



**Ochieng v Muchuku & another (Environment and Land Case Civil Suit
274 of 2014) [2022] KEELC 2467 (KLR) (14 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE CIVIL SUIT 274 OF 2014**

EO OBAGA, J

JULY 14, 2022

BETWEEN

PHILIP DIRO OCHIENG PLAINTIFF

AND

PATRICK MWANGI MUCHUKU 1ST DEFENDANT

LABAN SHACHILE MUKOYWA 2ND DEFENDANT

JUDGMENT

1. By an amended plaint dated 6th August, 2019, the Plaintiff sought the following reliefs against the Defendants: -
 - a. A declaration that the 1st Defendants' purported acquisition of the suit property vide sale agreement dated 8th January, 2007 was fraudulent and is of no effect.
 - b. A declaration that the purported acquisition and transfer of the suit property by the deceased from the 1st Defendant was null and void and of no consequence.
 - c. An order for cancellation of the registration of the Defendants as owners of the suit property vide entries numbers 1, 2, 3 and 4 in the register and the restoration of the Plaintiff as the registered proprietor thereof.
 - d. An order of eviction against the 2nd and 3rd Defendants from all that parcel of land known as ELdoret/Municipality Block 11/490.
 - e. A permanent injunction against the 2nd and 3rd defendants restraining them their agents, servants, employees or any one of them claiming through them from trespassing into, taking possession or occupation of, constructing any structures or in any other way interfering with the Plaintiffs use and possession of the suit property.



f. Costs of the suit.

Plaintiff's case:

2. On 8th September, 1989, the Plaintiff entered into an agreement with Lenah Jerono Rotich for purchase of a plot known as plot No 37 within Eldoret Municipality. The plot had a permanent building comprising of 8 rooms which were half way complete.
3. The Plaintiff paid the entire purchase price of Kshs 120,000/= The vendor wrote a letter to the Municipal Council of Eldoret informing them that she had transferred her interest in the plot to the Plaintiff. The Municipal Council of Eldoret wrote back to her with a copy to the Plaintiff confirming that they had accepted the transfer.
4. The necessary changes were effected at the Municipal Council of Eldoret and the demand for rates started coming out in the name of the Plaintiff. Upon registration, plot No 37 became Eldoret Municipality/Block 11/490 (suit property).
5. In August 2009, the Plaintiff went to the suit property and found someone proceeding with construction. He wrote a letter to Eldoret Municipal council asking them to stop whoever was putting up a house on the suit property.
6. The Eldoret Municipal council wrote to the person who was developing and asked him to stop any further construction and reminded him that he had not obtained building approvals from the council. The person constructing was Laban Sachile Mukoywa now deceased who is being represented by the 2nd and 3rd Defendants as the administrators of his estate.
7. The Plaintiff reported the matter to Police for investigations but no action took place prompting the Plaintiff to file this suit. The Plaintiff states that he did not know the 1st Defendant who purports to have purchased the suit property from him. He states that the ID card number, PIN and photograph appearing on the transfer documents and sale agreement as well as the signatures do not belong to him.
8. The Plaintiff states that he was born in 1945 whereas the ID in the transfer documents puts his year of birth as 1961. He states that he did not have any dealings with either the 1st Defendant or the deceased Laban Shachile Mukoywa. He further states that despite the deceased being asked to stop further construction and being served with a demand from his advocate, he nevertheless continued to construct and that his family is in occupation of the suit premises.
9. A search at the lands office showed that the suit property was registered in the name of the 1st Defendant who later transferred it to Laban Shachile Mukoywa. The Advocate who witnesses the agreement between the 1st Defendant and Laban Shachile Mukoywa testified that he knew the 1st Defendant but that he did not know the person who was selling the suit property. He admitted that he did not carry out any due diligence before witnessing the sale agreement.

1st Defendant's case:

10. The 1st Defendant testified that he purchased the suit property from one Philip Diro Ochieng on 8th January, 2007. He proceeded to Municipal Council of Eldoret where he processed a lease after which he went to the Lands Office where the lease was registered and he was issued with certificate of lease.
11. The 1st Defendant stated that he paid stamp duty and there were clearance rates in the name of Philip Diro Ochieng. After the post-election violence of 2007, he sold the suit property to Laban Shachile Mukoywa and that he has never been to the suit property and does not know its current state.



2nd and 3rd Defendants' case:

12. The 2nd and 3rd Defendants are the administrators of the estate of Laban Shachile Mukoywa who died on 23rd December, 2017 (Deceased). The 1st Defendant who is the widow of the deceased testified that during the lifetime of the deceased, the deceased took her to the suit property and showed her houses which comprised of two single rooms, two self-contained single bedrooms, and two self-contained double bedrooms.
13. Upon the demise of the deceased, she took charge and started managing the suit property. She testified that she was not present when the deceased purchased the suit property. she further testified that the deceased lost the certificate of lease. He applied for a copy but had not obtained it as at the time he died.

Analysis and determination;

14. The Plaintiff filed his submissions on 1st March, 2022 and further submissions on 21st April, 2022. The 1st Defendant filed his submissions on 16th May, 2022. The 2nd and 3rd Defendants filed their submissions on 12th April, 2022. I have considered the evidence adduced by the Plaintiff as well as that of the defendants. I have also considered the submissions by the parties. The following are the issues which emerge for determination: -
 - i. Whether the transfer of the suit property from the Plaintiff to the 1st Defendant and the subsequent registration in the 1st Defendants name was lawful.
 - ii. Whether the transfer of the suit property from the 1st Defendant to Laban Shachile Mukoywa was lawful.
 - iii. Was Laban Shachile Mukoywa an innocent purchaser for value without notice of any defect in title of the 1st Defendant.
 - iv. Which order should be made on costs.

Whether the transfer of the suit property from the Plaintiff to the 1st Defendant and the subsequent registration in the 1st Defendant's name was lawful;

15. There is no contention that plot 37 is what later became the suit property upon registration. There is also no contention that the suit property was transferred from its original allottee to the Plaintiff's name. As late as 2014, the demand for rates were coming out in the name of the Plaintiff which means that the records in the County Government of Uasin Gishu which is the successor of Eldoret Municipal Council are still in the names of the Plaintiff.
16. During cross-examination of the 1st Defendant, he conceded that the Philip Diro Ochieng with whom he entered into a sale agreement was not the Plaintiff in this case. He further conceded that he did not carry out due diligence before he signed the sale agreement. While still being cross-examined by the Plaintiff's counsel, he admitted that he is not the one who signed the sale agreement. The sale agreement was signed on his behalf by a person whose name was indicated on the sale agreement.
17. According to the ID card which was presented during registration of the lease, the Plaintiff is alleged to have been born in 1961. The photograph appearing on the said ID Card number is not that of the Plaintiff. The fake photograph was mounted on the old generation ID Card. The correct date of birth of the Plaintiff Is 1945.



18. During the course of hearing, the 1st Defendant tried to produce documents which had not been served upon the other Advocates. There was objection of such documents. The 1st Defendant went and filed a list of documents on 6th October, 2021. This time round, he filed a copy of I.D card under new generation but the ID card still showed that the alleged Philip Diro Ochieng was born in 1961. According to the correct ID card of the Plaintiff, a copy of which was produced, he was born in 1945.
19. Again on the issue of transfer, the PIN which was given was xxxxxxxxx for Philip Diro Ochieng who was born in 1961. The correct PIN for the Plaintiff is xxxxxxxxx and the Plaintiff was born in 1945. It is therefore clear that the documents used to convey the suit property from the Plaintiff to the 1st Defendant as well as the documents used to register the suit property in the 1st Defendant's name were forgeries.
20. The lease which was presented for registration was signed by the mayor and town clerk but the signatures of the two were never witnessed by an advocate as required by law. A document which was not duly executed would not have been the basis of a lawful registration. There is every indication that the 1st Defendant was part of the fraudulent scheme. He has conceded that even the sale agreement the basis of which he purports to derive title was not signed by him.
21. In the case of *Munyu Maina –Vs- Hiran Gatiba Maina* (2013) eKLR the Court of Appeal stated 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 in the register.”
22. In the case of *Vijay Morjaria –Vs- Nansingh Madhusing Darbar & another* (2000) Tunoi J A as he then was) stated 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
23. The Plaintiff in this case pleaded particulars of fraud which he went ahead to prove. The admission by the 1st Defendant that he did not deal with the Plaintiff lessened the burden of proof which lay on the Plaintiff. This admission having been made, there was no need for the Plaintiff to bring evidence of a handwriting expert to say that he is not the one who signed the documents which led to the registration of the 1st Defendant as proprietor of the suit property.
24. Equally, it was not necessary for the Plaintiff to call officers from Lands office to come and confirm as to how the 1st Defendant came to be registered as owner of the suit property. The forged documents are there for all to see. No proper registration would have been based on a lease which was not properly executed. The court ordered the officials of the Lands office to give the Plaintiff an official search and register a restriction on the title. This was done and these documents were produced by the Plaintiff. There was therefore no need for officialS from the Lands office to be called to come and say that the 1st defendant was registered as owner of the suit property on 30th November, 2007 and that there was



transfer to Laban Shachile Mukoywa on 23rd September, 2008. In this regard the decisions in [*Jennifer Nyambura Kamau –vs- Humbrey Mbaka Nandi*](#) (2013) eKLR and [*Moses Parantai & Peris Wanjiku Mukuru suing as legal representatives of the estate of Sospeter Macharia Mukuru Mbeere \(deceased\) – Vs- Stephen Njoroge Macharia*](#) (2020) eKLR relied on by the 2nd and 3rd Defendants are distinguishable.

25. The Plaintiff's only burden was to show that the 1st Defendant was involved in the fraud. The 1st Defendant did not bother to say how or where he met the alleged Philip Diro Ochieng or where he is. He simply said that the said Philip Diro Ochieng was not the Plaintiff herein. The fact that the 1st Defendant admitted that he is not the one who signed the agreement and that the agreement was signed on his behalf is a strong pointer that he was part and parcel of the fraud.
26. The 1st Defendant did not provide any evidence in form of sale agreement to show that he sold the suit property to Laban Shachile or what consideration the said Sachile paid to him. What is only seen is Laban Shachile's name in the extract of the register which was produced by the Plaintiff. The 1st Defendant was operating in a mysterious way and this shows that he knew what he was doing. I therefore find that the suit property was fraudulently conveyed from the Plaintiff and fraudulently conveyed in the name of the 1st Defendant.

Whether the transfer of the suit property from the 1st Defendant to Laban Shachile Mukoywa was lawful;

27. I have already found out hereinabove that the registration of the suit property in the name of the 1st Defendant was not lawful. The 1st defendant therefore had no good title to transfer to Laban Shachile Mukoywa. The 2nd and 3rd Defendants who are the administrators of the Estate of Laban Shachile Mukoywa have not produced anything to show how the deceased acquired the suit property. They said that the deceased lost the title and had applied for the same. There was no evidence adduced to confirm this. As the root title of the deceased is being challenged, the 2nd and 3rd Defendants cannot simply bank on the registration in the register as proof of the deceased's acquisition of a proper title. They ought to have gone beyond the entry in the register to demonstrate that the deceased acquired the suit property lawfully as was held in the case of [*Munyu Maina*](#) (Supra).

Whether Laban Shachile was an innocent purchaser for value

28. The 2nd and 3rd Defendants are claiming that the deceased was an innocent purchaser for value without notice of any defect in the title. Citing the decision in the Uganda case of [*Kalende –vs- Haridar & Company Limited*](#) (2008) 2 EA P. 173, the Court of Appeal in [*Weston Gitonga & 10 others –Vs- Peter Rungu Gikanya & another*](#) (2007) eKLR stated as follows:-

“...it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that –(a) he holds a certificate of title; (b) he purchased the property in good faith; (c) he had no knowledge of the fraud, (d) he purchased for valuable consideration; (e) the vendors had apparent valid title; (f) he purchased without notice of any fraud; and (g) he was not party to any fraud.”

29. In the instant case, the 2nd and 3rd Defendants did not produce any title in the name of Laban Shachile Mukoywa. They simply said that he had applied for a copy of title after losing the original and that he never got one. There was no evidence adduced of the alleged application for a copy. What is only available is an extract of registrar which shows that Laban Shachile Mukoywa was issued with certificate of lease on 23rd September, 2008.



30. Even assuming that Laban Shachile Mukoywa had title, would he have passed the test of an innocent purchaser? The answer is no. This is because there was no evidence of purchase of the suit property from the 1st Defendant. There was no evidence of any consideration made. There was no evidence of payment of stamp duty or transfer. In the absence of all this and given the fact that the 1st Defendant who alleges to have sold to him did not give an iota of evidence of the alleged sale, there is no basis upon which this court can hold that Laban Shachile Mukoywa was innocent of the fraud involved. The deceased does not fit the bill of an innocent purchaser for value without any defect in title.

Disposition:

31. It is clear from the above analysis that the Plaintiff has proved his case on a balance of probabilities. I enter judgement for him against the Defendants in the following terms;
- a. A declaration is hereby given that the 1st Defendant's purported acquisition of LR. No Eldoret Municipality/Block 11/490 vide sale agreement dated 8th January, 2007 was fraudulent and is of no effect.
 - b. A declaration is hereby given that the purported acquisition and transfer of LR. No. Eldoret Municipality from the 1st Defendant was null and void and of no consequence.
 - c. An order is hereby given cancelling the registration of entries numbers 1, 2, 3 and 4 and in place thereof registration of the Plaintiff as proprietor of LR. No. Eldoret Municipality/Block 11/490.
 - d. An order of eviction against the 2nd and 3rd Defendants from all that parcel of land known as Eldoret Municipality/Block 11/490.
 - e. A permanent injunction is hereby given against the 2nd and 3rd Defendants restraining them, their agents, servants, employees or any one of them claiming through them from trespassing into, taking possession or occupation of, constructing any structures or in any other way interfering with the Plaintiff's use and possession of LR No Eldoret Municipality/Block 11/490.
 - f. Costs of the suit.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF JULY, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Mr. Oduor for 2nd and 3rd Defendants.

Court Assistant -Albert

E. OBAGA

JUDGE

14TH JULY, 2022

