



**M'Ikiao v M'Kiambati & another (Environment & Land Case
6 of 2020) [2022] KEELC 12570 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 12570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 6 OF 2020**

**CK NZILI, J
JULY 27, 2022**

BETWEEN

JOHN MUTUMA M'IKIAO PLAINTIFF

AND

ISAYA M'KIRERA M'KIAMBATI 1ST DEFENDANT

DANIEL KIUNGA M'KIAMBATI 2ND DEFENDANT

JUDGMENT

A. Introduction

1. When this suit came up for hearing on 17.3.2022, the plaintiff in the main claim failed to show up despite service of the hearing notice. The defendants sought for and the court proceeded to dismiss the main suit for both non-attendance and non-prosecution. This judgment relates to the 1st defendant's defence and counterclaim who testified de bene esse with leave of the court on 27.4.2021, in support of his claim.

B. Pleadings

2. By a plaint dated 30.1.2020 the plaintiff sued the defendants claiming to be in actual possession and the user of L.R No. Abothuguchi/Katheri/1195 since 1990, initially utilized by his late father as part and parcel of L.R Abothuguchi/Katheri/417 but subdivided in 2005.
3. He averred that the defendants fraudulently filed Meru CMCC ELC Case No. 37 of 2014 and obtained a decree in which an appeal was filed, heard and determined without his involvement leading the suit to be registered under the 1st defendant's name.



4. The plaintiff averred he thereafter filed Meru ELC No. 302 of 2019 against the registered owner and obtained a decree on 15.5.2019 by way of adverse possession only to establish that the land was already transferred to the 1st defendant through a fraudulently obtained decree.
5. He sought for a declaration that the commencement and prosecution of Meru CMCC ELC No. 37 of 2014 was fraudulent, the decree was null and void, rectification of the register, replacement of the name of the 1st defendant with his name and an order that the 1st defendant should surrender the original title deed for the execution of the prayers therein.
6. The 1st defendant filed a defence and counter claim dated 20.3.2020 stating that he has been in exclusive possession of L.R No. Abothuguchi/Katheri/417 which was never subject to any land committee, arbitration A/R objection or appeal cases. The 1st defendant averred that the 2nd defendant had illegally and secretly procured, registration over the suit land in his name but upon realization on 8.10.2013, he caused the cancellation and registration of the same under his name, lawfully through the Meru CMCC No. 37 of 2014 & Meru ELC Appeal No. 34 of 2017 in which two suits, the plaintiff herein failed to seek to be enjoined or to set aside or appeal against them but instead filed Meru ELC No. 302 of 2014 (O.S) without enjoining him, hence this suit remained sub-judice and required to be stayed.
7. As regards the counterclaim, the 1st defendant averred he was in exclusive control and the registered owners of L.R no. Abothuguchi/Katheri/1195 since 1944 and that on 17.11.2016 the plaintiff had trespassed into his land, caused damage of Kshs.380,800. He has sought for special damages and a permanent injunction plus costs of the suit.
8. By a reply to defence and defence to counterclaim dated 18.2.2021, the plaintiff denied knowledge of the existence of the alleged suits prior to the filing of Meru ELC No. 307 of 2017 or ever being an agent of the 2nd defendant. Further, the plaintiff averred the 1st defendant/plaintiff in the counterclaim sought and obtained orders to reopen Meru ELC No. 302 of 2017 (OS) which was still pending.
9. As regards the defence to counterclaim the plaintiff admitted that the 1st defendant was the current registered owner of the suit land which he termed as fraudulently done between his brother and the 2nd defendant and not as a result of the alleged gathering and or bequest from his late father as alleged in the counterclaim.
10. Further, the plaintiff denied the alleged long possession and user rights by the 1st defendant from 1944, since in 1980 the land was being cultivated by his late father and eventually he took over with effect from 1990 to the present given the 1st defendant's land was separate. He urged the court to dismiss the counterclaim with costs.
11. With leave of court, parties filed their bundle of documents on 26.4.2021 and 22.4.2021 respectively.

C. Testimony

12. DW 1 adopted his witness statement dated 22.4.2021 as his evidence in chief and produced the documents in his list dated 22.4.2021 namely a copy of title deed for L.R NO. Abothuguchi/Katheri/1195 as D. exh (1), official search as (D. exh 2), defence and counter claim in Meru CMCC No. 37 of 2014 as (D. exh 3), proceedings thereof as D. exh (4), plaint in Meru 37/14 as D. exh (5), decree as (D. exh 6), Judgment as (D. exh 7), letter dated 22.11.2016 and a reply of 24.11.2016 as D. exh 8 & 9, damage assessment report dated 2.6.2017 as D. exh. No. (10), order of injunction as D. exh (11), enforcement order issued on 13.3.2019 as D. exh (12), copy of letter to Njuri Ncheke dated 21.5.2019 as D. exh (13), ruling in Meru ELC JR 10/19 as D. exh (14), Judgment in Githongo PM Cr. Case No. 131/14 as D. exh (15) and a letter dated 21.5.2019 in ELC No. 301 of 2017 as D. exh



no. (16) respectively. Similarly, DW 1 produced the affidavit dated 27.5.2020 in Originating Summons No. 302 of 2017 and annexures thereto as his evidence and exhibits “16” respectively.

13. In cross examination DW1 testified he was aged 93 years old, lived in Kienjereni Nanyuki but acquired the suit land at Katheri from his late father and became the owner in 1956 which he later on subdivided in 2015 into L.R No’s 4552, 4553 and 4554 and gave out the land to the 2nd defendant, his late brother. Further DW 1 stated that his son was the one staying on the suit land in issue where he had planted coffee. DW 1 also confirmed her daughter and himself were utilizing the land which was under coffee as farm no. 9 as per the records held by Katheri Coffee Cooperative Society.
14. DW 1 confirmed it was his daughter who utilized the suit land doubling also as the sub-chief of the area known as Riije sublocation, in Kianthumbi location in which parcel No. 1195 is situated.
15. Lastly DW 1 insisted after he wrote the letter dated 22.11.2016 and obtained a court order one Mutuma stopped trespassing into the suit land and that the plaintiff while was responding to the said letter he did not state if he had any share(s) of the suit land.

D. Issues for determination

16. Having gone through the pleadings and evidence tendered by the plaintiff in the counterclaim, the issues for determination are:
 - i. Whether the 1st defendant and the plaintiff in the counterclaim has proved ownership of L.R No. Abothuguchi/Katheri/1195 to be entitled to a permanent injunction
 - ii. If the plaintiff has pleaded and proved damage to his farm.
 - iii. If in view of Meru CMCC NO. 37 of 2014 and Meru ELC No. 302 of 2017 this suit is res judicata & or Sub-judice.
 - iv. If the defendant in the counter claim has pleaded and proved any fraud over the manner the plaintiff and or 1st defendant herein obtained registration of the suit land so as to impeach the aforesaid title deed.
17. The 1st defendant who is also the plaintiff in the counterclaim has pleaded that he has been in exclusive possession of L.R NO. Abothuguchi/Katheri/1195 which land was never part of L.R Abothuguchi/Katheri/417 or subject to any disputes. He pleaded illegally and secretly the suit land was taken up by the 2nd defendant but on through Meru CMCC No. 37 of 2014 and Appeal No. 34 of 2017 the courts determined the suit in his favour and eventually acquired the title deed.
18. In his counterclaim, the plaintiff averred he was now the registered owner of the suit land which the defendant in the counterclaim had trespassed into on 17.11.2016, caused material damage assessed at Kshs.380,800/-
19. The plaintiff in his testimony has produced a copy of the title deed, search certificate, decree, assessment of the damage, order of injunction, enforcement notice and judgment in the previous suit(s).
20. In cross examination the plaintiff in the counterclaim explained how he acquired the suit land since 1956 and later on subdivided it in 2015. He testified that his daughter was the one utilizing the suit land. Further, DW 1 was able to describe the locality of the land and offer evidence in terms of demand letters which were sent to the trespassers.



21. In his defence, the 1st defendant to the counterclaim admitted that the plaintiff in the counterclaim was the registered owner but termed the said registration as fraudulent or illegal.
22. Further, the defendant in the counter claim denied the alleged gathering, long possession and or user rights as pleaded in the counterclaim by the plaintiff. He further alleged the suit land was separate from his which he was in exclusive control to present time.
23. The defendant in the counterclaim failed to show up and produce any documents before this court or offer any evidence in support of his reply to defence and defence to the counterclaim.
24. It is trite law that fraud must not only be pleaded but must also be strictly proved on a standard of proof above the ordinary balance of proof. It cannot be inferred from facts but must be substantiated as held in *Virjay Morjaria vs Nasingh Madbusingh Darbar & another* (2000) eKLR, and in *Aritbi Highway Developers vs West End Butchery* (2015) eKLR.
25. Again, where a party fails to offer testimony in support of its pleadings the pleadings, remain mere statements.
26. In *North End Trading Co. Ltd t/a Kenya Refuse Handlers Ltd vs City Council of Nairobi* (2019) eKLR the court held where a defendant does not adduce evidence, the plaintiff evidence is to be believed as allegations in the defence are not evidence.
27. In *Edward Mariga thro' Stanley Mobisa Magira vs Nathaniel David Shutter & another* (1979) eKLR the court held where there is no evidence by the opposite party, the version put forward by the present party is to be taken as unchallenged while in *CMCC Aviation Ltd vs Crusair Ltd* (1987) KLR 103, the court held averments in pleadings are not made on oath and the courts depend upon evidence for proof of their contents.
28. In this suit the plaintiff in the counterclaim has produced a title deed which under Sections 23, 24, 25 & 26 of the *Land Registration Act* 2012 is to be taken as prima facie evidence of ownership unless there is challenge based on fraud, illegality, misrepresentation or procurement through corrupt means. The defendant in the counterclaim has raised issues on fraud and illegality.
29. No substantiation of the said allegations and pleadings have been made through evidence. The pendency of a suit challenging the title has also been raised. Unfortunately, the defendant in the counterclaim has not testified to as its outcome and or as to whether the title deed held by the plaintiff has been declared invalid or illegal. Therefore issue no. (10) remains unproved by the defendant in the counterclaim.
30. In absence of such evidence by way of a decree from a superior court, I am inclined to find issue no. 1 answered in the affirmative. Concerning issue no.2, the plaintiff has produced the assessment of damage which the defendants have not challenged at all.
31. Further, on whether this suit is res judicata and res sub-judice the defendant as alluded above has not appeared before this court to testify in support of his plaint and the defence to the counter claim. His allegations on res judicata and res sub-judice remain as mere statements. Again, there is no evidence tendered to show that the decree in the trial court and the superior court was ever overturned in favour of the defendant in the counter claim.
32. Having found the plaintiff in the counterclaim is an absolute proprietor of L.R. Abothuguchi/ Katheri/1195, it follows that he is entitled to his ownership rights under Article 40 of *the Constitution* as read together with Order 40 Civil *Procedure Rules*.



33. In *KPLC vs Sherrif Molana Habib* (2018) eKLR the court held a permanent injunction also known as a perpetual injunction fully determines the rights of the parties before the court and is given on merits to restrain the commission of an act by the defendant so as to protect the rights of the plaintiff.
34. In my considered view the rights of the plaintiff in the counterclaim need to be protected.
35. I therefore find the plaintiff entitled to the same. The counterclaim is hereby allowed and the defence by the defendant the same dismissed with costs.

Orders accordingly

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 27TH DAY OF JULY, 2022

In presence of:

C/A: Kananu

C.P Mbaabu for defendant, plaintiff in counterclaim

Murira for plaintiff in the main suit

HON. C.K. NZILI

ELC JUDGE

