



Eliud (Suing as the legal representative and administratrix of the Estate of Eliud Allan Muriungi – (Deceased) v M’Nkiria (Environment and Land Appeal E0123 of 2021) [2023] KEELC 21864 (KLR) (22 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21864 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E0123 OF 2021
CK NZILI, J
NOVEMBER 22, 2023**

BETWEEN

JOAN MUYIA ELIUD (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF ELIUD ALLAN MURIUNGI – (DECEASED) APPELLANT

AND

M’NDEGWA M’NKIRIA RESPONDENT

(Being an appeal from the judgment of Hon. E.M Ayuka S.R.M. in Nkubu PMC ELC No. 118 of 2018 delivered on 4.11.2021)

JUDGMENT

1. The appellants at the lower court sued the respondent by a plaint dated 28.6.2018, for breach of a sale agreement between her late husband over LR No. Igoji/Mweru/726 measuring 0.05 ha for value from the respondent by denying her vacant possession, causing the estate loss and damage. She prayed for a declaration that she was the absolute owner of the land, eviction of the respondent from the land, and general damages for trespass. The plaint was accompanied by witness statements and documents dated 28.6.2018, 7.12.2020, and 18.5.2020.
2. The respondent opposed the claim with a statement of defense and counterclaim dated 6.11.2018. The respondent indicated that in 1980, he sought from the defunct Meru County Council a creation of a plot measuring 0.05 ha from his land, designated as LR No. Igoji/Mweru/6276, he approached the late Eluk Allan Murungi to assist him in erecting a commercial building on ½ of the portion in exchange for one-half of his plot.
3. The respondent averred that the appellant’s husband, contrary to their oral agreement, took the county council minutes and implemented them by building a shop on his plot but not the respondent’s land.



- The respondent averred that the deceased took advantage of his illiteracy and misrepresented the facts to the county council that the respondent had applied for his inclusion in his plot, which adjoined each other.
4. Therefore, the respondent averred that the plot registration in the deceased's name was through fraud, misrepresentation, and forgery. He denied receiving any valuable consideration according to an alleged sale of the suit land from the appellant or the land having been taken possession of occupation by the appellant.
 5. By way of a counterclaim, the respondent denied the alleged sale. He claimed the registration of his plot to the name of the appellant's name was illegal, fraudulent, and based on forged documents. Additionally, the respondent averred the matter was handled in Meru Land Dispute Tribunal No. 97 of 2000, which he appealed against in the Provincial Appeals Committee No. 22 of 2004. He prayed for the cancellation of the registration in her favor. The defendant was accompanied by a witness statement and documents dated 2.11.2020.
 6. In reply to the defense and defense to the counterclaim dated 18.2.2019, the appellant denied the contents of the defense. As to the counterclaim, the appellant averred that her late husband acquired the land for valuable consideration; hence, his registration was procedural and legal. He denied the alleged forgery, fraud, or misrepresentation.
 7. Joan Muyia, Eliud testified as PW 1 at the trial. As the wife of the late Eliud Allan Murungi, she said she was the administratrix of the registered owner of LR No. Igoji/Mweru 1/726 in 1996, after acquiring it to a valuable consideration from the respondent. She said the respondent had illegally blatantly, without any justification, refused to vacate the land despite the decision at the provincial appeals committee. She produced a copy of a limited grant of letters of administration as P. Exh No. (1) death certificate as P. Exh No. (2), agreement dated 9.9.1989 and its translation as P. Exh No. (3), copy of the register as P. Exh No. (4), proceedings in the Provincial LDT. dated 22.7.2009 as P. Exh No. (5), letter by the respondent dated 24.11.2983 as P. Exh No. (6), County Council Committee minutes dated 13.3.1984 as P. Exh No. (7) and the chief's letter as P. Exh No. (8). PW 1 said the deceased had taken possession of the land but was later chased away by the respondent. PW1 said the respondent had no title to the land since his land was elsewhere. She denied the contents and the reliefs sought in the counterclaim since the respondent had been passed for and willingly transferred the land to her late husband. She urged the counterclaim be dismissed since no court order or decree had revoked her title deed.
 8. In cross-examination, PW 1 told the court the respondent was a neighbor who excised the suit land from his larger parcel of land. She said the sale agreement was made in 1984, while the title deed came out on 4.1.1996. PW 1 told the court that the respondent had been utilizing and or occupying the plot since 1984. Further, she said the plot had no definite boundaries; hence, she has been unable to develop it. Her evidence was that the respondent had approached her husband to join hands in developing the plot, and in exchange, he was entitled to one part of the plot. PW 1 said that after the appeal at the provincial level, the respondent preferred an appeal in Meru Civil Application No. 60 of 2010, which was settled through a consent judgment.
 9. In the Re-examination, PW 1 said her late husband bought the land at Kshs.60,000/= and paid the entire amount since the sale, transfer, and the title registration were valid. She vehemently opposed any order for the cancellation of her title.
 10. M'Ndegwa M'Nkiria testified as DW 1. He adopted his witness statement dated 2.11.2000 as his evidence-in-chief. He told the court the subject plot on his land was 0.12 acres, separate from his shamba, measuring 3 acres. He wanted to build a canteen on his land, so he approached the defunct



county council to establish an "own" plot. He denied selling or transferring any portion of his land to the deceased, nor was he party to the whole acquisition process. DW1 said the deceased never followed the proper procedure in acquiring his land, given that he never attended any land control board meeting to consent to the transfer. D.W. 1 produced the Land Dispute Tribunal award proceedings as D. Exh No. (1) Provincial Land Dispute Tribunal proceedings and award as D. Exh No. (2) copy of a memorandum of appeal in HCC Meru M.C.A 1/2014 as D. Exh No. (3) the High Court decisions and consent as D. Exh No. (4).

11. Though admitting his other name was Samuel Kaaria, DW 1 denied entering into a sale agreement with the deceased, for no such agreement was tendered at the tribunal. He urged the court to cancel the title held by the appellant. In cross-examination, D.W. 1 told the court that the deceased was his neighbor. He admitted the cases at the Land Dispute Tribunal and Provincial Land Dispute Tribunal and the appeal in the High Court. Further, D.W. 1 admitted to writing a letter to the Land Adjudication Officer Igoji in 1984. He believed Mugumo allegedly helped the appellant's late husband acquire the title. He denied attending any land control board at Igoji for the transfer. He termed the transfer unprocedural, for the deceased never bought any land from him or paid any consideration. He said the only agreement he made with the deceased was to develop the plot jointly, but not for a sale and transfer of a plot to him. He termed the transfer as fraudulently done with the assistance of one Mugumo.
12. After reviewing the evidence, the trial court rendered its judgment on 4.11.2021, which is now appealed against before this court.
13. The appellant, by a memorandum of appeal dated 2.12.2021, faults the trial court for the following grounds:
 - i. For failing to find the sale and registration occurred before the land adjudication process in the area.
 - ii. For not finding a sale agreement was made in 1984 and approved by the defunct County Council.
 - iii. For not finding the suit land was a portion that was distinct, separate, and different from the respondent's more significant portion of his land.
 - iv. To find a contradiction in the appellant's documents.
 - v. For finding there was no land control board consent when none was required.
 - vi. For finding the agreement was for financing the project and not for sale.
 - vii. For finding there was no due process in the acquisition.
 - viii. For finding that it would have been illogical for the respondent to take out Land Dispute Tribunal proceedings when the same was a nullity in law.
 - ix. For not finding there was no Land Dispute Tribunal and Provincial Dispute Tribunal resultant decree since it was overruled at the provincial level and the appeal for the tribunal had no jurisdiction over the dispute.
 - x. For disregarding his evidence and written submissions.
 - xi. For not finding the respondent's evidence lacking probative value.
 - xii. For ruling against the weight of the evidence tendered.



14. With leave of court, the parties agreed to canvass the appeal by written submissions to be filed by 25.10.2023. The appellant, by written submissions dated 16.10.2023, urged the court to find the appellant was the first registered owner of the suit land on 4.1.1996 and eventually acquired the title on 7.5.1997, which documents she produced to sustain her claim.
15. Therefore, since she was the first registered owner, land control board consent was not necessary to prove ownership. Regarding outcomes in the Land Dispute Tribunal cases, the appellant submitted that the decree could not vindicate the respondent's claim since they were nullities. Regarding whether fraud was proved, the appellant submitted that the respondent failed to attain the benchmark in *Vijay Morjaria v Nansigh Madhu Singh Darbar* C.A No. 106 of 2000. (2000) eKLR.
16. The issues calling for determination in this appeal are:
 - i. Whether the appellant proved her case at the lower court to be entitled to the reliefs sought.
 - ii. If the respondent proved the counterclaim to the required standard.
 - iii. If the appeal has merits.
 - iv. What is the order as to costs?
17. The appellant's claim at the lower court was for vacant possession, general damages, and eviction of the respondent from land duly bought, transferred, and registered under the deceased's name. In support of the claim, the appellant produced P. Exh No's 1-8, among them a sale agreement, a copy of proceedings in previous cases at the LDT, PLDT Chief Magistrates Court, and the High Court, and an extract of minutes by full council meeting held on 13.3.1984, which adopted the town planning markets and housing committee minutes, showing that the deceased was allocated the suit land at Nkuene alongside the respondent.
18. In opposing the claim, the respondent averred that registering the suit land in the deceased's name was fraudulent, out of misrepresentation and or a forgery, for he took advantage of his illiteracy and manipulated him to be included in the County Council Minutes. Further, the respondent averred he merely sought the assistance of the appellant's late husband to build half of his plot for and in consideration to take the other half, instead the deceased took the council minutes and implemented the same by building a shop on his land and not on the respondent's land.
19. By way of a counterclaim, the respondent denied any sale of his land to the appellant's late husband. He termed the transfer and registration to his name illegal, fraudulent, and based on forgery. He sought for the cancellation of the title and the land to revert to him. In support of his defense and counterclaim, the respondent produced the award and proceedings in LDT. No. 1/2014, proceedings and decisions in the PLDT case, a copy of the memorandum in Meru H.C.A. 60 of 2010.
20. Fraud is defined in *Black's Law Dictionary* 9th Edition, page 131, as knowingly misrepresenting the truth or concealing a material fact to induce another to act to their detriment. In trite law, parties are bound by their pleadings, and issues flow from them. See *Mutinda Mule v IEBC*.
21. In this appeal, one party alleged to be a bonafide title holder entitled to vacant possession, while the other alleged the title was not bonafide and should be canceled.
22. In *Raila Odinga & another v IEBC & others* (2017) eKLR, the court said that though the legal and evidential burden of establishing the facts and contention to support a party's case was static and remains constant, the evidential burden keeps shifting in a trial and its position at any time is determined by answering the question as to who would lose if no further evidence was introduced.



23. In this appeal, the appellant produced documentary evidence that her late husband was holding a title to the land issued on 4.1.1996, following consent to the allocations of a plot for the market by the minutes of the defunct County Council & full council meeting on 13.3.1984. From D. Exh No. (1), it is quite apparent that the respondent knew the title deed was in the deceased's name. He knew about the alleged fraud, misrepresentation, or illegality. He had, in law, to file the suit for the recovery of the land out of fraud before the expiry of 12 years as per Section 7 of the *Limitation of Actions Act*. See *Mary Osundwa v Nzoia Sugar Co. Ltd* (2002) eKLR and *Nzoia Sugar Co. Ltd v K.P.A.* (1990) eKLR.
24. In *Alba Petroleum Ltd v Total Marketing (K) Ltd* (2019) eKLR, the court said under Section 26 of the *Limitation of Actions Act* in an action for relief based on fraud time begins to run when the fraud or mistake is discovered or could, with due diligence, have discovered it. The court cited with approval *Gathoni v Kenya Cooperative Creameries. Ltd* (1982) KLR 104, that the law on limitation is intended to protect defendants against unreasonable delay in bringing suits against them, and the statute expects the intending plaintiff to exercise due diligence and to take reasonable steps in his interest.
25. In this appeal, the counterclaim was brought against Section 7 of the *Limitation of Actions Act*, which bars a suit for land recovery after 12 years. In *Bosire Ogero v Royal Media Services* (2015) eKLR, the court said limitation goes to the jurisdiction of a court, and to entertain a statute-barred claim was a nullity.
26. On the other hand, the appellant's claim was based on trespass to land belonging to the deceased, who was a registered owner with effect from 1996. In *Chevron Ltd v Harrison Charo wa Shutu* (2016) eKLR, the court said in a tort of trespass was an intrusion on the land of another without justification. In *Kenya Power & Lighting Company v Ringeria & 2 others* (2022) eKLR, KECA 104 (KLR) 4th February 2022 (Judgment), the court said trespass would continue daily, and every new entry was a new trespass. In *Two-Thirds Investment Ltd v Katana Kalama & others* (2018) eKLR, the court said a cause of action was a combination of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party.
27. After the appellant tabled evidence on ownership, the burden was on the respondent to impeach the title under Section 26 of the *Land Registration Act* through cogent and tangible evidence based on illegality, fraud, and forgery. See *Virjay Morjaria* (supra). Fraud must be specifically pleaded and proved as held in *Arthi Development v West End Butchery Limited & 6 others* (2015) eKLR other than alleging fraud misrepresentation or forgery, the respondent failed to call for any forensic report where he had complained since 1996 to 2004 for investigations on the alleged misrepresentation to the defunct county council and the land registrar who issued the title. The respondent produced no single letter as evidence that he lodged a complaint against the appellant's deceased husband for fraud, misrepresentation, and or illegality in acquiring his land.
28. Further, no evidence was produced to support the particulars of the defense on fraud and misrepresentation. A counterclaim is a separate suit. The counterclaim filed by the respondent had no particulars of fraud, illegality, or misrepresentation. Other than relying on the land dispute tribunal proceedings, no other evidence was produced to sustain the defense and the counterclaim. The land dispute tribunal had no jurisdiction to hear a dispute on titled land. The proceedings and the award added no probative value to the respondent's case.
29. In *Waweru Mathu J.M v Danson Otachi Chionja & another* (2015) eKLR, the defendant had encroached on the plaintiff's land. The claim was for vacant possession or eviction. The court said that under Section 25 of the *Land Registration Act*, an absolute proprietor was entitled to enjoy his rights.



30. Without any justification by the respondent to remain on the suit land, I find the appellant had proved her case to the required standards.
31. The appeal is allowed. The defense and counterclaim of the respondent are hereby dismissed with costs. The respondent shall hand over vacant possession of the suit land after three months from the date hereof, in the absence of which he shall be evicted at his own cost and expenses.
32. Costs of the appeal and at the lower court to the appellant.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 22ND DAY OF NOVEMBER 2023**

In presence of

C.A Kananu/Mukami

Mukaburu for the appellant

Mokua Obiri for respondent

HON. CK NZILI

ELC JUDGE

