



**Jahava v Mburu (Environment & Land Case 283 of 2017)
[2022] KEELC 89 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 89 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 283 OF 2017**

EO OBAGA, J

MAY 17, 2022

BETWEEN

GRACE IMALI JAHAVA PLAINTIFF

AND

SIMON KIMANI MBURU DEFENDANT

JUDGMENT

Introduction:

1. The Plaintiff filed this suit against the Defendant in which she sought the following reliefs:-
 - a. A declaration that the entry of the 1st Defendant's names in the register of the suit parcel of land known as plot No. 274 measuring $\frac{1}{4}$ of an acre comprised in LR. No. Langas Farm 8500 is illegal and/or fraudulent.
 - b. A declaration that the Plaintiff is the bonafide legal owner of plot No 274 measuring $\frac{1}{4}$ of an Acre comprised in LR. No. Langas Farm 8500 having purchased the same for valuable consideration.
 - c. Cancellation of the entries of the register by removing the names of the 1st Defendant and replacing them with those of the Plaintiff forthwith.
 - d. A permanent injunction against the Defendants, their agents, heirs and /or servants restraining them from any manner detriment dealing with legal ownership of the suit parcel of land by the Plaintiff.
 - e. Mesne profits.
 - f. Costs of the suit interest.
 - g. Any other relief this honourable court may deem just and expedient to grant.



2. During the hearing, the Plaintiff testified that on 9th September 1988, she entered into an agreement with Florence Wambui Kibiku in which the vendor agreed to sell to her a plot known as Plot No. 274 which was comprised in LR. No Langas Farm 8500 (suit property). The agreed purchase was Kshs 30,000/= The Plaintiff paid the purchase price in full and took possession of the suit property which was ¼ an acre. The plot had not been registered and remains unregistered todate.
3. The Plaintiff later on re-located to Canada but she left her sister in-law Rose Mideva Jahava to look after the suit property. As at the time the Plaintiff re-located to Canada, her sister in-law who was working for Kenya Defence Forces was based at Eldoret. The sister in-law could occasionally go to the suit property to check on it. Later on, the sister in-law was transferred to Nairobi.
4. The Plaintiff would visit the suit property whenever she was in Kenya. One day in 2017, as the Plaintiff's sister in-law was going home through Eldoret-Kisumu Road, she noticed that there were developments on half of the suit property. She telephoned the Plaintiff who asked her to go to the County offices to ascertain the position of the records held by the County Lands Office.
5. It turned out that the records at the County Lands Office had been changed. Her name had been replaced with that of the Defendant. The Plaintiff testified that she had never sold the suit property to the Defendant and that the change of records in the County Lands Offices was fraudulent.

Defendant's Case:

6. The Defendant testified that the suit property belongs to him having purchased it from one Grace Jahava who had who had purchased the same from Christopher C. Sultan. He stated that he purchased the suit property through a sale agreement dated May 22, 2015 at a consideration of Kshs 400,000/= He took possession and constructed a house on which he has been occupying since 2016. He stated that the suit property is 1/8 of an acre and that he has constructed on half of the suit property. He states that when he went to the County Land Offices to have the records changed into his name, he was asked to go and bring along the area Chief. When he availed the area Chief, the records in the County Land Offices were changed from Grace Jahava's name to his name.

Analysis:

7. At the conclusion of the hearing, parties were directed to file written submissions. The Plaintiff filed her submissions dated 14th December, 2021. The Defendant filed his submissions dated December 20, 2021. I have considered the evidence adduced by the Plaintiff and the Defendant as well as their respective submissions. The issues which emerge for determination are firstly, whether this suit is statute barred. Secondly, who between the Plaintiff and the Defendant owns the suit property. Thirdly, was the suit property transferred to the Defendant fraudulently and if so was the Defendant aware of the fraud. Fourthly, is the Plaintiff entitled to the reliefs in the plaint?
8. On the issue as to whether this claim is statute barred, it is important to note that the Plaintiff's claim is based on fraud. The Law of *Limitation of Actions Act* is clear that where a claim is based on fraud, time for purposes of Limitation does not start to run until the fraud is discovered. In the instant case, the fraud was discovered in 2017 when PW2 Rose Mideva Jahava saw a building which had been put up on the suit property and on-going to the County Lands office, she discovered that the records had been changed from the name of the Plaintiff to that of the Defendant.
9. It is therefore clear that time for purposes of the *Limitation of Actions Act* started running in 2017 when the fraud was discovered. The Defendant seems to be relying on a ruling of the Court which was delivered on 17th August, 2017 in which the Court declined to extend the time for filing of this



suit. The application for extension of time was unnecessary as the Plaintiff's claim was based on fraud. In any case, one cannot seek extension of time in contract matters. Extension of time only relates to actions founded on tort. I therefore find that the Plaintiff's suit is not statute barred.

10. On the second issue, the evidence on record is that the sale agreement between the Plaintiff and Ms. Florence Wambui Kibiku was based on the Plaintiff having physically gone to the plot she was purchasing and was satisfied with the physical location. The vendor's plot was half an acre but she was selling $\frac{1}{4}$ of an acre. The typewritten agreement did not describe the plot number but there is a handwritten plot number shown as plot 278.
11. The Defendant has tried to argue that the Plaintiff purchased plot 278 whereas she is claiming plot No 274 and that the map shows that plot 278 is bigger than plot 274. The Defendant therefore tries to use this to justify that the Plaintiff may be laying claim to a different plot. What the Defendant forgets is that he claims to have purchased plot 274 from Grace Jahava. When the Defendant testified, he was categorical that the Grace Jahava who sold him the land is not the Grace Jahava the Plaintiff herein.
12. The Plaintiff produced a rates demand from the Municipal Council of Eldoret dated 31st May, 2006. The plot number is indicated as plot 274 and the owner is Grace Jahava who is the Plaintiff herein. As at 2006, the Defendant had not purchased the suit property from the alleged Grace Jahava. The Defendant cannot therefore use the imposed handwritten plot No. 278 to the Plaintiff's agreement as justification that the Plaintiff is laying claim to a different plot.
13. The Plaintiff called PW2 Barnabas Cheruiyot who confirmed that according to the records held by their offices that is the County Lands offices, the owner of plot No. 274 is the Plaintiff and that the rates demand note dated 31st May 2006 emanated from their offices. It is therefore clear and as confirmed by this witness that Plot No 278 must have been inserted in the sale agreement later. There is no doubt that this was part of the fraud which led to the records being changed from the Plaintiff's name to the Defendant's name.
14. Though the Defendant claims that he had records changed in the County Lands office, he did not produce any rates demand note to confirm that indeed it is his name which is in the record. There is evidence that when there is a change of ownership, the new owner is supposed to take a sale agreement to the county Lands offices. The new owner is to be accompanied by the local chief who confirms that indeed there has been a sale. This is so because plots in Langas are not registered. In the instant case, the Defendant did not call the Chief who allegedly accompanied him to the County Lands office to have the records changed.
15. The County Physical planner who was called by the Defendant produced the planning map for Langas. In his evidence, he claimed that plot No. 274 appears to be smaller than plot No. 278. I have looked at the planning map produced as defence exhibit 2. The two plots appear to be of the same size and if anything, plot 278 has been reduced by a road which has cut it and deprived it of its rectangular shape. This witness was not therefore being candid about the sizes of the plots. When cross-examined, he stated that he did not have any documents pertaining to plot No. 274. On the contrary, the witness from the County Lands office testified that according to their records, the Plaintiff is the owner of plot No. 274 and that the rates demand note was issued by their office. The demand rates note is in the name of the Plaintiff and refers to plot No 274. There was an attempt to call a surveyor to come and give evidence on the two plot numbers. This did not work and in any case, the surveyor would not have added any value to this dispute as the plots in Langas have not been surveyed. They have only been planned. What would have been of relevance is for the County Lands office to say who according to their records owns plot 278. From the evidence adduced herein and given the fact that there was fraud



involved in the sale of the suit property to the Defendant as would be demonstrated in the preceding paragraphs, I find that the true owner of the suit property is the Plaintiff.

16. The Defendant states that he purchased the suit property from Grace Jahava but when he testified in this case, he was categorical that the Grace Jahava who sold him the suit property is not the Grace Jahava who is the Plaintiff herein. Though the postal address of the Plaintiff is the same as that appearing on the sale agreement of the Defendant, the ID No is different from hers. The personnel from the Directorate of Criminal Investigations carried out investigations on the ID No appearing on the sale agreement held by the Defendant. It was found that the ID No. belongs to a man and not that of the Plaintiff. The report by the DCI was presented to Court and is part of the Court record. The ID No on the agreement held by the Defendant is xxxxx which belongs to a man called Atanasi Omondinyi Kusabala from Mt. Eldon whereas the correct ID of the Plaintiff is No xxxxx from Vihiga.
17. It is therefore clear that the sale to the Defendant was fraudulent. It was done by a fraudster masquerading as the true owner. The other issue which is related to the one which has been addressed is whether the Defendant was aware of the fraud or ought to have known that the transaction was fraudulent. It is important to note that the suit property was not registered. The evidence emerging is that the local Chief is very crucial in transactions involving unregistered land as in this case. This is so as the Chief is the only one who can attest as to the true owner because he is on the ground. In the instant case, the Defendant claims that he was accompanied by the area Chief when he went to have the records changed from the alleged Grace Jahava to his name. The defendant did not bring the said Chief to confirm that he was indeed involved. The Defendant having been made aware that the alleged Grace Jahava who allegedly sold him the land is not the Plaintiff, he should have availed the said Chief to confirm that he indeed knew Grace Jahava is the one who sold the suit property to the Defendant.
18. The Physical planner who was called by the Defendant stated that usually they rely on letters from the Chief to confirm change of ownership and to enable them to put the name of the new owner in the system for purposes of development control. When this witness was cross-examined, he stated that he did not have any document relating to the suit property. This coupled with the fact that the Defendant has never been issued with any demand note and given the fact that the officer from the County lands office confirmed that the true owner of plot 274 is the Plaintiff, this shows that the Defendant was aware that the transaction he was entering into was fraudulent. He was not an innocent purchaser for value. The Defendant claimed that he kept in touch with the alleged seller for some time before he lost touch with “her”. He did not bother to give evidence of such communication to absolve him from the fraud. This being the case, the inevitable conclusion is that the Defendant was not an innocent purchaser and that he was part of the scheme to defraud the plaintiff of the suit property. The Defendant did not even bother to produce the agreement between Christopher N. Sultan and the alleged Grace Jahava which he was allegedly given by the said Grace Jahava.
19. Apart from the prayer for Mesne profits which are in nature special damages which ought to be pleaded and proved, I find that the Plaintiff has proved her claim to the required standards that is on a balance of probabilities. The Plaintiff’s claim on Mesne profits fails as the same was not pleaded and proved.

Disposition:

20. Having found that the Plaintiff has proved her claim on a balance of probabilities, I allow her claim in terms of prayers (a), (b), (d) and (f).

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF MAY, 2022.

E. OBAGA



JUDGE

In the virtual presence of;
Mr. Kinyanjui for Defendant
Court Assistant -Albert

