



REPUBLIC OF KENYA



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**Koech v Mwangi & another (Environment & Land Case 230 of 2016)  
[2022] KEELC 12672 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12672 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 230 OF 2016  
EO OBAGA, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**EMILY KOECH ..... PLAINTIFF**

**AND**

**ZIPPORAH NYAMOITA MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**UASIN GISHU COUNTY LANDS REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint filed on August 18, 2016, the plaintiff claimed the following reliefs against the defendants:-
  - a. A declaration that the certificate of lease of title No Eldoret Municipality Block 11/327 issued to the 1<sup>st</sup> defendant is null and void and same be recalled by the 2<sup>nd</sup> defendant of purposes of cancellation.
  - b. An order of eviction ordering the 1<sup>st</sup> defendant to vacate the parcel referred to as Eldoret Municipality Block 11/327 in default she be forcefully evicted by an order of this court.
  - c. A permanent injunction barring 1<sup>st</sup> defendant from interfering with the plaintiff's peaceful use of all that parcel of land referred to as Eldoret Municipality Block 11/327.
  - d. Any other remedy the honorable court may deed fit to grant.
  - e. Costs of the suit interest.
2. The 1<sup>st</sup> defendant filed a defence and raised a counterclaim in which she sought the following reliefs: -
  - a. The original plaintiffs suit be dismissed with costs and the prayers in the counterclaim declaring the plaintiffs as the absolute lawful owner of the suit parcel of land herein be granted.



- b. Costs and interest.
  - c. Any other or further relief that this honourable court may deem fit to grant.
3. Though the 2<sup>nd</sup> defendant entered appearance, there was no defence filed.

**Plaintiff's Case:**

4. The plaintiff testified that on August 16, 1994 she purchased land known as Eldoret Municipality Block 11/327 (suit property) from Elias Kimaiyo Biama. The land measured 0.024 hectares. On or about May 31, 2016 she conducted a search at the lands office where she learnt that the same had been registered in the name of the 1<sup>st</sup> defendant.
5. The plaintiff called PW2 Elias Kimaiyo Biama who testified that on May 22, 1986 he was allotted the suit property by Eldoret Municipal council. On August 16, 1994 he sold the suit property to the plaintiff. On August 22, 1994, he applied for consent to transfer the suit property to the plaintiff. On September 14, 1994, he applied for a rates clearance certificate. Later on July 25, 2016, the county government of Uasin Gishu confirmed that the suit property was allocated to him and that he sold it to the plaintiff and that the certificate of lease held by the 1<sup>st</sup> defendant was null and void.
6. The plaintiff also called PW3 Ruth Jemutai Rop a chief officer of lands and housing at the county government of Uasin who came to produce letter dated July 25, 2016. The letter was in response to one dated June 3, 2016 from the firm of Ms Audambi & co advocates. The letter from Ms Andambi & co advocates had asked the county government of Uasin Gishu to confirm the status of the suit property. The county government in return confirmed that the suit property had been allotted to Elias Kimaiyo Biama who sold it to the plaintiff.

**1<sup>st</sup> Defendant's Case:**

7. The 1<sup>st</sup> defendant testified that she purchased the suit property from John Michael Wanjao on August 23, 2005 at a consideration of Kshs 610,000/=. Upon payment of the purchase price, John Michael Wanjao signed all necessary documents which culminated in her being issued with a certificate of lease. She proceeded to construct four units on the suit property in the year 2006. The four units were completed and are occupied by tenants.
8. The 1<sup>st</sup> defendant further testified that for the entire period of construction, no one came up to claim the suit property until this suit was filed in 2016.
9. The 1<sup>st</sup> defendant called DW2 Rahab Muthoni Njoroge a land registrar at Uasin Gishu lands office. This witness testified that she had in her possession a certified copy of the white card. According to her evidence, the white card was opened on June 10, 2005. The lessor was ELdoret Municipal Council and the lessee was John Michael Wanjao. The size of the suit property is 0.0203 hectares. A certificate of lease was issued in favour of John Michael Wanjao on June 10, 2005.
10. The suit property was transferred to the 1<sup>st</sup> defendant on September 1, 2005 and a certificate of lease was issued on the same day. The witness testified that entry number 5 on the white card is a decree arising from LEC case No 230 of 2016. The witness testified that all the entries were made pursuant to documents presented to the lands office. The witness stated that she was unable to bring along the parcel file containing the supporting documents as she was given a short notice to come to court.



### **Analysis And Determination;**

11. I have carefully gone through the evidence adduced by the plaintiff and her witnesses as well as the 1<sup>st</sup> defendant and her witnesses. I have also gone through the submission by the plaintiff and the 1<sup>st</sup> defendant. Before I set out the issue for determination, I have to trace the origin of the suit property as shown in the documents filed by the plaintiff.
12. In or around August 1984, Elias Kimaiyo Biama applied to the Municipal Council of Eldoret for allocation of a plot at Kapsoya. On August 31, 1984, the town clerk of Eldoret Municipal Council wrote to him giving options of either applying for a plot in Kapsoya or Kipkaren or at old Uganda road. On February 15, 1985, Mr Biama wrote to the town clerk and informed him that he was not going to apply for a plot at Kapsoya because of financial constraints. He opted for a plot at old Uganda road.
13. The town clerk then wrote to him on April 24, 1985 asking him to forward his interview number to enable the council commence the process of allocation. Mr Biama forwarded his interview number and on May 22, 1986, he was allotted provisional plot No 128 site "A" at old Uganda road.
14. The letter of allotment contained conditions which Mr Biama had to meet. One of the important conditions was that Mr Biama had to pay Kshs 1000/= on or before accepting the offer. The other important condition was that he was not to transfer the plot before expiry of two years and even after expiry of two years he could not transfer the plot without the consent of the council.
15. On November 16, 1989, Mr Biama sold the suit property to the plaintiff at a consideration of Kshs 50,000/=. The plaintiff paid the amount in instalments which she cleared on April 10, 1989. It is apparent that the agreement of August 16, 1994 which was produced as exhibit 1 was made subsequent to the one of November 16, 1988 as there is no consideration shown on the one of August 16, 1994.
16. On August 22, 1994, Mr Biama wrote to the town clerk seeking consent to transfer the suit property to the plaintiff. In the said letter, Mr Biama stated that all the arrears outstanding were to be paid by the plaintiff. On September 14, 1994, Mr Biama applied to Eldoret Municipal Council for land clearance certificate. The council tabulated the outstanding amount which was to be paid. The total came to Kshs 68,193.15/=
17. Having set out the background of the suit property the, issues which emerge for determination are firstly, did Mr Biama accept the offer of allotment as required and if so did he comply with the conditions set out thereon. Secondly, was the suit properly transferred to the plaintiff by Mr Biama. Thirdly, was there fraud involved in the acquisition of title to the suit property by the 1<sup>st</sup> defendant in conjunction with the 2<sup>nd</sup> defendant as alleged by the plaintiff. Fourthly, are the plaintiff and 1<sup>st</sup> defendant entitled to the reliefs claimed in their respective suits. Lastly, which order should be made on costs.

### **Whether Mr. Biama accepted the letter of allotment and if so whether he met the conditions set out thereon;**

18. Mr Biama is the one who alleges to have transferred the suit property to the plaintiff. The suit property was provisionally known as plot 128 site "A" old Uganda road. This is clear from the letter from Eldoret Municipal Council dated May 22, 1986 forwarding the allotment letter. This is the plot which later became the suit property.
19. The plots at old Uganda road were being sold at Kshs 15,500/= excluding other charges like survey fee, legal charges interest etc which was to be paid over a period of 25 years. Clause 15 of the letter of



allotment stated that if the allottee failed to pay monthly instalments for 6 consecutive months, the council was to re-allocate the plot to another person.

20. There was no evidence adduced to show whether Mr Biama accepted the letter of allotment. Equally there was no evidence adduced to show whether Mr Biama fully complied with the conditions set out in the letter of allotment. The witness who came from the county government of Uasin Gishu the successor of the Eldoret Municipal Council stated that she did not see any receipt for the Kshs 1000/= . Mr Biama himself who testified did not give proof of payment of the Kshs 1000/= which was a requirement to signify acceptance of the allotment letter.

#### **Whether the suit property was transferred to the Plaintiff by Mr Biama;**

21. Condition number 7 in the letter of allotment was clear that transfer of the suit property from the allottee to a third party was only possible if the allottee obtained consent of the Municipal Council of Eldoret. There is evidence that Mr Biama applied for consent to transfer the suit property to the plaintiff on August 22, 1994. In this letter, Mr Biama indicated that the arrears were to be cleared by the plaintiff. On September 14, 1994, Mr Biama applied for rates clearance certificate. The rates which were to be paid came to Kshs 68193.15/=
22. There is no evidence that these amounts were paid by either Mr Biama or the plaintiff. There is no evidence that consent to transfer was given. In absence of consent to transfer and payment of outstanding rates and rent including other charges there is no basis upon which this court can make a finding that the suit property was transferred to the plaintiff.
23. In the letter seeking for consent from the council, Mr Biama clearly indicated that the arrears of rates and rent and other charges were to be paid by the plaintiff. The plaintiff did not adduce any evidence to show that she cleared the arrears or that Mr Biama got consent to transfer the suit property to her.
24. The documents filed by the plaintiff show that the last time Mr Biama engaged the Municipal Council of Eldoret was on September 14, 1994 when he was given the arrears of rates and rent and other charges amounting to Kshs 68,193.15.
25. It is therefore clear that Mr Biama did not transfer the suit property to the plaintiff. The mere fact that there is a letter dated July 25, 2016 from the county government of Uasin Gishu confirming that Mr Biama was allottee who later sold the suit property to plaintiff is not enough proof of transfer as required.
26. PW3 Jemutai Rop while being cross-examined by counsel for the 1<sup>st</sup> defendant stated that she had a receipt dated July 26, 1996 for Kshs 1,100/= When counsel put it to her that the payment was in respect of payment after the plot had been re-possessed, she denied this arguing that repossession could not be done without minutes to that effect. I observed the demeanor of the witness. She was not being honest. She could not say that the plot was not re-allocated when the only document she had in her file was letter of allocation to Mr Biama and the confirmation letter written by the county government of Uasin Gishu. The payment of Kshs 1100/=made on July 26, 1996 could not have been made by Mr Biama and if it was made by him, he would have stated so during his testimony. The truth is that the plot may have been repossessed but the witness chose to give evidence in support of the plaintiff selectively.

#### **Whether there was fraud involved in the acquisition of title to the suit property by the 1<sup>st</sup> defendant in conjunction with the 2<sup>nd</sup> defendant.**

27. The plaintiff gave particulars of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as follows:-
  - a. Forging documents in favour of 1<sup>st</sup> defendant.



- b. Secretly causing the title to come out in favour of the 1<sup>st</sup> defendant without the plaintiff's knowledge.
28. The 1<sup>st</sup> defendant's evidence is that she purchased the suit property from John Michael Wanjao *vide* sale agreement dated August 23, 2005. This agreement was produced as defence exhibit 1. A transfer was duly signed and lodged at the lands office on September 1, 2005. The transfer was produced as defence exhibit 2. A valuation requisition for stamp duty was filed. This was produced as defence exhibit 3.
29. Stamp duty of Kshs 14100/= was paid. The stamp duty declaration, assessment and payment form was produced as defence exhibit 4. The 1<sup>st</sup> defendant was thereafter issued with a certificate of lease which was produced as exhibit 5. An official search carried out on May 31, 2016 shows that the 1<sup>st</sup> defendant is the registered owner of the suit property.
30. DW2 Rahab Muthoni Njoroge a land registrar from Uasin Gishu land registry produced a white card which shows the entries in the register. Initially the suit property was registered in the name of John Michael Wanjao. This later changed to the 1<sup>st</sup> defendant's name. In *Solomon Omwega Omache & another v Zachary O Ayioko & 2 others* (2016) eKLR it was stated that the court has the duty to uphold the sanctity of record at the lands office. The official record at the lands office in relation to the suit property shows that the suit property was first registered in the name of John Michael Wanjao and later on transferred to the 1<sup>st</sup> defendant.
31. Section 26(1) (a) and (b) of the *Land Registration Act* No 3 of 2012 provides as follows:-  
The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
32. Section 26 of the *Land Registration Act* is clear that a title issued to a purchaser of land upon transfer can only be impeached on grounds of fraud if the person is proved to be a party to the fraud. In the instant case, the 1<sup>st</sup> defendant purchased the suit property from John Michael Wanjao. There is absolutely no evidence adduced by the plaintiff to show that the 1<sup>st</sup> defendant was involved in any fraud in the process of acquisition of the title. The particulars of the fraud alleged have not been proved.
33. In *Ndolo v Ndolo* (2008) IKLR (G & F) 742 the Court of Appeal stated as follows:-  
“...we start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery of fraud. The standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; in cases where fraud is alleged it is not enough to simply infer fraud from the facts.”



34. In *Vijay Morjaria v Nansigh Madbusing Darbor & another* (2002) eKLR 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

35. The plaintiff's counsel submitted that the declared amount in the transfer was Kshs 350,000/= whereas in the sale agreement, the amount shown is 610,000/=. He therefore argued that this goes to show that the 1<sup>st</sup> defendant was a fraudulent person. Again there was an argument that the land registrar did not sign the transfer. These acts of omission or commission cannot be taken as fraudulent conduct on the part of the 1<sup>st</sup> defendant. Failure to sign the transfer form cannot be attributed to the 1<sup>st</sup> defendant and in any case, the land registrar said that she could not avail the parcel file due to time constraints. One may not know if the transfer in the parcel file was signed. As to the understatement of the amount in the transfer, this was meant to defraud the Kenya Revenue Authority but it does not show that the title was fraudulently acquired. Unless there is legislation to curb such kind of conduct, the Kenya Revenue Authority will continue to lose revenue through such means.

36. If indeed the plaintiff had the suit property transferred to her upon purchase of the same in 1988, it is beyond comprehension that she did not bother to take possession for over 28 years until 2016 when she discovered that title had been issued in favour of the 1<sup>st</sup> defendant. The plaintiff testified that she comes from Kapsabet about 45 kilometers from Eldoret town. The 1<sup>st</sup> defendant started constructing in 2006. There are four complete units occupied by tenants. Where was she if indeed the plot was transferred to her when all these activities were going on. If she has any interest in the land as she claims, then her claim is hopelessly untenable in view of the *Limitation of Actions Act* as there is no fraud proved which would enable time to start running upon discovery of the alleged fraud in 2016.

### **Disposition:**

37. From the above analysis, it is clear that the plaintiff has failed to prove her case on a balance of probabilities. The same is dismissed with costs to the 1<sup>st</sup> defendant. On the other hand, I find that the 1<sup>st</sup> defendant has proved her counterclaim on a balance of probabilities. A declaration is hereby given that the 1<sup>st</sup> defendant who is the plaintiff in the counterclaim is the absolute lawful owner of LR No Eldoret Municipality Block 11/327. The costs of the counterclaim shall be paid by the Plaintiff in the main suit.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Mengich for 1<sup>st</sup> Defendant.

Court Assistant –Albert

E. O. OBAGA

JUDGE



29<sup>TH</sup> SEPTEMBER, 2022

