



**Awadh v Faraj (Environment & Land Case 198 of 2014)
[2022] KEELC 13715 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2014
NA MATHEKA, J
OCTOBER 25, 2022**

BETWEEN

KHALID AHMED AWADH PLAINTIFF

AND

ANISA ABEID FARAJ DEFENDANT

JUDGMENT

1. The Plaintiff states that all material times he is registered owner of all that piece or parcel of land known as Title No..C.R.43603 being Sub-division No. 10328 (Orig No.805/27) Sec 1/MN together with the house constructed thereon having purchased the same from Salama Breik. The Plaintiff states that the Defendant has since November, 2013 trespassed on the above property wherein the Defendant has been illegally collecting rent from the tenants of the Plaintiff. In the premises, the Plaintiffs claim against the Defendant is for vacant possession the suit property belonging to the Plaintiff. The Plaintiff also prays for an injunction restraining the Defendant from trespassing on the said property. Despite demand and notice of intention to sue, the Defendant has failed, neglected and/or refused to stop collecting the rent and to vacate the said land. The Plaintiff prays for Judgment against the Defendant for;
 - a. Vacant possession of all that piece or parcel of land known as Plot No. 10328 (Orig No.805/27)/Section I/MN.
 - b. The order of Injunction to restrain the Defendant from trespassing on the
 - c. Plaintiffs property known as Plot No. 10328 (Orig No.805/27)/Section 1/MN.
 - d. General damages for trespass.
 - e. Costs of and incidental to this suit.



2. The Defendant further states that the alleged sale of subdivision No. 10328 together with a house thereon by Salama Breik to the Plaintiff is null and void and the said property was at all material times part of the estate of Ahmed Hamda Ahmed deceased and the said Salama Breik has not obtained a grant of representation to the said estate that would have entitled her to sell the said property and pass a proper title thereto. That the alleged title of the Plaintiff to the aforesaid property having been acquired unlawfully is illegal and the Plaintiff is not entitled to possession of the suit premises.
3. This court has carefully considered the evidence and submissions therein. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, 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.”
4. Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
5. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
6. PW1 who produced a power of attorney from the Plaintiff testified that the Plaintiff states that all material times he is registered owner of all that piece or parcel of land known as Title No..C.R.43603 being Sub-division No. 10328 (Orig No.805/27) Sec 1/MN together with the house constructed thereon having purchased the same from Salama Breik in 2013. He produced the title to the land and the transfer document as exhibits. PW2 Hamed Athman Fumo confirms selling the suit property to Salama Breik in 2013 after her husband passed away. He produced a copy of the transfer and the register of the suit property. Salama Breik and her Husband Ahmed Hamda Ahmed had been tenants of his paying ground rent before her husband died. And that he had since sold both the house and the land to Salama Breik.
7. The defendant states that the alleged sale of subdivision No. 10328 together with a house thereon by Salama Breik to the Plaintiff is null and void and the said property was at all material times part of the estate of Ahmed Hamda Ahmed deceased and the said Salama Breik has not obtained a grant of representation to the said estate that would have entitled her to sell the said property and pass a proper title thereto. That the alleged title of the Plaintiff to the aforesaid property having been acquired unlawfully is illegal. DW1 testified that she does not live in the suit premises but her brothers do. That



the house belonged to the Plaintiff's husband and when he died he left it to his sister who is her mother. That rent was being paid to PW2 and they refused to surrender the house to the Plaintiff.

8. According to the *Black's Law Dictionary* (8th ed. 2004),

“Fraud is knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. In contract law, fraud has been defined as unconscionable dealing, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain. The remedies for fraud in common law are damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract, or set aside a transaction, or gave compensation where one party had acted unfairly by the other.”

9. The Court of Appeal in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* (2015) eKLR held,

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“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 (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd's Rep. 305, 308).

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 *Lawrence v Lord Norreys* (1880) 15 App. Cas. 210 at 221). 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 (*Davy v Garrett* (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount o an averment of fraud of which any court ought to take notice”.

10. Where fraud is alleged, it's a question of evidence, I find that there has been no pleading or particulars placed before court that established that the Plaintiff is a party to any fraud or illegality. Fraud has to do with a person's state of mind and intentions. There is no evidence that the Plaintiff participated in any kind of fraud in acquiring the said title. I find that the Plaintiff was a bonafide purchaser for value who bought the suit property from Salama Breik. PW2 confrims that Salama Breik and her husband where his tenants and Salama Breik bought the house plus the land after the husband died. I find that the suit property is not part of the estate of the deceased as alleged by the defendant. I find that damages trespass has not been proved and the same shall not be awarded. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The Defendant to vacate all that piece or parcel of land known as Plot No. 10328 (Orig No.805/27)/Section I/MN within 60 days from the date of this judgement.
2. An order of Injunction to issue to restrain the Defendant from trespassing on the Plaintiffs property known as Plot No. 10328 (Orig No.805/27)/Section 1/MN.
3. Costs of this suit to the Plaintiff.



It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2022.

N.A. MATHEKA

JUDGE

