have been given.
  28. The plaintiffs contend that the defendant obtained order to revoke the plaintiff certificates of lease through fraud due to the fact that the plaintiffs were not enjoined in the application and yet they were the registered owners of the land. The plaintiffs were not served with the application for cancellation despite being interested persons. The plaintiffs were not served with the application for eviction. It is



argued that this was not a fraud. The plaintiff further argues that the chief magistrates' court lacked jurisdiction to entertain dispute.

29. The defendant on his part submits that the plaintiff has not proved fraud as allegation of fraud cannot be taken lightly. That the plaintiffs had not bought the land when the orders to rectify the register were made hence the court could not have notified the plaintiff. It is argued that the plaintiffs bought the land subsequent to the orders of rectification and eviction.
30. The defendant further argues that the plaintiffs were required to challenge the jurisdiction of the Principal Magistrates Court in Nakuru CMCC No. 717 of 1988 in the case itself or in an appeal. The plaintiffs ought to have appealed or applied for a review under order 45 of the Civil Procedure Rules 2010 or filed a judicial review. The defendant believes that the plaintiffs were not innocent purchasers for value without notice and therefore their titles are not indefeasible. Moreover, that the plaintiffs are not the correct title holders and therefore the principle does not apply.
31. I have considered the evidence on record and the rival submissions and do find that the facts of this matter are that Prior to 1988 Nakuru Municipality Block 2/13 was the property of Joseph Njuguna Kamau. By 1988, the defendant was in arrears of land rates. The Municipal Council of Nakuru moved under the *rating Act* to recover the land rates. They filed Nakuru CMCC No 717 of 1988 against the defendant and judgment was entered against the said defendant and a decree issued. The decree was executed by way of attachment and Nakuru Municipality Block 2/13 was attached and sold to one Samuel Kanyoro on 10<sup>th</sup> June 1991.
32. Samuel Kariuki Kanoro was registered as the proprietor on 21<sup>st</sup> August 1991 and certificate of title issued on 21<sup>st</sup> September 1991. The property was subdivided on 23<sup>rd</sup> September 1991 and new titles created thus 11/173 and 11/174. Parcel number 11/173 was registered in the names of Martin Geoffrey Owino Onyago on 16<sup>th</sup> April 1995 and certificate of lease issued on the same date. The other parcel number 11/174 registered in the names of James Mburu Ndua on 25<sup>th</sup> July 1994.
33. The *ex parte* judgment was set aside on March 7, 1994. Consequently the defendant made an application before the court on March 9, 1994 for the court to order the Land Registrar to transfer the suit property into the names of the defendant.
34. The order was made without notice to the then owner of the property at the time thus Samuel Kariuki Kanyoro. When the order was made, the property had already changed its form from Nakuru Municipality Block 11/13 to Nakuru Municipality Block 11/173 and Nakuru Municipality Block 11/174.
35. On the June 23, 1995 again, the court heard the defendant and issued orders of eviction against the plaintiffs in a matter where they were not parties and had not been served.
36. This court finds that the issuance of orders against the plaintiffs in a matter where they were not parties and where they were not served was a fraud by concealment in order to obtain favorable orders because had the plaintiffs been aware of the application they could have defended themselves and the outcome could not have been the same. Failure by the defendant to inform the plaintiffs in itself, was a fraud hence the order cannot be relied upon.



37. In the case of *Githinga Kibutha vs Caroline Nduku* ELCA No 16 of 2007 the court stated thus:-

“The *Land Registration Act* does not define fraud. Recourse must therefore be had to other sources of law. The Black’s Law Dictionary defines fraud thus:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’.

Fraud would, therefore consist of deceitful actions which may be made through either positive assertions or concealment of facts. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”

38. I agree with the plaintiffs that a judgment obtained fraudulently can be set aside through a separate suit. The court of Appeal of Kenya has held that a judgment fraudulently obtained can be challenged through a new suit.

This was in *Richard K. Bunei & 8 others t/a Geo-Estate Development Services v Lorien Ranching Company Limited & 799 others* (being sued on behalf of themselves and on behalf of alleged 795 Members) [2017] eKLR where the court observed as follows:-

“The jurisdictional competence of the court below to entertain a fresh suit to nullify court orders previously made in other suits on account of fraud had previously been raised in the proceedings leading to this appeal by way of preliminary objection which Juma, J. by a brief ruling made on 28<sup>th</sup> May 2003 rejected thus;

“At the commencement of the hearing of this suit, counsel for one of the defendants took up a preliminary objection to the effect that this suit is incompetent. If the plaintiff seeks to set aside orders in those earlier cases, then the application should have been brought in those earlier cases, and not to file a new case. The other objection is that the suit is *res judicata*.

It would appear that counsel did not understand the import of this case. If I got what counsel for the plaintiff was arguing about, it is to the effect that the defendants, purporting to be duly authorized agents of the plaintiff filed suits against other parties. The present suit is by the “legal” plaintiff against those who misused its name. This is a complete new case with a new cause of action and parties are clearly different.

As to whether applications in earlier cases (sic) to set the judgments or rulings aside, the position was well covered by the decision of the Privy Council in *Hip Foong Hong vs. H. Neotia and Company* (1918) AC 888 where the Privy Council held that when it is alleged that a judgment has been obtained by fraud



an independent action to set aside the judgment is more convenient mode of procedure than a motion for a new trial supported by affidavit.”

39. The court endorsed the holding of the Privy Council in the above-cited Hip Goong Hong case (supra) quoting with approval the judgment of the Committee as delivered by Lord Buckmaster at P 894;

“A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail; ...where a new trial is sought upon the ground of fraud, procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out, and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient.”

40. The Court of Appeal also referred to and accepted the earlier decision of the Queen’s Bench Division in *Cole vs. Langford* [1898] 2 QB 36 which, after considering the decisions of Jessel M. R. in *Flower vs. Lloyd* 6 Ch. D 297 and Lord Justice Baggallay in *Baker vs. Wadsworth* [1898] 67 L.J. Q.B 301 held that;

“Where a judgment has been obtained by fraud, the court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside.”

41. Finally, the court did also consider and was fully persuaded by yet another English decision, this time of the former House of Lords in *Jonesco vs. Beard* [1930] AC which held categorically and in a manner that seemed to put the matter beyond dispute that;

“It is the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation must be established by strict proof.

Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted; the necessity for stating the particulars of fraud and the burden of proof are in no way abated and all the strict rules of evidence apply.”

42. This court further finds the order made by the Principal Magistrates Court in Nakuru CMCC No ... on 9<sup>th</sup> March 1994 that the Land Registrar do transfer the proprietries to the defendant was an illegality having been made by a court that lacked jurisdiction to cancel and rectify a register and the same is unenforceable.

43. Section 143 of the repealed Registration of *Land Act* provides :-

143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

44. Section 159 of the repealed *Registered Land Act* provided for jurisdiction as follows.



Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.

45. The value of the property exceeded ksh 20,000 and therefore the magistrate had no jurisdiction at all to entertain the dispute.
46. The upshot of the above is that the plaintiff's suit succeeds and the counter-claim fails.
47. I do grant judgment for plaintiff in terms that:-
  1. A declaration that the cancellation of the plaintiffs' titles Nos : Nakuru Municipality Block 11/173 and Block 11/174 in a suit where they were not parties is null and void and of no legal consequences.
  2. A declaration that the order issued in Nakuru CMCC 717 of 1988 revoking the certificates of lease Nakuru Municipality Block 11/174 and Block 11/173 issued in favor of the plaintiff were obtained through fraud, collusion material non-disclosure of fact and misrepresentation of material facts.
  3. A declaration that plaintiffs' title can only be cancelled in a substantive suit where they should be joined as parties and being given a chance to be heard.
  4. A declaration that the orders obtained by the defendant in Nakuru CMCC 717 of 1988 directing that the parcel registered in the names of the plaintiff be transferred to the defendant effectively revoked the plaintiff's certificates of lease to the said parcel of land and that they were made by a court which had no jurisdiction to issue such orders. A declaration that the plaintiffs titles are valid and that those possessed by the defendant are unprocedurally and illegally obtained.
  5. An order revoking the certificates of lease for Nakuru Municipality Block 11/174 and Block 11/173 held by the defendant and an order directing the land registrar, Nakuru County Land Registry to rectify the register to reflect the plaintiffs as the registered owners.
  6. A permanent injunction restraining the defendant by himself his servants and/or agents from evicting the plaintiffs from their parcel of land or demolishing any building and/or structure built by them or interfering with them in any manner whatsoever.
  7. Costs of the suit to the plaintiffs.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29<sup>TH</sup> DAY OF JUNE 2023.**

**A.O.OMBWAYO**

**JUDGE**

