



**Mogote v Kamau (Environment & Land Case 203 of 2013)
[2022] KEELC 3422 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 203 OF 2013**

DO OHUNGO, J

MAY 25, 2022

BETWEEN

PETER CHEGE MOGOTE PLAINTIFF

AND

FAITH WANGECHI KAMAU DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced through plaint dated October 14, 2009, which the plaintiff filed in the High Court. The matter was later transferred to this court whereupon it acquired its current case number. The plaintiff averred that he is the registered proprietor of the parcel of land known as Subukia/Subukia Block 6/345, hereinafter referred to as the suit property.
2. The plaintiff further averred that sometime in 1998, he entered in to an oral agreement with one Patrick Kamau Kibunja (deceased) in respect of sale of plot number 351 Subukia which later became known as Subukia/Subukia Block 6/345. That upon the agreement and part payment of the purchase price, he took possession of the suit property and began developing it. That before completion of the said transaction, Patrick Kamau Kibunja (deceased) passed on and the defendant who is one of his widows and who was aware of the agreement acknowledged the transaction and entered in to a memorandum of agreement with the plaintiff. That the defendant and other beneficiaries of the deceased's estate instituted High Court Succession Cause No 82 of 1999 in respect of the deceased's estate and that during the hearing of the cause, the suit property was not included as an asset of the deceased's estate. That however, during confirmation of grant, the suit property was fraudulently and illegally sneaked in and allocated to the defendant.
3. The plaintiff therefore prayed for judgment against the defendant for the following orders:
 - a. An order of perpetual injunction restraining the defendant, her servants, agents and or assignees from selling, charging, disposing, transferring, and or in any manner whatsoever from



interfering with the plaintiff's peaceful possession and occupation of all that parcel of land known as Subukia/Subukia Block 6/345.

- b. Cancellation of title issued to the defendant in respect of suit parcel No Subukia/ Subukia Block 6/345.
 - c. Costs of this suit.
 - d. Interest on (c) above at court rates.
 - e. Any other relief that this honourable court may deem fit.
4. The defendant entered appearance on October 21, 2009 and filed his statement of defence on November 9, 2009. She admitted that they filed the succession proceedings but denied the plaintiff's other averments. She stated that the plaintiff has never been in occupation of the suit property at any given time and that the memorandum does not amount to a sale agreement and the same was obtained by misrepresentation. She added that she constructed houses on the suit property and operated her business known as Village Villas Inn therein. She further averred that if at all there was an agreement for sale, then the same was an illegal contract which cannot be enforced. She therefore prayed that the plaintiff's suit be dismissed with costs.
 5. At the hearing, despite evidence of service of a hearing notice being availed, neither the defendant nor her advocates attended court.
 6. The plaintiff testified as PW1. He adopted his witness statement filed on April 10, 2017. He stated that he knew Patrick Kamau Kibunja (deceased) having been introduced to him by PW1's friend by the name David Nderitu and that the three of them became good friends. That in or around the year 1998, by virtue of the mutual trust between him and the deceased, the deceased and him had a meeting at Ol Kalou and entered into a verbal agreement through which he purchased from the deceased a parcel of land then known as plot No 351 measuring approximately 50ft by 100ft situated at Subukia Township. That the deceased was the owner of the said land having purchased it from the previous owner, one Teresia Wangari Kariuki. That to prove his entitlement to the land, the deceased showed him a copy of a sale agreement dated October 16, 1995 between Teresia Wangari Kariuki and the deceased.
 7. The plaintiff further testified that the terms of his agreement with the deceased were that he would purchase the said land at a price of KShs 150,000 which price he duly paid after which the deceased gave him a copy of the above-mentioned agreement dated October 16, 1995, a copy of a receipt dated November 7, 1995 for KShs 3,000 being payment of transfer fees for the said land to Nguba Estate Ltd and a sketch plan of the land. He added that both the defendant, as the deceased's wife, and David Nderitu were present during the verbal agreement between him and the deceased. That even before the agreement, he had already taken possession of the said land and developed it with the consent of the deceased and knowledge of the defendant. That on the property stands a perimeter fence and a four bed roomed unit among other developments.
 8. The plaintiff went on to state that unfortunately, the deceased passed away early in 1999 and that as a precaution, he entered into a written memorandum of agreement dated February 12, 1999 with the defendant in which they set out the genesis of his interest in the land and the defendant's acknowledgement and appreciation thereof. That in the memorandum, the defendant confirmed her knowledge of the purchase agreement between him and the deceased in regard to plot No 351, the payments made towards the purchase thereof, the various instances as well as nature and extent of assistance offered to the deceased and his family. That the defendant undertook to fulfil the deceased's obligations under the verbal agreement.



9. That soon after the demise of the deceased, his family filed Nakuru High Court Succession Cause No 82 of 1999 in which the plaintiff later became involved as the defendant's witness in her successful quest to prove she was the deceased's wife. That he moved into the four bedroomed unit on the land in 2001 and stayed there peacefully without interference from the defendant or any other person and he even applied for connection of electricity to the premises in June 2005. He added that around the year 2006, he rented the unit to a tenant who later stopped paying rent to him when the defendant showed her a title deed in the defendant's name and demanded that she remits rent to the defendant.
10. PW1 further stated that he conducted a search at the land registry on August 17, 2009 and was shocked to discover that the defendant had been registered as the owner of the land whose plot number had changed to Subukia/Subukia Block 6/345 and that she had been issued with a title deed on July 30, 2009. Upon that discovery, he lodged a caution on August 31, 2009 and obtained a Registry Index Map of the area. He added that he investigated how the defendant had managed to be registered as the proprietor of the parcel and discovered that some fraud was involved initially in Nakuru High Court Succession Cause No 82 of 1999 since all along the cause, the suit property was not indicated as part of the estate of the deceased and that it was sneaked in the Certificate of confirmation of grant dated December 18, 2008. That a glance at the summons for confirmation of grant dated December 7, 1999, the affidavit in support thereof and the proposed mode of distribution reveals neither plot No 351 nor its new name Subukia/Subukia Block 6/345 was included for distribution yet it ended up in the confirmed grant. That he therefore filed this suit so that the defendant's title may be cancelled for having been obtained fraudulently. He added that the defendant's contention that the suit property was previously known as plot No 404 which later became Subukia/Subukia Block 6/345 and Subukia/Subukia Block 6/346 is baseless. That on the contrary, the parcel of land formerly known as plot No 404 is now Subukia/Subukia Block 6/346, is adjacent to the suit property and is the one on which the business known as Village Villas is run. He referred the court to the Registry Index Map. He further stated that he protested the grant through summons for rectification of grant but the court declined and advised him to file a suit. He urged the court to grant him judgment as per his plaint.
11. David Nderitu Weru testified as PW2. He adopted his witness statement filed on April 10, 2017. He stated that he had known the plaintiff for a long time, that they were workmates 30 years ago and that he knows the defendant as the widow of Patrick Kamau Kibunja (deceased). He further stated that he introduced the plaintiff to the deceased and the three of them were good friends. That around the year 1998, the plaintiff, the deceased, the defendant and him held a meeting at the KNUT offices at Ol Kalou. That the deceased was desirous of selling and the plaintiff wanted to purchase a parcel of land then known as plot No 351. That the deceased stated that he was the rightful owner of the said land and showed them a sale agreement dated October 16, 1995 between Teresia Wangari Kariuki and himself. That it was then agreed verbally that the plaintiff would pay KShs 150,000 as the purchase price. That owing to the friendship and mutual trust between the parties the agreement was verbal. He added that the plaintiff had taken possession of the said land and had begun developing it with the consent of the deceased prior to the agreement. He concluded by stating that the defendant was present in the said meeting as a witness to the agreement between the deceased and the plaintiff.
12. The plaintiff's case was then closed. Since there was no appearance by the defendant, the defence case was closed upon an application to that effect by the plaintiff's advocate. Parties were then ordered to file and exchange submissions.
13. The plaintiff filed his submissions on July 9, 2021. He argued that he had made a case for issuance of an order of a perpetual injunction and that the defendant's title should be cancelled since he had demonstrated that it was obtained fraudulently. He further argued that under the doctrine of equitable estoppel, the defendant is estopped from claiming interest in the suit property more than 22 years after



the agreement between the plaintiff and the defendant. He urged the court to grant him judgment as prayed.

14. The defendant filed her submissions on August 5, 2021. She argued that there is no evidence that there was any agreement between the plaintiff and the defendant's husband and that if there was any, a Land Control Board consent would have been procured with an interest to transfer. That the plaintiff did not prove that he actually paid for the plot and how much he paid. That the plaintiff's conduct is not consistent with a purchaser for value and that failure to obtain consent of the Land Control Board within 6 months of the agreement renders it invalid. That the plaintiff's claim is frustrated by operation of law and as such he can only claim refund of purchase price whose payment he has not in any case proven.
15. The defendant further submitted that as the deceased's spouse, her consent was required before such an agreement could be reached yet no spousal consent had been availed. She concluded by contending that the plaintiff's case had failed the test of law and should be dismissed with costs.
16. I have carefully considered the parties' pleadings, evidence and submissions. The issues that emerge for determination are whether there was a valid sale agreement, whether fraud has been established and whether the plaintiff is entitled to the reliefs sought.
17. The basis upon which the plaintiff claims the suit property is that he entered into an oral agreement with the deceased sometime in 1998 pursuant to which he purchased plot number 351 Subukia which later became known as Subukia/Subukia Block 6/345, the suit property. The important point to note is that the agreement was unwritten. As I understand it, the plaintiff's case is that the suit property does not belong to the defendant. He maintains that it belonged to the deceased and from whom he purchased it way back in 1988 through an oral agreement. Even though he claims that he later entered into a memorandum of agreement with the defendant on February 12, 1999 after the death of the deceased, the memorandum of agreement is only meant to elaborate and reiterate the oral agreement.
18. The oral agreement is said to have been made in 1998. The Court of Appeal discussed the implications of section 3(3) of the [Law of Contract Act](#) on such a contract in [Peter Mbiri Michuki v Samuel Mugo Michuki](#) [2014] eKLR as follows:

Section 3(3) of the [Law of Contract Act](#) provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the [Law of Contract Act](#) excludes the application of section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the [Law of Contract Act](#), came into effect on June 1, 2003. Prior to the amendment of section 3(3) of the [Law of Contract Act](#) in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or



- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”
19. Besides the subject agreement herein being unwritten, the plaintiff has not demonstrated payment of the purchase price. Further, the plaintiff is not currently in possession of the suit property. For all those reasons, I find and hold that there was no valid sale agreement with the deceased.
20. According to the material placed before the court by the plaintiff, the defendant became the registered proprietor of the suit property on July 27, 2009 and a title deed was issued to her on July 30, 2009. As a registered proprietor, the defendant is entitled to the rights, privileges and benefits under section 24 of the *Land Registration Act*. Further, section 26 of the *Act* obligates the court to accept her certificate of title as conclusive evidence of proprietorship, unless of course the provisos under section 26 (1) (a) or (b) are established. The said sections provide as follows:
24. Interest conferred by registration
- 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;
26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) 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 a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...
21. The plaintiff has opted to challenge the defendant’s title on account of fraud. He is therefore under obligation not only to plead fraud but also to strictly prove it. The Court of Appeal restated the law relating to fraud in *Adam v Adam & 3 others* (Civil Appeal 103 of 2019) [2022] KECA 501 (KLR) (1 April 2022) (Judgment) as follows:
- “In *Vijay Morjaria v Nansingh Maddhusing Darbar & another* [2000] eKLR, Tunoi, JA stated:
- “It is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleading. It is also settled law that fraudulent conduct must be distinctly alleged and distinctively proved and it is not allowable to leave fraud to be inferred from the facts.”
19. In *Kinyanjui Kamau v George Kamau* [2015] eKLR, the court restated the principle that allegations of fraud must not only be pleaded but must be strictly proved. The court



cited with approval the earlier statement by the Court in *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 as follows:

“...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; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

22. In the present case, the plaintiff’s allegation of fraud is based on the claim that the defendant “sneaked” the suit property into the certificate of confirmation of grant in Nakuru High Court Succession Cause No 82 of 1999. I have perused a copy of the said certificate of confirmation of grant. It was issued by the High Court on December 18, 2008 to Milkah Gathigia Kamau and Karen Wanjiku Kamau who were the joint administrators of the deceased’s estate and it shows that the suit property was distributed wholly to the defendant. The defendant was not an administrator of the estate. It has not been shown how the defendant, who is not an administrator of the estate, “sneaked” the suit property into the certificate of confirmation of grant.
23. The defendant became registered proprietor pursuant to the certificate of confirmation of grant which is an order made by a court of competent jurisdiction. It has not been shown that the said order has ever been set aside. If something was “sneaked” into its proceedings or order, it is for the High Court to determine so and to take any corrective measures. This court has no jurisdiction to question the certificate of confirmation of grant. If the plaintiff has reason to believe that the certificate of confirmation of grant should be set aside, he should move the High Court and appeal if dissatisfied with the outcome. To the extent that I cannot determine any “sneaking” in the matter, I do not see any fraud.
24. In view of the foregoing, I find that the plaintiff has failed to prove fraud to the required standard. It follows therefore that the plaintiff is not entitled to the reliefs sought.
25. The upshot is that the plaintiff’s case is dismissed. Since the defendant did not resist the plaintiff’s case at trial, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF MAY 2022.

DO OHUNGO

JUDGE

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma

