



**Marteu v Kosgei & 2 others (Environment & Land Case 173 of 2013)
[2023] KEELC 18279 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18279 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 173 OF 2013**

**A OMBWAYO, J
JUNE 20, 2023**

BETWEEN

SAMUEL LEMPESHAYO MARTEU PLAINTIFF

AND

LOISE JERUTO KOSGEI 1ST DEFENDANT

FREDRICK KOSKEI ROTICH 2ND DEFENDANT

**MARY WANJIRU MUGO (SUED AS LEGAL REPRESENTATIVE OF THE
ESTATE OF THE LATE JACKSON MUGO MAATHAI) 3RD DEFENDANT**

JUDGMENT

1. Samuel Lempeshayo Marteu hereinafter referred to as the plaintiff, came to this court by way of plaint against Loise Jeruto Kosgei, Fredrick Koskei Rotich, Mary Wanjiku Mugo who was sued as the legal representative of the estate of the late Jackson Mugo Maathai (hereinafter referred to as the defendants.) The plaintiff alleges that on or about the 13.5.2003 the plaintiff did purchase the above-mentioned parcel of land then registered in the name of one Mr. Jackson Mugo Mathai.
2. The said Jackson Mugo Maathai was the registered owner of all that parcel of land known as Kampi Ya Motor/Kampi ya Moto Block 3/23 measuring approximately 585 acres (234.7 hectares). This parcel of land was made available for sale and M/S. Muigai Commercial Agencies were the sole agents for purposes of dealing with the subdivision and sale of the entire parcel of land.
3. On or about the 30.6.2001 the said Muigai Commercial Agencies sold part of the parcel of land to one Mr. Peter Githinji Ng'ang'a which parcel of land was measuring 1 acre
4. piece and was excised from the entire 583 acres of Kampi Ya Moto/Kampi ya Moto Block 3/23 and the said 1 acre was then described as plot no. 125.



5. Upon purchasing the said 1 acre of land (Plot 125) the said Peter Githinji Ng'ang'a appointed the Muigai Commercial Agencies to find a buyer of the excised parcel of land and proceeded to sell and upon receiving this authority to sell, three persons; -namely William Chemalmal Kipchumba, Vincent K. Ngeny and Joseph Kosgei expressed interest to purchase and indeed they purchased the said plot no. 125 whereby William Chemalmal took 0.5 acres and he was to pay Kshs.80,000/=, Vincent K. Ngeny and Joseph Kosgei each took 0.25acres and they paid another total of 80,000. Subsequent thereto, William Chemalmal transferred his purchaser's interests to the plaintiff as the plaintiff paid off for William Chemalmal's portion which communication was given to M/S. Muigai Commercial Agencies for purposes of transferring the 0.5acre to the plaintiff.
6. Thereafter, upon completion the said purchase, M/S. Muigai Commercial Agencies wrote to the Mr. Jackson Mugo Maathai's advocates M/S. Mindo & Co. Advocates asking the said firm of advocates to proceed and complete the processing of title deeds in the names of the plaintiff Mr. Ngeny and Mr. Kosgey as the said firm of advocate's was holding the mother title for the entire parcel of land known as Kampi Ya Moto/Kampi ya Moto Block 3/203.
7. The plaintiff has visited the offices of M/S. Muigai Commercial Agencies on several occasions to ask about the progress in processing the title deeds but indeed he has always been advised that the same was not ready.
8. In the year 2004 the plaintiff constructed a 2 bedroomed house in his 0.5acre portion of land and has since been living there peacefully with his family.
9. Sometimes towards the end of the year 2011 the 1st and 2nd defendant's came to the plaintiffs parcel of land and purported to erect a fence an act which the plaintiff defied as the plaintiff knew the 1st and 2nd defendants were trespassers to his home. It is then that a dispute arose as the 1st and 2nd defendants claimed that the same subject parcel of land had also been sub-divided and sold to them by the said Jackson Mugo Maathai as Kampi ya Moto/Kampi ya Moto Block 3/148 in the year 2007.
10. The plaintiff thus conducted a search at the Nakuru Lands Registry where he discovered that the said parcel of land was illegally re-sold to the 1st and 2nd defendants an act which was not legal as indeed proprietary rights had already passed to the plaintiff and is the plaintiff who could sell the land.
11. The purported sale of land by Mr. Jackson Mugo Mathai to the 1st and 2nd defendant in 2007 was not only illegal but fraudulent as the same parcel of land had already been sold in 2001 to Mr. Peter Githinji Ng'ang'a who sold it to the plaintiff, Mr. Ngeny and Mr. Kosgey.
12. The 3rd defendant thus acted fraudulently in transferring the parcel of land from her late husband's name to the 1st and 2nd defendant's name.
13. The plaintiff prays for judgment in terms of a permanent injunction restraining the defendant by themselves, servants, agents and or representatives from either alienating, selling, transferring, charging, leasing dealing and or in any way interfering with that parcel of land known as Kampi ya Moto/Kampi ya moto Block 3/148 measuring 0.5 acres. The plaintiff prays for costs and interest.
14. The defendants filed a joint statement of defence denying that the plaintiff has ever been the owner of the suit land or ever purchased the land form the later Jackson Mugo Mathai. The defendants denied that Jackson Mugo Mathai ever sold the suit land to one Peter Githinji Ng'ang'a and that the said Peter Githinji Ng'ang'a obtained any proprietary rights in the property. The defendant denied the existence of any agency between Jackson Mugo Mathai and anybody to sell the suit land. The defendant denied that plot No.125 was the same as parcel of land No. Kampi ya Moto/Kampi ya Moto Block 3/148. the defendant decreed lack of consent of the Land Control Board and lack of spousal consent an any



- agreement of sale. The defendants contend that the suit was lawfully sold to the 1st and 2nd defendants by the deceased Jackson Mugo Mathai the sole registered proprietor of the land. They acquired good title and are the absolute proprietors. The plaintiff is therefore in illegal occupation of the suit property.
15. The defendant contend that this suit is bad in law incompetent and unsustainable and null and void as there existed a suit No. Nakuru HCCC No. 100 of 2006 between Jackson Mugo Mathai Versus Samuel Lempeshau Marteu and Vincent Ngeny. The defendant contends that the suit is time barred.
 16. In the counter claim, the 1st and 2nd defendants claims to be the lawful owners and the registered absolute proprietors of the suit land having purchased it from Jackson Mugo Mathai and that plaintiff has trespassed on the land and pray for vacant possession and or eviction against the plaintiff. The defendant prays for an Order commanding the Plaintiff (now Defendant) Samuel Lempeshayo Marteu to vacate the suit land Title Number Kampi ya Moto/Kampi Ya Moto Block 3/148, and to deliver vacant possession thereof to the 1st and 2nd Defendants' (now Plaintiffs') Loice Jeruto Kosgei and Fredrick Koskei Rotich. In default of his vacating and delivering vacant possession of the suit land as aforesaid, the Plaintiff (now Defendant) Samuel Lempeshayo Marteu to be forcefully removed and evicted from the suit land
 17. Further, an Order of permanent injunction restraining the Plaintiff (now Defendant) Samuel Lempeshayo Marteu by himself, his heirs, legal representatives, successors family members, assignees, agents, servants, or anyone claiming through or under him, from entering, remaining on, living on, using, cultivating, wasting, alienating, disposing, selling, or in any other way whatsoever interfering with the suit land, or with the IS and 2nd Defendants' (now Plaintiffs') ownership, quiet possession, occupation, and use of the suit being Land Title Number Kampi ya Moto/Kampi ya Moto Block 3/148. Damages for trespass to land and to goods, and for conversion of goods.
 18. Lastly, the defendants pray for Mense profits from January 2009, up to the date of delivery of vacant possession of the suit land to the 1st and 2nd defendants (now 1st and 2nd plaintiffs) plus Costs of this suit. In reply the defence and defence to counter-claim the plaintiff states that the counter-claim is incompetent and reiterates that he is the legal owner of the suit property. The defendant denies each and every allegation in the counter- claim
 19. When the matter came up for hearing, the plaintiff testified that on 13th May 2003, he purchased the suit property while it was registered in the names of Jackson Mugo Mathai.
 20. The parcel of land was known as Kambi ya moto/kambi ya moto3/23 and the sole agents for sale were Muigai Commercial agencies. M/s Muigai Commercial Agencies sold him plot No.125 which was part of Kampi ya moto/Kampi ya moto3/23 before subdivision.
 21. The plot later became parcel number Kampi ya Moto/Kampi ya Moto Block 3/148. The parcel of land had been purchased by one Peter Githinji Ng'ang'a who gave Muigai Commercial Agencies Authority to sell the land. Upon receiving the authority to sell the land, three person expressed interest namely, Joseph Kipsogei Koskei, William Chemalmal Kipchumba, Vincent K Ngeny and Joseph Kipkosgei Kosgey.
 22. William Chemalmal opted to transfer his parcel to the plaintiff through Muigai Agencies and he paid Ksh140,000/=. Muigai agencies wrote to Mindo the advocate for Jackson Mugo Mathai to complete the processing of title but it was never done. He constructed a 3 bedroomed permanent house in 2004. In 2011 the 1st and 2nd defendant claimed ownership of the suit land and went to take possession. He prayed for judgment in his favour.



23. On cross- examination he agreed that Jackson Mugo Mathai sued him in 2006 and wanted their eviction from the parcel of land. He bought the land from Chemalmal and built a house.
24. PW3, Elizabeth Omwenyo, an advocate of the High Court of Kenya testified that she prepared a sale agreement between Jackson Mugo Mathai and Peter Githinji Ngang'a in respect of Kampi ya moto/Kambo ya Moto Block 3/23. Jackson Mugo Mathai was the vendor through an agent Mungai Commercial agency Limited.
25. The vendor was selling one acre to the purchaser for Ksh30,000. The parcel being sold was known as plot No. 125. It was agreed that the purchaser would pay a deposit and the whole purchase price would be paid after subdivision. The parties executed the agreement. According to the witnesses, the vendor authorized Mugai Commercial agencies to sell the property. No consideration was paid at the time of signing the agreement.
26. PW3, Enisha Wanjiku stated that Peter Githinji Ng'ang'a brought an agreement between him and Jackson Mugo Maathai. It was a sale agreement. Mr Githinji was selling a "sale agreement" and not land. The property being sold was plot number 125. The authority to sell the land was given by Mr Ng'ang'a. The payment for land was made directly to Muigai agencies. The money was remitted to Peter Muigai Ng'anga. She produced the payment vouchers for Kshs80,000. William Kipchumba Chemalmal sold half acre of the land to the plaintiff. They wrote to Mindo advocate the lawyer for Jackson Mugo Mathai to remove William Clemalmal and replace him with the plaintiff. She states that there is no evidence linking plot number 125 to parcel number 145. Jackson Mugo Mathai was not party to the agreement of sale of the plot to Chemalmal. Muigai Commercial agencies has no power of Attorney from Jackson Mugo Mathai.
27. The defence called John Mathai Mugo the son of Jackson Mugo Mathai and Mary Wankiku Mugo. He relied on his witness statement and clarified that the parcel of land in dispute is No. 148 that belonged to his father. It was a subdivision from land measuring 500 acres that belonged to his father. Kampi ya Moto/Kampi ya Moto Block 3/148 was sold to Fredrick Rotich and Loise Jeruto Kosgei. The 2nd defendant entered the land and is cultivating.
28. Loise Jeruto Kosgei did not enter as someone else is in occupation. There are no recording that their father sold land to the plaintiff. He categorically states that his father did not sell land to the plaintiff and disowns the agreement allegedly signed by Jackson Mugo Mathai. The plaintiff is occupying the land illegally. Muigai agencies were agents but were removed. The land was purchased by 1st and 2nd defendants. She produced the agreement and title deed.
29. On cross- examination he states that his father was dealing with the land but admits that Muigai Commercial Agencies were the agents. He does not know when the agency was revoked. He admits that Mindo was the advocate for Jackson Mugo Mathai.
30. DW2, Loise Jeruto Kosgei testified that the plot belongs to her and the 2nd defendant. They bought the plot from Jackson Mugo Mathai. They were issued with title on 12th July 2012. She has never entered the land.
31. On cross examination by Muchella, she states that when she bought the land in 2007, nobody was living on the same. Samuel started using the land in 2009.
32. DW3 Fredrick Koskei Rotich testified that he is the registered owner of parcel number Kampi ya Moto/ Kampi ya Moto Block 3/148 jointly with Jeruto Loice. He bought the plot in 2007 from Jackson Mugo Mathai. He produced the agreement. He produced the payment receipts. He entered the plot in 2008 or 2009. Jackson Mugo Mathai has sued the plaintiff for trespass in 2006. He lives on the land and



- had constructed a house. On cross examination he states that he paid Mindo and Company advocates the purchase price.
33. DW4, John Litira Lokwon a court administrator in charge of small claims Nakuru testified that there were three files related to this matter Nakuru HCCC No. 179 of 2000 between Muigai Commercial Agencies Limited and Jackson Mugo Mathai, HCCC No. 80 of 2006, Mugai Commercial agencies versus Jackson Mugo Mathai. Suit No. 179 of 2000 was discontinued on 25th April 2000. Suit No. 100 of 2006 abated on 6th July 2015.
34. I have considered the evidence on record and do find that the sale agreement dated 30th June 2001 was made between Jackson Mugo Mathai and Peter Githinji Ng'ang'a . In the sale agreement Jackson Mugo Mathai authorized Muigai Commercial agencies Limited to sell the property Kambi ya moto/Kambi ya moto/block 3/23. Measuring 585 acres (234.7hectares) by the best they deemed necessary. Peter Githinji Nganga had agreed to buy and Jackson Mugo Mathai had agreed to sell the parcel marked No 125 (measuring 1 acre on the subdivision plan for a sum of Kshs130,000. The purchaser has to settle the purchase price when the relevant title deed of the property would be made available by the vendor. On the completion date the vendor was to deliver to the purchaser or their advocate a registrable transfer in favor of the purchaser and the purchaser was to pay or prove payment of the balance of the purchase price. The agreement was witnessed by Elizabeth Omwenyo advocate acting for both the vendor and the purchaser. The agreement was drawn by Omweyo and Co. Advocates. M/ s Elizabeth Omweyo testified that she witnessed the parties sign the agreement but did not witness the parties exchange money that can be referred to as consideration.
35. Later Peter Githinji Nganga gave Muigai Commercial Agencies authority to sell the land. The authority was received by Muigai Agencies on 15th August 2002. Three persons namely William Chemalmal Kipchumba Vincent K Ngeny and Joseph Kipkesgei Koskey expressed interest to purchase the property. The plaintiff paid off William Chemalmal and he gave M/s Muigai Commercial agencies authority to sell. He paid Chemalmal Kshs140,000/= as consideration. Thereafter Muigai Commercial Agencies and Jackson Mugo Mathai did not complete the transaction. The plaintiff constructed his house on the land and moved in with his family. He even buried his child on the land. In the year 2007, Jackson Mugo Mathai sold the land to the 1st and 2nd defendants directly. The land was subdivided and parcel number Kampi ya moto/Kampi ya moto 3/148 was created and sold to the 1st and 2nd defendants. The defendant are holding the title to the property.
36. There are various ways in law on how agency can be created. According to Cheshire and Fifoot, the Law of Contract, 5th Edition page 386-394, agency can be created in various ways. These include agency by Estoppel. The quote therein by Lord Cransworth is important in demonstrating how this form of agency is created:

“No one can become an agent of another person except by the will of that person. His will may be manifested in writing or orally or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him... this proposition, however, is not at variance with the doctrine that where one has acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that the other person is about to act on that behalf, then unless he interposes, he will in general be stopped from disputing the agency, though in fact no agency really existed....”

Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001, defines such a relationship to be:-



“... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”

In the case of *Branwhite versus Worcester Works Finance Ltd.* [1969] 1 A.C. 552 at 587 where Lord Wilberforce stated thus:-

“While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency.

In the case of *Garnac Grain Co. Inc. versus H.M. Faure & Fair Dough Ltd and Bunge Corporation* (1967] 2 All E.R. 353 Lord Pearson with the concurrence of the House used the words-

“The relationship of the Principal Agent can only be established by the consent of the Principal and Agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it... the consent must, however, have been given by each of them, either expressly or by implication from their words and conduct “. (Emphasis by applicants)

37. Muigai Commercial Agency Limited were validly appointed as the agent for the vendor Jackson Mugo Mathai. This court finds that there was an agency by estoppel between the late Jackson Mugo Mathai and Muigai Commercial agency as stated in the sale agreement dated 30th June 2001 as per paragraph 2 of the agreement.
38. However, Muigai Commercial Agencies sold the property and remitted the money to Peter Muigai Ng'ang'a instead of Jackson Mugo Mathai. The rest of the money was allegedly paid to Jackson Mugo Mathai. There is no evidence of payment to Jackson Mugo Mathai. The property was later sold by Muigai Commercial Agencies to the plaintiff. This court finds that Muigai Commercial Agencies as the agent of Jackson Mugo Mathai had no authority from the vendor, Jackson Mugo Mathai to sell the land to the 3rd parties. There was no agency agreed between Jackson Mugo Mathai and Muigai commercial agency for the sale of the suit property to Chemalmal and the plaintiff. The only agency agreement that existed was for the Muigai Commercial Agency to sell the land to Peter Githinji Ng'ang'a. Instead of complying with the sale agreement Peter Githinji Ng'ang'a took the sale agreement to Muigai Commercial Agency and asked them to sell the land belonging to Jackson Mugo Mathai. Mr Githinji has no land to sell and therefore the purported authority to sell was illegal. Moreover, the transfer of the plot number 125 Kampi ya Moto/Kampi ya Moto/block 3/23 was also illegal as Mr. Chemalmal did not have the capacity to transfer the parcel of land as he did not own the same. This court finds that Muigai Commercial Agency was involved in illegalities in the process of sale of the suit land and nothing comes out of the illegal transaction. On the other hand, the 1st and 2nd defendants are holders of title to the suit property having been registered on 12th July 2012 and title issued.

Section 24 of the *Land Registration Act* provides:-

24. Interest conferred by registration
Subject to this Act—



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease

Section 25 provides

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
 - (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

Section 26 provides:-

26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

39. No evidence has been produced by the plaintiff that the title was fraudulently obtained or that registration was done irregularly. The balance of proof for fraud fails with the plaintiff who alleges proves.

40. I am guided by the Court of Appeal in case of Kuria Kiarie & 2 Others –vs- Sammy Magera [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged 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 these 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.” [Emphasis added].

41. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, this court in the case of Kinyanjui Kamau – vs George Kamau [2015] eKLR expressed itself as follows;-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –vs- Ndolo [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

42. The plaintiff having failed to prove his case on a balance of probabilities the same is dismissed with costs. Conversely, the 1st and 2nd defendants have proved that they acquired the property legally and are the registered proprietors of the same. This court finds that the plaintiff is a trespasser on the suit parcel of land and orders that he vacates within a period of 90 days, failure of which he ben evicted in accordance with the law. I do find that the 1st and 2nd defendant have not proved their claim and Mesne profits and do decline to grant the same on general damages for trespass, I do find that there is no evidence that the plaintiff has put in possession by the vendor. I do award general damages for trespass of Kshs.50,000. Costs of the suit to the defendant. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF JUNE 2023.

A. O. OMBWAYO

JUDGE

