



**Chege v Mukangu & another (Environment & Land Case 31 of 2018)
[2023] KEELC 20461 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 31 OF 2018
MD MWANGI, J
SEPTEMBER 28, 2023**

BETWEEN

FRANCIS KAMENWA CHEGE PLAINTIFF

AND

FRANCIS KIRATU MUKANGU 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

RULING

1. The Plaintiff vide his Complaint dated 29th January 2018 seeks against the Defendants a declaration that he is the bona fide owner of the plot number P4295; a ¼ acre plot situated at the Shujaa Area of Embakasi Ranching Company, presently demarcated as plot number Nairobi block 105/9047 in the Registry Index Series SK2 of 1996 from the Survey of Kenya (hereinafter referred to as ‘the suit property’) and a permanent injunction restraining the Defendants from alienating, transferring, developing or howsoever dealing with the suit property. The Plaintiff further seeks an order directing the Defendants to deliver at their expense vacant possession of the said plot. Further, and against the 1st Defendants specifically, the Plaintiff prays for an order directing him to deliver at his expense vacant possession of plot number P4295B (a bonus plot the Plaintiff became entitled to on account of payment of Kshs. 6,000/- and fulfilling other requisite conditions as well as the costs of the suit.

Case for the Plaintiff

2. The Plaintiff’s case is that he purchased the suit property sometimes in 1991 from a willing seller at the price of Kshs.15,000/=. The transaction was conducted through the offices of the Advocate of the 2nd Defendant. He paid the entire consideration to the seller before paying the transfer fees. Subsequently he was issued with a share certificate number 12772 in his name by the 2nd Defendant, thereby becoming entitled to ownership of Plot number 4295, a ¼ acre plot.



3. The Plaintiff avers that he paid all the requisite charges for purpose of survey. He was allocated the plot on 20th July 1991. A surveyor of the 2nd Defendant pointed out the plot on site to the Plaintiff. He thereafter fenced it off using cedar posts and barbed wire.
4. On or about the year 1996, the 2nd Defendant Company invited all its members including the Plaintiff to pay Kshs.6,000/= for 'bonus' plots. The Plaintiff complied, paid the said sum of money and was issued with a receipt which indicated that he had been allocated plot number P4295B, as the bonus plot. In the year 2013, he paid a further Kshs.20,000/= for purposes of a beacon certificate for the bonus plot.
5. The Plaintiff alleges that sometimes in the year 2016 on a routine visit to the suit property, he noticed that his fence had been removed by an unknown person who had also planted seedlings inside the suit property. It turned out that it was the 1st Defendant who then appeared and informed the Plaintiff that he had bought the suit property from a Mr. Ominde. The Plaintiff and the 1st Defendant mutually agreed to take up the matter of ownership of the suit property with the 2nd Defendant Company. They jointly visited the 2nd Defendant Company's offices and submitted the dispute for resolution.
6. The Plaintiff asserts that the Surveyor dispatched by the 2nd Defendant Company showed them a map at the physical site of the suit property which indicated the plot number to be V8702B and not P4295 as he had always known. Despite his protest against the Surveyor's report, the 2nd Defendant Company did not intervene.
7. The Plaintiff's case is that he 'recently' obtained a survey map of the subject area titled Nairobi Block 105 (Embakasi Ranching) described as Registry Index Series SK 2 of 1996 from the Survey of Kenya which describes the plot he claims as number 9047.
8. The Plaintiff accuses the 2nd Defendant Company of acting fraudulently. He has pleaded the particulars of the alleged fraud at paragraph 13 of his Plaint. He accuses the 2nd Defendant of failing to point out on the ground the location of Plot number 4295 that the Plaintiff is entitled to an account of his undisputed ownership of the share certificate number 12772. Further the Plaintiff avers that the 2nd Defendant has not been candid enough to supply him with a detailed survey map for the subject area. It is the Plaintiff's position that the 1st Defendant has been complicit in the fraudulent alteration of the map in the Surveyor's possession to aid in the illegal taking away of his plot.

1st Defendant's response and Counter-claim

9. The 1st Defendant's response to the Plaintiff's case was by way of a statement of defence and counter-claim dated 30th October 2018. In the said statement, the 1st Defendant denied the Plaintiff's claim in its entirety. The 1st Defendant denied being in occupation of either plot number 4295 or plot number 4295B as alleged by the Plaintiff or at any one point for that matter. The 1st Defendant asserts that it is the Plaintiff who came into his plot number V8702 which the 1st Defendant had purchased from one Amos Ominde Ouko.
10. At that instance both the 1st Defendant and the Plaintiff agreed to take up the matter with the 2nd Defendant Company. A site visit was subsequently organized and undertaken in the presence of both parties. A surveyor from the 2nd Defendant Company confirmed on site that the subject plot was Plot number V8702 owned by the 1st Defendant and not Plot number P4295 as alleged by the Plaintiff. The Plaintiff was dissatisfied with the Surveyor's confirmation and they once again agreed to present the dispute before the Board of Directors of the 2nd Defendant Company. This was still in the year 2016



and the Board of the 2nd Defendant Company confirmed that the subject property being Plot number V8702 belonged to the 1st Defendant.

11. The 1st Defendant asserts that the Plaintiff petitioned the Board of the 2nd Defendant Company a second time being dissatisfied with the Board's first finding being dissatisfied with its first finding. On 9th May 2017 both parties once again appeared before the Board tabling their respective claims and evidence. The Board unequivocally for the 2nd time after considering the evidence of either side reaffirmed that the suit property belonged to the 1st Defendant.
12. The 1st Defendant affirms that the surveyor's report, and the relevant area map all indicate that he is the owner of plot number V8702. He terms the Plaintiff's assertion of having come across a survey map described as Registry Index Series (SK2) of 1996 as suspicious.
13. The 1st Defendant denies the allegations of complicity to the alleged fraud as alleged by the Plaintiff in his Pliant.
14. The 1st Defendant on his part accused the Plaintiff of negligence and fraud. He asserts that if the Plaintiff at all entered into the transactions as alleged, then he was negligent in failing to carry out due diligence to ascertain the actual physical location and the number of the supposed plots. It is the 1st Defendant's position that the Plaintiff's allegations, averments, conduct and dealings are not only ill-motivated but are calculated to defraud the 1st Defendant of his legally acquired plot number V8702 in a fraudulent and malicious way.
15. The 1st Defendant counter-claims against the Plaintiff and prays for a declaration that he is the owner of Plot number V8702 and that the Plaintiff is a trespasser. Further, the 1st Defendant prays for a permanent injunction restraining the Plaintiff (Defendant in the counter-claim) from interfering with his possession of Plot number V8702. The 1st Defendant too has a claim for general damages and special damages of Kshs.50,000/= being the cost of the plants uprooted by the Plaintiff.
16. The 2nd Defendant did not file any pleadings neither did it participate in these proceedings.

Evidence adduced

17. This matter proceeded to hearing with the Plaintiff testifying in his own case as the only witness. The 1st Defendant too testified in his case and called one more witness.

Evidence adduced for the Plaintiff

18. The Plaintiff adopted his witness statement dated 29th November 2018 as his evidence in chief. He further produced the documents in the Plaintiff's list of documents as his exhibits which were marked as PE 1-9 in the order in which they are listed.
19. The Plaintiff reiterated the averments in his pleadings. He stated that he came to court because the 2nd Defendant company – Embakasi Ranching Company Limited had failed to help him get the plot that he was entitled to. He was even supposed to get a bonus plot which the 2nd Defendant had failed to allocate to him too.
20. Under cross-examination from the 1st Defendant's Advocate, the Plaintiff stated that he bought the plot from the original shareholder of Embakasi Ranching Company; he could not however remember the name of the seller who sold it to him. He had no agreement signed between himself and the alleged seller confirming the purchase. He alleged that he was allocated the plot in 1991 by the 2nd Defendant Company having become entitled to it via the share certificate he had acquired from the seller. He



- confirmed that he had not produced any evidence to confirm that he had actually paid the purchase price/consideration for the said plot.
21. In regard to the alleged site visit when he was shown the plot by the surveyor of the 2nd Defendant Company in 1991, the Plaintiff agreed that he had not produced evidence to confirm that he had paid for it. He alleged that no payments were being made then for site visits. He too had not produced the beacons receipts.
 22. The Plaintiff confirmed visiting the 2nd Defendant's Company offices alongside the 1st Defendant. They were sent to the site by the Company with a Surveyor of the 2nd Defendant Company. The Surveyor told the Plaintiff that plot Number 4295 was not in the map. The Board of the 2nd Defendant Company also affirmed that position. The Surveyor had a map which showed that the subject plot was Plot number V8702 and not P4295.
 23. The Plaintiff stated that he recently went to the Director of Surveys Office and bought a map. On that map there was no plot number P4295. The number on the map was 9047.
 24. Referring to the share certificate in his possession, the Plaintiff confirmed in agreement to the suggestion by the 1st Defendant's Advocate that it merely confirmed that he held one share of Embakasi Ranching Company Limited; and not a plot. He did not have a plot ownership certificate unlike the 1st Defendant.
 25. In re-examination by his own Advocate, the Plaintiff stated that Embakasi Ranching Company deals with land, it was a land buying Company. His share certificate was stamped at the back with the company's stamp with the words "allotted plot P4295 on 20/7/91".
 26. In response to a question by the court, the Plaintiff stated that there is a concrete perimeter fence around the subject plot. He is not aware if there are any other developments on the plot.

Evidence adduced on behalf of the 1st Defendant

27. The 1st Defendant testified as DW1 in his case. He adopted his witness statement dated 30th October 2018 as his evidence in chief. He too produced as exhibits the document on his list of documents of 30th October 2018 and the additional bundle of documents dated 30th December 2020.
28. Counsel for the Plaintiff's objection to the production of the statement and affidavit of Amos Ominde Ouko, a banker's cheque in favour of Mary Wanijiru was upheld by the court. The court directed that the two documents be produced by their maker.
29. The 1st Defendant reiterated the averments in his pleadings. He further affirmed that he has since been issued with a certificate of title of the suit property.
30. Under cross-examination by the advocate for the Plaintiff, the 1st Defendant stated that he had actually conducted due diligence before purchasing his plot. He had visited the offices of the 2nd Defendant Company with the person who sold him the plot. He was issued with a non-member certificate of plot ownership. He bought the plot from one Amos Ominde Ouko.
31. The 1st Defendant confirmed that he undertook a site visit on the suit property before purchasing it. He paid Kshs. 20,000/= to the 2nd Defendant for that purpose. The Surveyor of the 2nd Defendant Company who showed him the plot physically counter-signed at the back of the receipt indicating the new plot number as 105/9047.



32. The 1st Defendant confirmed visiting the subject plot with the Plaintiff and a Company Surveyor after he and the Plaintiff had mutually agreed to submit their dispute over the suit property to the 2nd Defendant Company. The Company Surveyor confirmed to them that the plot was V8702.
33. The 1st Defendant asserted that he was not aware if the Plaintiff was eventually shown his proper parcel of land by the 2nd Defendant. He could not tell whether the Plaintiff's papers were verified or not.
34. The 1st Defendant occupied the suit property in the year 2014 and constructed a perimeter fence around it.
35. In re-examination by his own advocate, the 1st Defendant confirmed that before buying the Plaintiff he had requested the seller to bring him all his documents which he did. They thereafter visited the offices of the 2nd Defendant Company to verify the documents. The Company confirmed to the 1st Defendant that the seller indeed owned the suit property. The Company also explained to the 1st Defendant the steps he was expected to follow in order to legally acquire the plot.
36. The parcel number of the subject plot was issued by the Ministry of Lands.
37. DW2 was one Amos Ominde Ouko who testified virtually from the USA. He adopted his witness statement dated 21st December 2020 as his evidence in chief. He confirmed that he had bought the subject plot in 2011 from one Mary Wanjiru. The copy of the banker's cheque of Kshs.700,000/= was for payment of the purchase price. The plot number then was V8702.
38. DW2 asserted that he confirmed that the seller's documents were genuine before going for the site visit in the Company of a Company Surveyor and officials of Embakasi Ranching Company. They made and signed the agreement with Mary Wanjiru after the site visit.
39. When it was his turn to sell the suit property to the 1st Defendant, they underwent the same elaborate process he had gone through when he was purchasing the suit property from Mary Wanjiru.
40. Under cross-examination by the Plaintiff's Advocate, DW2 confirmed that he had not produced any documents from Mary Wanjiru Kibaara; only the cheque he had issued to her and an acknowledgment. DW2 had not developed the plot before selling it to the 1st Defendant. He had only planted a temporary fence.
41. DW2 explained that the 1st Defendant had a non-member ownership certificate which was a confirmation by the 2nd Defendant Company that he indeed owned the suit property.

Court's direction

42. At the close of the hearing of the case, the court directed parties to file written submission. Both the Plaintiff and the 1st Defendant filed their written submissions which the court has had an opportunity to read.

Issues for determination

43. Having perused the pleadings in this matter, the testimony by the witnesses for the Plaintiff and the written submission by both parties, the court is of the view that the issues for determination in this case are:-



A. Whether the Plaintiff has established his claim of ownership of the suit property.

44. Both the Plaintiff and the 1st Defendant testified that they agreed mutually agreed to submit their dispute to the 2nd Defendant Company – Embakasi Ranching Company for resolution. A site visit was organized and undertaken in the presence of both parties and a Company Surveyor. The Surveyor of the 2nd Defendant Company confirmed that the subject plot was number V8702 owned by the 1st Defendant and not plot number P4295 as the Plaintiff was alleging.
45. The Plaintiff being dissatisfied with the report of the Surveyor sent by the 2nd Defendant Company petitioned the Board of the 2nd Defendant Company. Both parties presented their respective claims and the Board after considering the evidence presented before it affirmed the position of the Surveyor. The Plaintiff yet again approached the Board a second time and for the second time, the Board arrived at the same decision.
46. The Plaintiff placed reliance on a map that he allegedly acquired from the offices of the Director of Surveys. Interestingly, the Plaintiff under cross-examination, in his own words confirmed that the plot number P4295 was not in the said map. The number on the map on the spot where his plot was supposed to be was indicated as plot number 9047. The authenticity of the said map was doubtful. The Plaintiff did not even bother to call the Director of Surveys or his authorized representative to authenticate the map. It was of no value to his case.
47. he Plaintiff alleged fraud against the Defendants. He accused the 1st Defendant of complicity. I must point out that allegations of fraud must not only be specifically pleaded but must be specifically pleaded. The law is clear as expressed in the case of *Vijay Morjaria vs 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.”
48. Similarly, in the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR, the Court of Appeal stated that:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved.”
49. The Plaintiff did not prove the alleged fraud either against the 1st Defendant or the 2nd Defendant. He left it upon the court to infer the alleged fraud from the facts.
50. The court further agrees with the 1st Defendant’s submissions that the Plaintiff’s claim offends the provisions of Section 3(3) of the *Law of contract Act*. The Section 3(3) of the *Law of Contract Act* provides as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless:

- a) the contract upon which the suit is founded:
 - i. is in writing
 - ii. is signed by all the parties thereto; and



- b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

51. The Plaintiff did not produce the alleged agreement for purchase of the suit property or even evidence confirming his payment of the purchase price. In fact, and again in his own words, he could not remember the name of the supposed original shareholder who allegedly sold the plot to him.
52. The Court’s finding is that the Plaintiff has not proved his claim of ownership of the suit property. He has indeed not established the factual and legal basis of his claim, either against the 1st Defendant or the 2nd Defendant.

B. Whether the 1st Defendant has established ownership of the suit property and or proved his counterclaim.

53. The 1st Defendant’s case was that he had been issued with a certificate of plot ownership by the 2nd Defendant Company confirming his ownership of the suit property after he had purchased the suit property. He had subsequently even been issued with a title to the suit property under the provisions of the [Land Registration Act](#), which is now L.R. Nairobi/Block 105/9047. The 1st Defendant has also been in possession of the suit property since 2014. The [Land Registration Act](#) is very clear on issues of ownership of land. Section 24(a) of the [Land Registration Act](#) provides as that:

“Subject to this Act, 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.”

54. Section 26 (1) of the [Land Registration Act](#) on the other hand stipulates that:

“The Certificate of Title issued by the Registrar upon registration 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... 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.”

55. The certificate of registration of title exhibited by the 1st Defendant is by virtue of the above cited provision of the prima facie evidence that the 1st Defendant being the person named as proprietor of the land is the absolute and indefeasible owner of the land. No evidence was offered to challenge he title either on ground of fraud or misrepresentation to which the 1st Defendant is proved to be a party or on the ground that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
56. The court’s finding is that the 1st Defendant has established ownership of the suit property on a balance of probabilities.

C. Whether the 1st Defendant is entitled to the reliefs sought in his counter-claim

57. Having found that the 1st Defendant has established his ownership of the suit property, it goes without saying that he is entitled to the declaration that he is the legal owner of the suit property as sought in his counter-claim. He too is entitled to an order of permanent injunction against the Plaintiff and



the whole world. The prayer for a declaration that the trespass activities by the Plaintiff are illegal and unlawful is superfluous. Trespass is ex debito justitiae unlawful and illegal.

58. The claim of Kshs.50,000/=, as special damages by the 1st Defendant against the Plaintiff has not been proved. The law as regards special damages is clear and settled. Special damages must not only be specifically pleaded but must also be specifically proved. In the case of Hahn vs. Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held that;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. ”

57. The 1st Defendant has not strictly proved the special damages of Kshs. 50,000/-. The claim must be disallowed.

58. Regarding the claim for general damages for trespass, the court finds that trespass has not been proved. The 1st Defendant’s own testimony was that after purchasing the suit property, he took possession, erected a perimeter fence and has been in occupation since then.

59. The costs of the counter-claim shall be awarded to the 1st Defendant against the Plaintiff.

Final disposition

57. The conclusion is that this court dismisses the Plaintiff’s case in its entirety with costs to the 1st Defendant. The court allows the 1st Defendant’s counter-claim in the following terms: -

- a. A declaration is hereby issued declaring the 1st Defendant as the legal owner of Plot number V8702, now L.R. Nairobi/Block 105/9047.
- b. A permanent injunction be and is hereby issued restraining the Plaintiff by himself or his agents, servants and or employees from interfering with the 1st Defendant’s possession of Plot number V8702 now L.R. Nairobi/Block 105/9047.
- c. The costs of the suit and the counter claim are awarded to the 1st Defendant against the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023

M.D. MWANGI

JUDGE

In the virtual presence of: _

Ms. Murimi holding brief for Mr. Muthoka for the 1st Defendant

Mr. Gachuna for the Plaintiff

No appearance for the 2nd Defendant

Court assistant - Yvette

M.D. MWANGI

JUDGE

