



REPUBLIC OF KENYA



KENYA LAW
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**Lelei v Melly & 3 others (Civil Suit 67 of 2016)
[2022] KEELC 3253 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3253 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
CIVIL SUIT 67 OF 2016**

SM KIBUNJA, J

JUNE 8, 2022

BETWEEN

JOHN KIPKOECH LELEI PLAINTIFF

AND

STEPHEN KIPCHIRCHIR MELLY 1ST DEFENDANT

NICHOLAS KIBITOK MAIYO 2ND DEFENDANT

LAND REGISTRAR, UASIN GISHU COUNTY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this claim *vide* the plaint dated 29th March, 2016, as amended on the 29th April, 2016 and further amended on the 1st July, 2016 seeking for:
 - i. “An order of eviction of the 1st and 2nd Defendant their servants and agents from Eldoret Municipality Block 14/439 as per paragraph 9 above.
 - ii. An order for permanent injunction barring the 1st and 2nd Defendants their servants and agents from trespassing onto, invading, cultivating, occupying and/or otherwise dealing with the land parcel number Eldoret Municipality Block 14/439 as per paragraph 7 above.
 - iii. Costs of this suit.
 - iv. Interest thereon.
 - v. An order of general damages as against the 1st and 2nd Defendant for trespass.
 - vi. A Declaration that the Plaintiff is the lawful owner of Eldoret Municipality Block 14/439.”



The plaintiff among others avers that he is the registered owner of Eldoret Municipality Block 14/439, the suit land, that measures 0.3982 hectares, which he bought from Elisha Kare Busienei. That the 1st and 2nd Defendants trespassed onto the suit land on or about March 2016, and have been using it since, committing wanton destruction without his permission. That the 1st Defendant fraudulently, and illegally obtained a lease over the said land on the 15th March 2003, that was issued by the 3rd Defendant who ought to have known the land belonged to the Plaintiff. That the prayers sought should be granted.

2. The Plaintiff's claim is opposed by the 1st and 2nd Defendants through their Statement of Defence dated 23rd May, 2016 wherein they averred that the Plaintiff had fraudulently purported to have bought the land from Elisha Kare Busienei, making false documents, and threatening to interrupt the 1st Defendant's possession of the suit land, which he has occupied since 2003. They therefore prayed for inter alia that "the Plaintiff's suit be dismissed with costs and the County Land Registrar, Uasin Gishu be ordered to cancel the fake Certificate of Lease issued in the name of the Plaintiff, pertaining Eldoret Municipality Block 14/439."
3. That during the hearing John Kipkoech Lelei, the Plaintiff, testified as PW1 adopting his witness statement dated 31st January, 2019 as his evidence in chief. It was his evidence that the certificates of official searches indicated the suit land was registered in the name of Elisha Kare Busienei on the 2nd August 1985, for a 99 years lease. That he bought the suit land from Stephen Maraba Kiboi *vide* the sale agreement dated 11th August, 2007 for Kshs. 4.9 million. That the Stephen, the vendor, had purchaser's interest over the land when he sold it to him, with the knowledge of the Elisha, the registered owner. That the transfer to his favour was signed by Elisha, the registered owner, and it was registered. He produced a transfer of lease document executed in his favour dated 8th August, 2007 as PExh 6. PW 1 produced an Application for Registration form as PExh 7. It was his evidence that the due process was followed and all the statutory fees paid for the transaction leading to his registration as proprietor of the suit land. That he had hired Elisha Cheruiyot Tanui to fence the suit land and subsequently, leased it out to a neighbour for a consideration of Kshs. 2,000.00 per year for a period of nine (9) years until 2016 when the Defendants evicted the leasee. That the families of Busienei and Maraba have not filed a suit against him concerning the suit land. PW1 testified that in March, 2016 he received a call from his brother, that the 1st Defendant, accompanied by 50 men had evicted Mr. Cheruiyot, and taken possession of the suit land. That he reported the matter to Langas Police Station but did not know what action was taken. That his passport number is A166xxxx, while the passport number on his Certificate of Lease is A66xxx, which was the number of his first Kenyan passport. That he was not aware that the lease over the suit land had been surrendered to the government. That he does not have a lease document in his name. The Plaintiff called Enos Kimaru Chemogos and Elisha Cheruiyot Tanui as witnesses and they testified as PW2 and PW3 respectively. The two witnesses adopted their statements both filed on the 31st January, 2019 as their evidence in chief. PW2 testified that he owns a parcel of land that neighbours that of the Plaintiff. That he had hired the Plaintiff's land until the 2nd defendant took it over. PW3 testified that in November, 2007 he fenced the suit land, and planted keiapple seedling thereon in 2008, on instructions of PW1.
4. The Plaintiff closed his case on the 29th September 2020, after which the defence hearing was fixed for the 19th November, 2020. That the counsel for the 1st and 2nd Defendants, and his clients did not attend court on the date for defence hearing. That after hearing submissions from counsel for the Plaintiff, 3rd and 4th Defendants, the case for the 1st and 2nd Defendants was marked closed.
5. That Sarah Chelimo Maina, the County Land Registrar Uasin Gishu, testified as DW1 as a witness for the 3rd and 4th Defendants. She testified that the register of the suit land show that the Plaintiff was



registered as the proprietor of the suit land on the 10th August, 2007 after purchasing the suit land from Elisha Kare Busienei, who was the first registered as owner from the 2nd August 1985, of the leasehold of 99 years commencing from the 1st June, 1984. DW1 further testified that the suit land has never been registered in the names of the 1st and 2nd Defendants. When she was shown the documents filed by the 1st and 2nd Defendants, she stated that the parcel register does not contain documents to support the Certificate of Lease bearing the 1st Defendant's name. She pointed out that the said certificate of lease bears the date of issue of 15th March, 2003 which was a Saturday, when the land registry is not open. DW 1 testified that the Memorandum of Surrender shown to him is not held at the land registry. That the Land Registrar, B.A, Choka, who is said to have signed the transfer forms is currently the Land Registrar Nandi and was employed in 2008, and therefore could not have signed the transfer in 2001. That the said B.A, Choka has never been the Land Registrar Uasin Gishu, and the transfer document the said Defendants had filed was a forgery.

6. The learned counsel for the Plaintiff, 3rd and 4th Defendants filed their submissions dated the 25th February, 2021 and 3rd March, 2021 respectively.
7. The Plaintiff submitted that before the purchase of the suit land, he had conducted searches on 3rd March, 2006 and 14th June, 2007 and both searches confirmed that Elisha Kare Busienei is the registered owner of the suit land before entering into the sale agreement on the 11th August 2007. That he had therefore complied with section 36 of the Registered Land Act Chapter 300 of Laws of Kenya (repealed), and section 3(3) of the Law of Contract Act, as read with section 38(1) of the Registered Land Act. That he obtained the land rent and rates clearance certificates, and paid the requisite stamp duty and the transfer charges, in addition to obtaining the Commissioner of Lands consent to transfer. That he was issued with a Certificate of Lease on 10th August, 2007 over the suit land and therefore his title to the suit land is absolute and indefeasible as is provided by section 25 and Section 26(1) of the Land Registration Act. The Plaintiff stated that his title to the suit land can only be challenged on grounds of fraud or misrepresentation to which he is a party. Further, the Plaintiff urged the Court to find that that 1st Defendant's title issued on 15th March, 2003 was not issued by the land registry and as such, it is tainted with fraud and illegality. That the documents produced by DW1 should be taken as genuine on the strength of section 83 as read with section 86(1)(a) and (2) of the Evidence Act, chapter 80 of Laws of Kenya. That the learned counsel for the Plaintiff cited the Court of Appeal decision in *Jaj Super Power Cash And Carry Ltd v Nairobi City Council & Others* Ca Civil Appeal No. 11 Of 2002 (nrb) (unreported), where the court held that:

“It would be a violent affront to our land tenure systems, with all their perceived imperfections, unless there is a lawful challenge to an existing title or a policy — charge by parliament, to uphold the rights of a temporary allottee of land or trespasser, over those of a registered proprietor.”

And submitted that the Plaintiff's title is protected by the law, and should be declared as the owner of Eldoret Municipality Block 14/439 As per section 13(7) (h) of the Environment and Land Court Act No. 19 of 2011. That section 24 of the Land Registration Act No. 3 of 2012 vests on the plaintiff the absolute ownership rights to enjoy all the rights and privileges over the suit land, and that the 1st and 2nd Defendants' act of trespassing on the said land has not impeached the Plaintiff's title. That the Plaintiff is entitled to an order of eviction. The Plaintiff relied on the following decisions in support of his submission: *Jaber Mohsen Ali & Anorther v Priscillah Boit & Anorther* (2014) Eklr, *Joel Kipchirchir Kitur v David Kimutai Langat And Anr* [2006 And *Gladys Wanjiru Kirubi v John Kangethe Kibe*



[2005] eKLR, and *Scott v Brown* (1892) quoted in a subsequent Supreme Court of Canada decision of 1894 *Walsh v Trebilcock*, where Justice Lindley stated:

“Ex turpi causa non oritur actio. This old and well known legal maxim is founded on good sense, and expresses a clear and well recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal action which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

The Plaintiff further submitted that the rights of a registered proprietor of land are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interests, under Article 40 of the [Constitution](#) of Kenya and sections 27, 28 and 38 of the [Land Registration Act](#), and urged the court to issue permanent injunction against the 1st and 2nd Defendants. The Plaintiff urged the court to find the 1st and 2nd Defendants liable to pay general damages for trespassing on the Plaintiff's land, noting that the Defendants would have developed and collected rental income for the past 4 years. The learned counsel cited the decision in the case of [Kimutai Tunoi Leonard v Samuel Cheboi](#) (2017) eKLR where the court found a trespasser liable to pay general damages. The Plaintiff also submitted that the 1st and 2nd Defendants should be condemned to pay the Plaintiff's costs in compliance with section 27 (1) of the [Civil Procedure Act](#) and section 13(7)(1) of the [Environment and Land Court](#).

8. The 3rd and 4th Defendants submitted that it is incumbent upon a title holder who seeks the protection of the court, to not only prove that they hold a title document in respect of property, but also demonstrate that the procedure followed in acquiring the title that is under scrutiny was regular. That the evidence of DW1 and PW1 was clear on the process followed by the Plaintiff in acquiring his title. That DW1's evidence corroborated the testimony of PW1. The learned counsel referred to the cases of [Funzi Island Development Limited & 2 Others v Count Council Of Kwale & 2 Others](#) (2014) Eklr, [Republic v Land Registrar Kilifi & Another Ex Parte Daniel Ricci](#) (2013) Eklr And [Henry Muthee Katburima v Commissioner Of Lands & Another](#) (2015) eKLR, where the courts held *inter alia* that it must review and evaluate the evidence on record to ascertain whether parties obtained their titles, rights or interests lawfully or properly, as indefeasibility of title is subject to Article 40 (6) of the [Constitution](#). That a title deed is merely an end product of a process, and for it to find protection under the law, the holder of the title deed has to establish that he followed the laid down procedures in acquiring it. That no court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of illegal transaction, if the illegality is duly brought the court's notice. The 3rd and 4th Defendants submitted that the Plaintiff's title is not tainted with fraud or illegality, while on the other hand, the title held by the 1st Defendant dated 15th March, 2003 did not originate from the land registry as there was no record to support it. The Plaintiff did not plead or prove fraud on the part of the 3rd Defendant. The learned counsel referred to the case of [Vijay Morjaria v Nansingh Madhusingh Darbar Another](#) (2000) eKLR where the Court held that:

“... It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”



And the case of *Ndolo v Ndolo* (2008) 1 Klr (g&f)742 where the court observed that:

“... 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...”

And the Court of Appeal case in *Kinyanjui Kamau v George Kamau Njoroge* (2015) eKLR where the court unanimously stated that:

“In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding. In the present appeal, there is no such evidence, and the courts below rightly came to the conclusion that appellant had not made out a case for the grant of the orders he sought”.

And submitted that the 3rd Defendant has never tampered with the Plaintiff's title, and the suit against the 3rd Defendant is a non-starter.

9. The following are the issues for the court's determinations;
 - a. Who is the lawfully registered proprietor/owner of the suit land;
 - b. Whether the Plaintiff's Certificate of Lease issued on 10th August, 2007 was acquired procedurally;
 - c. Whether the Plaintiff has proved fraud on the part of the 3rd and 4th Defendants,
 - d. Whether the Plaintiff is entitled to general damages for trespass, and if so, how much; and
 - e. Who pays the costs.
10. The court has carefully considered the pleadings filed, evidence tendered, submissions by the two learned counsel, the superior courts decisions cited thereon, and come to the following determinations;
 - a. That it is trite that a title document to a parcel of land subject matter of litigation is not an end in itself, but a creature of a process. In *Daudi Kiptugen v Commissioner Of Lands & 4 Others* [2015] eKLR the court stated as follows:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

Further in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR the Court of Appeal held as follows:

“We state 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 not be noted on the register.”

That from the evidence presented by the Plaintiff, and corroborated by DW1, the County Land Registrar Uasin Gishu, who testified on behalf of the 3rd and 4th Defendants, the Plaintiff had first caused an official search to be conducted over the suit land to establish its proprietorship. That in compliance with the provisions of Special Condition No. 6 contained on the Lease Document dated 2nd August, 1985 issued in favour Elisha Kare Busienei, the Plaintiff caused the consent to transfer of the Land Commissioner to be sought and obtained on 10th August, 2007, before he proceeded to enter into a sale agreement dated 11th August, 2007 for the sale of the suit land, with one Stephen Maraba Kemboi who had obtained a purchaser’s interest over the suit land. That Elisha Kare Busienei, the registered proprietor of the leasehold interest in the suit land executed a transfer form in favour of the Plaintiff dated 10th August, 2007. That the requisite rent, rates and the stamp duty were paid and upon registration the Certificate of Lease was issued in favour of the Plaintiff on 10th August, 2007.

- b. That it is also noteworthy that the sale agreement dated 11th August, 2007 was executed between the Plaintiff herein and Stephen Maraba Kemboi, but the transfer document dated 10th August, 2007 indicates that the interests in the suit land were being transferred from Elisha Kare Busienei to the Plaintiff. Further the court notes the fact that an earlier transfer of lease dated 10th April, 2006 indicated that Elisha Kare Busienei had sought to transfer the suit land to Stephen Kemboi Chumo. That though there is no explanation tendered to confirm whether or not Stephen Maraba Kemboi and Stephen Kemboi Chumo are one and the same person, the court will take the names to be an alias of the same person. That person is the one who sold his purchaser’s interest to the Plaintiff with the registered owner’s knowledge.
- c. The Plaintiff has in his evidence outlined the procedure undertaken resulting in his registration as the proprietor of the leasehold interest on the suit land. That testimony has received material corroboration from the evidence tendered by DW1, especially on the procedure undertaken resulting in the issuance of a Certificate of Lease in favour of the Plaintiff being issued. In the circumstances, the Court is convinced that the Plaintiff’s Certificate of Lease to the suit land was acquired procedurally and regularly and therefore it is valid and must be upheld.
- d. That having arrived at the conclusion that the Plaintiff is the rightful owner of the suit land and his proprietorship is lawful, absolute and indefeasible, it follows that the 1st and 2nd Defendants occupation of the suit land from 2016 amounts to trespass. That the said trespass had the effect of denying the Plaintiff full use and enjoyment of suit land from the year 2016 to date. I note that the Plaintiff has not adduced evidence to prove the quantum of loss occasioned to him due to the 1st and 2nd Defendant’s trespass of the suit land. That as the Plaintiff is definitely entitled to some damages, then the court will have to make a determination of the quantum. In doing so, the court has considered the decision in the case of *Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another* [2013] eKLR the court held as follows:

“ On the issue and quantum of general damages, once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary to for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/ = as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant’s trespass.”



And noting that the foregoing decision was made almost a decade ago, I find an award of Kshs. 200,000 [two hundred thousand] as general damages for trespass against the 1st and 2nd Defendants as fair and just.

- e. The Plaintiff had outlined the particulars of fraud and forgery on the part of the 1st Defendant at paragraph 6A of the Amended Amended Plaintiff dated 1st July, 2016. The Plaintiff did not raise any concerns of fraud in the manner in which the 3rd Defendant handled the suit property herein. The court therefore finds that the Plaintiff neither pleaded fraud nor did he prove fraud on the part of the 3rd and 4th Defendants. The Court of Appeal in *Kinyanjui Kamau v George Kamau* (2015) eKLR, held as follows:

“It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to inter (sic) from the facts.”

And in the case of *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR the Court of Appeal cited with approval the decision of the Court in *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, as follows:

“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.”

That from the foregoing, I find the failure by the Plaintiff to plead and prove fraud on the part of the 3rd and 4th Defendants, leads to only one conclusion that his case against the two offices must fail.

- f. That as the plaintiff has succeeded in proving his claim against the 1st and 2nd Defendants, the two should pay his costs in accordance with section 27 of the *Civil Procedure Act* chapter 21 of the Laws of Kenya. That as the Plaintiff has failed in his claim against the 3rd and 4th Defendants who have actively participated in the proceedings, he will pay their costs of the defending the suit.
11. That flowing from the foregoing, the court finds for the Plaintiff and against the 1st and 2nd Defendants and orders as follows:
- a. That a declaration is hereby issued that John Kipkoech Lelei, the Plaintiff, is the rightful proprietor/owner of Eldoret Municipality Block 14/439, the suit land.
 - b. That the 1st and 2nd Defendants are declared trespassers on the suit land, and are directed to give vacant possession to the Plaintiff in ninety (90) days and in default eviction order to issue.
 - c. That upon the 1st and 2nd Defendants giving vacant possession or being evicted from the suit land, they be permanently restrained from interfering with the Plaintiff's use of the said land in any way.
 - d. That the Land Registrar, Uasin Gishu, having confirmed the official records that the Certificate of Lease issued to Stephen Kipchirchir Melly, the 1st Defendant, on the 15th March, 2003 is a forgery for reasons *inter alia* that the date of its issue fell on a Saturday when the registry is closed, should upon receipt of a certified copy of this judgment, initiate the necessary steps



to call for the original copy of the certificate for cancellation to protect the integrity of title documents.

- e. That Plaintiff is awarded general damages of Kshs. 200,000 [two hundred thousand] for trespass upon his land, to be paid by the 1st and 2nd Defendants jointly and or severally.
- f. The 1st and 2nd Defendants to pay the Plaintiff's costs in the suit.
- g. The Plaintiff's claim against the 3rd and 4th Defendants is dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF JUNE, 2022

S.M.KIBUNJA,J.

ENVIRONMENT & LAND COURT - ELDORET

In the Virtual Presence of;

Plaintiff: Absent

Defendants: Absent

Counsel: Ms. Kaleiha for Chesoo for Plaintiff

Mr. Mathai for 1st & 2nd Defendant

Mr. Odongo for 3rd & 4th Defendant

Court Assistant: Oniala

S.M.Kibunja,J.

Environment & Land Court - Eldoret

