



Kimani v Thome Farmers Company (No.1) Limited & 4 others (Environment & Land Case 109 of 2019) [2023] KEELC 22277 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 109 OF 2019
EK WABWOTO, J
NOVEMBER 30, 2023**

BETWEEN

ANNAH WANJIRU KIMANI PLAINTIFF

AND

THOME FARMERS COMPANY (NO.1) LIMITED 1ST DEFENDANT

MICHAEL MBUGUA THIGE 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

THE REGISTRAR OF COMPANIES 4TH DEFENDANT

THE HON ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of a Plaint dated 22nd March 2019 wherein the following reliefs were sought;
 - i. An order compelling the 1st Defendant to rectify its records of shareholding to indicate the Plaintiff as the shareholder of two (2) shares of the Company.
 - ii. An order compelling the 4th Defendant to rectify her records of shareholding of the 1st Defendant to indicate the Plaintiff as the shareholder of two (2) shares of the Company.
 - iii. An order compelling the 2nd Defendant to give vacant possession of Nairobi/Block 110/671 to the Plaintiff.
 - iv. An order compelling the 3rd Defendant to cancel the registration of the 2nd Defendant as proprietor of Nairobi/Block 110/671 and replace him with the Plaintiff.



- v. In the alternative to prayer (i) and (ii) above, the Court do order the 1st and 2nd Defendants jointly or severally to pay damages to the Plaintiff to the value of the land Nairobi/Block 110/671 at current market rates.
 - vi. Costs of the suit.
 - vii. Interest on prayers (v) and (vi) at Court rates
 - viii. Any other order that the Court may deem fit and just to grant.
2. The suit was contested by the Defendants. The 2nd Defendant filed a statement of defence dated 12th July, 2019, while the 3rd and 5th Defendant filed a statement of defence dated 8th May 2019. The 1st and 4th Defendant never filed any defence, neither did they participate in these proceedings.

The Plaintiff's case

- 3. The Plaintiff averred that vide an Agreements for Sale dated 4th October, 1994 and impliedly incorporated agreements, the Plaintiff contracted to purchase into two shares from the 1st Defendant's shareholders Maina Karanja (deceased) and Gichango Gataua.
- 4. Maina Karanja (deceased) and Gichango Gataua owned one share each in the 1st Defendant Company each share translating into a single piece/ plot of property.
- 5. The Plaintiff and the sellers Maina Karanja (deceased) and Gichango Gataua agreed that the purchase price for each plot was Kenya Shillings Two hundred and Twenty-Five thousand (Kshs. 225,000/-) therefore summing up to Kenya Shillings Four Hundred and Fifty Thousand (Kshs. 450,000/-)for the two shares/plots.
- 6. The plots had no title and the only form of security for the Purchaser were the two shares held by the sellers Maina Karanja (deceased) and Gichango Gataua in the 1st Defendant Company.
- 7. On 15th February, 1995, the Plaintiff proceeded to draw two Kenya Commercial Bank Ltd Cheques Numbers 9285 and 9286 each for Kenya Shillings Two hundred and Twenty-Five thousand (Kshs. 225,000/-) for each of the sellers Maina Karanja (deceased) and Gichango Gataua.
- 8. The two Cheques were duly acknowledged by M/S. Oraro & Rachier Advocates, the then Advocates for Kenya Commercial Bank Ltd, which bank was financing the transaction through a legal Charge over the Plaintiff's property number L.R Nairobi/Block 78/167.
- 9. On the same day 15th February 1995, the Plaintiff went to the firm of M/S D.A. Nanjero & Co. Advocates, the advocates for the 1st Defendant and handed over the two Kenya Commercial Bank Ltd Cheques Numbers 9285 and 9286 each for Kenya Shillings Two hundred and Twenty-Five thousand (Kshs 225,000/-) each to the sellers Maina Karanja (deceased) and Gichango Gataua.
- 10. Consequently, the sellers forfeited their receipts of ownership of the respective shares in the 1st Defendant Company and executed transfers for the shares in favour of the Plaintiff.
- 11. Given that the sellers Maina Karanja (deceased) and Gichango Gataua had no titles for the properties at the time of selling their shares in the 1st Defendant Company to the Plaintiff, the Plaintiff was directed by M/S D.A. Nanjero & Co. Advocates to pay Kenya Shillings Thirteen Thousand and Ninety (Kshs. 13,090/-) only to facilitate the processing of the titles as well as the demarcation of roads and survey. The Plaintiff paid these amounts and was issued with receipts of payments thereof.



12. Therefore, the Plaintiff was to have the registration of the sellers' properties to her name as first registrations.
13. It was further averred that it was a common and mutual understanding between parties involved in the transaction that each of the sellers had one share each in the 1st Defendant's Company translating to a distinct piece of property for each of them. M/S D.A. Nanjero & Co Advocates further advised the Plaintiff that the properties of the sellers, being adjacent to each other, would be merged and the Plaintiff issued with one title for the properties. The Plaintiff was issued with title number Nairobi/Block 110/671 in October, 1995 from the 1st Defendant's advocates M/S D.A. Nanjero & Company Advocates.
14. Upon receiving the title document, the Plaintiff's understanding and legitimate expectation was that the title encompassed both properties sold by the said Maina Karanja (deceased) and Gichango Gataua. The plaintiff, hence, never insisted on crosschecking measurements of the property as indicated on the title document vis-a-vis on the ground.
15. In early January 2015, the Plaintiff bumped on to the 2nd Defendant on the site of the property purporting to elect a fence around the properties claiming he had purchased them from a lady called Waruguru. M/s Waruguru is the widow of the said Maina Karanja (deceased) one of the initial sellers. The 2nd Defendant further claimed that he had the original documents of ownership of the properties which he had left back in the United States of America.
16. A few days later, the 2nd Defendant proceeded to construct a site house on the properties creating an altercation between him and the Plaintiff causing the Plaintiff to report the matter to Directorate of Criminal Investigations Land Fraud Department.
17. The investigations officer reported that, indeed, the Plaintiff held two shares in the 1st Defendant Company each from the sellers of the properties and, consequently, their names had been cancelled out from the 1st Defendant's records.
18. Upon making numerous queries on diverse occasions over the issue to Department of Survey Ministry of Lands and Physical Planning, the Plaintiff was informed that the title she held (i.e. Nairobi/Block 110/670) was only a portion of the two properties and the beacons had been interfered with.
19. The Plaintiff has since then been following up the matter with the Ministry of Lands and Physical Planning and M/S D.A Nanjero & Co. Advocates but to no avail. In particular, the said firm of D.A. Nanjero & Co. Advocates has hostilely declined to engage the Plaintiff, has withheld some crucial documents from the Plaintiff including the original transfers for the shares of the sellers of the properties.
20. The Plaintiff further averred that this has gravely hindered her course and pursuit of the second parcel of property and continues to cause immense frustrations.
21. It was further averred that the parcel of land known as Nairobi/Block 110/671 was hived out from the two properties and title documents in favour of the 2nd Defendant created thereof irregularly, illegally and or fraudulently by the 1st Defendant and/or its officers 2nd Defendant. The following particulars of fraud were pleaded as against the 1st and 2nd Defendants;
 - i. Transferring the Plaintiff's one share in the 1st Defendant Company to the 2nd Defendant without the consent of the Plaintiff.
 - ii. Obtaining registration of land known as Nairobi/Block 110/671 through false pretence.



- iii. Obtaining sale and transfer of the land known as Nairobi/Block 110/671 without valid or any Confirmed Grants of Letters of Administration Intestate from the widow of Maina Karanja.
 - iv. Altering the Plaintiff's documents and/or records of ownership of shares in the 1st Defendant Company.
22. During trial, the Plaintiff testified as the sole Plaintiff witness and she relied on her witness statement dated 22nd March, 2019 and her bundle of documents dated 22nd March, 2019 as her evidence in chief.
 23. On Cross-examination, she stated that the suit property Nairobi/Block 110/671 was her property before the title deeds were issued. She also stated that the sale agreement referred to Nairobi/Block 110/670 because at the time she was buying the property, title for 671 was not available since 671 was part of 670.
 24. She also stated on cross-examination that she did due diligence before purchase and she was shown the land by the vendors in the presence of a surveyor who fixed the beacons.
 25. When asked about the beacon Certificate, she conceded not having any in Court. She also stated that she got the share Certificate in 2021. She further stated that she was not a shareholder since she came to buy the property when it was already divided.
 26. She also stated in cross-examination that she did not have a title for 671. She further stated that she had seen a search of 671 showing the 2nd Defendant as the owner of the property.
 27. On further Cross-examination, she stated that the sale agreement did not mention any purchase of shares and neither did she see any list of Shareholders at the time of purchase of the property.
 28. When re-examined, she stated that she bought the property from the vendors after confirming that they were shareholders. She also stated that her title was issued in October, 1995 having paid for it through Dorcas Nanjero Advocate. She also stated that she never confirmed the acreage of the property when she got her title. She only realized later that the 2nd Defendant was claiming the same.
 29. When Cross-examined by the Court, she stated that property 670 and 671 were the same on the ground.

The case of the 2nd defendant:

30. The 2nd Defendant filed a written statement of defence dated 12th July, 2019 wherein he sought for the dismissal of the Plaintiff's suit with costs.
31. During trial, the 2nd Defendant, Michael Mbugua Thige testified as the sole witness for the defences. It was his testimony that he purchased the property known as Nairobi/Block 110/671 at a time when it did not have a title. He stated that he purchased the share of one Edith Ruguru Kimani which was her share from the 1st Defendant. It was his further testimony that the share was to come with the plot that he was assigned and the plot number was number 278. The said number was indicated in the sale agreement.
32. The 2nd defendant also stated that upon being issued with the Share Certificate, the lawyer for the 1st defendant was tasked to prepare and process the title which was later issued to him. He also stated that the property measured 0.200 Ha and he has title to the same.
33. On cross-examination, he stated that the Plaintiff came to her plot when he was fencing the same and at that time, there was no development. He also stated that he has never dumped any soil on the Plaintiff's



property. He also stated that he was issued with a title to suit property number 671 which title had been processed by Dorcas Nanjero Advocate on behalf of the 1st defendant.

The case of the 3rd and 5th defendants:

34. The 3rd and 5th defendants filed a statement of defence dated 8th May 2019. The 3rd and 5th Defendants denied the averments made by the Plaintiff in her Plaint and also averred that there is no substantive claim against them.
35. No witness testified on behalf of the 3rd and 5th defendants during trial.

The Plaintiff's submissions:

36. The Plaintiff filed written submissions dated 4th August, 2023 through the firm of Kamau Kinga & Co. Advocates. Counsel for the Plaintiff submitted on the following eight issues:
 - i. Is the Plaintiff the bonafide owner of the suit property (Nairobi/Block/110/671)?
 - ii. Was the plaintiff ever issued with a title document of the suit property by the 1st Defendant's advocates in October 1995?
 - iii. Did the title deed given to the Plaintiff, encompass both properties sold to the plaintiff by Maina Karanja and Gichango Gataua (now both deceased) who were shareholders of the 1st defendant?
 - iv. Does the 2nd Defendant have the original documents of ownership of the suit properties as he claims he has?
 - v. Did the 1st Defendant Company and the 2nd Defendant illegally and fraudulently transfer one share of the plaintiff in the 1st Defendant Company to the 2nd Defendant without her consent?
 - vi. Did the 2nd and 3rd Defendants allow the sale and transfer of and transfer of the suit property known as (Nairobi/Block/110/671) without a valid and any confirmed grant of letters of administration intestate from the widow of Maina Karanja?
 - vii. Have the 1st 2nd, 3rd and 4th Defendants created a well-orchestrated scheme to conspire against the plaintiff to dispose the plaintiff of her one property known as Nairobi/Block110/ 671?
 - viii. Is the plaintiff entitled to the prayers sought in her plaint dated 22nd March 2019?
37. It was submitted that the plaintiff was made to understand by the 1st defendant that after purchasing two shares from two members in the 1st Defendant Company, she would thereafter be getting two properties that would be merged into one and obtain one title to the suit property as a first registered owner.
38. That the transaction conducted by the 1st Defendant's advocates (M/S D.A. Nanjero & Company Advocates) went smoothly until registration of the two plots when the latter failed to merge the plots as she had earlier said it would be done, and only issued a title to one of the properties (L.R.No Nairobi/Block/110/670) to the Plaintiff and irregularly, illegally and fraudulently transferred the other property (L.R. No. Nairobi/Block/110/671) to the 2nd Defendant.
39. The Plaintiff paid for two properties (Kshs.225,000/=) each totaling to (Kshs. 450,000/=) but was only issued with one property. The Plaintiff produced evidence of the said payment before this Court in form of the cheques Nos. 9285 and 9286 issued to the sellers of the shares namely Maina Karanja (now deceased) and Gichango Gataua (now deceased) respectively. The Plaintiff further paid Kshs 13,090



to facilitate the processing of the titles as well as the demarcation of roads and surveys as advised by the 1st Defendants advocates (M/S DA Nanjero & Company Advocates).

40. The Plaintiff is therefore entitled to the suit property L. R., No. Nairobi/Block/110/671.
41. It was also submitted that the Plaintiff was only issued with one title document for the property known as L.R. No. Nairobi/Block/110/670 and not that of the suit property (L.R. No. Nairobi/Block/110/671).
42. The suit property was instead fraudulently transferred and issued to the 2nd Defendant without a valid or any confirmed grants of the widow of the late Maina Karanja.
43. It was also submitted that the suit property the 2nd defendant is laying claim over is the property that she was shown by the surveyor to be one of her plots. Further that if at all the 2nd defendant did purchase any property at all, it was not the suit property herein and therefore the title issued in his name was fraudulently done.
44. It was also argued that the title given to the Plaintiff (L.R. No. Nairobi/Block 110/670 did not encompass both properties sold by Maina Karanja and Gichango Gataua as the acreage implied otherwise.
45. It was also submitted that the 2nd Defendant failed to honour the summons by DCI to record a statement in respect to ownership documents and as such it is questionable whether his title is genuine.
46. It was also further submitted that the 2nd defendant claims that he was sold a share by one Edith Ruguru Kimani which was later registered in his name after the transfer the 1st defendant's advocates (M/S D.A. Nanjero & Company Advocates) and obtained a title of L.R. Nairobi/Block/110/671. The 2nd defendant did not call the said Edith Ruguru Kimani as a witness before the court to corroborate his evidence that he purchased the share in 1st Defendant Company.
47. It is contended that the suit property (Nairobi/Block/110/671) was the property owned by Maina Karanja and the person who was to purchase the same ought to have obtained the confirmed grant of letters of administration from his widow.
48. The Court was urged to grant the prayers sought.

The 2nd defendant's submissions.

49. The 2nd Defendant filed written submissions dated 15th August, 2023 filed by Kithu Mbutia Advocates.
50. It was submitted that there is no dispute that the property known as title number Nairobi/Block 110/670 belongs to the Plaintiff. What is in dispute is whether the Plaintiff has any claim to the property known as Nairobi/Block 110/671 and the orders sought in the Plaintiff.
51. It was submitted that without the participation of the 1st defendant in the proceedings. The 2nd defendant was able to demonstrate that the 1st defendant was the beneficial owner of the suit property. The 1st defendant had shareholders whose each share entitled them to a plot measuring approximately ½ an acre. The 2nd defendant demonstrated how he bought a share (No. 371) from Edith Ruguru Kimani in 1989 and had it transferred to him with the blessings of the 1st Defendant and thereafter he was able to obtain plot No. 278 which was registered at the lands office as title number Nairobi/Block 110/671.



52. It was contended that the 2nd defendant was able to demonstrate his good root of title to the property known as Nairobi/Block 110/671. The 2nd defendant also confirmed that he had in his possession the Original Title Deed in respect of Nairobi/Block 110/671.
53. The plaintiff was not able to challenge the good root of title asserted by the 2nd defendant. The plaintiff was not able to demonstrate that the purchase agreement dated 4th October, 1994 was in respect of the plot no. 278 which was already bought by the 2nd Defendant in 1989. The sale agreement produced by the plaintiff did not have a plot number. It only had a title number Nairobi/Block 110/670 which is distinct from Nairobi/Block 110/671 owned by the 2nd Defendant.
54. The plaintiff did not provide any evidence to prove that she owned any shares in the 1st Defendant. Consequently, she could not prove any alleged misdeed against any defendants regarding alleged fraudulent transfer of share to warrant the orders sought against the 1st and 4th Defendants in rectification of the share register. Indeed, the plaintiff was not sure whether the transaction dated 4th October, 1994 was for purchase of property or for the purchase of shares.
55. It was submitted that the plaintiff did not discharge the evidentiary burden of proof against any of the defendants in this case. Even against the 1st defendant who did not participate in the proceedings, the evidentiary burden of proof was not discharged as the plaintiff did not adduce any evidence against the 1st defendant as to the issuance of shares or transfer of the property claimed by the plaintiff.
56. It was argued that the 2nd defendant provided evidence that he is the duly registered proprietor of title number Nairobi/Block 110/671. This evidence was even corroborated by the plaintiff herself who produced a search over the property which confirmed the 2nd defendant as the registered proprietor.
57. Secondly, the plaintiff did not lead any evidence to challenge the indefeasible title of the 2nd defendant's interest in the property. The plaintiff only casually suggested that the title was fraudulently registered in the name of the 2nd defendant.
58. The 2nd defendant also referred to Section 26 (1) of the *Land Registration Act*, 2012 which stipulates that:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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 subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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 party; or
- b. Where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme.”
59. The Court was urged to dismiss the suit with costs and reliance was placed to the following cases; Vijay Morjaria -vs- Singh, Madhusingh Darbar & another [2000] eKLR, Malachi Bob Mwangi -vs- Sarova Hotels Limited & Another [2022] eKLR, and Odinga & 16 others -vs- Ruto & 10 others, Law Society of Kenya & 4 others (Amicus Curiae) Presidential Election Petition E005, 001, E002, E003, E004 E007 and E008 of 2022 (Consolidated) [2022] KESC 56 (KLR).



The submissions of the 3rd and 5th defendants

60. The 3rd and 5th Defendants filed written submissions dated 10th August, 2023 through Ruth Kerubo, Senior State Counsel. Counsel outlined the following issues for consideration by the court; whether the plaintiff has proved ownership of NAIROBI/ BLOCK 110/671 and whether the claim against the 4th and 5th defendants is time bared as per the provisions of Section 7 of the *Limitation of Actions Act*.
61. On whether the plaintiff has proved ownership of Nairobi/ Block 110/671, it was submitted that the Plaintiff claims ownership of land parcel number Nairobi Block 110/671. The Plaintiff has however provided a sale agreement demonstrating that she bought Nairobi Block 110/670. She claims to have bought shares but no evidence has been provided supporting the purchase of the alleged shares. The Plaintiff has further not provided any evidence showing that she bought two plots which were to be amalgamated/merged. No evidence was provided to show that the parcel that the plaintiff was entitled to was excised to create land parcel number Nairobi Block 110/671. The plaintiff has further not provided any evidence to demonstrate that the initial acreage of Nairobi Block 110/670 was bigger than its current acreage.
62. On whether the suit was time barred, Counsel submitted that Section 7 of the Limitation of Action Act is clear that no action may be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. In the instant suit, the registration of land parcel number Nairobi Block 110/670 was done in the year 1995 and a title deed issued to the Plaintiff the same year. The registration of parcel number Nairobi Block 110/671 was done in the year 1998 and a title issued to the 2nd Defendant the same year. This suit was filed in the year 2019. This is a period of 24 years since the title to Nairobi Block 110/670 was issued and 21 years since the title to Nairobi Block 110/671, the suit parcel herein, was issued. This is more than the 12 years provided under section 7 of the *Limitation of Actions Act*.
63. It was further submitted that any claim made as against the 3rd and 5th defendants in relation to the registration and issuance of titles to Nairobi Block 110/670 and Nairobi Block 110/671 has therefore been made contrary to the 12 years provided under section 7 of the Limitation of Action Act.
64. Reliance was placed on the cases of Dickson Ngige Ngugi vs. Consolidated Bank Ltd [2020] eKLR and Sohanldurgadass Rajput & Another -vs- Divisional Integrated Development Programmes Co. Ltd [2021] eKLR.

Analysis and Determination

65. The Court has considered the pleadings filed by the parties and the evidence tendered together with written submissions filed by the parties and has outlined the following issues for determination in this suit:
 - i. Whether the plaintiff's suit is time barred?
 - ii. Whether the plaintiff is the bonafide owner of Nairobi Block 110/671?
 - iii. Whether the plaintiff has proved the particulars of fraud as against the defendants?
 - iv. Whether the plaintiff is entitled to the reliefs sought in the plaint?



Issue No. 1

Whether the plaintiff's suit is time barred.

66. The 3rd and 5th Defendants raised an objection to the Plaintiff's suit in their defence to the effect that the registration of land parcel Nairobi Block 110/670 was done in the year 1995 and title deed issued to the Plaintiff the same year. The registration of parcel number Nairobi Block 110/671 was done in the year 1998 and a title issued to the 2nd Defendant the same year. The suit was filed in the year 2019. It was argued that the suit having been filed after 12 years was outside the prescribed statutory time line as provided for under section 7 of the *Limitation of Actions Act*. Reliance was placed in the case of Dickson Ngige Ngugi vs. Consolidated Bank Ltd (Formerly Simba Credit Corporation Limited & Another [2020] eKLR and Sohanladurgadass [2021] eKLR (supra).
67. The Plaintiff in her evidence and pleadings stated that she bumped onto the 2nd Defendant in early January, 2015 on the site of the property when the 2nd Defendant was erecting a fence around the properties claiming that he had the original documents of ownership of the properties which he had left back in the United States of America.
68. Section 7 of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him if it first accrued to some person through whom he claims against that person. However, where fraud is pleaded, time does not start to run until when such fraud was discovered as is stated under Section 26 of the *Limitation of Actions Act*.
69. Section 26 of the *Limitation of Actions Act* provides as follows:-
- “Where, in the case of an action for which a period of limitation is prescribed, either—
- the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- the right of action is concealed by the fraud of any such person as aforesaid; or
- the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
70. Going by the above provision, it is trite law that in circumstances where fraud is pleaded, time does not start to run until when such fraud was discovered. In the case of Justus Tureti Obara Vs Peter Kopeitai (2014) eKLR the Court held:-
- “I am in agreement with the Plaintiff's submission that the Plaintiff's claim is for the recovery of the suit property from the defendant and as such the limitation period for such a claim is 12 years as provided for in Section 7 of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it”.
71. In the instant case, the Plaintiff at paragraph 27 of the Plaint pleaded particulars of fraud against the 1st and 2nd Defendants. As per the Plaintiff's pleadings, she became aware of the 2nd Defendant's claim to



the property in January, 2015 and subsequently filed the suit on 22nd March 2019. Having considered the said position, it is evident that time had no run out when the Plaintiff filed this suit in 2019. In view of the foregoing, the contention by the 3rd and 5th Defendants that the suit was filed out of time falls flat on its face.

Issue No. 2:

Whether the Plaintiff is the bonafide owner of Nairobi/Block 110/671

72. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the said Act provides as follows:

“ 27. Subject to this Act-

- (a) 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;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

73. The two sections have been reproduced in sections 24 and 25 of the [Land Registration Act](#), 2012 as follows:

“ 24. Subject to this Act—

- (a) 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; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging



or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (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; an
 - (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.

SUBPARA (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”.

74. The Plaintiff adduced evidence that on 4th October, 1994, she impliedly entered into an agreement to purchase two shares from shareholders of the 1st Defendant one Maina Karanja and Gichango Gatatua (both deceased). The 1st Defendant had told the Plaintiff that the said two shareholders owned one share each in the 1st Defendant's Company, translating into one piece of property. Each of the share property was agreed to be two hundred and twentyfive thousand Kenya shillings (Kshs. 225,000/-) therefore summing to four hundred and fifty thousand Kenya shillings (Kshs, 450,000/-).
75. Further, that the plots had no title and the only form of security for the purchaser was the two shares held by the sellers (Maina Karanja and Gichango Gatua (now both deceased) in the 1st Defendant's Company.
76. On 15 February 1995, the Plaintiff proceeded to draw two Kenya Commercial Bank Ltd (KCB)cheques numbers 9285 and 9286; each for two hundred and twenty-five thousand Kenyan shillings (Kshs. 225,000/-) for each of the said sellers and were acknowledged by M/S Oraro & Rachier Advocates who were the then advocates for the financiers (Kenya Commercial Bank Ltd) through legal charge over the Property number L. R. Nairobi/ Block 78/167.
77. On the same date, the Plaintiff went to the firm of M/S D.A. Nanjero & Co. Advocates who were the advocates for the 1st Defendant and handed over the said cheques. Consequently, the sellers forfeited their receipts of ownership of the respective shares in favour of the Plaintiff. The Plaintiff was directed by the same advocates to pay Kshs. 13,090/- to facilitate the processing of the titles as well as the demarcation of roads and survey. The Plaintiff paid the said sum of money with an understanding that the registration of the two sellers plots would be in her name as a first registration.
78. The surveyors engaged by the 1st Defendant's advocates M/S Kamwere and Associates pointed out the beacons to the Plaintiff indicating that she owned both pieces of property and she was advised that the



two properties of the sellers being adjacent to each other would be merged and she be issued with one title for the properties by the 1st Defendant's advocates.

79. The plaintiff was issued with the title number Nairobi/ Block 110/670 in October 1995 from the 1st Defendant's advocates M/S D. A. Nanjero & Company Advocates. It was not until the Plaintiff bumped into the 2nd Defendant on the site of the property purporting to erect a fence around the properties, claiming that he had purchased them from one Phyllis Waruguru and that he had the original documents of ownership which he had left in the United States of America.
80. In her cross-examination, she stated that bought the property before the title deed was issued and she also conceded that she did not have any beacon certificate. She also conceded that the people who sold her the land did not have any Share Certificate issued by the 1st Defendant at the time of purchase of the suit property.
81. From the evidence that was tendered herein and upon analyzing the same, it is evident that the 2nd Defendant has been able to demonstrate how he bought a share No. 371 from one Edith Ruguru Kimani in 1989 and had it transferred to him with the consent and approval of the 1st Defendant and thereafter he was able to obtain Plot No. 278 which was registered as title number Nairobi/Block 110/671. The 2nd Defendant was able to demonstrate his good root of title to the property known as Nairobi/Block 110/671.
82. Further from the evidence that was tendered, the Plaintiff was not able to provide any evidence that she owned any shares with the 1st Defendant nor that the people whom she purchased the land from had any shares from the 1st Defendant. The Plaintiff was also not able to provide and or produce any beacon certificate in respect to the suit property. The 2nd Defendant was also able to produce a copy of the title deed for Nairobi/Block/110/671 which was issued to him on 26th January, 1998. He was also able to produce a copy of the search Certificate issued on 20th December, 2018 which confirmed that indeed he was the registered proprietor of Nairobi/Block 110/671.
83. In view of the foregoing, this court is satisfied that on the evidence before this Court, the 2nd Defendant is the bonafide owner of the Nairobi/Block 110/671.

Issue No. 3

Whether the Plaintiff has proved the particulars of fraud as against the Defendants.

84. The Plaintiff pleaded and particularized fraud against the 1st and 2nd Defendants. The following particulars of fraud were pleaded: -
 - i. Transferring the Plaintiff's one share in the 1st Defendant company to the 2nd Defendant without the consent of the Plaintiff.
 - ii. Obtaining sale and transfer of the land known as Nairobi/Block/110/671 through false pretence.
 - iii. Obtaining sale and transfer of the land known as Nairobi/Block 110/671 without valid or any confirmed grant of letters of administration Intestate from the widow of Maina Karanja.
 - iv. Altering the Plaintiff's documents and/or records of ownership of shares in the 1st Defendant's Company.
85. A party alleging fraud A party alleging fraud must specifically plead the particulars of fraud and lead evidence to prove the allegations of fraud. Whether there was fraud or not needs production



of evidence. Fraud is defined under the Black's Law Dictionary 10th Edition as "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Defendants. How then can fraud be proved? The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR held;

"Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities".

Similarly, the Court of Appeal decision in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR held that:

"we find that the law is clear as put by Mr. Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine."

86. In the case of Gladys Wanjiru Ngacha vs Treresia Chepsat & 4 Others, [2013] eKLR, the Court held that:

"... Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In Mutsonga vs. Nyati (1984) KLR 425, at pg 439, this Court held: "Whether there is any evidence to support an allegation of fraud is a question of fact".

87. A party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud. In the case of Vijay Morjaria Vs Nansign Madhusihn Darbar & Another (2000) eKLR, the court of Appeal 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".

88. In the instant case, the Plaintiff submitted that there was a well-orchestrated scheme by the 1st and 2nd Defendants and to eventually dispose her of the other parcel of land resulting in the creation of and registration of land known as Nairobi/Block 110/671.

89. In respect to the issues of fraud, the 2nd Defendant argued that the Plaintiff did not specifically plead any fraud alleged against the 2nd Defendant neither did she set out any fraud ascribed to the 2nd Defendant nor prove any fraud in the part of the 2nd Defendant.

90. The Court has considered the totality of the evidence adduced herein. The 2nd Defendant has set out the history of his acquisition of the suit property being Nairobi/Block 110/671 all of which is undisputed.



Evidence was also adduced confirming that the 2nd Defendant is the duly registered proprietor of the suit property. The Plaintiff did not lead any evidence to demonstrate or prove the particulars of fraud that were pleaded as against the 1st and 2nd Defendant. It is trite law that where a person's title is under attack, he must of necessity give an account of its acquisition. In the case of Mungu Maina -vs- Hiram Gathiha Maina [2013] eKLR, the Court of Appeal held that:

“We stated that when a registered proprietor not of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interested which would not be noted in the register”.

91. The 2nd Defendant herein was able to demonstrate the good root of his title. There was no evidence placed by Plaintiff before this Court to intimate existence of fraud. Against any backdrop of evidence, the Plaintiff did not place before the Court any material evidence to enable it to interrogate and conclude that there was fraud on the part of the 1st and 2nd Defendants.
92. It is not in dispute that the 2nd Defendant has a title to the suit property and he purchased the suit lawfully. As to whether there was any fraud in respect to the acquisition of the property, under section 106-109 of the *Evidence Act*, the same lied squarely on the Plaintiff to prove it. This burden was not discharged and thus there was no material evidence placed before this Court to show that the 1st and 2nd Defendant engaged in any fraud. In the circumstances, it is the finding of this Court that the Plaintiff has not on the required standard of proof demonstrated any existence of fraud on the part of the 1st and 2nd Defendant.

Issue No. 4:

Whether the Plaintiff is entitled to the reliefs sought:

93. The Plaintiff sought for various reliefs as were pleaded in her plaint. The 2nd, 3rd, and 5th Defendants opposed the same. This court having addressed itself on the issues of fraud and further having found that the 2nd Defendant is the bonafide owner of the suit property and further having found that the particulars of fraud were not proved as against the 1st and 2nd Defendants, it is the finding of this Court that the Plaintiff's case has not been proved to the required standard and as such, the reliefs sought cannot be granted. There is no basis found in granting the same
94. In respect to costs it's a general rule that costs follow the event unless otherwise directed by the court. In the instant suit, upon considering the circumstances of this case, this court directs each party to bear own costs of the suit.

Conclusion:

95. In conclusion, it is the finding of this court that the Plaintiff has not proved her case to the required standard and as such the Plaintiff's suit is hereby dismissed with an order that each party to bear own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

E. K. WABWOTO

JUDGE



In the virtual presence of:

Ms. Waweru for the Plaintiff.

Ms. Kerubo for the 3rd and 5th Defendants.

Mr. Maina for the 2nd Defendant.

No appearance for the other parties.

