



REPUBLIC OF KENYA



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**Ndereba v Mbiyiwe & 5 others (Environment & Land Case
73 of 2011) [2022] KEELC 2458 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2458 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 73 OF 2011**

CK NZILI, J

JULY 20, 2022

BETWEEN

FRANCIS MBAE NDEREBA PLAINTIFF

AND

STEPHEN MURITHI MBIJIWE 1ST DEFENDANT

FRANCIS KIRIMI MBIJIWE 2ND DEFENDANT

JULIUS KIAMBI MBIJIWE 3RD DEFENDANT

KIMATHI MBIJIWE 4TH DEFENDANT

MWITI MBIJIWE 5TH DEFENDANT

KINYUA MBIJIWE 6TH DEFENDANT

JUDGMENT

A. Pleadings

1. The plaintiff as the registered owner of L.R Abogeta/U-Kithangari/1947 measuring approximately 6.5 acres, bought from one Lucas Kimanthi and adjoining L.R abogeta/U-Kithangari/1948, both subdivisions of the initial parcel No. 1231, sued the defendants as sons of Alexander Mbiyiwe M'Itabi, the registered owner of Parcel No. 1948 aforementioned for trespass on his and, sought for vacant possession, permanent injunction and mesne profits. The plaintiff relied on witness statement filed alongside the plaint, list of documents dated May 18, 2011, June 16, 2011, February 19, 2018, case summary and the issues for determination dated November 17, 2017.
2. By a defence and counterclaim dated July 12, 2011, the defendants averred the subdivisions and registration of the suit land in favour of the plaintiff was illegal, fraudulent and wrongful since at the time they were in possession, were not willing to let go their land, the land was their family land and it



did not belong to the alleged vendor; they were not consulted before the purported sale and the transfer and any alleged consideration paid by the plaintiff was unfortunate.

3. In counterclaim the defendants averred the plaintiff committed fraud and was not transparent in acquiring the land in that he conspired or colluded with one Lucas Kimanthi to subdivide and or acquire their family land without consulting or involving their deceased father or family members and by using undue influence through the local administration and the police to forcefully subdivide L.R No. Abogeta/U-Kithangari/1231.
4. Further the defendants averred that they had extensively developed the suit land which land was not up for sale by anyone of them least of all one Lucas Kimanthi, whose only entitlement as at the time of the subdivision by their deceased father was only 0.80 acres.
5. The defendants sought for the re-transfer of the land to the name of their deceased father Mbijiwe M’Itiabi. The defence and counterclaim was accompanied by witness statements, authority and consent to sue, list of documents dated June 28, 2017. In a reply to defence and defence to counter claim dated August 12, 2011 the plaintiff stated he was a legal purchaser of the land and denied the alleged fraud or collusion.

B. Testimony

6. PW 1 adopted his witness statement dated May 27, 2011 and produced documents as contained in the list of documents namely a copy of the register and search for L.R No. Abogeta/U-Kithangari/1947 and 1948 as (P. exh(1), 1 (a) & (b) & (c), decree in CMCC No. 40 of 2008 as P. exh (2), demand notice as P. exh (3) and a copy of title for L.R No. Abogeta/U-Kithangari/1947 as P. exh (4) respectively.
7. In cross examination, PW 1 stated that the defendants were nephews of the seller who were in occupation at the time he bought the land but gave them notice to vacate since the seller was the registered owner at the time and that the Chief Magistrates Case had already been determined though he was not party to it and could not therefore affect his purchasers rights. Further he said at the time given there were no inhibition or cautionary orders against the property or stay of the lower court decree.
8. PW 2 told the court the defendants were children of his late brother who was holding the land in trust but did not defend the lower court suit before he passed on in December 2008, despite service of the summons. He testified that he had applied that the land registrar signs the documents for him so as to get a transfer while his late brother was still alive soon after the decree was issued and was therefore not aware of any reversal of the decree by an appellate court allegedly made on July 7, 2008. PW 2 testified that he was not aware of any setting aside of the decree but confirmed he obtained the title deed in 2008 and sold the land soon after the case at the lower court was determined.
9. DW 1 adopted his witness statements dated July 12, 2011 and July 28, 2017 respectively. He admitted that one Lucas Kimanthi was his brother since his late father had four wives.
10. Regarding the suit in 2008, DW 1 said he knew about it but could not confirm if he had been sued by Lucas Kimanthi. He produced a land control board consent application dated May 12, 2005 as D. exh (1) a consent as D. exh (2), order and proceedings in CMCC No. 40 of 2008 as D. exh (3) and the decision in Civil Appeal no. 34/2009 D. exh (4) respectively.
11. In cross examination DW 1 stated their late father had brought up Lucas Kimanthi before elders alleging he was his son though the letter from the chief in support of the succession cause did not list him as a son. DW 1 told the court his late father passed on December 13, 2008 which was five months after the lower court decree. He said his late father died out of old age and was also sickly. As regards



fraud DW 1 said he did not make any criminal complaints against Lucas Kimanthi nor did he enjoin the land registrar or the Hon. Attorney General to this suit. He said he did not effect any caution or inhibition to the title as at December 23, 2008 when the plaintiff became the registered owner. He said the appeal was lodged in 2008 and allowed in 2018. DW 1 could not however confirm if the lower court decree had been set aside. He did not however produce any judgment, or order setting aside the lower court decree.

12. Similarly, DW 1 admitted that he did not produce any evidence showing his alleged developments on the suit land. He denied the existence any of customary trust over the suit land though he remembered going with Lucas Kimanthi, while his father was alive to the land control board for a subdivision.
13. Regarding the pending case, DW 1 testified he learned about the pending case in January 2009 after his father passed on, on August 13, 2008. He confirmed however no succession cause had been filed over his late father's estate except the limited grant ad litem.

C. Written Submissions

14. By written submissions dated February 9, 2022 the plaintiff takes the view the issues for determination are whether he holds a legitimate title requiring the issuance grant of the prayers sought and secondly if the defendant has proved his counterclaim.
15. As regards the 1st issue the plaintiff submits his title to the suit property was indefeasible under Section 26 (1) of the [Land Registration Act](#) 2012 which the defendants have failed to impeach in any of the set guidelines and to the required standard proof as held in [Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 others](#) [2013] eKLR and [Anastasia Ntakira vs Christopher M'Mwari Anthony & 2 others](#) [2015] eKLR.
16. On whether he was entitled to the prayers sought, the plaintiff submitted under Article 40 (1) of [the Constitution](#) he was entitled to enjoy his property by issuance of a vacant possession order and further mesne profits due to the wrongful occupation by the defendants as held in [Ministry Valji v Jenedira Raichand & 2 others](#) [2016] eKLR [John Mithamo Njika v Kellen Ndagala Ngumiri](#) [2015] eKLR, [Jeremiah Wachira Ichaura v KPLC Ltd](#) [2014] eKLR.
17. The plaintiff urged for a figure of Kshs.2 million mesne profits bearing in mind the case, acreage, inflation and the locality of the land in an arable area where he could have gained income from tea farming.
18. Concerning the counter claim the plaintiff submitted there was no pleading or prove of any trust, or setting aside of the lower court decree hence the counterclaim remained unproven.
19. The defendants by written submissions dated August 1, 2022 urged the court to find the issues for determination as whether the parcel of land on question originated from family land; if the case granting land to Lucas Kimanthi was still pending and its judgment conflicting or intertwined; whether a search is conclusive prove of ownership; whether the plaintiff used the right procedure to acquire the land and lastly the issues of costs.
20. On the first issue the defendants submit L.R No. 1947 arose out of L.R No. 1231 as per a copy of green card produced which is occupied by the defendants. On the 2nd issue it was submitted the lower court case was heard exparte and was still pending as ELC No. 4 of 2021 hence the plaintiff could not claim a valid title arising out of a challenged exparte judgment pending before court and the court should not give conflicting decision based on the same subject matter over the original Parcel No. 1231 which if done will lead to sub-judice given case No. ELC 4 of 2021 was filed earlier than this suit as held in [Republic v Paul Kihara Kariuki AG & 2 others exparte Law Society of Kenya](#) [2020] eKLR.



21. As regards the third issue the defendant submit the plaintiff admitted under oath that there were people living on suit the land at the time he bought the land meaning there was no due diligence hence he illegally acquired the land. Reliance was placed on *Daniel Kipruto Metto v Chase Bank (K) Ltd* (2018) eKLR and *NLC v African Export Import Ltd and 10 others* [2019] eKLR on the proposition that a search is not inclusive proof to ownership and under Section 26 of the *Land Registration Act* the court has wide powers to cancel title allegedly acquired unprocedurally even suo moto.
22. As to whether the right procedure was followed to acquire title by the plaintiff the defendants submit the initial land owner passed on December 13, 2008 and an ex parte order was issued on December 17, 2008 that dispensed production of title held by a deceased person.
23. The defendants submit that there was no subdivision plans to indicate actual subdivisions done on the ground occupied by them, the process of acquisition of land by the plaintiff was flawed and should not be sanctioned through the court by issuance of eviction orders.
24. Reliance was placed on *Pentecostal Assemblies of God (Bahati PAG) Church & 30 others v Peter Gathungu & 9 others* [2011] eKLR. In sum the defendants submitted the onus was on the plaintiff to show he did due diligence, and given there was a pending suit challenging the title of the seller, this being a court of equity it should dismiss the suit with costs.

D. Issues for Determination

25. Having gone through the pleadings, evidence and written submissions the issues commending themselves for determination are:
 - (i) If the plaintiff holds a proper title to the suit land to be entitled to the prayers for vacant possession, permanent injunction and mesne profits.
 - (ii) If the defendant pleaded and proved the land bought by the plaintiff was family land and was fraudulently or illegally obtained hence should be invalidated.
 - (iii) If the defendant was entitled to the prayers sought.
 - (iv) What is the order as to costs.

E. Determination

26. It is trite law parties are bound by their pleadings and issues flow from pleadings. See *IEBC & another vs Stephen Mutinda Mule & 3 others* (2014) eKLR.
27. The plaintiff brought this case as the registered owner of land parcel No. Abogeta/U-Kithangari/1947 said to border L.R No. 1948 held by the defendant's late father now deceased and which arose out of a subdivision of L.R No. Abogeta/U-Kithangari/1231. He averred the defendants were illegally trespassing into his land hence sought for vacant possession, permanent injunction and mesne profits. He produced a copy of title deed issued on February 20, 2009 and submitted it was prima facie evidence of ownership entitling him proprietary rights and safeguards against the defendants' illegal actions of trespass.
28. On the other hand, the defendants pleaded the land was initially family land; the process of acquisition by the alleged seller to the plaintiff was flawed, illegal and subject to pending litigation before this court and hence sought its invalidation on account of fraud, illegality and being subject to their overriding interests under trust.



29. In order to impugn a title under Section 26 (1) of the [Land Registration Act](#), a party must prove fraud, misrepresentation, corrupt scheme, illegality or acquisition in unprocedural manner.
30. It is title law that any allegations of fraud, illegality and misrepresentation must be strictly pleaded and proved. See [Aritbi Highway Developers Ltd v West End Butchery Ltd & 6 others](#) [2015] eKLR.
31. In [Karia Kiarie & 2 others vs Sammy Magera](#) (2018) eKLR the Court of Appeal held fraud must be specifically pleaded and proved on a standard of proof which is higher than of ordinary suits and cannot be inferred from the facts.
32. The defendants at paragraph 11 of the counterclaim pleaded and particularized the allegations of fraud. The defendants claimed that without their approval, knowledge and consent the plaintiff conspired or colluded with the Lucas Kimanathi to acquire their family land by subdividing it without following the laid down procedure, doing it hurriedly or secretly, not consulting the deceased or his family and unduly colluded with the local administration and the police.
33. The question for this court to determine is whether the defendants have presented any evidence for that matter to prove the claim of fraud to the required standards as per the cited case law.
34. In Alice Chemutai Too (*supra*) the court held where one intends to impeach a title on the basis that it was procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation and that where a party pleads illegality, unproceduralness or through corrupt scheme he need not demonstrate that the title holder is guilty of any immoral conduct on his part.
35. In their evidence the defendants admitted on Lucas Kimathi the initial owner and seller of the suit land to the plaintiff was their close relative – a brother who had sued their late father, had come to the land in 2005 as per D. exh 3 and D. exh 4 respectively.
36. The defendants admitted the said Lucas Kimanathi obtained a decree on account of customary trust in Meru CMCC No. 40 of 2008. The defendants however claimed the said decree was overturned by the appellate court in 2018. They did not however produce anything to show that there was indeed such order or judgment from the appellate court. Similarly, the defendants produced nothing to show that the said lower court decree was either reviewed or set aside by a superior court.
37. Further the defendants averred there was collusion and on conspiracy between the plaintiff and Lucas Kimanathi in the manner L.R No. 1231 was split to L.R No. 1947 and 1948.
38. It is trite law that he who alleges must prove under Sections 101 – 112 of the [Evidence Act](#). When asked if he made any formal complaint to the police and the Land Registrar on the allegations of conspiracy and collusion, DW 1 was emphatic that he did not do so or see the need to enjoin the Land Registrar and whoever else participated in effecting the fraud including Lucas Kimanathi to this suit.
39. On the other hand, the plaintiff produced a decree dated October 27, 2008 and September 25, 2008 issued in Meru CMCC No. 40 of 2008, a judgment, official search dated 6.4.2009 for L.R No. 1947, green card for L.R No. 1231, an order dated December 17, 2008 from Meru CMCC No. 40 of 2002 and a sale agreement.
40. The defence produced nothing to point out any illegalities or fraud over all these exhibits. Similarly, the defendants produced no order, stay or rival decree from a superior court overturning P. exh 2, 4 & 7.
41. Additionally, the defendants produced no investigative report from forensic documents examiner and or any government investigative agencies showing that the plaintiff had participated in any fraudulent



- or corrupt or illegal and unprocedural scheme in seeking for and obtaining the suit land from its mother title.
42. It was not enough for the defendants to plead fraud, or illegality and leave the facts without substantiating such grave allegations some of which were touching on the court processes regarding Meru CMCC No. 40 of 2008 decree and the judgment.
 43. The mere fact that there was a pending judgment or appeal on the issue and which there was no application made to consolidate this file with, does not by itself amount to impeachment of the title held by the plaintiff.
 44. Further and more importantly the defendants were sued in their individual capacities as trespassers to the suit land held by the plaintiff as an innocent purchaser for value. See *Katende v Haridar & Company Limited* [2008].
 45. Incidentally at paragraph 11, 12, 13 & 14 of the counterclaim the defendants pleaded and advanced a claim that the suit property was part of family land. Their prayer was that the land be declared family land and an order be made for the plaintiff to retransfer the same to the name of their deceased father M'Mbijiwe M'Itiabi.
 46. The defendants did not produce any letters of grant to show that they had capacity to advance the interest of their deceased father. In absence of such documents my finding is that the defendants lack capacity to sue for and on behalf of the estate of the deceased.
 47. As regards the issues whether Parcel No. 1947 arose out of 1231, whether the case that granted the land to Lucas Kimanthi was still pending in court and whether there would be conflicting judgment, it is trite law parties are bound by their pleadings and issues flow from pleadings.
 48. The defendants have not pleaded for any invalidation of the creation of customary trust out of L.R No. 1231 to the two parcels of land. Further there was no specific pleading by the defendants up to the hearing of their defence and counter claim that a related matter was pending elsewhere in this court and or seeking for the consolidation of any appeal with this suit if at all they were related. There was also no request made by the defendants to enjoin Lucas Kimanthi to this suit as an interested party.
 49. Again, other than D. exh 3 & 4 the defendants did not file any decree from the High court invalidating the decree in Meru CMCC No. 40 of 2008.
 50. Submissions however forceful cannot not replace pleadings and amount to or evidence tendered by parties in court as held in *Erastus Wade Opande v KRA & another* Kisumu HCCA No. 46 of 2007.
 51. The issues and facts being raised by the defendants at paragraphs 12, 15, 16, 19, 20, 21, 22, 23, 24, of the written submissions were never pleaded and or such evidence tendered before this court.
 52. The defendants never raised the said matters in the defence and counterclaim. More importantly the defendant did not produce any documents by that effect at the time DW 1 took the witness stand.
 53. A party can only prove his claim through evidence. What appears in written submissions cannot possibly be taken as evidence. In *Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi & another* (2014) eKLR the Court of Appeal held submissions do not constitute evidence and cannot take the place of evidence.
 54. In *Avenue Car Hire & another v Slipha Wanjiru Muthegu* Court of Appeal No. 307 of 1997 the Court of Appeal held that no judgment can be based on written submissions and such a judgment was a nullity since Order 18 Rule 2 Civil Procedure Rules does not include it as one of the modes of receiving



evidence in court. Lastly, on the issue of mesne profits no evidence was tendered in support. The claim is also is rejected for submissions cannot out to evidence.

55. In absence of such pleadings and or evidence, I find the said issues and matters being raised at submissions stage as irrelevant, misleading and aimed at stealing a match from the plaintiff. See *Nancy Wambui Gacheru v Peters W. Wanjere Ngugi* Nairobi HCCC No. 36 of 1993, *Ng'ang'a & another v Owiti & another* [2008] 1 KLR (EP) 749.
56. In the premises I find the plaintiff to have proved his claim and hence entitled to the prayers sought in the plaint for terms of prayer 1 & 2. The counterclaim is dismissed with costs to the plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 20TH DAY OF JULY, 2022

In presence of:

Kiruai for plaintiff

Karanja for defendant

HON. C.K. NZILI

ELC JUDGE

