



Scott & another v Kihara & 4 others (Environment & Land Case 419 of 2017) [2023] KEELC 19045 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 419 OF 2017**

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

BETWEEN

LEON SCOTT 1ST PLAINTIFF

VERWRAY SCOTT 2ND PLAINTIFF

AND

JONATHAN MAINA KIHARA 1ST DEFENDANT

ESTHER KARURU KARANJA 2ND DEFENDANT

STEPHEN NJENGA NJUGUNA 3RD DEFENDANT

PETERSON MUCHIRI GACHARI 4TH DEFENDANT

GEOFFREY KARANJA MBOA 5TH DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit vide a Complaint dated 7th November, 2017 and amended on 19th May, 2022.
2. In the amended Complaint, the Plaintiffs aver that at all material times to this suit, the Plaintiffs were joint registered proprietors of L.R Nos Naivasha/Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu Block 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398 measuring approximately 0.38 Ha & 0.42 Ha or thereabout.
3. The Plaintiffs further aver that the 1st Defendant under the guise of a legitimate authority under a power of attorney has purported to sell the said property to the 2nd, 3rd and 4th Defendants.
4. It is the Plaintiff's averment that the 1st Defendant acted unlawfully purporting to be the owner of the said parcel of land and selling it without the Plaintiff's knowledge despite the power of attorney vested



in him to act as an agent, he did not communicate to the Plaintiff's (principals") herein about the sale and the Plaintiffs aver that the purported sale transaction between the Defendants was a fraudulent scheme meant to con the Plaintiffs of their property.

5. The Plaintiffs further aver that the 1st Defendant was in breach of trust by (i) acting beyond the power vested in him and purporting to be the owner of Naivasha/ Maraigushu Block 18/1814, Naivasha/ Maraigushu Block 18/1815, Naivasha/Maraigushu Block 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398, (ii) unlawful selling of the said parcel of land, (iii) abuse of the power of attorney (iv) breach of trust.
6. The Plaintiffs aver that the particulars of fraud on the part of the 2nd, 3rd and 4th Defendants is (i) Failing to exercise due diligence by failing to enquire from the Plaintiff if they had authorized the 1st Defendant to sale the subject property, (ii) failing to communicate their intention to purchase property from the Plaintiff and (iii) deliberately assuming a risk through purported payment of purchase price to an agent without the content of the principal.
7. The Plaintiffs prays for judgment against the Defendants for:
 - a. A declaration that LR. Nos Naivasha/ Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu Block 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398 belonged to the Plaintiff.
 - (aa) A declaration that LR. Nos. Naivasha/Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu Block 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398 belonged to the Plaintiffs.
 - b. A finding that the 1st Defendant breached a duty of trust by purporting to sell to the defendant's land Naivasha/Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398 without due process.
 - c. An Order that the 1st Defendant surrender to the Plaintiffs Original Title Deed for Naivasha/ Maraigushu Block 18/406
 - (cc) An order that the 1st defendant surrender to the Plaintiff's original Title Deed for Naivasha/ Marigushu Block 18/398 in the name of SCOTT and declare the Agreement dated 16th December, 2015 between Jonathan Maina & Esther Karanja and/or any other agreement by Jonathan Maina and any other in respect of the properties in dispute not binding on the Plaintiff.
 - d. An order of a permanent injunction restraining the defendants either by themselves, agents, servants and/or any person claiming through them from trespassing, laying claim and/or proceeding with the purported sale of LR No Naivasha/Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu Block 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398
 - e. In the Alternative the Honourable Court do order the 1st, 2nd, 3rd and 4th defendants to pay to the Plaintiffs the current purchase price of Land Parcel Numbers Naivasha/maraigushu Block 18/1814, Naivasha/maraigushu Block 18/1815. Naivasha/maraigushu Block 18/1816,



Naivasha/maraigushu Block 18/1817 formerly Naivasha/maraigushu Block 18/406 and Naivasha/maraigushu Block 18/398.

- f. Any other relief that this Honourable Court may deem fit to grant.
 - g. Costs and interest of this suit.
8. The Defendants have not entered appearance despite being served with a Hearing Notice through substituted service through an advertisement in the Daily Nation Newspaper and an affidavit of service dated 13th March 2023 was produced in Court and it was sworn by Andrew Geke.

Factual Background

9. The Hearing of the suit commenced on 24th April, 2023

Plaintiff's Evidence And Submissions

10. During the Hearing of the Plaintiff's case, PW1 stated that his name is Leon Scott and am married to Verway Scott and he lives in the state of Georgia USA. He also stated that at his spare time, the Plaintiff's are engaged in missionary work adopt statement filed as evidence.
11. The Plaintiff also testifies that in 2005 they met Jonathan (1st Defendant) in Naivasha. He also states that the Plaintiff's purchased property in 2008 and he was given title deed which he produced as P Exhibit 1
12. It is the Plaintiff's testimony that they engaged the 1st Defendant and went with the title deed to USA. The Plaintiff also states that the 1st Defendant was willing to take care of their land and they gave him instructions and Power of Attorney which they produced as P-Exhibit 2.
13. The Plaintiff states that they received a letter from an attorney that the defendant was trying to sell the land and produced it as P-Exhibit 3. He states that he was shocked, confused and angry. The letter was in respect of parcel number Number18/398.
14. The Plaintiff states that he called Jonathan who said that they are lying. He states that he had a hard time reaching him and later reached him by email which is produced as P-Exhibit 4.
15. The Plaintiff states that Jonathan admitted that he had done wrong and we did not authorize the wrong things he did. The Plaintiff states that they engaged an attorney. He also states that he contacted Fidelis Wandera and he connected us to Mr. Andrew Geke Advocate. We placed a caution on Block 18/398 which is P-Exhibit 5
16. It is the Plaintiff's testimony that he has the search which is P-Exhibit 6 (1)- 6 (5).
17. The Plaintiff states that he lost contact with Jonathan and prays for judgment as per the Plaintiff.

Issues For Determination

18. The Plaintiff filed his submissions and they are dated 22nd May, 2023 and were received by the Court on 6th June, 2023.
19. The Plaintiffs identify the following issues for determination;
- a. Whether the power of Attorney was validly registered being a foreign power of attorney in Kenya?
 - b. Whether there was breach of a fiduciary duty on the part of the 1st Defendant?



- c. Whether there was fraud on the part of the defendants?
20. The Plaintiffs submit that the defendants were served with the original plaint but did not file any defense. The amended plaint was served through substituted service and the defendants again did not file any responses leading the matter to proceed ex parte.
 21. The Plaintiff submits that the 1st Plaintiff testified as PW1 on his behalf of the 2nd Plaintiff. PW1 stated that he is a resident of Georgia USA and he does missionary work together with his wife the 2nd Plaintiff.
 22. He stated that sometime in 2008, they visited Kenya and in particular Nakuru, where they carried out missionary work. In the course of their stay, they developed an interest and decided to purchase land for their social work in Naivasha area.
 23. The Plaintiffs also submit that they later bought two parcels of land known as Naivasha/maraigushu Block 18 398 And Naivasha/maraigushu Block 18/406 from one Miriam Waithira Kimani.
 24. The Plaintiff further submits that he later went back to Georgia USA and left the properties under the care of the 1st Defendant, one of the pastors in the Naivasha church. They later gave him a Power of Attorney.
 25. PW1 produced copies of the title deeds to the said property and power of Attorney that was given to Jonathan Maina, the 1st Defendant.
 26. It the Plaintiffs submission that PW1 produced a number of emails that he and the 1st Defendant exchanged when he received a demand letter from a Kenyan law firm threatening to sue him for failure to complete the sale transaction of his property in Naivasha.
 27. The Plaintiff further submits that upon inquiring from Jonathan whom he had given a power of attorney about the alleged sale, the 1st defendant denied ever selling the suit property. The Plaintiff submits that this prompted him to lodge a caution at Naivasha land registry where it was discovered that the sale had taken place without his knowledge and the process of transferring the subdivided portions of the properties was in progress,
 28. The Plaintiff states that he eventually instructed his lawyers to institute a suit against Jonathan Maina Kihara who was his caretaker and the Defendant who had now taken out mutations and were preparing to take out title deeds for the subdivisions.
 29. The Plaintiffs submits that he sought out the reliefs in the amended plaint and the Defendants did not appear to defend and controvert the same.
 30. On whether the power of Attorney was validly registered being a foreign power of attorney in Kenya, the Plaintiffs submit that, the genesis of the problems revolve around the power of attorney dated 25th February, 2015. The Plaintiff submitted that the said power of attorney was notarized in Georgia USA and is a foreign power of attorney that upon signing, witnessed and notarized, the same must be registered in the Country of origin, registered the country of origin's embassy in Kenya and eventually stamped (payment of stamp duty) and registered in the Register of power of attorney under the [*Registration of Documents act*](#).
 31. It is that Plaintiffs submission that the registration of the foreign power of attorney is to give it authority and what is on record falls short of all the above parameters. It is their submission that other than being notarized, it was not witnessed; no prove of registration in the country of origin and its embassy in Kenya for it to have legal basis to be registered under the [*Registration of Documents Act*](#), at the land registry at Naivasha.



32. The Plaintiff also submit that the said power of attorney was a general power of attorney and nowhere does the said power of attorney give authority to the done to dispose of the donors (plaintiff) property.
33. The Plaintiff submit that the 1st Defendant acted contrary to what was contained in the power of attorney of 25th February, 2015. It is also the Plaintiff's submission that the 2nd to 5th Defendants ought to have acted diligently and conduct due diligence by first seeking to know from the registered owner (donors) whether they were selling the suit land and consent here was paramount.
34. The Plaintiffs relied on the case of *CBM v MIB & Another* (2014) Eklr where the case of *Mjasiri v Joshi* (1990-1994) 1 EA 372 was quoted.
35. It is the Plaintiff's submission that the Power of Attorney that he presented to the 2nd to 5th Defendants was not specific. The same was ambiguous hence raising doubts as to whether the 1st Defendant had authority to sale. Nowhere does it authorize the 1st Defendant to sale the Plaintiff's land and that probably explains why he denied in all the emails between him and PW1. It is the Plaintiffs submission that the 2nd to 5th Defendants were then obligated to seek to know from the Plaintiffs whether the done their consent to sale their property.
36. The Plaintiffs submit that there is evidence of breach of utmost good faith, dishonesty, lack of integrity and non-consideration of the Plaintiff's best interest which amounts to fraud. It is their submission that this is compounded further by denials in the emails that the Plaintiffs exchanged with the 1st Defendant immediately they received a demand letter asking for refund of the purchase money (if he could not conclude the sale).
37. It is also the Plaintiffs submission that the 1st Defendant in failing to disclose the sale of the suit property to the plaintiffs thereby breaching the principle of utmost good faith, thus displaying clear fraudulent intention to deprive them of their proprietary rights in the suit land.
38. The Plaintiffs relied on the case of *Agri Ltd v Christine Chepchirchir Baig & another* (2019) which quoted the case of *Vijay Morjaria v Nasingh Madhusingh Darbar & another* (2000) and submits the 1st Defendants denial of having sold, whereas he had sold and received the purchase price clearly demonstrates an element of fraud.
39. On whether there was breach of fiduciary duty on the part of the 1st Defendant, it is the Plaintiffs evidence that the suit properties together with their documents were left in the care of the 1st Defendant. The Plaintiff also gave him a power of attorney,
40. It is their submission that the alleged transaction which the Plaintiff is challenging is not the usual genuine transactions where the owner of the property grants a power of Attorney in favour of a family member or a friend to manage or sell his property as he is not able to manage the property or execute the sale personally.
41. The Plaintiffs urge the Court to examine the power of attorney in question and what specific authority was he authorized to do so. There is reliance on the case of *Suraj Lamp & Industries vs State of Haryana & Another* (2011).
42. The Plaintiff submit that there was fraud on the part of the Defendant's and state that the 1st Defendant had no authority to sale the Plaintiff's land. The 2nd to 5th Defendants thus acquired the suit land illegally and unprocedurally by colluding with the 1st Defendant. It was the Plaintiffs submission that the land was sold without consent of the owner thus the said sale should be cancelled and revert to the Plaintiffs.



Analysis And Determination

43. After considering the pleadings, submissions and testimony of the Plaintiff, the following issues arise;
 - a. Whether the orders sought in Amended Plaintiff dated 19th May, 2022 are merited?
 - b. Who should bear the costs of this suit?

A. Whether the orders sought in the Amended Plaintiff dated 19th May, 2022 are merited?

44. As a preliminary, the Court notes that the Defendant has not entered appearance nor participated in the hearing despite being served with a hearing notice as directed by this court on 13th February, 2023.
45. The Court further notes that there is an Affidavit of service on record dated 13th March, 2023 sworn by Andrew Geke showing that substituted service was effected by advertisement in the Daily Nation Newspaper on the 13th March, 2023.
46. The 1st and 2nd Plaintiffs have sought various orders in the amended plaintiff dated 19th May, 2022.
47. It is the Plaintiffs averment that fraud was perpetrated by the 2nd, 3rd and 4th Defendants and the particulars of the fraud are listed as (i) failing to exercise due diligence by failing to enquire from the plaintiff if they had authorized the 1st Defendant to sale the subject property, (ii) Failing to communicate their intention to purchase property from the plaintiff, (iii) Deliberately assuming a risk through purported payment of purchase price to an agent without the consent of the principal.
48. This Court will nonetheless interrogate the Plaintiff's claim despite nonappearance of the Defendants.
49. The Court in the case of Propwa Company Limited Vs Justus Nyamo Gatondo & another [2020] Eklr held as follows:

“The fact that the evidence is not challenged does not entirely mean that the Court will not interrogate the evidence tendered by the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case on the required standard. The Plaintiff has to discharge the burden of proof.”
50. 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.
51. This Court can evince from the amended Plaintiff that Fraud has been specifically pleaded at paragraph 5. The second limb on proof is what the Court will now interrogate based on the evidence provided by the Plaintiffs.
52. In making this determination, the Court seeks guidance from the Court of Appeal case of Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000] eKLR which 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.”
53. Further 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.”

54. 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] 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 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...”
55. The Plaintiff submitted that the said power of attorney adduced was a general power of attorney and nowhere does the said power of attorney give authority to the donee to dispose of the donors (plaintiff) property. It is the Plaintiffs submission that the 1st Defendant did not obtain his consent in selling the suit property.
56. The Power of Attorney in consideration adduced to this Court is dated 25th February, 2015 is worded “ We, Scott Leon Clinsee and Scott Helga Verwray hereby appoint Jonathan Maina Kihara of P.O Box 833-00517 Nairobi to be my attorney and generally in relation to my interest in the above mentioned title to do anything and everything that I myself could do and for me in my name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given.”
57. In the case of *CCB v MIB & another* [2014] eKLR , it was espoused in paragraph 22 that; “.....In a situation where the instrument is ambiguous the donee who is an agent of the doner who is the principal is supposed to act in good faith. In Halsbury's Laws of England Vol 1 4th edition states as follows with regard to authority of agents; -

“In the absence of express directions the agent may exercise his discretion so as to act in the best manner possible for the principal. An agent whose instructions are in ambiguous terms is justified if he acts in good faith and places reasonable construction on his authority; but where the limits imposed are definite he has no right to exercise his discretion”
58. Based on the evidence produced, this Court finds that the 1st Defendant acted contrary to the wishes of the Plaintiffs. There was therefore breach of trust.
59. In respect of fraud on the part of the 2nd, 3rd and 4th Defendants, this court finds and holds that the Plaintiff has discharged the burden to proof that the transactions in respect of the suit property were fraudulent.
60. The Amended plaint dated 19th May, 2022 is this merited and the orders sought there in are granted. For avoidance of doubt, this court orders;
 - a. A declaration that LR. Nos Naivasha/ Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu Block 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398 belonged to the Plaintiff.



- b. A finding that the 1st Defendant breached a duty of trust by purporting to sell to the defendant's land Naivasha/Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398 without due process.
- c. An Order that the 1st Defendant surrender to the Plaintiffs Original Title Deed for Naivasha/Maraigushu Block 18/406.
- d. An order that the 1st defendant surrender to the Plaintiff's original Title Deed for Naivasha/Marigushu Block 18/398 in the name of Scott and declare the Agreement dated 16th December, 2015 between Jonathan Maina & Esther Karanja and/or any other agreement by Jonathan Maina and any other in respect of the properties in dispute not binding on the Plaintiff.
- e. An order of a permanent injunction restraining the defendants either by themselves, agents, servants and/or any person claiming through them from trespassing, laying claim and/or proceeding with the purported sale of LR No Naivasha/Maraigushu Block 18/1814, Naivasha/Maraigushu Block 18/1815, Naivasha/Maraigushu Block 18/1816, Naivasha/Maraigushu Block 18/1817 formerly Naivasha/Maraigushu Block 18/406 and Naivasha/Maraigushu Block 18/398.

Costs of the suit to the plaintiff

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU

THIS 28TH DAY OF JULY, 2023

A O OMBWAYO

JUDGE

