



**Egesa v Kwoba (Environment & Land Case 15 of 2017)
[2023] KEELC 22181 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 15 OF 2017**

BN OLAO, J

DECEMBER 14, 2023

BETWEEN

**WILLIAM NAMUKOMA EGESA (SUBSTITUTED WITH ROSELIDA
ADHIAMBO EGESA PLAINTIFF**

AND

HENDRIKA ANYANGO KWOPA DEFENDANT

JUDGMENT

1. William Namukoma Egesa (now deceased and substituted with Roselida Adhiambo Egesa as Plaintiff) approached this Court vide his plaint dated 18th January 2017 and filed on 21st January 2017 seeking judgment against Hendrika Anyango Kwoba (the Defendant) as follows with respect to the land parcel No Bukhayo/Kisoko/1711 (the suit land).
 1. The Busia County Land Registrar and Surveyor do reinstate/fix the boundaries of land parcel no Bukhayo/Kisoko/1711.
 2. An order of injunction do issue restraining the Defendant, her family, servants or any other person claiming on her behalf from trespassing, encroaching onto and interfering in any manner with the Plaintiff's peaceful use and occupation of the land parcel No Bukhayo/Kisoko/1711.
 3. The Officer Commanding (OCS) Nambale Police Station do provide security.
 4. The Defendant do bear the costs.
2. The basis of the Plaintiff's case was that he is the sole proprietor of the suit land having purchased it for value in 1985 from THomas Kwoba Marere (hereafter Marere) the deceased husband to the Defendant whose family resides on the land parcel No Bukhayo/Kisoko/1710 which, together with the suit land, was also a sub-division of the original land parcel No Bukhayo/Kisoko/1562. That the Defendant has



unlawfully illegally and forcefully destroyed the boundaries to the suit land and encroached onto the same yet she has no beneficial or purchaser's interest therein. The Plaintiff lodged a complaint to the Land Registrar whose attempt to reinstate the boundary or advise the Defendant to keep off the suit land failed thus giving rise to this suit.

3. Together with the plaint, the Plaintiff filed his statement dated 18th January 2017 in which he repeated the averments in the plaint. He clarified that he had purchased the suit land from Marere in 1985 who he then paid the full purchase price. Marere passed away in 2001 after transferring the suit land to him but in 2015 the Defendant invaded it, destroyed the boundary and started using a portion thereof. He reported the matter to the Land Registrar who visited the suit land but the Defendant and her family became hostile. The Land Registrar however made his report dated 6th January 2017. He therefore seeks for an order that the boundary be reinstated.
4. Having substituted the deceased Plaintiff, Roselida Adhiambo Egesawho is a widow to the deceased Plaintiff recorded her own statement dated 6th November 2020 confirming that the deceased Plaintiff was the sole proprietor of the suit land measuring 0.2 Hectares which he purchased and fully paid the purchase price from Marere in 1985. That the said MARERE sub-divided the original land and transferred the suit land to the deceased Plaintiff. After Marere's demise in 2001, the Defendant invaded the suit land in 2015 and destroyed the boundaries and started using a portion of the same. The Plaintiff engaged the Land Registrar who visited the suit land for purposes of taking measurements to re-establish the boundary. However, the Defendant and her family became hostile thus necessitating the need to have security to carry out the exercise. The Land Registrar however prepared his report dated 6th January 2017. It is her evidence that the Defendant has no interest in the suit land and she and her family should be restrained from interfering with it.
5. In support of his case, the deceased Plaintiff filed two lists of documents as his documentary evidence. The first is dated 18th January 2017 and the second is dated 6th November 2020.
6. The list dated 18th January 2017 contained the following documents:
 1. Copy of title deed to the land parcel No Bukhayo/Kisoko/1711.
 2. Copy of register for the land parcel No Bukhayo/Kisoko/1711.
 3. Copy of mutation form for the land parcel No Bukhayo/Kisoko/1562.
 4. Copy of application for consent to transfer land parcel No Bukhayo/Kisoko/1711.
 5. Copy of consent by the Land Control Board to transfer the land parcel No Bukhayo/Kisoko/1711.
 6. Copy of Transfer Form for the land parcel No Bukhayo/Kisoko/1711.
 7. Map sheet No16.
 8. Report of the Land Registrar Busia dated 6th January 2017.

The second list dated 6th November 2020 had the following documents:

1. Limited Grant issued to Roselida Adhiambo Egesain respect to the Estate of the deceased Plaintiff in BUSIA CM'S Court Application NoE1 of 2020.
2. Certificate of death in respect to William Namukoba Egesa.
3. Police Abstract issued to William Namukoba Egesa on 7th November 2019 for loss of title deed to the land parcel No Bukhayo/kisoko/1711.



4. Police Abstract issued to Roselida Adhiambo Egesaon 21st October 2020 for loss of title deed to the land parcel No Bukhayo/Kisoko/1711.
 5. Letter by Gabriel Fwaya Advocates dated 19th November 2019 and addressed to the County Land Registrar in respect to the land parcel No Bukhayo/Kisoko/1711.
 6. Copy of the register to the land parcel No Bukhayo/Kisoko/1711.
 7. Copy of the Kenya Gazette Notice No 4261 dated 26th June 2020.
 8. Application for consent of the Land Control Board or the land parcel No Bukhayo/Kisoko/1711.
 9. Consent to Transfer.
 10. Transfer of land From for the land parcel No Bukhayo/Kisoko/1711.
 11. Mutation form for the land parcel No Bukhayo/Kisoko/1562.
7. The Defendant filed an amended defence and counter-claim dated 2nd August 2017 in which she pleaded that she is a stranger to paragraphs 3, 4, 5, 6, 7 and 8 of the plaint and put the Plaintiff to strict proof thereof. She added that if the Plaintiff acquired the suit land from MARERE, then the same was not in compliance with the relevant law and specifically the Law of Contract Act. That the said acquisition was fraudulent which fraud was discovered when the Land Registrar came to the land on 6th January 2017. In any event, the suit land shares common boundary with several other parcels of land owned by 3rd parties and an order to reinstate and fix boundaries without hearing the said 3rd parties will constitute a failure of justice as well as a criminal offence under the Law of Succession Act. The Plaintiff has no capacity to sue.
 8. In her counter claim, the Defendant pleaded that Marere never sold any land to the deceased Plaintiff from the parent title comprised in the land parcel No Bukhayo/Kisoko/1562 and any such acquisition was therefore procured fraudulently, illegally and through forgery.
 9. The particulars, of fraud on the part of the deceased Plaintiff were set out in paragraph 11(a) to (d) of the amended defence and counter claim as follows:
 1. Forging the signature of MARERE on the mutation form and transfer documents.
 2. Purporting to acquire land from MARERE without any written sale agreement.
 3. Obtaining consent of the Land Control Board without the knowledge of Marere.
 4. Obtaining the identification particulars of MARERE for use in the land sale transactions without his consent or knowledge.
 10. Alternatively and without prejudice to the foregoing, the Defendant pleaded that whereas there was a verbal agreement between MARERE and the deceased Plaintiff for the sale of a plot measuring 100 feet by 25 feet comprised in the land parcel No Bukhayo/Kisoko/1562 sometime in 1985, the intended sale did not materialise since the deceased Plaintiff failed to pay the full purchase price. The said verbal agreement did not therefore confer any property to the deceased Plaintiff. The fraud and illegality came to the fore on or about 6th January 2017 when the Land Registrar visited the suit land with a view to fixing the boundaries.
 11. The Defendant therefore seeks against the Plaintiff the following orders as per the counter-claim:



1. A declaration that the purported acquisition of the suit land by the deceased Plaintiff was illegal, null and void and of no consequence.
 2. An order cancelling the registration of the deceased Plaintiff as the owner of the suit land.
 3. A permanent injunction restraining the Plaintiff and all those claiming through him from trespassing into, claiming, using or in any way interfering with the use, occupation and possession of the suit land by the Defendant or any of MARERE'S lawful dependents.
 4. Costs of the counter-claim.
12. The Defendant did not file any documents in support of her case.
 13. The Plaintiff filed a reply to defence and counter-claim. He reiterated the averments in his plaint that he had acquired the suit land for value and complied with all the legal requirements but that the Defendant had trespassed thereon and destroyed the boundary. He denied having been involved in any fraudulent deals in the acquisition of the suit land adding that it is the side bordering the suit land and parcel No Bukhayo/Kisoko/1710 which has been interfered with by the Defendant. That MARERE executed all necessary transfer documents, was fully paid the purchase price and gave him vacant possession after which the Plaintiff developed shops and has been in occupation since then. That it is the Defendant and her family who want to defraud the Plaintiff of the suit land.
 14. The plenary hearing commenced before KaniaruJ on 26th February 2019 when the Plaintiff called as per witness Tom Chepkwesi (PW1) the Land Registrar Busia. He informed the Court that he and the surveyor visited the suit land to determine a boundary dispute. However, the Defendant and her sons did not allow him to do so and became violent. Nonetheless, he prepared his report dated 6th January 2017 which he produced as part of the Plaintiff's documentary evidence.
 15. The deceased Plaintiff's substitute Roselida Adhiambo Egesa(PW2) testified before OmolloJ on 29th June 2022 while I heard the Defendant's case on 4th July 2023.
 16. They all adopted as their evidence their statements which I have already summarised above and produced as their documentary evidence the documents placed herein.
 17. Submissions were thereafter filed both by Mr Fwaya instructed by the firm of Gabriel Fwaya Advocates for the Plaintiff and by Mr Omondi instructed by the firm of Omondi & Company Advocates for the Defendant. I have considered the evidence by the parties and the submissions by counsel
 18. I have identified the following as the issues for my determination in this dispute:
 1. Whether the Plaintiff fraudulently and illegally acquired the registration of the suit land in his name and should be enjoined therefrom.
 2. Whether the County Land Registrar and Surveyor should be ordered to re-instate the boundary between the land parcels No Bukhayo/Kisoko/1710 and 1711.
 3. Who shall bear the costs

Before I delve into the merits or otherwise of the respective cases by the parties, there are two jurisdictional issues which I must address as a first point of the call. This is because an issue of jurisdiction must be determined at the earliest opportunity – Owners of The Motor Vessel 'lillian S' -v- Caltex Oil (kenya) 1989 KLR 1. The other issue is whether the plaintiff has the capacity to prosecute this case.



Plaintiff's Capacity

19. In paragraph 8 of the defence and counter-claim, the Defendant has pleaded thus:

8: “The Defendant while reserving the right to lodge a counter-claim against the Plaintiff pleads that she is bereft of capacity to be sued.”

In his submissions on this issue, counsel for the Defendant has addressed the Court as follows as per paragraph 9:

9: “The third issue is with respect to the present Plaintiff's capacity to prosecute this case. The original Plaintiff died. He was substituted by his widow Roselida Adhiambo Egesa. The present Plaintiff holds a Limited Grant of Administration Ad Litem issued in Busia Chief Magistrate's Cause No1 of 2020. The Limited grant was produced as PEXH 8. The said grant expressly states that it is Limited For Purposes of Limited Grant For Filing Suit. By the time the Grant was issued on 15th September 2020 this suit was already in Court. An Ad Litem Grant is a grant issued for a special purpose under section 54 of the *Law of Succession Act*. Such a grant is limited in scope and cannot be had for any other purpose. The Grant herein was issued specifically for filing suit not prosecuting an existing suit. In our view, the Plaintiff purporting to prosecute this suit on the basis of PEXH 8 exceeded her powers set out therein. In Nairobi High Court Civil Case No 618 of 1997, Lydia Ntembi Kairanya & Anor –v- The Hon. Attorney General it was held that power to file suit is not power to prosecute an existing suit. The Court further held that a grant to file suit does not grant authority or power to prosecute a filed suit.”

It is common ground that this suit was filed on 21st January 2017 by the deceased William Wamukoma Egesa who then passed away on 8th May 2020 while these proceedings were in progress. He was substituted on 4th February 2021 by Roselida Adhiambo Egesa who had obtained Limited Grant of Letters of Administration Ad Litem limited for purposes of filing suit vide Busia Chief Magistrate's P&A Application No E1 of 2020. The issue of the locus standi of Roselida Adhiambo Egesa to prosecute this suit is therefore important.

20. Section 54 of the *Law of Succession Act* reads:

“A Court may according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule of this Act.”

Fifth Schedule (14):

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or



in any other Court between the parties, or any other parties touching the matters at issue in the cause or suit until a final decree shall be made therein, and carried into complete execution.” Emphasis mine.

I have read the judgment of Khamoni J delivered in the case of Lydia Ntembi & Another -v- A.G. (supra) cited by Mr Omondi. In that case, the Judge said the following about a party who had obtained a limited Grant but wanted to do more:

“Such applicant should however realize that power to file suit, strictly speaking in law, is not power to prosecute the suit, or power to receive proceeds of the suit when successful (power for collection and preservation of assets). If the applicant who wants power to file suit is also desirous of getting any of the other powers mentioned above, the applicant should specifically, in his application mention all the powers he wants so that the same or any of them are specifically spelled in the Limited Grant he subsequently gets when successful in his application of a Limited Grant under Grants for special purposes within the Fifth Schedule of Section 54 of the *Law of Succession Act*. That is what the plaintiffs and their learned counsel should have done in this matter to obtain a proper limited grant to enable them properly to do, in law, all they are purporting to do in this suit under the regime of The *Law Reform Act*”.

It is clear from the above that the Plaintiff in that case wanted to go beyond only prosecuting the suit. She wanted to collect proceeds thereof.

21. In this case, Roselida Adhiambo Egesa obtained a Limited Grant long after the suit had commenced. Obviously she could not have obtained it earlier because the deceased Plaintiff was prosecuting his case prior to his demise. Roselida Adhiambo Egesa did not, therefore, need a Limited Grant “For filing a suit” and which is what she obtained. What she needed was a Limited Grant to “prosecute an already existing suit”. But that is really a matter of semantics which, in my view, is curable by invoking the provisions of Article 159(2) (d) of *the Constitution* as well as Section 3A of the Civil Procedure Rules and Section 19 of the *Environment and Land Court Act*. I am of course also not oblivious of the fact that Khamoni J delivered the judgment before the promulgation of the 2010 Constitution.
22. Finally, it has not been demonstrated that Roselida Adhiambo Egesa is doing more than simply prosecuting the deceased Plaintiff’s case as per the pleadings filed herein. Clearly therefore, she has the locus standi to prosecute this suit.

Jurisdiction of Court

23. Though not raised in the defence and counter-claim, the Defendants counsel has submitted in paragraph 4 of his submissions that:

“This evidence by PW2 raises a jurisdictional question. The evidence and the report (PEXH1) clearly show that the suit land’s boundary has not been determined to date. What is before the Court is therefore a boundary dispute. By Section 18(2) of the *Land Registration Act* 2012, it is provided that Courts should not entertain any action or other proceedings relating to a dispute as to boundaries of a registered land unless the boundaries have been determined. With the clear evidence from PW1 that boundaries to the suit land have not been fixed this Court lacks jurisdiction to entertain this suit.”

It is true that Section 18(2) of the *Land Registration Act* vests the power to determine proceedings relating to disputes as to boundaries of registered land in the Land Registrar. The Plaintiff has not



approached this Court to determine any dispute over boundaries, in paragraph 13(a) of the plaint, the Plaintiff seeks the remedy that:

“The Busia County Land Registrar and Surveyor do reinstate/fix boundaries of L.R Bukhayo/Kisoko/1711”.

In paragraph 6 of the plaint, it is pleaded that:

“The Defendant without the Plaintiff’s consent, probable cause, unlawfully and illegally have forcefully destroyed the boundaries of the aforesaid Plaintiffs’ land and encroached/ trespassed onto and commenced use of apportion (sic) thereby denying the Plaintiff quiet, peaceful enjoyment and use of his land”.

In paragraph 7 of his statement, the deceased William Namukoma Egesastated that:

“... for strange reasons in 2015 the Defendant invaded my land, destroyed the boundaries and started using a portion.”

Roselida Adhiambo Egesarepeated the same averments in paragraph 9 of her statement dated 6th November 2020. It is clear therefore that what the Plaintiff seeks is inter alia, to reinstate the boundary to the suit land. The term “reinstate” is defined in the Oxford Advanced Dictionary as:

“to return to its previous position or status.”

The same term is defined in Black’s Law Dictionary 10th Edition as:

“To place again in a former state or position: to restore”.

The Court can only reinstate what has previously been in place and that can only mean that the boundaries of the suit land and the neighbouring parcels including the Defendant’s land parcel No Bukhayo/Kisoko/1710 had previously been fixed but has now been removed. That the boundary to the suit land had been determined is confirmed by the Defendant herself. In her statement dated 4th September 2018 and which she adopted as her evidence during the trial, she has stated in paragraph 4 that:

“The dispute in hand started when my husband died. After my husband’s burial, William Namukowa came and conducted a survey on my land without my approval and proceeded to fix boundaries. He brought policemen to my home who threatened to arrest me should I set foot in the parcel to try to cultivate in the same land.”

The Defendant’s husband died in 2001 and therefore by the Defendant’s own evidence, the boundary between her land and the suit land had been in existence for some 16 years by the time this suit was filed in 2017. In any case, the Defendant by her own counter-claim is seeking in paragraph 16 thereof:

16: “... a permanent injunction restraining the Plaintiff and all those claiming through him from trespassing into, claiming, using or in any way interfering with the use, occupation and possession of the suit land by the Defendant and/or any of the deceased’s lawful dependents”.

The Defendant cannot be urging this Court to injunct the Plaintiff from interfering with a parcel of land whose boundaries are not known. If indeed the boundaries have not been fixed and this is a boundary dispute, one would have thought that it is in the interest of both parties to have it determined to avoid future conflicts over the same. Instead, the evidence of the Land Registrar Tom



Chepkwesi(PW1) is that when he visited the suit land with the surveyor, the Defendant and her sons were violent and did not allow him to perform his duties. That conduct of the Defendant and her sons is a clear demonstration of the fact that the Defendant know that the report by the Land Surveyor would support the Plaintiff's rather than her case. It is the duty of the Defendant, by virtue of the provisions of Sections 107 to 109 of the *Evidence Act*, to prove that this dispute relates to boundaries and is therefore out of the jurisdiction of this Court which should down it's tools. She has not discharged that duty. The evidence before this Court shows that both her land and the suit land as well as the other portions of land have been registered. This Court is persuaded that boundaries thereof were determined and put in place. In the circumstances, this becomes a case of encroachment and trespass to land and this Court is clothed with the requisite jurisdiction to determine it pursuant to the provisions of Section 13(1) of the *Environment and Land Court Act*.

24. The twin issues of the Plaintiff's capacity to prosecute and the jurisdiction of this Court are accordingly determined in favour of the Plaintiff.
25. The thrust of the Defendant's counter-claim is that the Plaintiff obtained the title to the suit land fraudulently and illegally and the same should therefore be cancelled. The Plaintiff's case is that infact he obtained the sit land from MARERE way back in 1985 and paid the full purchase price. While the Defendant pleads fraud, she goes on to add that what was purchased by the Plaintiff was infact only a portion measuring 100 feet by 50 feet curved out of the original land parcel No Bukhayo/Kisoko/1562. None of the parties has availed the sale agreements in support of their respective versions. However the application for consent of the Nambale Land Control Board dated 5th July 1985 as well as the resultant consent of even date show clearly that Marere transferred the suit land to the deceased Plaintiff William Namukoma Egesa in 1985. He was issued with a title deed thereto on 15th July 1985. Having pleaded fraud on the part of the deceased Plaintiff including forgery of MARERE'S signature, lack of an agreement and obtaining consent without MARERE'S signature, the Defendant was required to prove those allegations to the standard required in law. This was set out in the case of Vijay Morjaria - v- Nansingh Madhusing Darbar & Another 2000 eKLR where Tunoi J.A stated that:

“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.”

In *Ndolo -v- Ndolo* 2008 1 KLR G&F 742, the Court said:

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities.”

In *R.G. Patel -v- Lalji Makanji* 1957 E.A. 314, the former East African Court of Appeal 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.”

26. There is no doubt that the Defendant has strictly pleaded the allegations of fraud in her defence and counter-claim. However, from the evidence, she has not strictly proved those allegations to the



required standards. She has simply made the allegations of fraud and illegality without proving them. For instance, among the documents produced by the Plaintiff in support of his case were the mutation form showing the sub-division of the original land parcel No Bukhayo/Kisoko/1562 to create the suit land and other parcels of land including parcel No Bukhayo/Kisoko/1710, the application for consent and the consent. Those documents bear the signature of Marereas well as his identity card number 0390623/63. I did not hear the Defendant dispute that the signature and identity card number belong to her late husband yet the easiest way of proving that forgery of signature, which she alleges, would have been by availing any document showing her late husband's genuine signature and identity card number. If, as pleaded, the Plaintiff had obtained those details fraudulently or illegally, the first thing would have been for MARERE to report to the Police because that would amount to a criminal offence.

27. Counsel for the Defendant has in paragraph 15 (a) to (g) pointed out several inconsistencies leading to the process by which the title to the suit land was acquired by the Plaintiff. These include that the title to the suit land was opened before the mutation which gave rise to it, that the consent was applied for before the suit land was registered, that the transferor did not sign but thumb-printed the documents, that the transferor is referred to as Thomas Kwaba Murene(not Thomas Kwoba Murere) etc. Counsel then submits as follows in paragraph 16 of his submissions:

16: The foregoing inconsistencies were never explained. In view of the Defendant's counter-claim, the evidential burden shifted to the Plaintiff to prove the validity of her title. She failed to do this. Whereas it is true fraud cannot be inferred, where documents speak for themselves the Court can make a finding of fraud and misrepresentation. This is one such case."

Counsel for the Defendant has then gone ahead to cite the authority of MUnyu Maina -v- Hiram Gathiha Maina C.A. Civil Appeal No. 239 of 2009 [2013 eKLR] where the Court said that:

"...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title, and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need to be noted on the register. It is our considered view that the respondent did not go the extra mile that is required of him and no evidence was led to rebut the appellant's testimony." Emphasis mine.

While it is true that the Plaintiff has dangled the title to the suit land, and whereas it is also true that there are some inconsistencies in the documents of transfer, the Plaintiff in this case has gone "the extra mile" to show that he obtained a good title to the suit land. For instance, the Plaintiff pleaded in paragraph 13 of the reply to defence and defence to the counter-claim that having paid the purchase price, he was given vacant possession of the suit land and commenced developments thereon which included shops and which he completed in 1991 and he remains in occupation thereof. It is also clear from the statement of the deceased Plaintiff and that of ROselida Adhiambo Egesathat although the suit land was purchased in 1985, trouble started only in 2015 long after Marerehad died in 2001. There is no evidence to suggest that prior to his demise in 2001, the said MARERE had tried to eject the Plaintiff from the suit land or made any demand for the balance of the purchase price yet that would have been



the most rational thing to do in the circumstances. It cannot therefore be true, as the Defendant has stated in paragraph 3 of her statement dated 4th September 2018, that:

- 3: “My late husband sold to William Namukoma half a plot (100ft by 50ft) from his parcel. William proceeded to build a shop on his acquired half a plot of land. However it is within my knowledge that William did not pay the full purchase price for the said half plot.”

The person who ought to have been making that complaint should have been Marere long before his demise in 2001. The fact that this complaint is being made 32 years later by a person who was not even a party to the transaction between the Plaintiff and MARERE way back in 1985, only demonstrates that the Defendant’s counter-claim is infact statute barred. By her own evidence, the Defendant was privy to the transaction between the deceased Plaintiff and Marere although she says what was purchased was a plot measuring 100 feet by 50 feet. This is what she has said in paragraph 2 of her statement:

“That I know William Namukoma Egesa very well. He is my neighbour. I knew William Namukoma in 1985 when he came to my home requesting to buy half a plot of land from my late husband one THOMAS KWOPA (deceased). I inherited the land in dispute upon his demise.”

It is not in dispute that the Plaintiff subsequently obtained a title to the suit land on 15th July 1985. Section 7 of the [Limitation of Actions Act](#) provides that:

- 7: “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 or, if it first accrued to some person through whom he claims, to that person.”

In an attempt to circumvent the above provision, the Defendant has pleaded in paragraph 13 of her counter-claim that:

- 13: “In view of the foregoing, the Defendant states that the purported acquisition of the suit property by the Plaintiff was illegal, fraudulent, null and void. The fraud came to the fore on or about 6th January 2017 when the Land Registrar Busia visited the suit property with a view to fixing it’s boundaries.”

The Defendant no doubt, having pleaded fraud and illegality, had in mind Section 26 of the [Limitation of Actions Act](#) which reads:

- 26: “Where, in the case of an action for which a period of limitation is prescribed, either-
- (a) 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
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) 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.” Emphasis mine.

Although the Defendant would like this Court to believe that she only discovered the alleged fraud in 2017, the evidence suggest that, “with due diligence,” she could have discovered it earlier. Indeed, the evidence shows that she knew as far back as 1985 that Marere had sold the suit land to the Plaintiff. And if she did not then, she ought to have known that fact as far back as 1991 when the Plaintiff started developing the suit land by constructing shops thereon a fact which was within her knowledge as is clear from her own evidence. She did not have to wait until the Plaintiff filed this suit. She should have moved to this Court as far back as 1991 because a simple search at the Land Registry in Busia would have revealed to her that the Plaintiff obtained title to the suit and in 1985.

28. It is abundantly clear that although the Defendant pleaded and particularized the allegations of fraud and illegality in her counter-claim, no mention of those allegation is made in her brief five (5) paragraph statement dated 4th September 2018 which she adopted as her evidence during the trial. The nearest she came to proving fraud was in paragraph five (5) where she states:

“The documents relied upon by William in this case are fraudulent and forged.”

As I have stated above, she does not go further to illustrate why those documents are “fraudulent and forged.” The case of *Vijay Morjaria -v- Nansingh Madhusing Darbar* (supra) clearly states that “it is not allowable to leave fraud to be inferred from the facts”. Even if this Court were to infer forgery, it could only do so by comparing the alleged forged signature as against the alleged genuine signature. All the evidence of the alleged fraud and illegality is contained in paragraph 15 (a) to (g) of the submissions by the Defendant’s counsel some of which I have already referred to above. However, it is trite law that submissions are not evidence – *Daniel Toroitich Arap Moi -v- Mwangi Stephen Muriithi & another*. Submissions cannot take the part of evidence.

29. From all the above, the only conclusion which this Court can arrive at is that not only has the Defendant failed to prove that the Plaintiff obtained the title deed to the suit land fraudulently but further, the counter-claim is, in my view statute barred. It is for dismissal.
30. Having dismissed the Defendant’s counter-claim, it follows that the Plaintiff’s claim must be allowed. I will nonetheless proceed to give my reasons.
31. On the prayer that the Land Registrar and County Surveyor do re-instate the boundaries, the Plaintiff has testified how, having purchased the suit land in 1985 and taken possession thereof, the Defendant invaded it in 2015 and destroyed the boundary. That action made the Plaintiff to involve the Land Registrar to re-establish it. The Defendant has not disputed the fact that the Plaintiff purchased land from MARERE. Her case is that it was not the whole suit land but rather, only a portion measuring 100 feet by 50 feet. The fact that MARERE the person who sold the suit land to the Plaintiff did not complain when shops were constructed thereon in 1991 is proof that he (MARERE) had no problem with the Plaintiff’s occupation of the suit land. As I have already stated above, if Marere had any issue with the Plaintiff’s occupation of the suit land, he would have taken legal action against the Plaintiff as far back as 1985 when the Plaintiff acquired the title and in 1991 when the Plaintiff constructed shops thereon. And the Plaintiff could only have been developing the shops within the boundary as identified during the purchase of the suit land.
32. I have looked at the proceedings held by the Land Registrar Mr Tom Chepkwesi on 6th January 2017 in which the Plaintiff was the complainant and the Defendant is referred to as the accused. The Plaintiff’s testimony during those proceedings was basically what has been stated in this case. That having purchased the suit land in 1985, he constructed shops thereon which he leased to other persons



and that it was not until 2015 that the Defendant started claiming the portion on which the shops are constructed. The Defendant's case, on the other hand, was that the Plaintiff had only purchased a plot measuring 25 feet by 100 feet but was only allowed by MARERE to use the space behind the shop to operate a butchery and that he (Plaintiff) did not even pay the full purchase price. That several attempts were made by the village elder, Assistant Chief and Chief to have the Plaintiff pay the balance but in vain. As stated earlier, there is no evidence to show that Marere evicted the Plaintiff from the space which the Defendant alleges was not paid for or indeed that he only sold the Plaintiff a plot measuring 100 feet by 50 feet or 100 feet by 25 feet. The fact that the Defendant and her sons became hostile when the Land Registrar and Surveyor attempted to re-establish the boundary to the suit land can only lead to the inevitable conclusion that the Defendant and her sons knew that they had destroyed the same and had encroached onto the suit land.

33. The Defendant pleaded in paragraph 7 of her defence that any attempt to fix the boundary between the land parcel No Bukhayo/Kisoko/1710 and the suit land will constitute a criminal offence because the former is registered in the name of the deceased MARERE. The Plaintiff is not seeking to create a new boundary. He seeks the reinstatement of a boundary which has always been there and was destroyed by the Defendant long after the Plaintiff had purchased the suit land and had been issued with the title deed and developed it during the life time of the original owner.
34. Counsel for the Defendant has also submitted in paragraph 11 of his submission about the absence of the land sale agreement for the proposition that there was in fact no such agreement in terms of Section 3(3) of the Law of Contract Act. The Plaintiff did produce among his documents the copies of Police Abstracts dated 7th November 2019 and 21st October 2020 issued by Busia Police Station in which he reported loss of the title deed to the suit land as well as loss of land sale agreement. There is nothing to suggest that those two documents are not genuine. Counsel for the Defendant has taken issue with the fact that the loss of the land sale agreement was made in 2020 while this suit was filed in 2017. Nothing really turns on that because a report of such loss can be made at anytime unless there is clear evidence of malafides or an attempt to steal a march on the other party. I see no such evidence in the circumstances of this case. In any event, the Defendant said the following when cross-examined by Mr Fwaya with regard to that transaction:

“I cannot recall when my late husband sold the plot. I was not a witness. My late husband used his fellow men as witnesses. My late husband did not transfer the plot to the name of William Egesa. I know that. My husband informed me.”

That is a clear confirmation that there was a land sale agreement in which the witnesses were only men. And that agreement must be the one whose loss was reported to the Busia Police Station by the Plaintiff. Since the Defendant was not a party or witness to the said agreement, she cannot purport to claim with any certainty, that it was in respect of only a portion of land measuring 100 feet by 50 feet or 100 feet by 25 feet and not what is contained in the title deed to the suit land.

35. Finally, by being hostile to the Land Registrar and Surveyor when they visited the suit land, the Defendant and her sons were clearly demonstrating that indeed they had destroyed the boundary to the suit land and they were afraid that the said officers would find them culpable and re-instate it to its previous position. If they had nothing to lose, they should have acted in good faith and allowed the exercise to proceed without hindrance because the re-instatement of the boundary is in the interest of all the parties who neighbour the suit land.
36. This Court is therefore satisfied that the Defendant unlawfully, illegally and forcefully destroyed the boundary to the suit land and encroached thereon.



37. Ultimately therefore and having considered all the evidence herein, this Court makes the following disposal orders:

1. The Defendant's counter-claim is dismissed.
2. Judgment is entered for the Plaintiff against the Defendant as follows:
 - a. The Busia County Land Registrar and Surveyor shall forthwith re-instate the boundaries to the land parcel No Bukhayo/Kisoko/1711 to the position in which it was before the Defendant destroyed it.
 - b. An order of permanent injunction is hereby issued restraining the Defendant, her family servants and any other persons claiming on her behalf from trespassing, encroaching onto or interfering in any manner with the Plaintiff's use and occupation of the land parcel No Bukhayo/Kisoko/1711.
 - c. Should there be any violence during the exercise of re-instating the damaged boundary, the Officer Commanding Busia/Nambale (OCS) Police Station shall, upon request, be at liberty to provide such security as indeed is their mandate under Section 24 of the [National Police Service Act](#) and they do not need any prompting to do so.
 - d. The Defendant shall meet the Plaintiff's costs of his suit and the dismissed counter-claim.

BOAZ N. OLAO

JUDGE

14TH DECEMBER, 2023.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 14TH DAY OF DECEMBER, 2023
BY WAY OF ELECTRONIC MAIL.**

Right of Appeal.

BOAZ N. OLAO

JUDGE

14TH DECEMBER, 2023.

