



**Wambura v Wambura & another (Environment & Land Case  
54 of 2018) [2022] KEELC 2862 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2862 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 54 OF 2018**

**AA OMOLLO, J  
JULY 20, 2022**

**BETWEEN**

**ANAKLETUS WAMBURA ..... PLAINTIFF**

**AND**

**JOHN WAMBURA ..... 1<sup>ST</sup> DEFENDANT**

**GEOFFREY WAMBURA ..... 2<sup>ND</sup> DEFENDANT**

*(Formerly Busia CMCC Case No. 22 of 2012)*

**JUDGMENT**

1. The plaintiff *vide* a plaint filed 16<sup>th</sup> of January, 2012 impleaded the defendants in this suit and prays for judgement against them for:
  - a. An eviction order; and
  - b. Costs of the suit.
2. The plaintiff avers that he is the registered owner of LR No Samia/Bulemia/2692 and that the defendants without any colour of right constructed semi-permanent houses on the land. That despite his objection and displeasure to the defendants' occupation to the land, they have declined to leave the said land hence this suit.
3. The defendants filed their amended defence and counterclaim on the 6<sup>th</sup> of August, 2019 in which they admitted that the plaintiff is the registered owner of LR No Bunyala/Bulemia/2692 not 2962. They stated that the plaintiff got registered as the owner of LR No Bunyala/Bulemia/2692 illegally, unlawfully, fraudulently and by concealment of material facts particularised as:
  - a. That the plaintiff took advantage of the sickness and illiteracy of the Vendor and the absence of the 1<sup>st</sup> defendant to have the suit land registered in his name;



- b. That the plaintiff did not disclose that the 1<sup>st</sup> defendant was a co-owner of the suit land and so merited to be registered as a co-owner;
  - c. That the plaintiff failed to disclose that the 1<sup>st</sup> defendant was in occupation of the suit land with the plaintiff.
4. The defendants in their counterclaim aver that the land parcel was bought jointly by the plaintiff and 1<sup>st</sup> defendant and is therefore entitled to ½ share in the land. They prayed for an order of cancellation of the plaintiff's title with respect to the suit land on the ground that he was registered as the owner of the land illegally. They further urged this court to order the land shared equally between the plaintiff and the 1<sup>st</sup> defendant together with the costs of the counterclaim.
5. The plaintiff filed a response to the counterclaim on the 20<sup>th</sup> of August, 2019 reiterating that he is the sole registered owner of the suit land and the defendants' counterclaim should be dismissed for being res judicata in view of the proceedings in Busia HCC No 52 of 2015.
6. The hearing commenced on the 25<sup>th</sup> of November, 2021 with the plaintiff testifying as PW1. He stated that the 1<sup>st</sup> defendant was his brother while the 2<sup>nd</sup> defendant was the 1<sup>st</sup> defendant's son. He stated that he bought the land from one Wanga Mzungu in 1971 and immediately took possession of the same. That he also settled his mother to the land. PW1 averred that sometime in the year 2000 after losing his job and the 1<sup>st</sup> defendant came to live in PW1's structure on the land. That despite being evicted in the year 2005, he came back forcefully on to the land. PW1 denied the assertions that the 1<sup>st</sup> defendant helped him buy the land. He produced the documents on his list as PEx1-4.
7. During cross-examination, PW1 stated that he was the one who made the decision to buy the land and denied the allegations that the 1<sup>st</sup> defendant sent him money for the same as he was in Dar es Salaam in the year 1976 after PW1 had bought the land. He elaborated that the money sent to him by the 1<sup>st</sup> defendant was for rent arrears and not for the land. That the 1<sup>st</sup> defendant went to his home in 1983. He confirmed that all the 1<sup>st</sup> defendant's children have also built on the suit land. On re-examination, PW1 stated that despite constantly reminding the 1<sup>st</sup> defendant to move out, he did not and consequently his house was demolished using an order obtained in this court.
8. The 2<sup>nd</sup> defendant testified as DW1 while the evidence of the 1<sup>st</sup> defendant was admitted without appearing in court due to his ill-health. The 2<sup>nd</sup> defendant stated that the suit land belonged to both the 1<sup>st</sup> defendant and the plaintiff. He stated that he was born on the land and that they were 6 surviving siblings of the 1<sup>st</sup> defendant all living on the suit land. DW1 stated further that his father had informed him that they agreed with the plaintiff to buy the land to settle in together with their mother. He confirmed that he had copies of documents used in sending the money to the plaintiff for purchase of the land and not for rent arrears. He produced the documents on his list of documents dated November 6, 2018 as exhibits Dex 1-6.
9. During cross-examination, DW1 confirmed that they have not been living on the land peacefully since 2010. That the total amount of money sent by his father was KShs 2,800 and that his father confirmed that he had no rent arrears.
10. Parties filed and exchanged their written submissions with the plaintiff filing his on the 21<sup>st</sup> of February, 2022. He submitted on the following issues for determination: who is the registered proprietor of the suit land; was the registration actualized by fraud; does the defendant have an equitable right to half share of the parcel of land; and whether the defendant's claimed is barred under statutes. He submitted that although the defendants pleaded fraud, the proof of fraud in civil matters goes beyond just stating it in the pleadings and that none of the allegations of fraud that have been pleaded have been



proved to the required standard. On whether the defendant has an equitable right to half a share of the suit land, the plaintiff submitted that this was not proved and that during trial he explained that the money received from the defendant was for other transaction and not for purchasing land. He concluded by stating that this claim was time barred because a claim for land has to be brought to court within 12 years and the defendants' admission that he had been in the knowledge and occupation of the suit land from 1992 to 2019 proves that. He urged this court to issue the eviction order and dismiss the defendants' counterclaim.

11. The defendants filed their submissions on the 1<sup>st</sup> of March, 2022. They stated that they were brother and nephew to the plaintiff respectively a fact that the latter seems to have conveniently forgotten. That that the 1<sup>st</sup> defendant has been residing on the suit land since the 1970s and that although the plaintiff claims that he invited the defendant to stay with him, he has not explained to the court whether and when he issue the notice to vacate as well as when the hospitality ended and trespass began. The defendants stated that they produced bank documents to prove the payments made and that a handwritten letter by the plaintiff produced during the District Land Tribunal confirmed that the plaintiff acknowledged receipt of KShs 650 with KShs 600 being deposit paid for the land and KShs 50 for their mother's upkeep. That they bought the suit land as family land and that the only reason it was registered in the sole name of the plaintiff was because he was the one on the ground.
12. The defendants rebutted the plaintiff's submission that their counterclaim is time barred and stated that the fact that he has been living on the suit land from the 1970 also makes the plaintiff's suit time barred because he instituted his claim in 2012 while the land was bought in 1974. They urged this court to dismiss the plaintiff's suit with costs and judgement be entered for the defendants on their counterclaim.
13. The following questions are framed by the court for determination of the dispute:
  - a. Whether the plaintiff acquired Land Reference No Bunyala/bulemia/2692 fraudulently;
  - b. Whether the defendants should be evicted for having trespassed onto Land Reference No Bunyala/bulemia/2692;
  - c. Whether the plaintiff's title should be cancelled and the suit land registered in the joint names of the plaintiff and 1<sup>st</sup> defendant;
  - d. Who bears the costs of this suit?
14. The principles of proving fraud were laid bare in HCCC No 135 of 1998 *Insurance Company of East Africa vs The Attorney General & 3 Others* as borrowed from page 427 in *Bullen & Leake & Jacobs, Precedent of pleadings* 13<sup>th</sup> edition quoting with approval the cases of *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd's Rep 305, 308, *Lawrence V Lord Norreys* (1880) 15 App Cas 210 at 221 and *Davy V Garrett* (1878) 7 ch D 473 at 489 thus: -

“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. 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). 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. “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”.

15. The plaintiff's claim for eviction is on the premise that he solely bought the suit land, but which claim the defendants countered by stating that suit land was jointly purchased after the 1<sup>st</sup> defendant while working in Dar es Salaam contributed to the purchase price to enable them get family land after the floods had displaced them. The defendants produced an agreement for sale of land dated 21<sup>st</sup> of August, 1975 faintly visible and written in the local dialect which inferred a sale of land from one Wangwe Musungu and the plaintiff at Kshs 1,950/- and attached the bank slips for the said moneys.
16. The plaintiff on the other hand stated that he bought the land from the said vendor but with his own money and that the money the 1<sup>st</sup> defendant claims to have sent him was for payment of the 1<sup>st</sup> defendant's rent arrears and not the purchase of the land. In his evidence in chief, PW1 stated that he bought the land in 1974 from Wangwe Musungu even though he did not produce an agreement for sale to contradict the one produced by the defendants. He also alleged that the 1<sup>st</sup> defendant went to Dar es Salaam in 1976 after he had already bought the property.
17. From the evidence produced by the defendants, the agreement for sale was made in 1975 when the 1<sup>st</sup> deposit of Kshs 400 was paid on September 21, 1975 and a further payment Kshs 600 made on the 21<sup>st</sup> of October. The slips for monies sent to the plaintiff and produced as Dex 2-4 bear the dates of October and December 1975. The plaintiff did not disclose how much was the rent arrears and the burden to prove that these monies were for payment of rent arrears shifted to the plaintiff. No such evidence was adduced.
18. From the history of the land as gleaned from the evidence, it appears to me that the plaintiff and the 1<sup>st</sup> defendant agreed to buy the land to relocate to after they were affected by the floods. Although the plaintiff initially claimed that the 1<sup>st</sup> defendant entered the land in the year 2000, he later conceded that the defendants started living on the suit land in 1983 after he came home and he built his home on the said land together with all his sons. The 2<sup>nd</sup> defendant while testifying as DW1 also confirmed that he was born on the suit land and they lived thereon peacefully until 2010. First, the plaintiff was under a duty to this court to prove why he allowed the 1<sup>st</sup> defendant to stay on the land for that long before now coming to court to evict him. As counsel for the defendants submitted, he needed to answer the question, what changed?
19. I am satisfied by the evidence adduced by the defendants that the 1<sup>st</sup> defendant contributed to the purchase of the land. Therefore, it was unlawful for the plaintiff to register himself only as the owner thereof. The evidence of contribution is supported by the fact the plaintiff allowed the 1<sup>st</sup> defendant together with his family to live on and work the land. The defendants are not trespassing and for this reason alone, the plaintiff is not entitled to the orders of eviction being sought.
20. In reply to the counter-claim, the plaintiff claimed that the same is res judicata ELC case no 52 of 2015 and time barred. On the question of *res judicata*, the case number 52 of 2015 was brought by the current defendants against the plaintiff by way of an originating summons. In the copy of the ruling from that case produced by the plaintiff, the originating summons was struck out for failure to annex a copy of the extract of the register of the suit land. The former case was not heard and determined on its merits thus it does not satisfy the threshold set in section 7 of the *Civil Procedure Act*.



21. On the limb of time bar, the plaintiff acquired the title in his name on January 1992. The suit was filed in the chief magistrate's court in the year 2012 before being transferred to this court June 2018. Section 7 of the Limitations of Actions Act provides that

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

22. Once a period of 12 years has lapsed, a party is estopped from bringing an action for the recovery of land unless the court grants them leave to do so. From his evidence, the plaintiff acquired title to the suit land with the defendants in possession so that his right to bring an action accrued from January 1992. For his claim, the twelve-year period from 1992 elapsed in the year 2000. While for the defendants, the limitation would only apply if the plaintiff recovered possession before the lapse of twelve years of their occupation. Thus the time barrier worked against the plaintiff but in favour of the defendants. By the time the plaintiff brought this claim, his right over the portion occupied by the defendants had been extinguished by section 17 of the Limitation of Actions Act which provides thus:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

23. With regards to the third issue, on whether the plaintiff's title should be cancelled, the Land Registration Act empowers this court to order the rectification of the register under section 80 which provides that,

1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

24. In light of the foregoing, I find that the plaintiff's claim for eviction is without merit and is hereby dismissed. On the other hand, I am persuaded to find that the defendants have demonstrated that they are entitled to a portion of the suit title they are in occupation of both by virtue of joint purchase and or by operation of the law. Consequently, I enter judgement for the defendants as per the counter-claim that:

- a. The plaintiffs title to LR No Bunyala/bulemia/2692 is hereby cancelled;
- b. The said LR No Bunyala/bulemia/2692 shall be surveyed and subdivided between the plaintiff and the 1st defendant putting into consideration their current residences and separate titles issued;
- c. The plaintiff shall sign the requisite forms and avail the necessary documents to facilitate the subdivision of and transfer of the suit portion to the 1st defendant's name or his nominee. In default, the Deputy Registrar of the court to execute the said documents in execution of this decree.
- d. The surveyor's costs to be borne by the defendants;



e. This being a case between family members, there shall be no order as to costs.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 20TH DAY OF JULY, 2022.**

**A. OMOLLO**

**JUDGE**

