



**Ogato v Nyaguthii & another (Environment & Land Case
625 of 2013) [2023] KEELC 18382 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 625 OF 2013**

**DO OHUNGO, J
JUNE 29, 2023**

BETWEEN

DR. JULIUS OGATO PLAINTIFF

AND

JENNIFFER NYAGUTHII 1ST DEFENDANT

PAULINE RUTO 2ND DEFENDANT

JUDGMENT

1. By amended plaint dated 21st July 2017, the plaintiff averred that he entered into a sale agreement with John Macharia who is since deceased and whose estate is represented in these proceedings by Jenniffer Nyaguthii, his widow and the administrator of his estate. That the agreement was entered into on 24th May 2011 for the purchase of a portion of the parcel of land known as Ngata/Njoro Block 1/5497 measuring half an acre (the suit property), which land constituted the vendor's inheritance. That the purchase price was KShs 1,400,000 out of which the vendor was paid KShs 100,000 at the time of execution of the said agreement and that the balance was payable within six months provided the vendor obtained title in respect of his share of the inheritance or payment later if he could not obtain the title within the said period.
2. The plaintiff further averred that subsequently, he paid a further sum of KShs 1,225,000 thereby leaving a balance of KShs 175,000 which would be paid upon successful transfer or as the parties would agree or to the vendor's legal representative, the first defendant herein. That as a term of the agreement, the plaintiff was to take possession of the suit property upon execution of the agreement and that with the knowledge of the first defendant, the plaintiff took possession thereof and built a site house thereon and a perimeter wall around the property. It was the plaintiff's further averments that sometime in 2012, he sought the vendor to pay him the balance and also to find out if the vendor had obtained registration of the parcel in his name so as to enable transfer and the vendor informed the plaintiff that the registration was in progress and that the vendor wished to defer collection of the balance as a



project he wanted to start using the money for was not ready and that sometime in mid-May 2013, the plaintiff learnt from his care taker that the vendor in company of the second defendant had gone to inspect the property ostensibly with an intention of disposing off the suit property and that the said caretaker informed the second defendant that the parcel had already been sold to the plaintiff and that he was taking care of it on behalf of the plaintiff. Subsequently, the plaintiff caused a wooden “not for sale” sign to be displayed in a visible part of the parcel as a warning to would be buyers and that sometime in 2013, after conducting a search, the plaintiff learnt that the vendor had been registered as the proprietor of the suit property and that the vendor caused the suit property to be subdivided into Ngata/Njoro Block 1/6182 and Ngata/Njoro Block 1/6183.

3. It was the plaintiff’s further averment that on 19th July 2012, the vendor and the second defendant conspired to defeat the plaintiff’s proprietary rights by illegally and fraudulently entering into a second agreement to sell and transfer the parcel of land known as Ngata/Njoro Block 1/6182 to the second defendant despite being aware that the plaintiff was in actual possession.
4. The plaintiff therefore prayed for judgement against the defendants severally for:
 - a. A declaration that an agreement for the purchase of a portion land parcel Title No. Njoro/Ngata/ Block 1/6182 being a sub-division of Njoro/Ngata/ Block 1/5497 now sub-divided into Njoro/Ngata/ Block 1/6182 and Njoro/Ngata/ Block 1/6183 was and is valid (sic) the property of the plaintiff.
 - b. A declaration that title deed for parcels of land known as Njoro/Ngata/Block 1/6182 was obtained fraudulently, illegally hence null and void and ought to be cancelled and revert to the estate of the deceased.
 - c. A declaration that pending the formal transfer of the land purchased by the plaintiff, the vendor was holding the portion already sold to the plaintiff in trust and without prejudice the 2nd defendant is holding the said land in trust for the plaintiff by virtue of the overriding interest.
 - d. [Prayer deleted in amended plaint]
 - e. That a permanent injunction do issue to restrain the defendants from charging, leasing, mortgaging, selling or in any other manner dealing or perpetrating acts of waste upon the said parcel of land.
 - f. Any other relief that this Honourable Court may deem fit and just to grant.
 - g. Costs of the suit.
5. The first defendant filed statement of defence dated 31st October 2017 in which she admitted that the vendor entered into the sale agreement with the plaintiff and that the plaintiff paid to the vendor the whole purchase price save for KShs 175,000. She further admitted that the plaintiff took possession immediately upon signing the agreement. She therefore urged the court to compel the plaintiff to pay the sum of KShs 175,000 as well as costs of the suit.
6. The second defendant filed amended statement of defence dated 14th September 2017 denying the averments in the plaint and further stating that the agreement was criminal, illegal, null and void as it contravened section 45 of the Law of Succession Act. She therefore urged the court to dismiss the suit with costs.
7. At the hearing, the plaintiff testified as PW1. He stated that he knew John Macharia (deceased) in the year 2001 and that John Macharia’s father passed away late 2010. That John Macharia offered to sell



to him a portion of the suit property which had not been subdivided and was the subject of succession proceedings in respect of John Macharia's father's estate. That they entered into a sale agreement dated 24th May 2011 pursuant to which John Macharia sold to PW1 half an acre out of a portion measuring 1 acre which was John Macharia's inheritance. The agreed purchase price was KShs 1.4 million which was to be paid within six (6) months by which time John Macharia should have also completed succession and transferred the suit property to the plaintiff. That it was further agreed that if by 6 months John Macharia would not have transferred the suit property to the plaintiff, then the payment would be delayed until transfer.

8. The plaintiff further testified that the sale agreement was signed by John Macharia and the plaintiff in the presence of witnesses Joseph Monari Maroko, James Kairu Mwangi and Daniel Njoroge Mwangi and that the plaintiff paid KShs 100,000 to John Macharia and later paid a further the KShs 1,225,000 thus leaving a balance of KShs 175,000 which remained owing even as of the date of the plaintiff's testimony. The plaintiff explained that the reason for not completing payment of the purchase price was that John Macharia did not transfer the suit property to the plaintiff. That he was however able and willing to pay the balance of KShs 175,000 and that he took possession of the suit property upon signing the agreement and remained in possession as of the date of his testimony.
9. PW1 further testified that when he learnt in early 2013 through his caretaker told him that strangers had visited the suit property, he wrote a demand letter dated 2nd May 2013 to John Macharia plot and conducted a search in respect of Ngata/Njoro Block 1/5497 on 12th July 2013 which showed that John Macharia became registered proprietor on 18th October 2011. That he conducted another search on 7th November 2013 which showed that Ngata/Njoro Block 1/5497 was closed on 18th October 2013 upon subdivision into Ngata/Njoro Block 1/6182 and 6183. That he conducted another search on 11th November 2013 which showed that the second defendant became the registered owner of Ngata/Njoro Block 1/6162 on 18th October 2013.
10. The plaintiff went on to testify that the portion that he is occupying is on Ngata/Njoro Block 1/6162 and that John Macharia passed away on 3rd May 2016. That John Macharia concealed from him the fact that he had obtained title and even subdivided the suit property. He also stated that he constructed a stone wall around the suit property in 2013, a site house and a pit latrine.
11. Zachary Matoke, a caretaker who was employed by the plaintiff in the year 2013, testified as PW2 and stated that he erected a "Not For Sale" sign on the suit property at the plaintiff's instructions after people came to view the suit property.
12. The Plaintiff's case was then closed.
13. During defence hearing, Jeniffer Nyaguthii testified as DW1 and stated that John Mwangi Macharia (deceased) was her husband. That her deceased husband sold to the plaintiff a parcel of land measuring half an acre in the year 2011 through a sale agreement which was prepared in her presence in her family house at Kiamunyi. That the purchase price for the half an acre was KShs 1.4million and that the agreement was signed by her deceased husband, the plaintiff, another man and DW1's brothers in law. DW1 further testified that earlier, the plaintiff had purchased another plot from DW1's husband's father who is since deceased and that the plaintiff was already in occupation of the other plot when DW1 got married to John Mwangi Macharia on 30th July 2011 and that the two plots are next to each other.
14. DW1 further stated that the plaintiff did not fully pay the purchase price since the plot was still in the name of DW1's father-in-law and that there remained a balance of KShs 175, 0000 as of the date of her testimony, which sum she urged the court to order that she be paid. She went on to testify that



she approved the sale of the suit property to the plaintiff and that although Daniel Njoroge, James Kairu and David Karuga who were her husband's brothers did not sign the agreement on the day of its execution, they signed it later but not in her presence.

15. The first defendant's case was then closed.
16. The second defendant Pauline Ruto testified as DW2 and stated that sometime in June 2012 while looking land to buy, her workmate Nyaboke who lived in Nakuru gave her a contact of one George Nchore, a property agent based in Nakuru. That she went to Nakuru a few weeks later and proceeded with George Nchore to view a parcel which was situated in Kiamunyi. That on the land, DW2 met the seller John Macharia together with his wife. They viewed the parcel and DW2 was informed that it was one acre. There were bananas, some bushes, a zero grazing area and the couple's house which was a timber structure with iron sheet roof. That John Macharia asked for KShs 6,000,000 for the one acre which DW2 did not have and DW2 asked John Macharia to subdivide the parcel into two parcels of half an acre each. She added that they agreed on a purchase price of KShs 2.65 million for half an acre and a sale agreement was drafted for them by Orina & Co Advocates through which she purchased half an acre of Njoro Ngata Block 1/5497 (Kiamunyi).
17. DW2 further testified that they agreed that she pays a deposit of KShs 500,000 and the balance was to be paid in instalments of KShs 700,000 by 30th August 2012, KShs 725,000 before 30th September 2012 and finally, KShs 725,000 before 30th October 2012. That she made the last payment by the end of December 2012 and that the agreement was witnessed by George Nchore. She also stated that before signing the agreement, she saw the title and that she was ultimately issued with title in respect of Njoro/ Ngata Block 1/6182 (Kiamunyi) on 18th October 2013, which title was processed for her by George Nchore. That she did not collude with George Nchore to defraud the plaintiff as alleged and that she was not aware that the plaintiff and John Macharia had any transaction concerning the land. That when she went to view the land in 2012, John Macharia was in possession and that she did due diligence before buying the land.
18. DW2 also testified that George Nchore is the one who arranged to get the advocate and took her together with John Macharia to the advocate's office where the sale agreement was signed. That upon paying the balance of the purchase price and signing an application for consent of the Land Control Board, she did not attend the Land Control Board and left George Nchore to follow up the process.
19. George Nyamache Nchore testified as DW3 and stated that he is a businessman involved in buying and selling plots under the business name Joje Commercial Agencies. That John Macharia went to his office on 4th November 2011 and gave him the original of the title for Njoro/ Ngata Block 1/5497 (Kiamunyi) with instructions that DW3 sells the plot for him. That John Macharia signed instructions and gave DW3 a copy of his identity card and a copy of his Kenya Revenue Authority PIN certificate and instructed DW3 to sell the whole plot or to subdivide it and sell it. He further stated that he went to view the plot on 4th November 2011 John Macharia. That later in July 2012 the second defendant went to his office looking for a plot to buy and he took her to see the plot after which they agreed on a purchase price of KShs 2,650,000 for half an acre. That the second defendant transferred KShs 500,000 to John Macharia's account on 19th July 2012 and a sale agreement was prepared by Mr Orina advocate who was the second defendant's lawyer.
20. DW3 further testified that John Macharia's surveyor by the name Mwaniki prepared the mutation form and that John Macharia followed up the process together with the surveyor until registration of the mutation form and completion of the subdivision. DW3 also stated that John Macharia gave him documents including signed transfers, passports photographs, copies of identity cards and Kenya Revenue Authority pins to enable him process titles and that he lodged the documents on 19th



January 2013 and collected the new titles being Njoro/Ngata Block 1/6182 (Kiamunyi) for the second defendant and Njoro/Ngata Block 1/6183 (Kiamunyi) for another buyer called Anthony Mukundi Ngere.

21. Other witnesses were Mwangi Samuel (DW4) who stated that he took photographs at the suit property, James Kairu Mwangi testified (DW5) who stated that he is a brother to John Macharia, that he did not sign the plaintiff's sale agreement, that he made a report at Central Police Station Nakuru together with his other brothers that John Macharia had sold Njoro/Ngata Block 1/6182 (Kiamunyi) to two people. He further stated that after his father passed away, his father's plot was shared between the sons and that at the time John Macharia had sold Njoro/Ngata Block 1/6182 (Kiamunyi), the said parcel had been transferred to John Macharia's name.
22. Daniel Njoroge Mwangi, another brother of John Macharia, testified as DW6 and reiterated that their father's land was shared between the sons with each getting his portion and that the report to the police was that John Macharia had sold his plot to two people. He added that the process of subdividing and sharing their father's land between the sons was led by John Macharia. Lastly, Number 48807 CPL Jackson Nkonge (DW7), a police officer attached to Nakuru Police Station performing general duties testified that a report was made on 3rd February 2014 at 12.30pm by Daniel Njoroge Mwangi, James Kairu Mwangi and Daniel Karuga through OB No. 48 that their brother John Macharia Mwangi had been forging their signatures to sell a piece of land to different persons. He added that the report was recorded by PC Okello of Nakuru Police Station and that he (DW7) did not take any part in the investigations and could not therefore tell what happened and whether a police file was opened for the report.
23. Defence case was then closed. Parties were thereafter ordered to file and exchange written submissions. The first defendant did not file any submissions.
24. The plaintiff argued that the sale agreement between the plaintiff and John Macharia is valid and enforceable. Citing the case of *Morris Mwiti Mburugu v Denis Kimanthi M'Mburugu* [2016] eKLR, the plaintiff submitted that by the sale by John Macharia of only a portion of his entitlement in the estate of Laban Mwangi (deceased) did not offend Section 45 of the *Law of Succession Act*. As to whether the title in respect of Njoro/Ngata/Block 1/6182 was obtained fraudulently, illegally hence null and void liable for cancellation, the plaintiff submitted that Laban Mwangi Kairu was already deceased when the sale agreement was executed on 24th May 2011 and that the aforementioned deceased is purported to have applied for consent to subdivide Ngata/Njoro Block 1/5497 (Kiamunyi) and that the deceased Laban Mwangi Kairu was indicated as being present on the land during survey and that the late Laban Mwangi Kairu's name is thereafter cancelled and replaced with that of John Macharia and that the cancellation could not legitimize what was being done in the deceased's name. It was the plaintiff's further submission that the certificate of compliance No. 010078 was issued to Laban Mwangi Kairu (deceased) on 19th March 2013 and as such all processes commenced and carried out in the name of Laban Mwangi Kairu (deceased) are a nullity and that the subdivisions of Njoro/Ngata Block 1/4187 (Kiamunyi) into various portions was based on processes purported to have been undertaken by Laban Mwangi Kairu (deceased) and approvals and consents given to him while deceased and further that the subdivision of Njoro/ Ngata Block 1/4187 (Kiamunyi) was made without any succession proceedings in respect of the estate of Laban Mwangi Kairu (deceased). That there were no succession proceedings, no land control board consent to subdivide and transfer, no valuation of the land for purposes of assessment of stamp duty payable, no payment of requisite fees including stamp duty and that as such, the title deed in the second defendant's name was liable for cancellation for being acquired illegally, unprocedurally or through a corrupt scheme to defeat the plaintiff's interest.



25. The plaintiff went on to argue that the second defendant's title to Njoro/Ngata /Block 1/6182 was procured fraudulently and that since both the plaintiff and the second defendant's claim over the land are equitable and considering that the plaintiff purchased the land on 24th May 2011 while the second defendant purchased it on 19th July 2012, the plaintiff's purchase being earlier in time should prevail on account of equity. The plaintiff further submitted that he is willing to pay the balance of KShs 175,000 upon transfer. The plaintiff therefore urged this court to allow his suit with costs.
26. The second defendant argued that the sale agreement executed between the plaintiff and John Macharia is invalid and unenforceable in view of Section 3 of the *Law of Contract Act* since the plaintiff and that John Macharia did not sign it in the presence of the witnesses. Reliance was placed on the case of Jane Catherine K. Karani v Daniel Mureithi Wachira [2014] eKLR. Further, relying on the case of Kadzo Charo v Alex Nzai Dzombo [2019] eKLR, the second defendant argued that the land the plaintiff purportedly purchased was hived from Njoro/Ngata Block 1/4187 which belonged to one Laban Mwangi Macharia (deceased) at the time of the purported sale and that the vendor, John Macharia had not taken out a grant of representation as required by Section 45 of the *Law of Succession Act* and that consequently, the transaction that took place on 24th May 2011 was a nullity ab initio. That the plaintiff's suit is grounded on a nullity and should fail.
27. On whether the plaintiff's allegations of fraud were proved, the second defendant cited the case of Gichinga Kibutha v Caroline Nduku [2018] eKLR and argued that the plaintiff just pleaded fraud without leading evidence to substantiate the same and that fraud was not proven to the required standard with the result that cancellation of title cannot issue. The second defendant further relied on Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR and contended that the plaintiff did not meet the test for granting a permanent injunction. She urged court to find the plaintiff's case as devoid of merit and to dismiss it.
28. I have carefully considered the parties' pleadings, evidence and submissions. The issues that arise for consideration are whether there was a valid and enforceable sale agreement between the plaintiff and the late John Macharia, whether the second defendant's title is tainted by fraud or illegality and whether the plaintiff is entitled to the reliefs sought.
29. On the first issue, as to whether there was a valid sale agreement between the plaintiff and John Macharia, I note that there is no dispute that a sale agreement dated 24th May 2011 was signed by the plaintiff and John Macharia. The agreement states that John Macharia who was the vendor was a beneficiary of part of family land known as parcel number Njoro/Ngata Block 1/4187 which was then registered in the name of Laban Mwangi Macharia, then deceased. Laban Mwangi Macharia was the father of John Macharia, DW5 and DW6. The plaintiff was the purchaser and the property sold was half an acre of Njoro/Ngata Block 1/4187. There is no dispute that the portion sold was part of John Macharia's inheritance from Njoro/Ngata Block 1/4187 which was part of the estate of Laban Mwangi Macharia. The agreed consideration was KShs 1,400,000 out of which the plaintiff paid KShs 100,000 at the signing of the agreement while the balance was to be paid within six months of the signing of the agreement or later "if the vendor shall not have completed registration of the relevant parcel of land in his own name." It further provided that and that John Macharia was to instruct his surveyor who " was already working on the subdivision" to subdivide the parcel.
30. I note that the sale agreement was signed by the plaintiff and John Macharia in the presence of Joseph Monari Maroko who also signed it. The first defendant has also testified that she was present during the signing of the agreement. Although DW5 and DW6 denied signing the agreement, they are not parties to the agreement. Further, all that Section 3(3) of the *Law of Contract Act* requires is that the signature of each party signing be attested by at least one witness who is present when the party signed.



I am satisfied that the agreement dated 24th May 2011 is in compliance with Section 3(3) of the *Law of Contract Act* as well as similar provisions found at Section 38 of the *Land Act*, 2012.

31. Another challenge that the second defendant subjected the agreement to is that John Macharia had not in respect of his deceased father's estate as required by Section 45 of the *Law of Succession Act* and that consequently, the agreement is a nullity ab initio. As noted earlier, there is no dispute that John Macharia only sold a portion of Njoro/Ngata Block 1/4187 which was his share of his father's estate. DW5 and DW6 who were his brother's confirmed as much in their testimonies and further stated that they received their own portions. The beneficiaries participated in the disposition and in the circumstances, I see no valid reason to interfere. See *Morris Mwiti Mburugu v Denis Kimanthi M'Mburugu* [2016] eKLR. I find that the agreement is valid and enforceable.
32. There is no dispute that the second defendant is the registered proprietor of land parcel number Njoro/Ngata/Block 1/6182 which is a subdivision of land parcel number Njoro/Ngata/Block 1/5497 which John Macharia acquired following distribution of his father's parcel number Njoro/Ngata Block 1/4187. Certificate of search dated 11th November 2013 which was produced by the plaintiff as well as copy of title deed which was produced by the second defendant all confirm as much.
33. As a registered proprietor of land, the second defendant is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept a proprietor's certificate of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) are established. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The plaintiff has opted to attach the second defendant's title on allegations of fraud and illegality.
34. The law on proof of fraud in civil proceedings is settled. The party alleging it must plead it, particularise it, and strictly prove it. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. A party alleging fraud cannot simply expect the court to infer fraud from the facts.
35. A perusal of the amended plaint shows that the mainstay of the plaintiff's allegations of fraud is that John Macharia and the second defendant "with intent to defraud the plaintiff engaged unqualified estate agent ... to enter into an agreement for the disposition of land parcel No. Njoro/Ngata/Block 1/5497 and sell the subdivisions thereof." The particulars of fraud include that the second defendant was aware that the property was not on sale and that the plaintiff was in occupation.
36. The authors of Black's Law Dictionary 10th Edition define fraud to mean "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". By way of further elaboration, the authors quote the following extract from John Willard, *A Treatise on Equity Jurisprudence* 147 (Platt Potter ed., 1879):

"Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat anyone, is to be considered as fraud."
37. Applying the above definition to the circumstances of this case, I do not see how it can be said that there was any misrepresentation or knowing concealment of a material fact to induce the plaintiff to



act to his detriment. By his own account, the plaintiff contends that he transacted with John Macharia before the second defendant entered the picture. He however concedes that he is yet to complete paying the purchase price. I do not see how the circumstances herein amount to fraud. Even if fraud had been disclosed, the plaintiff would need to show that the second defendant was party to such fraud. That too has not been shown. The plaintiff has failed to prove fraud or illegality to the required standard. He has not satisfied the requisite grounds for nullification of a title. It follows therefore that the reliefs sought cannot issue. Perhaps, the plaintiff may have considered seeking a refund of the amounts that he spent in pursuance of the sale agreement.

38. In view of the foregoing discourse, I find no merit in the plaintiff's case and I therefore dismiss it. Considering the circumstances of the case, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THROUGH ELECTRONIC MAIL THIS 29TH DAY OF JUNE 2023.

D. O. OHUNGO

JUDGE

