



**Naika v Wangatia & another (Environment & Land Case
398 of 2014) [2025] KEELC 3011 (KLR) (2 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3011 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 398 OF 2014**

DO OHUNGO, J

APRIL 2, 2025

BETWEEN

PASCAL NETIA NAIKA PLAINTIFF

AND

JAMES NALIANYA WANGATIA 1ST DEFENDANT

ANDREW MBAYAKI MAKOKHA 2ND DEFENDANT

JUDGMENT

1. Litigation in this matter commenced in the High Court on 31st October 2012, when the Plaintiff filed Plaintiff dated 26th October 2012. Later, the matter was transferred to this Court. The initial Plaintiff was replaced with Amended Plaintiff amended on 13th June 2023. The Plaintiff averred in the Amended Plaintiff that on 28th December 1998, he entered into a sale agreement with the First Defendant pursuant to which he purchased the parcels of land known as Bunyala/Budonga/1808 and Bunyala/Budonga/929 (the suit properties) at an agreed purchase price of KShs 302,500 which he paid in instalments.
2. The Plaintiff further averred that he took possession of the suit properties the same year and that the First Defendant undertook to transfer the suit properties to him once a succession cause which he said that he had filed was concluded. That instead, the First Defendant fraudulently transferred the suit properties to the Second Defendant. The Plaintiff also averred that he had been in continuous and peaceful use of the suit properties for over 13 years and had acquired them by adverse possession.
3. The Plaintiff therefore sought judgment against the Defendants for an order declaring him the owner of the suit properties, transfer of the suit properties to him and costs. He also prayed, in the alternative, for a refund of the purchase price at “the current market value” of KShs 500,000 per acre.
4. The First Defendant filed a Statement of Defence in which he denied the averments in the Plaintiff and urged the Court to dismiss the Plaintiff’s suit with costs.



5. The Second Defendant filed a Statement of Defence and Counterclaim in which he averred that he acquired the suit properties for value without notice of any defect in title and that he was a bona fide purchaser. He added that he had been in quiet possession and was cultivating crops on the suit properties. He denied the allegations of fraud and averred that the Plaintiff had interfered with his possession and even harvested his sugarcane. Consequently, the Second Defendant prayed for dismissal of the Plaintiff's suit and for judgment against the Plaintiff for a permanent injunction restraining the Plaintiff, his employees and agents from interfering with his quiet possession of the suit properties. He further prayed for costs.
6. At the hearing, the Plaintiff adopted his witness statement dated 26th October 2012 as his evidence in chief and produced the documents listed as item numbers 2 to 10, 13 and 14 in his list of documents dated 26th October 2012 as his exhibits. The Plaintiff stated in his said statement that on 28th December 1998 he entered into a sale agreement with the First Defendant through which the First Defendant sold to him the parcels of land known as Bunyala/Budonga/929 and Bunyala/Budonga/1808 measuring 3.5 acres and 2 acres respectively and that he paid the agreed purchase price of KShs 302,500 in instalments. He added that the suit properties were adjacent to each other and that he immediately took possession. That the First Defendant told him at the time of the transaction that he had title to Bunyala/Budonga/929 and that Bunyala/Budonga/1808 was in someone else's name.
7. The Plaintiff further stated that the First Defendant kept telling him to wait for him to obtain title to Bunyala/Budonga/1808 so that he could transfer both plots to him. That he conducted searches early 2012 and realised that the First Defendant had transferred the suit properties to the Second Defendant in 2011. He added that he had used the suit properties uninterruptedly for 13 years during which time he grew sugarcane on them. That on 10th March 2012 a family meeting was convened during which the First Defendant who was his relative admitted that he had sold the suit properties and promised to settle in two weeks. The Plaintiff further stated that information filed with the Land Registrar indicated that the titles passed from the First Defendant to the Second Defendant by succession through Kakamega High Court Succession Cause Number 205 of 2010, yet the First Defendant was still alive. That a check at the Kakamega succession registry revealed that Kakamega High Court Succession Cause Number 205 of 2010 had no relationship with the parties herein or the suit properties.
8. In his oral testimony, the Plaintiff stated that he was not in occupation of the suit properties as of the date of his testimony because he was chased away in the year 2010. That the total purchase price was KShs 350,000 and that the exhibits he had produced showed that he had paid a total of KShs 250,000. He further stated that the First Defendant was his first cousin and that the Second Defendant took over the suit properties and started farming on them once he was evicted. He also stated that he agreed with the First Defendant that the First Defendant would refund him KShs 350,000. Under re-examination, he stated that he completed paying the purchase price.
9. The Plaintiff's case was then closed.
10. Since the First Defendant was not ready to proceed on the date defence hearing was scheduled, defence case commenced with the testimony of the Second Defendant.
11. The Second Defendant adopted his witness statement dated 23rd July 2014 as his evidence in chief. He stated in the statement that he purchased the suit properties from the First Defendant for valuable consideration and that he was in occupation. He produced copies of the documents listed as item numbers 1 to 3 in his list of documents dated 14th June 2023 as his exhibits.
12. The Second Defendant went on to testify that he purchased the suit properties from the First Defendant through a sale agreement dated 26th April 2011 and that he conducted searches prior to



- the transaction, which showed that the First Defendant was the proprietor. That he took possession as soon as he paid the first instalment, and that the Plaintiff was not in occupation when he took possession. He added that he neither knew the Plaintiff nor of any dispute between the Plaintiff and the First Defendant prior to the transaction.
13. The Second Defendant also testified that he purchased the suit properties with everything on them including a sugarcane crop. He added that he did not acquire the suit properties through succession and that he was not a party in Citation Cause Number 205 of 2010.
 14. The Second Defendant's case was then closed.
 15. The First Defendant testified next. He stated that the Plaintiff was his cousin and that he sold the suit properties to the Plaintiff on 29th December 1998 at a consideration of KShs 302,500 which sum was to be paid instalments. That the Plaintiff paid KShs 170,000 then KShs 50,000 followed by KShs 30,000 and KShs 20,000 thereby making a total of KShs 270,000. That the Plaintiff did not pay the balance, and that the Plaintiff later told him to sell the suit properties since he was unable to pay the balance.
 16. The First Defendant further testified that there was no discussion or agreement that he would refund the Plaintiff. That he later sold the suit properties and everything on them to the Second Defendant at a consideration of KShs 750,000 after which he transferred them to the Second Defendant. He added that there was no dispute between him and the Second Defendant and that he did not refund the Plaintiff because the Plaintiff had grown and harvested sugarcane on the suit properties from 1998 to 2011 during which time he earned more money than what he had paid the First Defendant.
 17. The First Defendant's case was then closed. Directions were then given that parties file and exchange written submissions.
 18. On 26th February 2024, counsel for the Second Defendant informed the Court that the First Defendant had passed away shortly after his testimony. Subsequently, on 1st October 2024, the Plaintiff withdrew his case against the First Defendant. The Plaintiff thereafter filed submissions dated 4th December 2024 while the Second Defendant filed submissions dated 4th December 2024.
 19. I have considered the pleadings, the evidence and submissions. The issues that arise for determination are whether fraud has been established, whether adverse possession has been established and whether the reliefs sought are available.
 20. Fraud is a serious allegation. The party alleging it has to go an extra mile to plead and prove it. As the Court of Appeal stated in the case of *Kinyanjui Kamau vs. George Kamau* [2015] eKLR:

...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...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 or 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.
 21. In the earlier case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated:

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.

22. There are several aspects of the dispute that are not contested. These include that the Second Defendant is the registered proprietor of the suit properties. A perusal of the registers which the Plaintiff produced and the copies of titles which the Second Defendant produced shows that the Second Defendant was registered as proprietor of both parcels on 3rd August 2011 and title deeds issued to him thereafter. The First Defendant was the registered proprietor of both parcels prior to the Second Defendant obtaining title.
23. The law jealously guards the rights of a registered proprietor of land and guarantees protection of his right to property, pursuant to Article 40 of the *Constitution*. To further secure those rights, Section 24 of the *Land Registration Act* makes specific provisions as follows:
Subject to this Act—
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
24. Section 26 of the *Land Registration Act* obligates the court to accept the proprietor's certificate of title as conclusive evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) are established. Those provisos lay down the grounds on which a title can be nullified as fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. Thus, despite the ironclad protection, title to property which is found to have been unlawfully acquired is open to impeachment.
25. The Plaintiff chose to attack the Second Defendant's title on allegations of fraud. A reading of the Amended Plaint shows that the Plaintiff's allegations of fraud were principally levelled against the First Defendant with whom he had a sale transaction. The Second Defendant only came into the picture after the First Defendant's actions. Notwithstanding his allegations against the First Defendant, the Plaintiff withdrew his claim against the First Defendant. In view of the withdrawal and considering that the First Defendant is now deceased, the Plaintiff's allegations and claims against the First Defendant all ended at the point of the withdrawal.
26. The particulars of fraud pleaded included that the suit properties were transferred from the First Defendant to the Second Defendant through Kakamega High Court Succession Cause Number 205 of 2010, yet the First Defendant was still alive. There is no dispute that the First Defendant was alive as of 3rd August 2011 when the Second Defendant obtained title. The registers in respect of the suit properties confirm that the transfers were by way of transmission through Kakamega Succession Cause Number 205 of 2010. The Second Defendant remained mum as to the circumstances through which he obtained title. A proprietor who was alive could not lawfully transfer land by way of transmission.
27. By definition, fraud entails conduct which leads another to act to his detriment or to suffer a loss. The authors of Black's Law Dictionary 10th Edition define fraud to mean "A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment". By



way of further elaboration, the authors quote the following extract from John Willard, *A Treatise on Equity Jurisprudence* 147 (Platt Potter ed., 1879):

“Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud.”

28. I am not persuaded that the Plaintiff has shown that he was induced to act to his detriment. I say so because he could only be entitled to the suit properties upon fully paying the purchase price. He testified that the purchase price was KShs 350,000 yet the documents that he produced showed payment of only KShs 250,000. It must also be recalled that the First Defendant categorically stated in his testimony that the Plaintiff did not complete paying the purchase price. In those circumstances, the Plaintiff cannot be said to have been defrauded. It must also be remembered that fraud cannot be inferred. I am not persuaded that the Plaintiff established fraud.
29. While not condoning the procedure through which the Second Defendant obtained title, I do not think that a cancellation of the Second Defendant’s titles is the way to go in the matter. To begin with, the Plaintiff did not seek cancellation on any other ground besides fraud. As has been severally held by the courts, parties are bound by their pleadings. The court too is in a sense bound by the parties’ pleadings since pleadings circumscribe the issues for determination and reliefs sought. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. Secondly, a court of law does not act in vain. If I were to nullify the Second Defendant’s titles, proprietorship would revert to the First Defendant, yet the Plaintiff withdrew his case against the First Defendant. A nullification of the Second Defendant’s titles would not directly result in the Plaintiff obtaining title because the Plaintiff’s testimony revealed that he did not fully pay the purchase price.
30. I now turn to the question of whether adverse possession has been established. The law relating to adverse possession is found at Sections 7, 13, 17 and 38 of the Limitations of Actions Act. The Court of Appeal discussed ingredients of adverse possession in the case of *Richard Wefwafa Songoi v Ben Muniyifwa Songoi* [2020] eKLR where it stated that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
31. The Plaintiff’s claim of adverse possession is based on a sale transaction. By its very nature, adverse possession presupposes a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It follows that for a claim of adverse possession to succeed, the claimant must demonstrate that his occupation was without the proprietor’s permission. Entry and possession pursuant to a sale agreement is by the proprietor’s permission. Time for purposes of adverse possession does not run in favour of such a person for as long as her presence on the land is by permission of the proprietor. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the purchased property is no longer by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.



32. There are two reasons why the Plaintiff's adverse possession claim has no leg to stand on. Firstly, as I have held above, the Plaintiff did not pay the full purchase price. Time for purposes of adverse possession did not start to run in his favour. Secondly, the Plaintiff testified that he was not in possession as of 31st October 2012 when he filed this case. He had been evicted in the year 2010. By his own account, he took possession after the agreement dated 28th December 1998. 12 years from the date of the agreement translates to 28th December 2010. The Plaintiff did not demonstrate that his eviction was after 28th December 2010. By his own account, it is more likely that he was evicted before 28th December 2010, prior to attaining the requisite 12 years of uninterrupted possession. I find that adverse possession has not been established.
33. Arising from the above discourse, the Second Defendant's titles remain intact. In those circumstances, he should be left to enjoy the benefits of his proprietorship. The First Defendant made it clear in his testimony that there was no dispute between him and the Second Defendant regarding the latter's proprietorship. On the other hand, the Plaintiff has made it clear that he desires to own the suit properties. In those circumstances, there is no doubt that the Second Defendant has made a case for grant of the permanent injunction sought.
34. In the result, I find that the Plaintiff's case lacks merit. His prayer for a refund of the purchase price at "the current market value" of KShs 500,000 per acre has no leg to stand on following withdrawal of his case against the First Defendant to whom he paid part of the purchase price. On the other hand, the Second Defendant's counterclaim is merited.
35. I therefore dismiss the Plaintiff's case. I grant a permanent injunction restraining the Plaintiff, his employees and agents from interfering with the Second Defendant's quiet possession of the parcels of land known as Bunyala/Budonga/1808 and Bunyala/Budonga/929. Considering the circumstances of the case, I order that each party bears own costs.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS
2ND DAY OF APRIL 2025.**

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Sichangi for the Plaintiff

Mr Otsyeno for the Defendant

Court Assistant: B Kerubo

