



Murage (Suing as the Administrator of the Estate of the Late James Njuguna Mwangi) v Matindi (Environment & Land Case 143 of 2012) [2023] KEELC 19152 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 143 OF 2012**

**A OMBWAYO, J
JULY 28, 2023**

BETWEEN

**JOYCE WAGITHI MURAGE (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE JAMES NJUGUNA MWANGI) PLAINTIFF**

AND

PATRICK GITAU MATINDI DEFENDANT

JUDGMENT

Introduction

1 The Plaintiff commenced this suit vide a Complaint dated February 10, 2010. She avers that she is the legal administrator of the late (James Njuguna Mwangi) estate vide letters of administration ad coligenda bona issued to her on November 4, 2009 by the Hon Justice W Ouko. The Plaintiff further avers that the late (James Njuguna Mwangi) is and was at all material times to this suit the registered proprietor of Plot Number BLOCK 16/188. She states that sometimes in the year 2008 and thereafter, the Defendant without any lawful order, any authority or any colour of right and without consent of the Plaintiff, wrongfully entered the Plaintiff's parcel of land known Plot Number BLOCK 16/188 and secretly and fraudulently obtained certificate of lease conferring ownership to himself. The Plaintiff lists the particulars of fraud on the part of the Defendant as;

- a. Obtaining a title deed in relation to a parcel of land that belonged to the deceased (James Njuguna Mwangi) without the knowledge of the legal administrator the plaintiff herein.
- b. Processing, transacting in relation to the said parcel of land without following due law and procedure
- c. That after the defendant obtained Certificate of lease in relation to Land Plot Number Block 16/188 the Defendant has now commenced constructions on the aforesaid parcel of land to the detriment of the deceased estate.



- 2 The Plaintiff prays for judgment against the defendant for;
 - a. A cancellation of the title deed on portion of Land Parcel No Nakuru Municipality BLOCK 16/188 situate at Milimani within Nakuru District.
 - b. That the costs of this case be paid to the Plaintiff by the Defendant.
- 3 The Defendant filed a Statement of Defence dated March 22, 2010 where he states that the Plaintiff is misconceived and has no legal basis as she does not have any title or title documents for the suit property. The Defendant also states that he is the registered owner of all that parcel of land known as Nakuru Municipality Block 16/188 and has a Certificate of Lease to that effect. According to the defendant, when he obtained the lease, he checked all records for the plot and also on the ground and the plaintiff did not appear anywhere as far as the plot is concerned, and has never taken it possession. The Defendant denies the particulars of fraud in the Plaintiff and he states that due process was followed when the plot herein was first registered and subsequently transferred to him. The Defendant states that the registration of the suit property was a first registration which title cannot be challenged in law as it's a first one, which even if fraud was proved, it cannot challenge or invalidate the same. The Defendant also denies being given any notice of intention to sue.

Plaintiff's Evidence And Submissions

- 4 The Plaintiff produced the following documents dated March 26, 2010
 - a. Certificate of death of James Njuguna Mwangi dated August 30, 2006
 - b. Letters of administration ad colligenda of all the estate James Njuguna Mwangi dated November 4, 2009.
 - c. Lease issued to James Njuguna Mwangi for Nakuru Municipality Plot Number Block 16/188
 - d. The Certificate of official search dated April 7, 2009
 - e. Land rent Pay in slip dated April 18, 2007 for Nakuru Municipality Plot Number Block 16/188
 - f. Photographs of some structures put up by the defendant
 - g. Letter of allotment to James Njuguna Mwangi of Nakuru Municipality-UNS. Residential plot 3 known as Nakuru municipality Plot Number Block 16/188 dated May 14, 1992.
 - h. Letter from the Commissioner of Lands to Director of Surveys dated July 1, 1996.
 - i. Letter from Commissioner of Lands to Director of Surveys dated July 16, 1999 plus a receipt referred to in the said letter.
 - j. Fee receipts from the Department of Lands of various dates paid by James Njuguna Mwangi for Plot Number Block 16/188
- 5 During the hearing of the Plaintiff's case Joyce Wagithi Murage testified as PW1. It is her evidence that she lives in Lanet and works as a farmer. She stated that she is in court because there is land that belonged to her husband who is deceased and she has a certificate of death which she wishes to produce it as P- Exhibit 1.
- 6 PW1 testifies that she filed a succession cause and got letters of administration and produced it as limited grant marked as P- Exhibit 2



- 7 That after getting the grant, she went to collect this property and went to the land which they had been using before and found a person in it. She states the land is in Milimani and it is Nakuru Municipality Block 16/188. It is PW1's testimony that she has a lease in the name of her husband and she wishes to produce it. This is marked as MF1- P1. She states that her husband applied to the Government for this land and he was issued with an allotment letter and she produced it as P- Exhibit No 3.
- 8 That she has a letter from the commissioner of lands dated July 1, 1996 and her husband's letter dated July 19, 1999. She produced the letter dated July 19, 1999 as P-Exhibit No 4 and the letter dated July 1, 1996 as marked Exhibit PMF1-2. Her husband paid money to the lands office and she has 5 receipts which she wishes to produce them. These are marked P- Exhibits 5(a) (b) (c) (d) and (e) respectively.
- 9 That she used to farm on this land since the year 2002 and in January 2008 when she went to prepare the land, she found a person who told her not to enter the land because it was not hers. She further states that she did not know the person and she went to the lands office to do a search and discovered that a title deed had been issued in the name of the defendant. She produced a search marked P-Exhibit 6. Later the land was fenced and a small mabati structure erected and she has two photographs which she produced to court marked P- Exhibits No 7 (a) and 7 (b). She concluded her testimony by stating that she wishes to have the title issued in the name of her husband and costs.
- 10 On cross -examination by the legal counsel for the defendant, she testifies that she filed a succession cause and she does not have a full grant but a limited grant. She further testifies that her husband died in 2006 and she is yet to file a succession cause as she was left with young children whom she has been attending to. She testifies that she wanted to collect all assets before filing a succession cause and the purpose of the grant marked as P-Exhibit No 2 is limited for purposes of bringing a suit to protect the property of the deceased. She further states that the grant does not specifically identify a property. That her husband was allotted this lands through the letter of allotment as Exhibit 3 and the plot in the allotment letter refers to Nakuru Municipality Residential Plot No 3. She does not have something to show the nexus between this description of the plot and Nakuru Municipality Block 16/188. It is her testimony that Kshs 208, 260 was to be paid and she can read a condition at the back of the letter of allotment which states that payment is to be made within 30 days of the letter of offer and the letter of offer is dated May 14, 1992.

Defendant's Evidence And Submissions

- 11 The Defendant called DWI by the name Patrick Gitau Matindi who was sworn on March 7, 2022. He produced the following list of documents dated January 12, 2011;
- a. Certificate of Lease for Nakuru Municipality Block 16/188 dated December 27, 2002
 - b. Certificate of lease for Nakuru Municipality Block 16/188 dated August 15, 2008
 - c. Certificate of Official Search dated February 8, 2008
 - d. Letter of Consent to Transfer from Commissioner of Lands
 - e. Rent Clearance Certificate dated July 3, 2008
 - f. Rates demand note from Municipal Council of Nakuru
 - g. Copy of cheque dated August 12, 2008 in favour of Municipal Council of Nakuru
 - h. Sale Agreement dated March 28, 2008
 - i. Clearance Certificate from Municipal Council of Nakuru



- 12 On record is the Defendants submissions dated June 12, 2023 and received by the Court on June 13, 2023. The Defendant adopted his witness statement dated January 23, 2014. It is also his testimony that he visited the suit property for the first time in early 2008 and that there was nothing on the land. He testified that he conducted a search and verified that Mr Henry was the proprietor of the suit property prior to purchasing the same and that there was no inhibition, caution, or restriction in Nakuru or in Nairobi. He testified that during the purchase there were some outstanding rates amounting to Kshs 49,680/= and a penalty of Kshs 2,192/= which he testified that he paid the outstanding amount a total of Kshs 63,997,2/= with a cheque. A copy of the Cheque in favour of Nakuru Municipal Council was submitted as evidence marked EXH7
- 13 The Defendant on being cross examined confirmed that he had erected a small temporary house after purchasing the suit property. He confirmed that the suit property had not been cultivated prior to the purchase. The Defendant further testified that he had been paying the rates from the time of the transfer of ownership from the vendor. The Defendant testifies that the land was not ploughed prior to the purchase and that he had neither met the Plaintiff nor her deceased husband. It is the Defendants testimony that he took possession of the suit property immediately after purchase and that he begun cultivation immediately after he got the certificate of lease

Analysis And Determination

- 14 After considering the pleadings and the testimony for the Plaintiff and Defendants, the following issues arise for determination;
- a. Whether the registration of the defendant as the owner of the parcel of land known as Nakuru Municipality Block 16/188 was fraudulent & ought to be cancelled
 - b. Who should bear costs of this suit.

Whether the registration of the defendant as the owner of the parcel of land known as Nakuru Municipality Block 16/188 was fraudulent & ought to be cancelled.

- 15 As a preliminary, on April 20, 2023, the Court directed that the plaintiff to file and serve submission within 14 days of service. The defendant to do likewise within 14 days of service. The Court notes that the Plaintiff has not filed any submissions whereas the Defendant has filed submissions dated June 12, 2023 and received on June 13, 2023. Despite the foregoing, this Court will nonetheless interrogate the issues raised in the Plaint dated February 10, 2010 and make a determination.
- 16 The crux of the Plaintiff's claim is on fraud on the part of the Defendant wherein it is alleged that the Defendant obtained a title deed in relation to a parcel of land that belonged to the deceased (James Njuguna Mwangi) without the knowledge of the legal administrator of the Plaintiff.
- 17 The other particulars of fraud raised by the Plaintiff include processing, transacting in relation to the said parcel of land without following due law and procedure.
- 18 Further it is alleged that after the Defendant obtained a certificate of lease in relation to Land Plot Number Block 16/188, the defendant has commenced constructions on the aforesaid parcel of land to the detriment of the deceased estate.
- 19 It is on this basis that the Plaintiff seeks cancellation of the title deed on portion of Land Parcel No Nakuru Municipality Block 16/188 situate at Milimani within Nakuru District.



- 20 Fraud has been defined in *Black's Law Dictionary 11th Edition* as 'A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.' It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved.
- 21 The Plaintiff in this case has met the first test whereby at Paragraph 5 of the Plaint dated February 10, 2010, it has been specifically pleaded.
- 22 The Court of Appeal in the case of *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000]eKLR* held that: 'It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.'
- 23 This Court will now interrogate whether the Plaintiff has proved the alleged fraud to warrant the grant of the orders sought in the Plaint dated February 10, 2010.
- 24 During the hearing of the Plaintiff's case on January 30, 2018, the Plaintiff produced a lease in the name of her husband. The legal counsel for the defendant raised an objection and stated that it is a photocopy and it is not registered. This was marked as exhibit MFI-P1.
- 25 The Court notes that in an effort to authenticate the evidence, the Land Registrar and Director of Surveys were to be called as witnesses. On November 22, 2018 the officers from the respective offices (Mr Edwin Wafula and Mr Victor Kirui) were directed to liaise with the Plaintiff to produce evidence.
- 26 In the case of *Koinange & 13 others vs Charles Karuga Koinange 1986 KLR* at page 23 the court held that: 'When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.'
- 27 Also in the case of *Kinyanjui Kamau v George Kamau [2015] eKLR* the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that: 'It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo [2008]1KLR (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 the 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.'
- 28 The Standard of proof in cases of fraud ought to be higher than in ordinary cases. This Court finds that this burden has not been discharged by the Plaintiff. No evidence has been adduced as directed by the Court pursuant to directions issued on November 22, 2018.
- 29 Section 107, 108, 109 of the *Evidence Act* provides that:-
- 107.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

30 Given the foregoing, this Court finds that the Plaintiff has failed to prove fraud on the part of the Defendant and thus the claim of cancellation of the title deed on portion of Land Parcel No Nakuru Municipality Block 16/188 situate at Milimani within Nakuru District fails.

B. Who should bear costs of this suit?

31 Section 27 (1) of the *Civil Procedure Act*, Cap 21 provides that Costs follow event. The costs are awarded to the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28th DAY OF JULY, 2023

A O OMBWAYO

JUDGE

