



**Wanjohi v Kbara (Environment & Land Case 62 of 2021)  
[2023] KEELC 20307 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20307 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 62 OF 2021**

**JG KEMEI, J**

**SEPTEMBER 28, 2023**

**BETWEEN**

**ESTHER WANGUI WANJOHI ..... PLAINTIFF**

**AND**

**KELLEN MUTHONI KBARA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendant vide the plaint 4/4/2019 seeking the following orders:
  - a. That the purported sale and subsequent transfer of Ruiru/Kiu/Block 2519 (suit land) is null and void.
  - b. An order directing the Registrar of Titles Thika Land Registry to cancel any entry made transferring the suit property into the names of the Defendant or from the Defendant names into any person's names thereto.
  - c. A permanent injunction restraining the Defendant by herself her agents and or servants or any other person acting for the Defendant or with the Defendants authority from taking possession encroaching or trespassing onto alienating disposing off or in any other way whatsoever interfering with the parcel of land Ruiru/Kiu/Block/11001-11012 formerly Ruiru/Kiu/Block/2/2519 pending the hearing and determination of this suit.
  - d. General damages.
  - e. Costs of the suit.
2. The Plaintiff avers that the Defendant fraudulently acquired the suit land from his father who held it in trust for his family. That being family land he lacked the capacity to dispose it without the consent of the family members. Further that her father lacked the capacity to sell the land because of he suffered from hallucinations forcing him to be referred for psychiatric review.



3. The Plaintiff pleaded particulars of fraud against the Defendant under clause 15 of the Plaintiff.
4. That despite her and her family's efforts to Block the sale by lodging cautions in 2002 and 2014, the encumbrances were removed and the land fraudulently transferred to the Defendant. That in 2015 the Defendant through her agents demolished the graves of her kin buried on the land forcing her to report the incident to the police station at Ruiru.
5. The Defendant denied the Plaintiff's claim and contend that the sale and transfer of the suit land to her name by the Plaintiff's father was legal and above board and sought to put the Plaintiff into strict proof. She denied that the Plaintiff's father was forced or coerced to dispose the suit land and averred that the deceased at the time of the sale was of sound mind and that the land was never family land. She denied the allegation of destruction of any graves on the land. Moreover she denied knowledge of any caution having been lodged on the title in 2002 and was emphatic that the caution lodged in 2014 was procedurally removed by the Land Registrar in line with the law.
6. In her counterclaim, she averred that she acquired the land legally having followed all the due processes and therefore acquired a good title whereupon she subdivided into 12 plots and sold 10 plots to third parties. She sought the following orders in the counterclaim;
  - a. That the suit be dismissed with costs
  - b. In the alternative and without prejudice the refund of the full current value of the suit land.
  - c. Damages for suffering and loss
  - d. Costs of the suit.

### **The evidence**

7. PW1 – Esther Wangui Wanjohi stated that she is the daughter of Wanjohi Munaku Mwangi (Wanjohi) who was the registered owner of the suit land. She relied on her witness statement dated the 4/4/2019 and produced documents in support of her case marked as PEX No 1-8.
8. That her family was among the first squatters in Gatambaya Village in Ruiru to be settled in the area through the graces of H.E President Mzee Jomo Kenyatta. That the then KANU Chairman and Chairman of the Githunguri Constituency Ranching Company Limited (GCRCL), the late Waira Kamau settled her family amongst others on the land between 1985 and 1986.
9. The witness stated that to protect the suit land from disposal, the family appeared before the then area Chief one, Solomon Kiuna Kiarie and agreed that the land would be held by her father in trust for the family and not to be sold. That the agreement, notwithstanding, Wanjohi being an alcoholic, attempted to sell the land on many occasions forcing her to lodge a caution in 2002. In addition, she approached GCRCL not to issue any certificates which request was acceded to by the Chairman of the Company pending settlement of the dispute by her family.
10. She added that her three family members are buried on the land and that the Defendant destroyed the graves in 2015. That upon reporting the matter to the police station she realised that the land had been transferred to the Defendant without her and her family's consent and knowledge and lodged a caveat on the resultant subdivisions. That Wanjohi who had been through several hospitalisation was coerced to dispose that land by the Defendant. He died on 13/11/13 after being referred to a psychiatric review.
11. In cross she added that the land was purchased by her maternal grandfather from GCRCL and registered in the name of Wanjohi to hold in trust for the family and could not have had the capacity to dispose it without the consent and knowledge of the family.



12. PW2 – Peter Wanjohi testified and relied on his witness statement dated the 3/7/2019 and stated that he is a nephew of the Plaintiff being the son of her sister Jane Njeri Wanjohi, deceased. That he learnt in 2011 that Wanjohi was planning to sell the land so as to bail out her Aunt Rahab Njoki who had been arrested for land fraud. That later he also learnt that the suit land had been sold by Wanjohi to the Defendant whereupon he alerted the Plaintiff and the Chief of the area who cautioned Wanjohi against selling the land.
13. PW3 – James Mburu Njoroge relying on his witness statement dated the 3/7/2019 testified that he knew the Wanjohi family well having been a village elder in the area since 2002. He stated that like Wanjohi he also purchased land from GCRL where both were members That Wanjohi was very vulnerable before his death as a result of alcoholism to the extent that his decision making capacity was impaired hence unable to make transactions such as transfer of land and that he and his fellow elders in the village were shocked to learn that he had sold the only piece of land he held in trust for his family to the Defendant. That of great concern to them was the destruction of the family graves on the suit land by the Defendant, an act that is an abomination among the Kikuyu community.
14. PW4- Kingori Munaku stated that he is the elder brother of Wanjohi and was aware that the suit land belonged to Wanjohi and his family and was not to be sold without the consent of the family. That it was registered in the name of Wanjohi in trust for the family. In addition, that Wanjohi died and was buried in Mwea where he acquired land after selling the suit land.
15. PW5- Solomon Kiuna Kiarie stated that between 1985 -1986 he was the Chief of the area. That the family of Wanjohi agreed before him that the land would not be sold as it was family land. That he did not produce the agreement recorded by the family although he was certain he handed it over to his predecessor in office.
16. DW1 – Kellen Muthoni Kibara relied on her witness statement filed on the 24/7/2019 and produced documents in support of her case and marked DEX 1-9.
17. She stated that vide an agreement of sale dated the 6/11/2011 she purchased the suit land from Wanjohi at the sum of Kshs 1.5 Million and paid in full. Prior to the signing of the agreement she carried out a search at the land's office as well the offices of GCRL where the land was found to be unencumbered. That GCRL refused to grant her clearance on account of a complaint raised by the Plaintiff but on being sued the company duly released the clearance to her. That Wanjohi informed her that he had given the Plaintiff land parcel 2037 and her sister Rahab Njoki Wanjohi got parcel 495, both parcels having been acquired by Wanjohi from GCRL. That the restriction lodged on the title in 2015 was removed as per the provisions of the law in 2017. That she is aware that Wanjohi utilised some of the proceeds of sale to purchase two acres of land in Makutano, Mwea, Embu District.
18. The witness added that she learnt that the family led by the Plaintiff were not in support of the land sale after she had paid for the land. That there are no graves on the land and that the allegation that she destroyed graves is not true. Shown the photographs with graves she insisted that the suit land as shown in her valuation report does not contain graves. That there were no restrictions on the land at the time it was transferred to her.
19. That in 2013 she subdivided the land into 12 plots, sold 10 to third parties and retained two for herself. She averred that she is a purchaser for value without notice and urged the Court to dismiss the suit.
20. DW2 - George Daniel Kihara Maina stated that he is a registered valuer commissioned to value the suit land by the Defendant. He produced the valuation report marked as DEX 9 on record. He stated that he did not see any graves on the land and that there were no developments on the suit land. That he valued each plot at the sum of Kshs 2.25 Million.



### **The written submissions**

21. With leave of the Court the parties elected to file written submissions which I have read and considered. I thank Counsel for their illuminating highlights.

### **Analysis and determination**

22. Having now considered the pleadings, the evidence tendered at the hearing, the written submissions and all the material placed before the Court the issues for determination are; whether a customary/family trust existed on the suit land; and if yes whether the Plaintiffs father had the capacity to sell the land; whether the Plaintiff proved fraud on the part of the Defendant; whether the Defendant was a bonafide purchaser for value without notice.
23. It is not in dispute that the suit land was registered in the name of Wanjohi on 9/8/93 and a title issued on even date. From the record Wanjohi was a married man with children, the Plaintiff being one of them. He was predeceased by his wife, a son and a daughter.
24. The Defendant is insistent that upon satisfactory inquiries at the lands office and at the offices of the GCRCL she purchased the suit land lawfully from Wanjohi, paid the full consideration and was given possession and later subdivided the land into 12 portions out of which she sold 10 leaving 2 in her name. She denied the particulars of fraud and sought to put the Plaintiff in strict proof.

### **Issue No 1 - Whether A Customary/family Trust Existed On The Suit Land**

25. I must point out that the crux of the Plaintiffs case is rooted in fraud against the Defendant however no evidence was led in support of fraud but instead the Plaintiff dwelt on the notion of family or customary trust in evidence and the written submissions.
26. It is settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. Any evidence adduced in a matter must be in consonance with the pleadings. Evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. Vs. Stephen Mutinda Mule & 3 Others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Vs. Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

27. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another Vs. IEBC & 2 Others (2017)eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its



pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings .....

28. That said I shall determine the issue based on the evidence placed before the Court. It is the case of the Plaintiff that the suit land was family land having been purchased by her maternal grandfather and was held by Wanjohi in trust for his family. Further that the family had agreed before the local area Chief that the land would be held as such and would not be sold. That Wanjohi sold the land fraudulently to the Defendant without the knowledge and consent of the family and it is on that basis that she averred that Wanjohi lacked the capacity to dispose the land. Further she alluded to Wanjohi having been an alcoholic and therefore was incapable of making sound decisions and blamed the Defendant for coercing and forcing Wanjohi to sell the land knowing too well that it was family land. That the suit land was the only family land and that she and her family stand to be rendered destitute unless the Court grants her reliefs.
29. The Defendant in rebuttal argued that there was no evidence of family trust and that according to her due diligence carried out at the land's office and the Company Wanjohi owned the land wholly.
30. The rights of a registered proprietor of land are anchored under Section 25 of the [Land Registration Act](#), where it is stipulated that:-
- “(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
31. A registered proprietors' rights may be defeated by the overriding interests stipulated under Section 28 of the [Land Registration Act](#) (now repealed), one of them being trust including customary trusts.
32. In the case of [Isack Kieba M'inanga Vs. Isaaya Theuri M'Lintari & Another](#) [2018] eKLR where it held as follows:

“ Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of



such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

33. In the case of *Susan Mumbi Waititu Vs. Mukuru Ndata & 4 Others* (19 of 2007) eKLR Justice M.S.A Makhandia stated that:-

“As for trust, the Plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the Plaintiffs have miserably failed in this onerous task. The 1<sup>st</sup> Defendant has deponed that he purchased the suit premises for value. Accordingly, it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The Plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1<sup>st</sup> Defendant in favour of the Plaintiffs.”

34. Though the Plaintiff stated in passing that the land was purchased by her maternal grandfather, she did not lead any evidence in support. It is not in dispute that Wanjohi was a member of the GCRCL vide the share certificate No 5444 issued in 1992. The members register also attests that Wanjohi was a shareholder and was allotted the suit land by the company. Equally he held a title issued in his name in 1993. PW2 and PW4 led evidence that Wanjohi purchased the land from the land buying company. Save for generalised and rehashed evidence by most of the Plaintiffs witness that the land was family land, none led evidence to rebut the evidence of he purchased the land from GCRCL.

35. The Plaintiff led evidence that the family agreed at the Chief’s office that the land was family land and that it should not be sold. Neither the Plaintiff nor the Chief PW3 tabled any cogent evidence in support.

36. I am guided by the decision of the case in Isack Kieba that trust cannot be imputed but must be proved in evidence. The Court finds that the Plaintiff has not proved customary trust. The Court finds that the land belonged to Wanjohi and he sold it to the Defendant.

### **Issue No 2 - If Yes Whether The Plaintiffs Father Had The Capacity To Sell The Land**

37. Having held that Wanjohi owned the land absolutely he had the right to deal with it as he deemed fit and in this case he sold it to the Defendant at a consideration. The land was sold *intervivos* and there was no requirement then of a spousal consent and even if spousal consent was required the Plaintiff was incapable of giving it she being a child of the seller. This issue is determined in the positive.



### **Issue No 3 -Whether The Plaintiff Proved Fraud On The Part Of The Defendant**

38. Fraud is defined as:-

“ A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

39. In the case of *Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court held 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.”

40. It would appear that the Plaintiff abandoned this prayer in both the evidence and written submissions. No iota of evidence was led to prove this claim and the Court finds that the same though pleaded was not proved. It is dismissed.

### **Issue No 4- Whether The Defendant Was A Bonafide Purchaser For Value Without Notice.**

41. It is on record that Wanjohi entered into an agreement for sale with the Defendant in 2011. The payment of the purchase price is not disputed. When the company declined to issue the Defendant with the clearance certificate none other than Wanjohi sued it and in his affidavit of 22/2/2011 avowed under oath stated that he sold the land to the Defendant with the knowledge and blessings of his family members. That he purchased land for her daughters including the Plaintiff as shown in the share certificate No B -8592. Further that the proceeds of the sale of the land was deployed in the purchase of 2 acres in Mwea – Plot No 1540 Plot 4 situate at Gachoka division in Embu District – see copy of agreement of sale on record dated the 20/1/2011. PW3 led evidence that Wanjohi was buried in this land in Makutano, Mwea. This evidence was collaborated by the letter authored by the Chairman of GCRL dated the 10/7/2011 on record where the company confirmed that according to its records the Plaintiff was given parcel No Ruiru WEST /Block 1 /237 where she has constructed a commercial building .The Court finds this evidence cogent and the Plaintiff has failed to place any evidence to the contrary to rebut this.

42. It is on record that the GCRCCL duly issued a clearance certificate to Wanjohi for the sale of the suit land to the Defendant on the 8/7/2011.

43. The Defendant led evidence through a valuation report that the land was not developed. The Plaintiff claims that there were 3 graves on the land and that the Defendant destroyed them in 2015. No evidence was led in form of a police report or abstract in support of the allegations.

44. In the end the Court finds that the Plaintiff failed to prove her case. The Defendants counterclaim succeeds save for the damages which the Court declines to grant on the ground that the Defendant did not lead any evidence in support.

45. It must be pointed out that according to the green card the suit land no longer exists, it having been subdivided into 12 plots. The Defendant led unchallenged evidence that she has sold 10 plots to third parties. It is has not been explained why the Plaintiff failed to enjoin the third parties. It is trite that no



adverse orders can be granted against a party who is not enjoined in the suit as it will amount to the party being condemned unheard.

46. In conclusion the Court finds that the Plaintiff failed to proof customary or family trust, fraud against the Defendant. The land was not held in trust the same having been purchased by the Plaintiffs father, sold for valuable consideration to the Defendant in his lifetime, no vitiating factors have been proved to negate the transaction between Plaintiffs father and the Defendant. Indeed the Court must state that going by the evidence on record Wanjohi was a prudent man in his dealings seeing that he sold the land and acquired a bigger parcel in Mwea where his remains were interred and also that he settled his two daughters by buying them parcels of lands at GCRL, the Plaintiff included. The passing allegation that Wanjohi may have suffered from a mental illness was not proven and it therefore remains untrue that he left the family landless and destitute. Far from it. The allegation of coercion and force were also not proven in evidence.
47. Final orders for disposal;
- a. The Plaintiffs suit remains unproven. It is dismissed.
  - b. The counterclaim of the Defendant succeeds.
  - c. I decline to grant the Defendant orders for damages as no evidence was led to proof the claim.
  - d. Costs shall be in favour of the Defendant.
48. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

