



**Wachira v Weru & 3 others (Environment & Land Case E004 of 2021)
[2023] KEELC 18209 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E004 OF 2021**

**JO OLOLA, J
JUNE 16, 2023**

BETWEEN

JAMES KABURU WACHIRA PLAINTIFF

AND

HOUSTON MUCHIRI WERU 1ST DEFENDANT

DAVID MUNDIA MUCHUGU 2ND DEFENDANT

THE LAND REGISTRAR NYERI 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. By his Complaint dated 26th February, 2021 as filed herein on 1st March 2021, James Kaburu Wachira (the Plaintiff) prays for Judgment against the four (4) Defendants for:
 - (a) A permanent injunction order restraining the Defendants by themselves, their servants, agents and/or servants from alienating, selling, leasing and/or interfering (with), wasting or dealing in whatsoever manner with land parcel No. Iriaini/Gatundu/104;
 - (b) Cancelling of the sub-division arising from Iriaini/Gatundu/104 and a declaration that the original mother title Iriaini/Gatundu/104 (sic);
 - (c) Any other relief that this Honourable Court may deem fit and
 - (d) Costs of this suit.

2. Those prayers arise from the Plaintiff's contention that his deceased grandmother and father were the original proprietors of the said L.R. No. Iriaini/Gatundu/104. The Plaintiff avers that at some



- point in time, he had the intention of selling the said property to the 1st Defendant but the sale never materialised. It is his case that when he recently checked on the status of the suit property, he discovered that the same had been sub-divided into L.R Nos. Iriani/Gatundu/1286; 1870; 1871 and 1872.
3. The Plaintiff avers that as at the said time, the 1st Defendant had registered two of the new sub-divisions into his name and title deeds had been issued. The 1st Defendant had also caused one of the sub-divisions to be registered jointly in his name and that of the 2nd Defendant who is unknown to the Plaintiff. It is the Plaintiff's case that the said sub-divisions and title deeds were issued illegally and fraudulently and hence the suit herein.
 4. Houston Muchiri Weru and David Mundia Muchugu (the 1st and 2nd Defendants respectively) are opposed to the orders sought by the Plaintiff. In their joint Statement of Defence dated 7th April 2021, the Defendants state that the Plaintiff entered into a land Sale Agreement with the 1st Defendant on 11th March, 2020 for a portion of land measuring 0.430 Ha. in land parcel No. Iriani/Gatundu/1286 for a consideration of Kshs.1,500,000. The Defendants further assert that by another agreement dated 5th February 2020, the Plaintiff had further sold a portion of the same piece of land measuring 0.9 Ha jointly to the two of them at a consideration of Kshs.4,700,000.
 5. The 1st and 2nd Defendants further aver that the Plaintiff followed through with the agreements and proceeded to sub-divide the said L.R No. Iriani/Gatundu/1286 into land parcel Nos. Iriani/Gatundu/1870 – 1872. The Plaintiff then transferred L.R No. Iriani/Gatundu/1871 to the 1st Defendant and also transferred Iriani/Gatundu/1870 to the names of the 1st and 2nd Defendants jointly.
 6. Accordingly, the Defendants deny committing any acts of fraud and aver that they paid the full purchase price to the Plaintiff who voluntarily proceeded to execute all the necessary documents that culminated in the transfer.
 7. The Land Registrar and the Attorney General sued as the 3rd and 4th Defendants equally filed a joint Statement of Defence dated 10th February 2022 in which they generally denied the Plaintiff's claim.

The Plaintiff's Case

8. At the trial herein, the Plaintiff testified as the sole witness in his case. Testifying as PW1 and relying on his Statement dated 12th February 2021, he told the Court that he is the grandson and a son to the registered proprietor of L.R No. Iriani/Gatundu/104. PW1 testified that he had intended to sell the suit property to the Defendants upon sub-division but the same never materialized and that he still holds the original title in the names of the proprietors who are both deceased.
9. PW1 further told the Court that his family had the intention of filing succession proceedings but due to a shortage of finance they are yet to do so. However sometime in the year 2020, the 1st Defendant brought to him a title bearing his name and told him that the land had already been sub-divided. When PW1 checked out the position, he came to learn that the said property had indeed been sub-divided into L.R No. Iriani/Gatundu/1286 which was further sub-divided into L.R No. Iriani/Gatundu/1870 -1872.
10. PW1 testified that he then discovered that the 1st Defendant had issued a title deed to himself and another to the 2nd Defendant. PW1 told the Court this was suspicious as he had never sold or transferred the suit property to the Defendants.



11. On cross-examination, PW1 told the Court that when the 1st Defendant went to buy the land, the same was in his name and that of the children of Wachira. The Defendants asked to be sold one acre. He told the Court that once the Defendants gave him Kshs.2 Million, they started threatening him.
12. PW1 testified that he sold to the Defendants 2 ½ acres and they went before an Advocate. They first gave PW1 Kshs.2 Million. Eventually, they only gave him Kshs.5.5 Million which was not the total purchase price. He conceded that he signed two Sale Agreements – one with the 1st Defendant and the other with both the 1st and 2nd Defendants jointly. PW1 however told the Court that the Defendants also forged his signature as they had his identity card.
13. PW1 further conceded that the title for L.R No. Iriaini/Gatundu/104 was closed on 26th June, 2016. He did not know the numbers for the resultant sub-divisions. PW1 told the Court that they had discussed about the title No. Iriaini/Gatundu/1286. He told the Court the Defendants took him to an Advocate and that it was the Advocate and not himself who had done the transfers.
14. PW1 told the Court the sum of Kshs.5.5 Million was paid into his Bank account but the Defendant did not complete the payments. PW1 told the Court the Defendants had defrauded him and that they had refused to compensate him for the Coffee on the land.

The Defence Case

15. On their part, the Defence called the testimony of 2 witnesses in support of their case.
16. DW1 – Houston Muchiri Weru is the 1st Defendant. He told the Court he is in the properties business. DW1 testified that they had entered into a Sale Agreement with the Plaintiff on 5th May, 2020 where the Plaintiff agreed to sell to him and the 2nd Defendant who was DW1's Partner, a portion of land measuring 0.9 Ha that was to be excised from L.R No. Iriaini/Gatundu/1286. The two bought the land for Kshs.4.7 Million.
17. DW1 further told the Court they also entered into another agreement on 11th March, 2020 wherein the Plaintiff agreed to sell to them a portion of the same land measuring 0.4 Ha. They bought the same at a consideration of Kshs.1.5 Million.
18. DW1 testified that he was unaware of L.R No. Iriaini/Gatundu/104 and denied sub-dividing the Plaintiff's land without his knowledge.
19. On cross-examination, DW1 testified that they had conducted a Search before the sale transaction and had confirmed that the Plaintiff was the owner of the land. He did a search for parcel No. 1871 which was a sub-division of Iriaini/Gatundu/104.
20. DW2 – David Mundia Muchugu is the 2nd Defendant. He told the Court he knows the Plaintiff and that the 1st Defendant is his Partner. DW2 reiterated the position taken by DW1 and told the Court they bought a portion of Parcel No. 1286 and not number 104 as stated by the Plaintiff.
21. DW1 further testified that they had paid the Plaintiff through his Bank account and that it is the Plaintiff who instructed a Surveyor who did the sub-divisions. After they took the land, the Plaintiff started complaining.
22. On cross-examination, DW2 told the Court their business is to buy and sell land. When they engaged the Plaintiff, he gave them a title for parcel No. 1286 which was in his name.



Analysis and Determination

23. I have carefully perused and considered the pleadings filed by the Parties herein, the testimonies of their witnesses as well as the evidence tabled before the Court. I have similarly perused and considered the submissions and authorities placed before me by the Learned Counsels representing the Parties herein.
24. By this suit, the Plaintiff urges the Court to issue a permanent order of injunction restraining the Defendants from selling, leasing, alienating, wasting or dealing in any manner with a parcel of land described as Iriaini/Gatundu/104. In addition, he prays for an order cancelling all sub-divisions said to be arising from the said L.R No. Iriaini/Gatundu/104.
25. It is the Plaintiff's case that his grandmother and father are the registered proprietors of the said parcel of land measuring some 7.08 Ha. The Plaintiff asserts that while at some point in time he wanted to sell the said parcel of land to the 1st and 2nd Defendants, the sale never materialised and he remained in possession of the original title deed which is in the joint names of his grandmother Jane Muthoni Kaburu and his father Samuel Wachira Kaburu.
26. It was the Plaintiff's case that in circumstances that were unclear to him, the 1st and 2nd Defendants were somehow able to sub-divide the said L.R No. Iriaini/Gatundu/104 into four (4) other parcels of land some of which they have since caused to be registered in their names with the assistance of the 3rd Defendant herein.
27. The Plaintiff denied selling and/or transferring portions of the said property to any of the Defendants herein and urged the Court to find that the said sub-divisions and subsequent registration of the Defendants as proprietors of portions of the land were the subject of an illegality and hence fraudulent.
28. The 1st and 2nd Defendants on their part deny that they have had any dealings with the parcel of land described as L.R No. Iriaini/Gatundu/104. On the contrary, the two Defendants assert that on two occasions in February and March 2020, they did enter into two transactions with the Plaintiff wherein they did purchase two portions from him of a parcel of land known as L.R No. Iriaini/Gatundu/1286 at an agreed consideration.
29. It was the two Defendants' case that following the said purchases, it was the Plaintiff who then proceeded to sub-divide the said L.R Iriaini/Gatundu/1286 into L.R Nos. Iriaini/Gatundu/1870, 1871 and 1872 before transferring two of the portions to themselves.
30. While in his pleadings the Plaintiff vehemently denies that he was unaware of the circumstances under which the properties came to change hands, it was apparent from his testimony that he not only knew but was a willing participant in the transfer and registration of the portions of land into the 1st and 2nd Defendants' name.
31. Questioned during his cross-examination, the Plaintiff readily admitted that he sold a portion of land measuring 2 ½ acres to the two Defendants and that he was paid a handsome sum of Kshs.5.5 Million for his troubles. His grouse when he appeared in Court appears to be the claim that the Defendants did not pay the full purchase price and/or that they refused to pay for the coffee bushes that were on the land.
32. As it were, the Plaintiff did not disclose the amount outstanding from the purchase price nor what he considered to be the value of the coffee bushes that the Defendants failed to pay for. And of course that is not his claim before the Court.



33. I have taken time to consider the two Sale Agreements dated 5th February, 2020 as well as the one that is dated 17th March, 2020. The Plaintiff's signature appears on both as the vendor. His signature thereto is witnessed thereon by one Joyce Wandia Kaburu and Charles Wanjohi Wachira. At the trial herein, the Plaintiff readily conceded that he executed those agreements before an Advocate. Asked about the witnesses to the Agreement, the Plaintiff quickly offered that Joyce Wandia is his dear wife while Charles Wachira is his brother. Neither of the two were called as witnesses in this case and it was clear to me that there was no dispute that they had witnessed both the Agreements and the transfers exhibited by the Defendants.
34. Again while the Plaintiff made heavy weather of the fact that he was still holding the original title for the parcel of land he referred to as L.R No. Iriaini/Gatundu/104, it was apparent from the two Sale Agreements that the land whose portion he was selling was referred to Iriaini/Gatundu/1286. From the Plaintiff's own documents produced before the Court, this new parcel of land was created on 27th June, 2016 after title No. Iriaini/Gatundu/104 referred to by the Plaintiff was closed. Having been so closed, there was no title capable of being claimed in the manner herein.
35. Indeed, the Plaintiff did not place any evidence before the Court to demonstrate that the Defendants had dealt with the land in 2016 and caused the changes without his knowledge. His case was that the Defendants approached him in the year 2020 seeking to purchase the land. Indeed the fact that the Plaintiff executed the agreements showing the new parcel number was an indication that he was already aware of the closure of the previous titles in the name of his grandmother and father in the year 2016 as aforesaid.
36. From a perusal of the Green Card of the said L.R No. Iriaini/Gatundu/104, it was apparent that on its closure on 27th June 2016, parcel Nos. 1286 to 1290 had been created. If indeed someone defrauded the Plaintiff and his relatives of L.R No. Iriaini/Gatundu/104 as he claims, the question that then begs the answer from the plaintiff is, who are the fraudsters who own the other parcels being L.R No. Iriaini/Gatundu/1287 to 1290? Why is there no action brought against the owners of those sub-divisions.
37. As was stated by Tunoi JA (as he then was) in matters of fraud in *Vijay Morjaria -vs- Nansingh Madhusing Darbar & another* (2000) eKLR:
- “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.”
38. Confronted by the Sale Agreements between himself and the 1st and 2nd Defendants during cross-examination, this is what the Plaintiff told the Court:
- “I have been shown the Defendants' List of Documents. I have seen an agreement between me and the 1st Defendant and another between me and the 1st and 2nd Defendants. I signed the documents but they also forged my signature as they had my I/D ...”
39. Given such generalized Statements, it was not easy for this Court to put any seriousness on the Plaintiff's testimony. As the one alleging that there was a forgery, the burden to prove that allegation lay squarely with him. It certainly was not helpful to him to make such Statements and then leave it to the Court to make a guess as to which documents he genuinely executed and which ones were made up by the Defendants.



40. It follows that I was not persuaded that there was any iota of merit in the Plaintiff's case.

41. Accordingly, this suit is dismissed with costs to the Defendants.

Judgment dated, signed and delivered in open Court and virtually at Nyeri this 16th day of June, 2023.

In the presence of:

Ms Ndichu holding brief for Mburu for the Plaintiff

Ms Lucy Mwai for 1st and 2nd Defendant

No appearance for Attorney General for 3rd and 4th Defendants

Court assistant - Kendi

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J. O. Olola

JUDGE

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