



**Karwenju v Ngenye & another (Environment & Land Case
413 of 2017) [2023] KEELC 18937 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 413 OF 2017
OA ANGOTE, J
JULY 19, 2023**

BETWEEN

JANE WAMBUI KARWENJU PLAINTIFF

AND

JOSEPH MAINA NGENYE 1ST DEFENDANT

JOSEPH WANYOIKE THUO 2ND DEFENDANT

JUDGMENT

1. The Plaintiff initiated this suit vide a Complaint dated 21st June 2017, in which she sought for the following remedies:
 - a. A permanent injunction restraining the defendants, their agents, servants, representatives, and/or assigns from trespassing, encroaching, interfering, selling, disposing off or erecting illegal structures thereon in any way and not to interfere with the plaintiff's quiet and peaceful occupation and enjoyment of the suit plot known as Plot No. B38 Kayole Shopping Centre (Extension), within Nairobi County.
 - b. A declaration that the encroachment thereto and putting up or building illegal structures thereto, any sale, disposing off is illegal and unlawful and void and that the plaintiff is hereby declared the rightful, legal occupant and registered or beneficial owner of the suit plot known as Plot No. B38 Kayole Shopping Centre (Extension), Within Nairobi County, and further that the illegal structures erected thereto be demolished or removed forthwith.
 - c. Costs and interest of this suit.
2. The Plaintiff's case is that she is the registered proprietor and occupant of the suit property, being Plot No. B38 Kayole Shopping Centre (Extension), within Nairobi County. She avers that the 2nd Defendant is alleged to have been sold the same suit plot by the 1st Defendant, and that on diverse dates



- in the month of June, 2016, the Defendants and/or their agents unilaterally encroached, trespassed, dug trenches and erected illegal structures on the suit property without his consent and or authority.
3. The Plaintiff averred in the Plaint that the Defendants and their agents illegally and unlawfully encroached, trespassed on and even constructed an illegal structure on the suit plot with the intention of blocking and or evicting him from the suit plot.
 4. The Plaintiff averred that due to the foregoing, she has suffered loss and damage, particulars of which include delaying her development plan; loss of materials on site; destruction of the structures thereon; causing her inconvenience; causing her mental torture and physical anguish, amongst others.
 5. The Defendants filed a Statement of Defence dated 11th September 2017. They averred that the Plaint does not raise a reasonable cause of action as against the Defendant and ought to be dismissed with costs. The 1st Defendant averred that it was the legitimate and registered allottee of the suit property, having acquired the same by way of allotment from the Nairobi City Council and that he was in actual possession and occupation of the suit property and has been paying all land rent over the same.
 6. The 1st Defendant deponed that in 2008, he sold and transferred the suit property to the 2nd Defendant herein and the transfer was effected; that at no material time did he sell the suit property to the Plaintiff as alleged or any other person other than the 2nd Defendant; that they are not trespassers on the land and that any activities carried out by them on the suit property are proper and lawful.
 7. On his part, the 2nd Defendant averred that it purchased the suit property from the 1st Defendant in 2008; that he took possession of the property and commenced development thereon and that he has been in continuous possession of the land from the time of purchase to 4th April 2016 when he sold the suit property to John Ngatho Kamau and executed all necessary transfer documents and lodged the registration documents.
 8. It is the Defendants' case that the Plaintiff's documents are forged by the Plaintiff, who is a mastermind of a cartel involved in land fraud at the Nairobi City County; that the signatures appended to the Power of Attorney and the Sale Agreement purporting to be that of the 1st Defendant are forgeries and that the purported allocation letter relied on by the Plaintiff is a forged document and was not issued by the Nairobi City Council.
 9. The Defendants averred that with respect to the documents produced in this suit, the Plaintiff has been charged before the Chief Magistrate Court at Kiambu in Kiambu Criminal Case No. 830 of 2017- Republic v Jane Wambui Karwenju with three counts of making documents without authority and a fourth count of malicious damage to property having demolished the perimeter wall on the suit property valued at Kshs. 260,000.
 10. The Defendants urged that the Plaintiff has not come to this court with clean hands, and that her suit is tainted with impropriety, fraud, illegality and abuse of court process, for which she is not entitled to any remedy by this court.

Hearing and Evidence

11. PW1, the Plaintiff herein, relied on her witness statement in which she averred that she is the registered and lawful owner and occupant of the suit property; that the suit property was sold to her in 2010 by the 1st Defendant for Kshs. 300,000 and that the 1st Defendant secretly sold the same property to the 2nd Defendant in 2016.
12. It was the testimony of the Plaintiff that the Defendants have proceeded and encroached on her land and illegally dug trenches and erected structures without her consent or authority; that the Defendants



- have been threatening her with eviction and that this court should compel the Defendants to vacate from the suit property and remove all the illegal structures put up thereon.
13. PW1 testified that she had been paying rates to the Nairobi City Government; that she had a letter from the Nairobi City Government in which the 1st Defendant informed the City Government that he had sold plot A52 and not B38 and that he however never owned Plot A52. PW1 admitted that she was charged for forging documents in Kiambu Criminal No. 830 of 2017. She however denied forging the documents and stated that the documents came from the 1st Defendant.
 14. During cross-examination, PW1 stated that the 1st Defendant gave her the original allotment letter but she did not pay the stamp duty; that she had initially been paying rates under the name Joseph Maina because they had not transferred the property to her; that after the transfer of the land at City Council, she started paying rates in her name, as indicated in the receipts and that she paid survey and transfer fees on 10th February 2011.
 15. PW1 referred the court to an affidavit sworn on 19th January 2017 purportedly by the 1st Defendant which she found at the City Council. According to PW1, the said affidavit shows that the 1st Defendant sold to her Plot No. A52 Kayole and not plot B38 Kayole.
 16. PW1 clarified in re-examination that Plot No. A52 was not sold to her, as the 1st Defendant only owned plot B38. She further stated that the investigation officer took all her original documents; that although they executed a Power of Attorney, they did not have any time to register it and that she was not aware of the requirement to register such Power of Attorney.
 17. The Plaintiff's second witness, PW2, stated that he was an officer seconded to Nairobi Metropolitan Services by the Nairobi County Government. PW2 produced a bundle of documents which included a copy of the sale agreement in their file, the Power of Attorney, the letter of allotment, a request for the opening of the file for the Plaintiff's plot, a payment receipt issued in the Plaintiff's name and a letter from the NCC to confirm her ownership.
 18. PW2 produced another bundle of documents as PEXB3 which included a receipt issued to the Plaintiff, a statement of account, a letter of allotment to the suit land in the name of Joseph Maina Ngenye and a search showing that the property was owned by the 1st Defendant. PW2 also produced another batch of documents, PEXB4.
 19. PW2 testified that according to the search, the land is registered in the name of the 1st Defendant; that the ledger shows the payments are still in the Plaintiff's name and that the Sale Agreement and Power of Attorney in favor of the Plaintiff indicate that the 1st Defendant sold the land to Jane. However, the property was not transferred to Jane.
 20. In cross-examination, PW2 stated that the property was allocated on 17th July 2003; that the letter of allotment was forwarded to them by the Plaintiff as the original letter of allotment is always with the client; that a duplicate was not retained in the file; that there was no allotment in favor of John Kimani; that the Plaintiff availed to them the Power of Attorney and the Sale Agreement and that he did not check the authenticity of the documents supplied to them by the Plaintiff.
 21. It was the evidence of PW2 that they did not rely on the Power of Attorney as it was not registered; that the letter of allotment in the Defendants' bundle was not the same letter given to them, and that he could not tell which one of the two letters of allotment was valid.
 22. The 1st Defendant, DW1, informed the court that he was allocated Plot A52 and B38 in Kayole; that in 2008, he sold plot B38 to the 2nd Defendant and in 2010, he sold plot A52 to Jane Karwenju,



- the Plaintiff. According to the 1st Defendant, he was the legitimate and registered allottee of the suit property until 2008, when he transferred the property to the 2nd Defendant.
23. It was the evidence of DW1 that he has been paying the land rates over the disputed property to the Nairobi City Council; that the property was duly transferred in the name of the 2nd Defendant at the Nairobi City Council registry at Dandora and that at no material time did he sell the suit property to any person other than the 2nd Defendant. It was his evidence that the 2nd Defendant had sold the suit land to John Kamau
 24. DW1 stated that in 2010, he learnt of the allegation that he had transferred the suit property to the Plaintiff from the police; that he never appeared before firm of J.O. Ombongi & Co. Advocates or any Advocate to make or witness the alleged Power of Attorney and that the purported sale agreement and Power of Attorney are forgeries as the signatures therein do not belong to him.
 25. According to DW1, he gave a specimen of his hand DWriting to DCI who confirmed that the documents in the Plaintiff's bundle were fake; that the Plaintiff was charged in Kiambu Criminal Case No. 830 of 2017 for uttering forged documents and that the Plaintiff only bought Plot A52 from him.
 26. DW2, the 2nd Defendant, averred that he was the legitimate owner of the suit property having acquired it on 12th November 2008 from the 1st Defendant who was the first allottee of Plot No. 38 and that he had been in actual possession and occupation of the suit property and paying all land rates to the Nairobi City County, until he transferred it to John Ngatho Kamau.
 27. According to the 2nd Defendant, he learnt from John Ngatho Kamau and the police of an ownership dispute over the suit property with the Plaintiff claiming ownership; that he believes that the documents relied on by the Plaintiff are forgeries and that the Plaintiff has been charged before the Kiambu Chief Magistrates Court with five counts of forgeries and malicious damage to property.
 28. During cross-examination, DW2 averred that when he bought the suit property, DW1 gave him a letter of allotment in 2008, together with receipts dated 17th November 2008, a signed sale agreement and a Power of Attorney; that he surrendered the original receipts to the person he sold the suit property to in 2016 and that he did an informal search before purchasing the land.
 29. The Defendants' third witness, DW3, was Chief Inspector Bernard Cheruiyot, a document examiner, who testified that on 13th June 2017, he received documents at the documents examination laboratory being A1, a sale agreement dated 5th February 2010; A2, a Power of Attorney dated 5th February 2010; C1- a sale agreement dated 12th November 2008 which had a known signature of Joseph Ngenye and D- the specimen signatures of Joseph Maina Ngenye.
 30. It was the evidence of the document examiner that the exhibits were forwarded to him with a memo form for him to determine whether the signatures on A1 and A2 were made by the same person as those on D and C1.
 31. DW3 averred that PC John Mwaniki examined the same and was of the opinion that the signatures were made by different authors; that PC Mwaniki could not appear to testify as he was attending a course in Embakasi and that he had worked with PC Mwaniki for ten years and was conversant with his signature on the report of 21st June 2017 made by him. DW3 produced the report as exhibit DEXB11.

Submissions

32. Counsel for the Plaintiff submitted that there is no dispute that the 1st Defendant was the owner of the suit property, as evident in the letter of allotment dated 17th July 2003 and that the letter is consistent



- with the Plaintiff's testimony that she purchased the suit property from the 1st Defendant and that the required fees stated in the Statement of Account dated 12th February 2010 were paid.
33. Counsel submitted that the receipts dated 10th February 2011 shows that the Plaintiff paid survey fees, transfer fees, the ground rent and the applicable rates; that the receipt numbers appearing in the receipts are consistent with the date of issuance and that this court should not rely on the criminal proceedings which are yet to be concluded or the forensic examination report without ascertaining its credibility.
 34. Counsel submitted that fraud requires to be pleaded, particularized and proved on a higher standard than a balance of probabilities; that the 1st Defendant's contention that he had sold Plot A52 to the Plaintiff and not the suit property was not supported by any evidence and that there are no documents to prove that the 1st Defendant ever owned Plot No. A52.
 35. Counsel urged the court to conclude that the 1st Defendant sold the suit property to the Plaintiff, the 1st Defendant having admitted that he had entered into a sale agreement with the Plaintiff and that there is no evidence to show that the 2nd Defendant took possession of the suit property after entering into an agreement with the 1st Defendant.
 36. The Defendant's Counsel submitted that the Plaintiff has approached this court with unclean hands; that her claim is tainted with fraud, illegality and a corrupt scheme and that the Plaintiff was charged in Kiambu Criminal Case No. 830 of 2017 for three counts of forging documents, which documents are the allotment letter for Plot B38 Kayole Shopping (extension) and a Power of Attorney and Sale Agreement purportedly signed by the 1st Defendant.
 37. It was Counsel's submission that the 2nd Defendant's interest in the suit property has been extinguished, having sold the same to John Ngatho Kamau who is in actual occupation of the suit property but is not a party to this suit.
 38. According to the Defendants' Counsel, the executed sale agreement dated 12th November 2008, the rates payment receipts, the allocation letter dated 11th July 2003 and the transfer application form dated 10th April 2016 show that the transfer of the suit property to the 2nd Defendant was legally done. Counsel submitted that the Plaintiff has not produced any evidence to challenge his evidence and that the documents produced by the Plaintiffs have been proved to be forged.

Analysis and Determination

39. Upon consideration of the pleadings, the evidence and the submissions filed by the parties, the following issues arise for this court's determination:
 - a. Whether the Plaintiff lawfully acquired the suit property.
 - b. Whether the 2nd Defendant lawfully acquired the suit property.
40. In brief, this is a dispute over the ownership of the suit property, Plot No. B38 Kayole Shopping Centre (Extension), within Nairobi County. It is not disputed that the 1st Defendant was the first allottee of the suit land and was issued with a Letter of Allotment dated 11th July 2003. The Plaintiff contends that the 1st Defendant sold to her the suit property in 2010 and that she has been in occupation of the same.
41. The 1st Defendant however denies ever selling the suit property to any other person other than the 2nd Defendant. He avers that the 2nd Defendant has since sold the suit property to a third party, John Ngatho Kamau. Consequently, the 1st Defendant asserted that the suit cannot be enforced against him as his interest in the disputed land had been extinguished.



42. The Defendants have also averred that the documents relied on by the Plaintiff are forgeries and that the Plaintiff has since been charged for three counts of preparing fraudulent documents and one charge of malicious damage to property. The Plaintiff has denied these assertions.
43. In this matter, it is a not contested that the suit property, Plot No. B38 Kayole Shopping Centre (Extension), is an unregistered property and does not have a certificate of title. It is further not disputed that the 1st Defendant was the first allottee of the said suit land.
44. With respect to unregistered property, as in this case, tracing ownership is dependent on the root of the documentary evidence. This position was held in the case of *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR as follows:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

45. The Plaintiff in this suit has asserted that it lawfully acquired the suit property from the 1st Defendant. To buttress her case, the Plaintiff produced in evidence a sale agreement and a Power of Attorney dated 5th February 2010 purportedly between herself and the 1st Defendant; a letter of allotment in the 1st Defendant’s name dated 17th July 2003; payment receipts and letters of confirmation of ownership from the Nairobi City County.
46. The Defendants have challenged the validity of the sale agreement and the Power of Attorney adduced by the Plaintiff. The 1st Defendant has asserted that he did not sign any agreement with the Plaintiff in respect of the suit property and that his signature in the Sale Agreement and the Power of Attorney have been forged. The Defendants also assert that the purported allocation letter relied on by the Plaintiff is a forged document and was not issued by the Nairobi City Council.
47. Regarding the allegations of fraud, it is trite that fraud must not only be specifically pleaded, but it must also be proved to a standard of proof higher than on a balance of probability, but lower than beyond reasonable doubt. The Court of Appeal in *Demutilla Nanyama Pururmu v Salim Mohamed*



Salim [2021] eKLR quoted with approval the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated 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 ours)

48. As regards the standard of proof for fraud, the Court of Appeal in the case of *Kinyanjui Kamau v 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 v 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)

49. In this case, the particulars of fraud as pleaded by the Defendants relate to forging of the 1st Defendant’s signature on the Sale Agreement and the Power of Attorney. The 1st Defendant averred that he gave a specimen of his hand writing to the DCI who confirmed that the documents in the Plaintiff’s bundle were forged and that the Plaintiff has since been in charged in Kiambu Criminal Case No. 830 of 2017-Republic v Jane Wambui Karwenju with three counts of making documents without authority and a fourth count of malicious damage to property.

50. The Defendants adduced the evidence of DW3, Chief Inspector Bernard Cheruiyot, a document examiner at DCI HQ. DW3 presented a report which analyzed the sale agreement and the Power of Attorney relied on by the Plaintiff. The conclusion of the analysis was that the signatures in the sale agreement and the Power of Attorney were not made by the 1st Defendant.

51. Section 48 of the *Evidence Act* provides that:

“(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of hand writing or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of hand writing or fingerprint or other impressions.

(2) Such persons are called experts.”

52. Expert evidence falls into the category of opinion evidence. Consequently, a court has the task of weighing the evidence of such expert opinions and determining the extent to which it should influence the decision of a court. This was held in *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR as follows:

“The fundamental characteristic of expert evidence is that it is opinion evidence. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert’s opinions are well founded.



“While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common responsibility of weighing expert evidence and determining its probative value. This is no easy task. Expert opinions are admissible to furnish courts with information which is likely to be outside their experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.”

Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence and the circumstances of the case including the real likelihood of the expert witness having been compromised or the real possibility of such witnesses using their expertise to mislead the court by placing undue advantage to the party in whose favour they offer the evidence. The court must be alert to such realities and act with caution while analyzing such evidence.”

53. In the case of *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR, the Judge drew out four tests to be applied by a court when considering admission and acting on expert evidence:

“In my view its correct to state that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert’s testimony where he finds the expert’s reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert’s process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable.

It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof.

The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.” An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.”

54. This court is guided by these decisions. In this case, the forensic report prepared by Eli John Mwangi was presented by Chief Inspector Bernard Cheruiyot because Eli John Mwangi was away on training in Embakasi until August 2023. CI Bernard Cheruiyot testified that he had worked with Eli John Mwangi for ten years and was conversant with his signature on the report of 21st June 2017 made by him.
55. The Forensic Report was tendered as evidence in accordance with Section 72 of the *Evidence Act*. This section provides that where an attesting witness is not available to give evidence or present a document without an unreasonable delay, it is sufficient to present such document by a witness attesting that it is in the hand DWriting of such attesting witness. DW3 averred that he was conversant with the signature of Eli John Mwangi.



56. The expert witness indicated that he subjected the questioned, specimen and known signatures to image enhancement and magnification procedures for inspection of the individual characteristics. It was his opinion that based on peculiar characteristics such as character initialization and terminal strokes, pen pressure, character construction and general resemblance, the signatures in the sale agreement and the Power of Attorney were not made by the 1st Defendant.
57. This court is persuaded that DW3 adduced cogent evidence to show that the sale agreement and the Power of Attorney presented by the Plaintiff had forged signatures. The Plaintiff did not adduce expert evidence to show the contrary. The Plaintiff did not also challenge the validity of the samples used by DW3 nor the process of analysis that resulted in the finding that the signatures on the Plaintiff's documents were forged.
58. Further, the Plaintiff having averred that the sale agreement was signed in the presence of witnesses, it was critical for the Plaintiff to adduce the testimony of these witnesses. This would have established the validity of the documents relied on by the Plaintiff and would have impeached the 1st Defendant's testimony as well as the evidence of DW3.
59. The Plaintiff however failed to present such witnesses before this court. Similarly, while it is indicated in the Power of Attorney that it was witnessed by an advocate in the firm of J.O. Ombongi & Co. Advocates, the Plaintiff did not call an advocate from the said firm as a witness to testify on the validity of the Power of Attorney.
60. In the circumstances, this court finds that the Defendants have proved the allegations of fraud as against the Plaintiff. This court is satisfied on a balance of probabilities that the signatures of the 1st Defendant in the Plaintiff's sale agreement and the Power of Attorney were forged. Further, the letters of allotment in the Plaintiff's bundle were suspicious and products of a corrupt scheme. Consequently, the Plaintiff did not acquire any legal or beneficial interest in the suit property.
61. Conversely, the 2nd Defendant and John Ngatho Kamau, who is not a party to this suit, did obtain an equitable and beneficial interest in the suit property.
62. For those reasons, this court dismisses the Plaintiff's suit with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 19TH DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

