



**Orgut v Chepkonga (Environment & Land Case 124 of 2018)  
[2022] KEELC 3621 (KLR) (8 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3621 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 124 OF 2018**

**MAO ODENY, J  
AUGUST 8, 2022**

**BETWEEN**

**NELSON ORGUT ..... PLAINTIFF**

**AND**

**RICHARD CHEPKONGA ..... DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated October 25, 2019, the plaintiff herein seeking for the following orders: -
  - a. A declaration that the plaintiff is the lawful owner of provisional parcel No E122 forming part of land reference No 10930, 6802, and 75557/2;
  - b. Eviction orders against the defendant from the parcel of land No provisional parcel No E122 forming part of land reference No 10930, 6802, and 75557/2;
  - c. A permanent injunction restraining the defendant his servants and agents from trespassing upon parcel no. Provisional parcel No E122 forming part of land reference No 10930, 6802, and 75557/2;
  - d. General damages for trespass;
  - e. Costs of this suit together with interest thereon at such rates and for such period as this honourable court may deem fit to order;
  - f. Any such and further relief as this honourable court may deem appropriate.

**Plaintiff's Case**

2. PW1 adopted his witness statements dated November 21, 2018 and March 8, 2019 respectively and stated that he signed a sale agreement dated August 19, 2016 for the purchase of the suit property at



a consideration of Kshs 2.26 million which he paid to the directors of Elgeyo Border Limited via a cheque deposit at Transnational Bank.

3. It was PW1's evidence that two months later, he entered into another sale agreement for the suit property with one Devshi Varsani who took possession in October 2016 but sometimes in 2017, when Mr Varsani visited the suit property, he found the defendant in occupation. PW1 stated that Mr Varsani filed a complaint with the police and upon investigations, it was determined that the suit property belonged to the plaintiff. It was PW1's evidence that Mr Varsani rescinded the agreement on October 11, 2016, reverting the land back to the plaintiff and that the directors then drew another agreement dated and signed on June 15, 2015 and October 16, 2018 respectively.
4. PW1 further stated that JK Kiplagat advocate is the one who drew the agreements and could not have sold the suit property to the defendant in 2016, since PW1 was already in possession.
5. On cross examination by Mr Nyamweya the plaintiff explained that he signed three agreements in respect to the suit property, on June 15, 2015, October 11, 2016 and the last one on August 19, 2016 which agreements were all signed before the said advocate JK Kiplagat.
6. PW1 also stated that the suit property was allocated to him since the previous allottee was unable to pay for the same and that there was a cancellation document of the previous allotment.
7. PW2 Devshi Karsan Varsani equally adopted his witness statement dated June 5, 2017 and testified that he purchased the suit property from the plaintiff and took possession in 2016, put up a structure and a fence. He explained that JK Kiplagat advocate advised him to sign another agreement with Elgeyo Border so as to have the title issued to him directly and did as advised and was later given a copy of the fully signed agreement. He stated that he did not witness the Elgeyo Border directors sign the agreement.
8. It was PW2's evidence that he went to the suit property and found that the defendant had ploughed and later wrote a demand letter to the plaintiff asking for the refund of the purchase price and also reported the matter to Kapsoya Police Station.
9. On cross examination by Mr Nyamweya, PW2 stated that he has not yet been refunded the purchase price by the plaintiff and that the plaintiff did not sign the cancellation agreement. PW2 further stated that JK Kiplagat advised him to do an agreement directly with the directors of Elgeyo Border and that it is not true that the agreements that he had were forgeries.
10. PW3 Pius Kipkoech Yator a director at Elgeyo Border explained that JK Kiplagat was the company's advocate and would prepare documents on behalf of the company. He testified that the plaintiff purchased the suit property. He stated according to their records it is the plaintiff who purchased the suit land and that the plaintiff made payment for 5 acres into the company's proper account. When he was shown PEXH 1 and 5 (sale agreement dated August 19, 2016 and October 20, 2016 respectively) he told the court that the signatures thereon did not belong to the directors as they were forged.
11. According PW3, the only valid agreement is the one dated June 15, 2015 between the company and the plaintiff and added that the first allotment offer was given to the late Hon Biwot who failed to make the requisite payment within the given period of 60 days.
12. It was PW3's evidence that the company never instructed the advocate to draft any agreement with the defendant and further that they never received any money from the defendant in respect of the suit property.
13. On cross examination by Mr Nyamweya, PW3 told the court that the only genuine agreement with the plaintiff is the one dated October 16, 2018 produced as PEXH 10.



## Defendant's Case

14. DW1 Richard Kipruto Kiplagat adopted his written statement dated September 2, 2019 and told the court that vide a letter of offer dated August 9, 2014 from Kiplagat & Co Advocates, he was offered 5 acres of land for a consideration of Kshs 450,000/- per acre. He stated that he then visited the land where he met a surveyor, Mr Sitienei, who showed him two swampy plots and opted for the suit property which is plot No E122. Thereafter between 2014 and 2016, he compacted the suit property with soil, he then accepted and signed the offer letter. It was not until 2017 when his caretaker informed him of the third party who went to destroy the fence thereon claiming ownership.
15. DW1 produced a copy of receipt dated January 4, 2017 being payment of the purchase price paid to JK Kiplagat advocate.
16. Upon cross examination by Mr Kamau, DW1 stated that that upon acceptance of the offer letter, he paid a 50% deposit on September 30, 2016, two years after acceptance and confirmed that he had no agreement with Elgeyo Border and that he indeed took possession in 2014, even before signing any agreement or making any deposit thereof.
17. DW1 also stated that he bought the land as an individual and not as an agent of Hon Biwot who wanted to buy land for his community members. He further testified that the agreement did not have a clause for taking possession apart from the letter of offer.
18. DW2 Joseph Kipchumba Kiplagat advocate testified and told the court that the plaintiff and defendant were offered plot Nos E149 and E122 respectively. According to him, he did not sign the agreement dated June 15, 2015 as he was in Iten Law Courts when the same was purported to have been signed.
19. It was DW2's evidence that on October 16, 2018 he signed a cancellation of sale agreements cancelling the agreements dated October 11, 2016, October 16, 2016 and August 19, 2016 which had been fraudulently signed by people purporting to be him.
20. Mr Kiplagat further stated that the purchasers could pay the purchase price to him directly or to the company, Elgeyo Border and that the defendant paid to his office Kshs 2,250,000/- which he transferred to the company as per the receipt DEXH 5.
21. On cross examination DW2 stated that he did not have any bank statement to show that he had transferred the money to the company and that the suit land was allocated to the plaintiff.
22. At this point, court directed DW2 to have a meeting with the company Elgeyo Border, and file a report to allocate 5 acres to the plaintiff since it was undisputed that the plaintiff paid for 20 acres of land. In addition, summons were issued to the directors of the company.
23. Consequently, Susan Komen, one of the directors gave her testimony on June 21, 2021 where she testified that vide an agreement dated June 15, 2015, the plaintiff paid to the company Kshs 2,250,000/- making him the rightful owner of the suit property. She confirmed that the company received Kshs 16,000,000/- from the advocate but the defendant's money was not part of it. According to Susan, the plaintiff's agreement was never cancelled by the company and hence is the rightful owner of the suit land.
24. On cross examination by Mr Nyamweya, Susan Komen a director of Elgeyo Boarder stated that JK Kiplagat is still the lawyer for Elgeyo Border and that she drafted the report together with the committee whereby they confirmed that the suit land belongs to the plaintiff even though the defendant is in occupation.



25. She further stated that JK Kiplagat was not mandated to receive money on their behalf and that the Kshs 16 million that he forwarded were from his relatives and that the defendant's money was not part of it.

### Plaintiff's Submissions

26. Counsel identified 6 issues for determination by the court as follows: -
- a. Who is the lawful owner of the suit property?
  - b. Whether the plaintiff was under duress when he signed the cancellation agreement dated October 16, 2018.
  - c. Whether eviction orders should be issued against the defendant
  - d. Whether an order of general damages against the defendant should issue.
  - e. Whether an order of permanent injunction should be issued against the defendant
  - f. Who should bear the costs of the suit
27. Counsel for the plaintiff reiterated the evidence on record and submitted that the plaintiff has demonstrated that he legally acquired the suit property hence entitled the protection guaranteed under section 25 and 26 of the *Land Registration Act*. Ms Chesio also submitted that PW3 a representative of Elgeyo Border Investment Ltd as per the CR12 confirmed that plot No E122 was purchased by the plaintiff and the company did endorse its signature to the contract dated June 15, 2015 but executed on October 16, 2018 which evidence was buttressed by the report by Elgeyo Border Investment Ltd dated March 18, 2021 and produced by Ms Susan Komen a director of the company on June 21, 2021.
28. Ms Chesio submitted that the defendant admitted that he does not have a written contract with the company and he produced an unexecuted and unattested contract which is in contravention of section 3 (3) of the contract act as read together with section 38 of the *Land Act* No 6 of 2012.
29. Counsel further stated that the defendant did not comply with the letter of offer on the following grounds: he did not pay 50 % of the purchase price as deposit in contravention of clause 5.1 of the letter of offer; did not pay the purchase price into the company's account as required in clause 1.2 as demonstrated by DEX2'paid the money from September 30, 2016 more than 2 years from the date of acceptance of the offer; did not adhere to the completion dates of 60 days from August 9, 2014; did not execute a contract with the company and took possession contrary to the terms of the letter of offer.
30. Counsel relied on the cases of *Jaj Super Power Cash and Carry Ltd v Nairobi City Council & others* CA Civil Appeal No 11 of 2002 NBI [UR] and *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 others* [2013] eKLR and submitted that the plaintiff's title is regular and should be protected by the law.
31. On the second issue as to whether the plaintiff was under duress when he signed the cancellation agreement dated October 16, 2018, counsel quoted the definition of duress in the *Halsbury's Laws of England 4<sup>th</sup> Ed Vol 9* and in the case of *KCB Limited & another v Samuel Kamau Macharia & 2 others* [2008] eKLR where the court relied on *Williston on Contracts* 3<sup>rd</sup> Edition 1970 chapter 47 which stated that duress must be such that the victim:

"must have entered the contract against his will;  
must have had no alternative course open to him;



must have been confronted with coercive acts by the party exerting the pressure.”

32. Counsel submitted that the plaintiff and PW3’s testimonies were coherent that the advocate pressured the plaintiff to sign the agreement failure to which he would not be given the new agreement which amounted to duress therefore the cancellation agreement dated October 16, 2018 should not be relied upon.
33. On the third issue as to whether eviction orders should be issued against the Defendant, counsel submitted that having established the plaintiff as the rightful owner of the suit property, the defendant’s actions amount to trespass as defined in the *Black’s Law Dictionary*, 8<sup>th</sup> Ed and in *Clerk & Lindsell on Torts*, Sweet & Maxwell, 18<sup>th</sup> Ed at page 923 and the defendant is a trespasser under section 3 of the *Trespass Act*, cap 294, hence entitled to the order of eviction.
34. Ms Cheso relied on the cases of *Rhoda S Kiilu v Jiangxi Water & Hydropower Construction Kenya Limited* [2019] eKLR; *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR; *Ahmed Ibrahim Suleiman & another v Noor Khamisi Surur* [2013] eKLR; *Scott v Brown* [1892] quoted in *Walsh v Trebilcock* [1894]; *Joseph Kipchirchir Koech v Philip Cheruiyot Sang* [2018] eKLR; and *Margaret Karwirwa Mwongera v Francis Kofi* [2019] eKLR.
35. On the fourth issue as to whether an order for general damages against the defendant should be issued, counsel relied on the case of *Kimutai Tunoi Leonard v Samuel Cheboi* [2017] eKLR where the court found that a trespasser was liable to pay general damages for trespass and prayed for an amount of Kshs 5,000,000/ taking into account that the suit property is a town plot which the plaintiff would have developed and collected rent for the past 5 years.
36. On the issue whether an order of permanent injunction should issue against the defendant, counsel submitted that the plaintiff having proved that he is the rightful owner of the suit land and that the defendant is a trespasser, an order of injunction should issue together with costs of the suit.

### Defendant’s Submissions

37. Counsel reiterated the evidence by the parties and identified 4 issues for determination by the court as follows: -
  - a. Does the plaintiff have a valid sale agreement between himself and the vendor of plot No E122?
  - b. Does the defendant have a valid sale agreement between himself and the vendor of plot No E122?
  - c. In the absence of 1 & 2 above who has any equitable claim to the land
  - d. Who bears the costs of this suit?
38. Mr Nyamweya submitted that the plaintiff having failed to prove duress in signing the cancellation agreement which cancelled the plaintiff’s sale agreement dated August 8, 2016, therefore the plaintiff has no valid agreement to warrant this suit as captured under section 3 of the *Law of Contract Act* and section 38 of the *Land Act*, 2012.
39. Counsel also stated that the agreement dated June 15, 2015 did not have any effect from that date but from October 16, 2018 when it was signed. It was counsel further submission that the defendant had a written document in form of a letter of offer in support of his claim hence the plaintiff has failed to prove his case on a balance of probabilities and should be dismissed with costs.



## Analysis And Determination

40. The issue for determination is who between the plaintiff and the defendant is the rightful owner of the suit land.
41. The plaintiff's case was that he purchased the suit property from a company identified as Elgeyo Border Investment Limited (the company) vide an agreement for sale dated June 8, 2016 for a consideration of Kshs 2,250,000/- which was paid in full to the company who acknowledged the same. The company discovered that advocate JK Kiplagat had unlawfully without authority sold the suit property to the defendant which culminated to the current dispute on the ownership of the suit land
42. It is on record that the company sought to regularize the sale agreement which led to the plaintiff signing another agreement dated October 16, 2018 and the same is not disputed by the parties.
43. On the same date, October 16, 2018, JK Kiplagat advocate drafted another agreement referred to as a cancellation agreement which intention was to cancel the agreement dated August 8, 2016. According to the plaintiff, he signed that cancellation agreement under duress with threats of not being given the agreement dated June 15, 2015 which was considered as the only valid agreement at that point.
44. It is on record that the directors of Elgeyo Border who gave evidence through Susan Komen confirmed that the plaintiff is the one who bought the suit land from the company and paid the full purchase price to the company's designated account at Transnational Bank. Susan Komen also confirmed that they entered into an agreement dated June 15, 2015 which JK Kiplagat purported to cancel.
45. I have perused the sale agreement, indeed it was signed by the directors of the company, the plaintiff and the advocate. Indeed, the two company directors testified in court and confirmed that they signed the agreement dated June 15, 2015, selling the suit property to the plaintiff and that they did not know the defendant. There was no evidence adduced in support of any allegation of fraud or forgery. In the circumstances, I find no reason to doubt the authenticity of the agreement dated June 15, 2015.
46. Further, DW2 admitted that the plaintiff had paid for a total of 20 acres and therefore there is no dispute that the plaintiff had purchased land within the disputed area. The defendant's case was that the plaintiff was entitled to a different plot E149 which claim was neither backed by evidence nor substantiated. This is due to the fact the only documents produced by the defence, particularly DW2 were copies of unsigned agreements for sale. As the company's advocate dealing with the land transactions in respect of the disputed parcels, one would expect him to be in possession of the offer letter or copies thereof at the very least.
47. The defendant's claim is grounded upon possession of a letter of offer issued to him on August 9, 2014. The description of the property to be sold to him was as follows:
  1. The property  
The property to be sold is 5 acres to be excised from land reference numbers 10930, 6802 and 7557/2
48. A letter of offer like a letter of allotment is simply that, an offer which is subject to acceptance of the conditions set out therein. It does not confer title to property. In the case of *Stephen Mburu & 4 others v Comat Merchants Ltd* [2012] eKLR it was held that:-

..From a legal stand point, a letter of allotment is not a title to property. It is a transient and is often a right or offer to take property”.



49. The directors of Elgeyo Border had stated that the land was sold to the plaintiff who paid the purchase price. They further stated that the advocate JK Kiplagat did not have authority to sell the suit land to the defendant and confirmed that they neither received the purchase price from the defendant nor the advocate. It follows that the letter of offer that the defendant hinges his claim is not valid.
50. Even if the letter of offer was valid, the defendant did not comply with the terms of the letter of offer as he admitted that the purchase price was to be paid within 60 days but he did not pay 50 % of the purchase price as deposit in contravention of clause 5.1 of the letter of offer; did not pay the purchase price into the company's account as required in clause 1.2 as demonstrated by DEX2' paid the money from September 30, 2016 more than 2 years from the date of acceptance of the offer; did not adhere to the completion dates of 60 days from August 9, 2014; did not execute a contract with the company and took possession contrary to the terms of the letter of offer. This means that the defendant would have been in default had the offer letter been valid which is not the case.
51. The letter of offer had specific timelines which were to be adhered to unless otherwise agreed between the parties for extension of time to reactivate the offer. Where an offer has a specified time within which it has to be accepted, no communication of the revocation would be necessary as it simply would stand revoked on the expiry of the specified period.
52. The defendant alleged fraud and set out particulars of fraud by the plaintiff but fell short of proof of the fraud. It is trite law that allegations of fraud must be specifically pleaded and proved as was held in the case of *Benson Wandera Okuku v Israel Were Wakho* [2020] eKLR where the court stated as follows: -
- "15. And what about the standard of proof? The plaintiff said he has proved the case on a balance of probability. Is that the standard required in law. Certainly not. The law has been clear along. In *RG Patel v Lalji Makanji* (1957) EA 314 the court expressed itself as follows: -
- "Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required".
16. In *Jennifer Nyambura Kamau v Hampherey Nandi* [2013] eKLR, the Court of Appeal sitting at Nyeri emphasised that fraud must be proved as a fact by evidence, and, more importantly that standard of proof is beyond a balance of probabilities. This is the same position found in *Koinange & 13 others v Nyati* [1984] EA 425, *Gudka vs Dodhia* CA No 21 of 1980 and *Richard Ekwesera Onditi v Kenya Commercial Finance Co Ltd*: CA No 329 of 2009, Nairobi".
53. Also, in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR Tunoi JA stated that: -
- It is well established that fraud must be specifically pleaded and that the particulars of fraud must be specifically pleaded and that the particulars alleged must be stated on the face of the pleadings. 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"
54. I find that the defendant has failed to discharge his burden of proving fraud on the part of the plaintiff. The defendant did not adduce any evidence in respect of the allegations of fraud levelled against the plaintiff.



- 55 On the issue of general damages for trespass, section 3 (1) of the *Trespass Act*, cap 294 provides that:
- 56 Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
57. The defendant entered the suit land without reasonable excuse, remained therein, cultivated and put up structures without the consent of the plaintiff. Where trespass is proved, the same is actionable per se and therefore the Plaintiff is under no duty to prove that he has suffered any specific damage or loss as was held in the case of *Kimutai Tunoi Leonard v Samwel Cheboi* [2017] eKLR (*supra*).
58. On the issue of general damages for trespass, the issue that arises is what is the measure of damages. In the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR the court held that :-
- The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less” See *Hostler v Green Park Development Co* 986 S W 2d 500 (No App 1999).
59. The plaintiff stated that this is a town plot which he had been denied access to develop for a period of more than 5 years. And urged the court to award him Kshs 5 million. The award of general damages is at the discretion of the court which must be exercised judiciously taking into account the interest of justice. I find that an award of Kshs 3 million would be adequate in the circumstances.
60. I have considered the pleadings, the evidence on record and the relevant judicial authorities and find that the plaintiff has proved his case of a balance of probabilities and make the final specific orders.
- a. A declaration is hereby issued that the plaintiff is the lawful owner of provisional parcel No E122 forming part of land reference No 10930, 6802, and 75557/2;
  - b. The defendant to give vacant possession to the plaintiff of parcel of land No provisional parcel No E122 forming part of land reference No 10930, 6802, and 75557/2 within 30 days failure to which eviction orders to issue.
  - c. A permanent injunction is hereby issued restraining the defendant his servants and agents from trespassing upon parcel no provisional parcel No E122 forming part of land reference No 10930, 6802, and 75557/2;
  - d. Plaintiff is hereby awarded general damages for trespass for Kshs 3 million.
  - e. Costs of this suit together with interest thereon at court rates.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 8<sup>TH</sup> DAY OF AUGUST, 2022.**

**MA ODENY**

**JUDGE**

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving order 21 [1] of the Civil Procedure Rules.

