



**Muchira v Muchiri & 2 others (Environment & Land Case  
20 of 2015) [2022] KEELC 2205 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2205 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 20 OF 2015**

**EC CHERONO, J**

**MAY 19, 2022**

**BETWEEN**

**ESTHER WANJIKU MUCHIRA ..... PLAINTIFF**

**AND**

**JAMES MUNENE MUCHIRI ..... 1<sup>ST</sup> DEFENDANT**

**PHYLIS WANJIKU MWAI ..... 2<sup>ND</sup> DEFENDANT**

**LILIAN KAGENDO MURIITHI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff vide an amended plaint filed on March 9, 2020 seeks the following orders:
  - a. That the Honourable Court do make a declaration that the plaintiff as the lawful owner of LR No Kabare/Njiku/2004 and subsequently order the rectification of the registrar by directing the District Land Registrar Kirinyaga County to cancel registration of Phyllis Wanjiku Mwai & Lilian Kagendo Muriithi as the joint proprietors and register the land in the name of Esther Wanjiku Muchira.
  - b. That the honourable court be pleased to order the 2<sup>nd</sup> & 3<sup>rd</sup> defendant to give vacant possession of land no. Kabare/Njiku/2004 to the plaintiff.
  - c. Costs of the suit.
  - d. The defendants be jointly and severally be ordered to pay the plaintiff mesne profit.
2. The 3<sup>rd</sup> defendant filed her defence dated July 9, 2020 on 10<sup>th</sup> July, 2020.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not enter appearance and/or file defence to the claim



4. After pre-trial directions were taken and the matter confirmed as ripe for hearing, the matter was fixed for hearing on November 8, 2021 by way of viva voce evidence. Upon closing their respective cases, the parties through their advocates on record agreed to file written submissions.
5. The Plaintiff filed hers on December 21, 2021 while the 3<sup>rd</sup> Defendant filed her on January 24, 2022.

**Plaintiff's Case and Submissions:**

6. The plaintiff adopted her written statements dated 2<sup>nd</sup> March, 2015 and 31<sup>st</sup> January, 2017. She was also referred a list of documents dated 31/1/2017 containing 26 items and a further list of documents dated 14/3/2019 containing 2 documents which she produced in her evidence as P-Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 23, 24, 25, 26, 27 & 28 respectively.
7. The Plaintiff stated that in the year 2012, she met the 1<sup>st</sup> Defendant and after negotiations, He agreed to sell and She agreed to buy one (1) acre of his land parcel No. Kabare/Njuku/114 at a consideration of Kshs. 1,000,000/-
8. She stated that the 1<sup>st</sup> defendant informed her that he wanted to sell part of his land to pay his debtors.
9. She stated that she learnt that the 2<sup>nd</sup> Defendant was the daughter to the 1<sup>st</sup> defendant and that they were registered as joint owners of the suit land.
10. She stated that the suit land was later subdivided into the following two portion namely -; Kabare/Njuku/2003 and Kabare/Njuku/2004.
11. She stated that the 1<sup>st</sup> defendant put her into possession of the suit land and she started to plant tea. She further stated that sometime in March 2013, rowdy youths went to the suit land and chased away her tea pickers and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants took over the land.
12. She stated that she was picking 2781 tea bushes and was a registered as a tea grower account no. kmq150384 at Thiba Buying Center.
13. She stated that contrary to the terms and conditions of the Sale Agreement, the 1<sup>st</sup> Defendant fraudulently transferred the same to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
14. She stated that she sued the 1<sup>st</sup> defendant for recovery of land and/or purchase price vide Gichugu Civil Case No. 2 of 2012 and they duly recorded a consent but he still transferred it to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant. She said that the said suit was later dismissed for want of jurisdiction necessitating the filing of this suit.
15. She stated that the suit land was subject to criminal proceedings at Gichugu law courts criminal case no. 4415 of 2013 where the 1<sup>st</sup> defendant and 3 others were charged with several counts of forgery, fraud, obtaining money by false pretence,
16. She stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the current registered owners who continue to pick tea leaves belonging to her causing her to suffer loss and damages.
17. In her submissions, the plaintiff submitted that this court cannot shut its eyes to the fraud by the 3<sup>rd</sup> defendant simply because it is not specifically pleaded in the plaint as the same would cause miscarriage of justice merely because a formality was not achieved.
18. She submitted that the 3<sup>rd</sup> defendant has downplayed the issue of mesne profits stating that the suit land is being utilized by third parties whom she has leased the land. However, no such evidence was tendered to prove the same.



19. She submitted that according to records from Kimunye Tea Factory dated 8/4/2019, 1000 Tea bushes produced 1.25 million shillings for years 2013-2019 and thus proposed to be awarded a sum of Kshs. 1.5 million as mesne profits.
20. She submitted that the 3<sup>rd</sup> defendant's plea of innocent purchaser for value falls flat in view of the criminal appeal judgment and cannot hold water going forthwith.
21. She relied on the case of Mombasa ELC No 265 of 1996 *KENATCO Transport Co. Ltd v Samuel Gikaru Njoroge* [2021] eKLR.
22. She prayed that judgment be entered as prayed in the amended plaint.

### **3rd Defendant's Case and Submissions:**

23. The 3<sup>rd</sup> Defendant also adopted her witness statement and produced documents contained in list of documents dated April 27, 2016 as D-Exhibit No. 1, 2, 3, 4, and 5 respectively.
24. The 3<sup>rd</sup> Defendant stated that sometimes in April, 2012 she and her husband met with one Danson Njogu Njiru who was interested in his plot at Meru and agreed that he buys ½ acre in a tea growing Zone so that she can become the registered owner of the ½ acre and thus entered into an agreement with the 1<sup>st</sup> Defendant in respect of ½ acre out of LR No Kabare/Njiku/111.
25. She stated that by 27<sup>th</sup> August, 2012 the 1<sup>st</sup> Defendant had received full consideration of 500,000/- from the said Danson Njogu Njiru and on August 29, 2012, consent of the land control board was given to have the suit land transferred to her and the 2<sup>nd</sup> defendant.
26. She stated that on February 18, 2013, the 1<sup>st</sup> Defendant signed the transfer form in her favour and that of the 2<sup>nd</sup> defendant. However, the same could not be registered immediately because there was a caution registered soon thereafter by one Mercy Nyakio Mwangi and the plaintiff herein claiming purchasers interest.
27. She stated that the said cautions were removed on 4/2/2013 through a court order which paved way for registration of the transfer.
28. She stated that the plaintiff claimed purchaser's interest, just the same way she was also a purchaser and no one of them ranks higher than the other.
29. The 3<sup>rd</sup> Defendant submitted that in the amended plaint, no particulars of fraud can be attributed to the 3<sup>rd</sup> defendant and therefore, there is no cause of action against her has been disclosed.
30. She submitted that she holds a valid title to the suit land and therefore the plaintiff cannot allege that she has been deprived use of land and suffered loss whereas she did not have title to the land nor are there agreements between herself pertaining to the suit land.
31. She submitted that it is trite law that fraud must be pleaded, particularized and proved and that none had been pleaded against the 3<sup>rd</sup> defendant as provided under Order 2 Rule 4 of the *Civil Procedure Rules*.
32. She submitted that fraud had been pleaded against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only. She relied in the cases of *Vijay Morjaria v Nasingh Madhisigh Darbar & another* [2000] eKLR and *Laban Omubaka Otumbula v Truphosa Okutoyi* [2019] eKLR.



33. She further submitted that the allegation of mesne profits had not been proved against her as the amended pleadings do not have any averment towards any loss that the plaintiff may have incurred and no valuation or any supporting document had been given to support the claim of Kshs. 1,500,000.
34. She submitted that there is no supporting documents produced in support of the allegation that the farm had over 1,000 tea bushes and that none of the agreements mentions about any tea bushes on the farm.
35. She submitted that it would be improper for the court to make an assumption over the submissions on the mesne profits and urged that the court finds that the same has not been proved to the required standard.
36. She urged that the case be dismissed with costs to the 3<sup>rd</sup> Defendant.

**Analysis:**

37. I have considered the pleadings, the testimony of the witnesses, the exhibits tendered, the rival submissions and the applicable law. From the materials placed before me, I find the following as the probable issues for determination-;
  - a. Whether the Plaintiff has proved a case of fraud against the Defendants to the required standard?
  - b. Whether the Plaintiff has proved the claim for mesne profits?
  - c. Who should bear the costs?

**Whether the Plaintiff has made out a case of fraud against the Defendants: -**

38. Fraud is defined in the Black's Law Dictionary Ninth Edition as follows: -

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

39. Section 26 of the *Land Registration Act* provides 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 a party; or
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

40. Section 80(1) of *Land Registration Act* provides that:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”



41. The standard of proof in fraud cases has been laid out by the Court of Appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR where it was held as follows;-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...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 cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
42. The burden of proof lies with the plaintiff to prove his claim and the standard is above that required in civil claims but not beyond reasonable doubt.
43. In this matter, the Plaintiff's case is that she purchased from the 1<sup>st</sup> defendant one (1) acre out of LR No Kabare/Njuki/1114 for a consideration of Kshs 1,000, 000. Pursuant to their Sale Agreement, the 1<sup>st</sup> Defendant partitioned the subject land into two parcels being LR No Kabare/Njuki/2003 and Kabare/Njuki/2004.
44. The plaintiff stated that her portion of land was Kabare/Njuki/2004. I have looked at the Letter of Consent issued to the 1<sup>st</sup> Defendant dated February 27, 2013 allowing transfer of the said parcel of land to the plaintiff and have every reason to believe that indeed the Plaintiff is entitled to Kabare/Njuki/2004.
45. From viewpoint, trouble seems to have started brewing the moment the 1<sup>st</sup> Defendant failed to transfer land parcel registration number Kabare/Njuki/2004 to the plaintiff which led the plaintiff to file Gichugu Principal Magistrate Civil Case Number 2 of 2013 which was resolved by a way of consent settlement
46. I have looked at the said consent order dated January 31, 2013 and issued on February 1, 2013, and find that indeed, the matter was resolved by agreeing to transfer the suit land to the plaintiff herein and restrictions registered thereon be lifted.
47. The Plaintiff proceeded to register the said consent order on February 4, 2013. However, upon presenting the documents for registration, she discovered that the suit land has been transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant herein by way of a gift and title issued on 19<sup>th</sup> February, 2013.
48. The plaintiff reported the matter to the DCIO Kirinyaga, which saw criminal proceedings being instituted against the Defendants herein in Gichugu Criminal Case Number 415 of 2013. Judgment in the said Criminal matter was delivered on December 28, 2018, where the 1<sup>st</sup> Defendant herein was acquitted and the 3<sup>rd</sup> Defendant convicted for the offence of conspiracy to defraud and of making a false document without authority.
49. The 3<sup>rd</sup> Defendant appealed against the said conviction and sentence vide Kerugoya High Court Criminal Appeal No. 3 of 2019 but the same was dismissed.
50. From the proceedings and Judgment in Gichugu Criminal Case Number 415 of 2013, it is evident that the 1<sup>st</sup> Defendant did not authorize the transfer of the suit land to the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants herein. He even testified that the only transaction he signed was the transfer of the suit land to the Plaintiff herein and was surprised to learn that the land had been transferred to his co-defendants herein. This must have been the reason he was acquitted.



51. Looking at the material presented before this Honourable Court, it appears as though the 1<sup>st</sup> Defendant took the required steps to ensure that the suit land was transferred to the Plaintiff but was overtaken by the fraudulent actions of the 2<sup>nd</sup> and 3<sup>rd</sup> accused as found in the Gichugu Criminal Case.
52. Looking more closely at Criminal proceedings and evidence adduced, one cannot fail to see that the Land Control Board Consent in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant herein was acquired fraudulently as it neither appears in the agenda or even the minutes of the Land Board Meeting on the day it was issued.
53. Further, the 3<sup>rd</sup> Defendant has claimed to have purchased the suit land from the 1<sup>st</sup> defendant but the records show that same was transferred to her as a gift.
54. In a nutshell, I am of the view that all events surrounding the transfer of the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein are not only questionable but also unprocedural, illegal and corrupt scheme.
55. I am therefore convinced that the actions by the defendants were not only criminal in nature but the same were aimed at ensuring that the Plaintiff is deprived ownership of the suit land.
56. The 3<sup>rd</sup> Defendant has submitted that there is no cause of action against her as there are no particulars of fraud attributed to her.
57. I have looked at the amended plaint and find that allegations of fraud have not only been specifically pleaded but the same have also been particularized as required by the law. That explains why the 3<sup>rd</sup> Defendant responded to the same by way of Defence. If at all there was no such claim against her, one wonders what she was responding to in the amended plaint.
58. Even assuming that there was no cause of action against the 3<sup>rd</sup> Defendant as alleged, the 3<sup>rd</sup> defendant as the registered proprietor of the suit land is a necessary party in the suit whose presence is paramount in enabling this Honourable Court effectually and completely adjudicate upon and settle all questions involved in this case.
59. For all the reasons given, I find that the plaintiff's claim on grounds of illegality, un-procedural irregularity and corrupt scheme has been proved to the required standard.

#### **Whether the Plaintiff is entitled to Menses Profits**

60. The Plaintiff stated that as a result of the defendants' actions and/or inactions, she was deprived substantial source of income which occasioned her loss of profits.
61. She stated that after completing payment of the purchase price to the 1<sup>st</sup> Defendant, she was put into possession of the suit land and started to plant tea. However, in March 2013 rowdy youths went and chased away her tea pickers and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants took possession and occupation of the suit land.
62. She submitted that according to the records from Kimunye dated 8/4/2019, 1000 Tea bushes produced 1.25 million shillings for years 2013-2019 and seek to be awarded a sum of Kshs. 1.5 million as mesne profits.
63. The 3<sup>rd</sup> Defendant on the other hand submitted that there was no supporting documents that had been produced in support of the allegation that the farm had over 1,000 tea bushes and that none of the agreements mentions any tea bushes on the farm.



64. In the case of *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR the Court of Appeal stated:

Mesne profit is defined in section 2 of the *Civil Procedure Act* to mean; - “in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession”. ... Measure for mesne profit was described in the Privy Council decision in *Invergue Investments v Hacketh* (1995) 3 All ER 842 cited with approval in the *Kenya Hotel Property Ltd* case (supra) as follows:

“This is form of an ordinary claim for mesne profit, that is to say, a appropriate measure of damages.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.

65. It is trite law that he who alleges must prove. It is therefore incumbent upon the plaintiff to place evidence before this court to warrant an order for the claim of mesne profits. This position was held by the Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR where it was held as follows:-

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

66. I have looked at the document by Kimunye Tea Factory Limited for the financial year 2012 – 2013 with respect to the plaintiff’s grower number and find the same has no evidentiary value as the maker ought to have been called to be cross-examined and to produce the same. I also find that the plaintiff is not entitled to mesne profits as the suit property had not been transferred and registered in her name. Mesne profit are damages payable to the owner of land by a trespasser for wrongful occupation. I find the claim by the plaintiff premature and unavailable.

#### **Who should bear the costs?**

67. It is trite law that costs follow the cause. Section 26 (1) of the *Civil Procedure Act* provides that: -

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

68. I find that the Plaintiff is entitled to costs as there is no good reason to deny the same.

#### **Conclusion:**

69. In view of the foregoing it is my considered view that the Plaintiff’s suit partly succeeds and the same is allowed as follows:-



- a. A declaration is hereby made that the plaintiff is the lawful owner of LR No Kabare/Njiku/2004.
- b. The District Land Registrar Kirinyaga County is hereby ordered to rectify the register by cancelling the names of Phyllis Wanjiku Mwai & Lilian Kagendo Muriithi as the joint proprietors of LR No Kabare/Njiku/2004 and substituting with the name of Esther Wanjiku Muchira as owner.
- c. The 2nd & 3rd defendant are hereby ordered to give vacant possession of land No Kabare/Njiku/2004 to the plaintiff.
- d. The Land Registrar, Kirinyaga County is hereby directed and ordered to dispense with the production of the original Title Deed and all other relevant document in compliance of this orders.
- e. The Defendants shall bear costs of this suit jointly and severally.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 19TH DAY OF MAY, 2022.**

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

Mr. Chomba for Plaintiff – present

1st and 2nd Defendants – absent

3rd Defendant/Advocate – absent

Plaintiff – present

Kabuta – Court Assistant.

