



REPUBLIC OF KENYA



**Kenga & 5 others v Bulakhidas Tribhovandans Hotel & 2 others (Environment & Land Case 287 of 2014) [2022] KEELC 3982 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3982 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 287 OF 2014**

**NA MATHEKA, J**

**JULY 28, 2022**

**BETWEEN**

**LEONARD TUVA KENGA ..... 1<sup>ST</sup> PLAINTIFF  
MARTHA WAMONA ..... 2<sup>ND</sup> PLAINTIFF  
JILANI MWACHAI ..... 3<sup>RD</sup> PLAINTIFF  
FRED M KATANA ..... 4<sup>TH</sup> PLAINTIFF  
KILLIAN MWAJANJI ..... 5<sup>TH</sup> PLAINTIFF  
MBURA EDWARD ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**BULAKHIDAS TRIBHOVANDANS HOTEL ..... 1<sup>ST</sup> DEFENDANT  
KUBERBHAI PATEL ..... 2<sup>ND</sup> DEFENDANT  
JOHN WAIGANJO ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated June 21, 2021 the 1<sup>st</sup> plaintiff pleads and acts on behalf of all plaintiffs who have developed and residing on the suit premises adding up in a total of not less than 120 families who have lived there throughout their life and buried their loved ones there. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are brothers and the registered owners of the suit premises Plot No MN/III/188 as it appears on the demand notice LA Name 256-County Government of Kilifi under the *rating act* (cap 267) Laws of Kenya. The 3<sup>rd</sup> defendant is a son of a caretaker who had been employed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the unknown new proprietor and managed to press and push the plaintiff's peaceful environment over the suit premises. The 1<sup>st</sup> and 2<sup>nd</sup> defendant had employed the late Fred Waiganjo who happened to the father of the 3<sup>rd</sup> defendant as their caretaker who ensured that the suit premises has been utilised



by within the rules and regulations in which their community members had engaged with the two brothers who happened to be the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. In the recent past they have witnessed several visitors at the suit property accompanied by the 3<sup>rd</sup> defendant who has officially introduced himself as the new proprietor of the suit premises without supplying them with detailed copies of the title deed to certify that the premises belonged to him and no one else despite the fact how he managed to acquire it since no one had transferred the suit premises to anybody else but their community to cultivate and then subdivide by the 1<sup>st</sup> and 2<sup>nd</sup> defendants agreement which the late Waiganjo had as a custodian. The constitution states that the land of Kenya belong to its people and they have the right to own it as per the law of Kenya. That under the provincial article 22 of the Constitution of Kenya plaintiff have the right to institute court proceedings claiming that a right of fundamental freedom on the bill of rights been denied, violated, infringed and/or is threatened which in this case, the threat is real.

2. The plaintiffs aver that the defendants are obliged to transfer the occupied portion of land to the plaintiffs and be registered as the owners as opposed to disrupting their lives with threatened subdivisions, eviction and fencing of the suited land. The plaintiffs aver that it is not in the public interest to deprive them their livelihood, shelter and residence which is their own only source of livelihood thus rendering them destitute and in dignified. The plaintiffs aver that their right to accessible and adequate housing and to reasonable standards of sanitation as provided for under article 43 (i) (b) of the constitution of Kenya 2010, and article 2(6) of the Constitution of Kenya is threatened and therefore seek protection of this honourable court. Despite repeated claims, defendants have failed, ignored and/or refused to return or pass out any information's regarding towards the recovery of the mentioned property for the same causing them untold misery and he we shall suffer irreparable loss should this honourable court not issue the orders prayed. The plaintiffs pray for judgement against the defendants for; -

1. The defendants to issue a vacant possession of the suit premises and then further sub division to each person who have signed in this application take effect and the premises be issued to the plaintiffs as the new registered owners.
  2. Costs and interest.
3. This court has considered the evidence therein. The defendants were served through substituted service but failed to enter appearance or file any papers. The plaintiffs have instituted a suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the registered owners of Plot No MN/III/188. The 3<sup>rd</sup> defendant is said to be the son of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' deceased caretaker (Fred Waiganjo) and alleged as the new proprietor and person behind the disruptions to the peaceful possession of the plaintiffs on the suit property. The plaintiffs claim the defendants gained ownership to the suit property by fraudulent and illegal means and pray for court to direct them to table their completion documents. The plaintiffs pray for defendants to issue them with vacant possession and for the suit property to be subdivided amongst them and for them to be registered.
4. According to the Black's Law Dictionary (8th ed. 2004),

"Fraud is knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. In contract law, fraud has been defined as unconscionable dealing, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain. The remedies for fraud in common law are damages for a wrong, and was compelled to define with care the wrong which



furnished a cause of action. Equity refused specific performance of a contract, or set aside a transaction, or gave compensation where one party had acted unfairly by the other.

5. The Court of Appeal in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* (2015) eKLR held that;

"It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs, Precedent of pleadings* 13<sup>th</sup> Edition at page 427:

"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd's Rep 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App Cas 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 chD 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".

6. Where fraud is alleged, it's a question of evidence, I find that there has been no pleading or particulars placed before court that established the defendants were parties to any fraud or illegality. Fraud has to do with a person's state of mind and intentions. There is no evidence that the 1<sup>st</sup> and 2<sup>nd</sup> defendants participated in any kind of fraud as abettors or perpetrators. No evidence has been adduced to prove ownership of the suit property. The plaintiffs have not produced a certificate of title to the suit property to ascertain indeed the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the registered owners of the suit property. If indeed the plaintiffs could not access the certificate of title to the suit property or any other document leading to the ownership of the same by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, they ought to have applied to the Land Registrar, who is the custodian and issuer of titles. The Land Registrar keeps the master record of all registered owners and guarantees a land title to be full, valid and indefeasible title. The plaintiffs came to court ill prepared for their case, they have been unable to produce in court any evidence of any interest they have in the suit property whether equitable or legal. The plaintiffs cannot claim title by merely entering into occupation and possessing the suit property, they are only trespassers in law. The amended plaint dated June 21, 2018 has no merit and is dismissed with no order as to costs as it was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**N.A. MATHEKA**

**JUDGE**

