



Chabari (Suing as the administrator of the estate of the late Chabari Mungnaia (Deceased)) v Kirai & another (Environment & Land Case 51 of 2017) [2022] KEELC 13469 (KLR) (12 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 51 OF 2017**

CK NZILI, J

OCTOBER 12, 2022

BETWEEN

**FRANCIS KIUNGA CHABARI PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE CHABARI
MUNGNAIA (DECEASED)**

AND

**FELIX MURITHI KIRAI 1ST DEFENDANT
GUARANTY TRUST BANK (KENYA) LIMITED 2ND DEFENDANT**

JUDGMENT

A. Pleadings

1. By a plaint dated February 1, 2017, the plaintiff as the registered owner of LR No Abothuguchi/Kijja/740) hereinafter the suit land) sued the defendant claiming that he fraudulently and illegally offered as a guarantee and charged his land in favour of the 2nd defendant for a bank loan without his consent, knowledge or approval.
2. He sought for declaratory orders to invalidate the charge and cancel the entries to the title. He relied on his witness statement, list of documents of the even date and further witness statement dated September 20, 2021.
3. The 1st defendant did not file a defence and a request for interlocutory judgment was made dated March 5, 2018.
4. The 2nd defendant by a defence dated June 6, 2017 denied the claim and maintained that the plaintiff voluntarily offered the suit land as security under a charge instrument registered in its favour for the repayment of a loan facility lawfully and procedurally sought through documents signed by both the



- plaintiff and the 1st defendant in line with the lending procedures including depositing the original title to the land. The 2nd defendant insisted the title deed held by the plaintiff was fake.
5. The 2nd defendant denied any alleged fraud or illegalities since the dealings thereto were with the full knowledge and consent of the plaintiff hence the latter was out to perpetuate a fraud against the 2nd defendant by making or uttering a fake document purporting to be an original title deed in unlike the one in their custody and denying the fact that he willingly offered his land as security for the repayment of the credit facility to the 1st defendant by the 2nd defendant.
 6. The 2nd defendant denied any alleged damage or any attendant consequences which have resulted out of the plaintiff's own voluntary and willful actions. The 2nd defendant relied on a witness's statement by Charles Andoji Amanga and Josephine Gachuru and list of documents dated February 23, 2018.

B. Testimony

7. The plaintiff adopted his witness statements dated February 1, 2017 as his evidence in chief. He produced a copy of his original title deed as pexh No (1), copy of official search dated January 26, 2017 as pexh No (2), copy of charge registered on November 24, 2010 as pexh No (3), application for land control board consent as pexh (4), letter of consent dated August 24, 2010 as pexh No (5), forensic documents examiner's report dated September 23, 2016 as p MFI No (6), a demand letter from Fina Bank dated February 10, 2011 as p exh No (7), reply to the demand letter dated April 6, 2016 as p exh No (8), and response by the 2nd defendant dated May 12, 2016 as p exh No (9) and lastly, a response by Kiautha Arithi Advocates dated June 3, 2016 as pexh No (10).
8. In cross examination, the plaintiff offered his original identity card for the perusal by the 2nd defendant's advocates present who confirmed it was ok. PW 1 denied knowledge of the 1st defendant or having given him his title deed as a security for the alleged loan, or ever going to the 2nd defendant's offices to guarantee him any loan. PW 1 also denied knowing Mr Atheru Thurunira advocate said to have witnessed his signature to the loan documents.
9. The court made an observation that the witness was very old, sickly looking and testifying under difficulties while seated on a chair. PW 1 denied that the signature appearing at page 12 of the charge, pexh No 3 was his. He further testified that he gave a sample signature to the police but could not recall the year he did so. He also said he went to the lands office to check on his land status where he obtained the land control board consent papers. He vehemently denied ever signing the documents held by the 2nd defendant. In particular, he said the signature therein did not resemble his genuine signature.
10. Similarly, PW 1 denied ever seeing the charge documents prior to filing his suit in court neither did he apply for the alleged land control board consent in favour of the 1st defendant to take a loan. He clarified that he was merely hearing about such facts in court. PW 1 denied knowledge of the alleged postal address No 1863. He however said he did not complain to the police about the forgery.
11. PW 2 adopted his witness statement dated September 20, 2021 as his evidence in chief and associated his evidence with that of his late father. PW 1 upon being shown the letter of offer, charge and the land control board application, PW 2 confirmed that the signature appearing there did not belong to him following which he complained to the police and a report came out vindicating him.
12. PW 3, a forensic document examiner told the court that he received the questioned documents on September 6, 2016 namely a charge dated November 11, 2010, copy of the application for land control board consent dated August 6, 2010 and specimen signatures from DCI Meru office. That upon examination of the documents, PW 3 said he made an opinion that they were made by different authors. He produced the report marked pMFI No (6) as p exh No (6).



13. PW 3 clarified that he relied on what was presented to him by the investigating officer and did not come across a parallel or extra documents other than what was availed to him. Further, PW 3 said even though it was a normal occurrence for signatures and handwriting to vary the unique characteristics shall always remain the same.
14. PW 4 told the court by a letter dated September 6, 2016, he forwarded to PW 3 the disputed documents though he did not have the forwarding memo before the court. PW 4 confirmed that he could not charge the suspects after his investigations since the 1st defendant disappeared while the 2nd defendant changed their name from Fina Bank, to the current name but the file was still pending action.
15. PW 4 said that he did not recover any documents from the 2nd defendant including the letter of offer. Similarly, he said that he did not get any witness statement from Thurania Atheru advocate. PW 4 also said that he retrieved the documents from the land registrar Meru after he obtained court orders. Unfortunately, the 2nd defendant gave an excuse that it was the former bank and not the 2nd defendant who had the original documents.
16. DW 1 adopted her witness statement dated October 17, 2019 as her evidence in chief and produced a letter of offer dated October 25, 2010 as D Exh No (1), charge dated November 11, 2010 as DExh No (2), deed of guarantee as DExh No (3), land control board consent as DExh No (4), copy of title as DExh No (5), statement of account as DExh No (6), statutory notice dated August 25, 2011 as DExh No (7) affidavit of service as DExh No (8) and the 45 days auctioneers' redemption as well of the notice advertisement dated December 20, 2012 as DExh No 9.
17. Additionally, DW 1 confirmed that the 2nd defendant acquired 70% of Fina Bank hence was a successor in title in 2014. Further, DW 1 said that in 2016 they supplied the requested documents to the DCI and that the title deed was still in their custody.
18. DW 1 admitted however that there were two original title deeds in existence and the forensic audit found out that there was forgery of the charge and the letter of offer.
19. Further DW admitted that the 2nd defendant did call a witness from Ms Kiautha Arithi advocate to confirm if PW 1 personally signed the letter of offer and the charge document in their presence as alleged.
20. DW 1 however reiterated that if there was any alleged forgery, the remedy for the plaintiff was against the 1st defendant who was the one who may have forged the documents. In addition, DW 1 admitted that the 2nd defendant had not lodged a cross claim against the 1st defendant.

C. Written Submissions

21. The plaintiff submitted he produced his original title deed as evidence that he did not offer his land and title as security in favour of the 1st defendant to the 2nd defendant for a loan. Going by the forensic report, the plaintiff submitted that all documents produced by the defendant alleged signed by him were all forgeries.
22. In absence of defence by the 1st defendant and given that there was entry of default judgment, the plaintiff submitted that the 2nd defendant was clinging on forged documents which are nullities, illegal and cannot be endorsed by the court.
23. The plaintiff submitted that the failure to call for the author and the witness to the forged documents to vouch for the 2nd defendant production of any evidence to the contrary, coupled by the failure to file a cross claim against the 1st defendant, the 2nd defendant's defence remained hollow.



24. On the other hand, the 2nd defendant submitted that the central issue for court's determination was whether or not the legal charge registered over the suit property was valid.
25. The 2nd defendant submitted that the burden was on the plaintiff to prove on a balance of proof above ordinary standard as held in *Kinyanjui Kamau v George Kamau* (2015) eKLR to establish his claim.
26. The 2nd defendant submitted that the evidence of PW 2 and PW 4 fell short of the above threshold given an expert opinion was not binding on court and has to be evaluated alongside other available evidence so that the court can make an independent decision on the issue reliance was placed on *David Njuguna Ngotho v Family Bank Ltd & another* (2018) eKLR.
27. The 2nd defendant submitted that the forensic document examiner only touched on two documents, relied on copies and not the original document to examine and failed to include in the report material details and relied solely on supplied specimen signatures.
28. The 2nd defendant therefore submitted that the failure to examine the disputed signatures from the original documents against several other documents with known signatures of PW 1 completely eroded the probative value of the report and rendered the document examiner's testimony unreliable. Reliance was placed on *Iskorostinskaya Svetlana & another v Gladys Naserian Kaiyoni* (2019) eKLR.
29. The 2nd defendant submitted the legal charge was not a stand-alone document and had to be looked at as against the letter of offer and the deed of guarantee said to have been signed by the deceased yet the said signatures were never questioned.
30. Additionally, the 2nd defendant submitted PW 4 never questioned the 1st defendant or any of its officers or made any inquiries at the land's office and the land control board to get crucial witnesses to ascertain the veracity of the deceased complaint. Further, the 2nd defendant submitted that since no criminal charges were mounted it means no investigations were ever carried out by the PW 4.
31. The 2nd defendant submitted the report by PW 3 was specifically procured in the guise of criminal investigations for use only in these proceedings, hence the evidence by PW 3 was speculative and that the plaintiff has failed to prove the suit.

D. Issues for Determination

32. Having gone through the pleadings, oral and documentary evidence and the written submissions, the issues arising for determination are:
 - i. Whether the letter of offer, acceptance letter, deed of guarantee and indemnity, application for land control board consent and the legal charge were signed and executed by the plaintiff.
 - ii. If the document examiners report and his testimony have value despite the failure to take into account the original documents held by the 2nd defendant, interview of the land's officers; the land control board officers and the 1st defendant.
 - iii. If the plaintiff is entitled to the prayers sought.

E. Determination

33. The plaintiff's claim was that he never offered his land to guarantee a loan in favour of the 1st defendant, which was allegedly advanced by the 2nd defendant and that all the documents held by the 2nd defendant were forgeries, null and void. In support of his claim the plaintiff testified that he did not know the 1st defendant, never attended to any land control board for a consent or before the bank and its lawyer to



- sign any of the 2nd defendant's documents. He vehemently denied that the signatures appearing thereto were his. Further PW 1 told the court that he only came to know of the alleged charge and loan after he received a demand letter from the 2nd defendant, made responses thereto and reported to the police for investigations leading to the document examiners report produced as PExh No (6). He termed the alleged dealings leading to the charge of his property as fraudulent since he has throughout been in possession of his original title deed which he produced as an exhibit before this court.
34. On the other hand, the 2nd defendant pleaded it offered an overdraft or credit facility of Kshs 600,000/= to the 1st defendant on the terms and conditions *vide* a letter of offer dated August 25, 2010 where the plaintiff gave a personal guarantee for the loan and offered the plaintiff's property as security through a charge dated November 11, 2010. Further, the 2nd defendant pleaded that the plaintiff signed a deed of personal guarantee and an indemnity letter dated November 11, 2010.
 35. Additionally, the 2nd defendant pleaded that the original title deed alleged to be in possession of the plaintiff was fake since the plaintiff had surrendered the original to them. Therefore, the plaintiff was orchestrating a fraud in making or causing to be made a fake title purporting to be the original and or denying to have offered his land as security for the loan.
 36. In support of the defence DW 1 produced DExh No's 1, 2, 3 & 4 and stated the same were duly signed by the plaintiff. The 2nd defendant however, failed to produce the original title deed allegedly in their possession, nor did it seek to demonstrate that the original one held by the plaintiff and produced as PExh No (1) was either fake or a forgery.
 37. It is trite law that fraud and or forgery must not only be pleaded but must also be expressly proved to the required standard above the ordinary manner but below beyond reasonable doubt as held in [*Virjay Morjaria v Nansingh Madhusingh Darbar & another*](#) (2000) eKLR.
 38. The onus was on the plaintiff to demonstrate that he did not sign the DExh No's (1) (2) & (3). PW 1 offered his specimen signatures and made a report to the police who commenced investigations and retrieved all the documents from the land registrar Meru Central as per the testimony of PW 4 leading to the PExh No (6).
 39. PW 4 also testified he obtained orders to investigate the matter and he visited the offices of the 2nd defendant but was told the bank had been sold to new entity. Further PW 4 said he went to the 2nd defendant who said the issue happened before 2014 when it took over from the former bank.
 40. The plaintiff also explained that he was at all material times and has been in possession of his original title deed and never went to the 2nd defendant to surrender it on account of a guarantee for a loan to the 1st defendant. PW 1 was emphatic that whatever a title deed and whoever allegedly deposited one with the 2nd defendant and or signed DExh No's 1, 2 & 3 was not him but someone else and the documents and title deed must have been forgeries.
 41. On the other hand, the 2nd defendant while aware of the clear pleadings and the production of the original title deed before court failed to seek to have the same subjected to any independent forensic examination if at all it was doubting the veracity and or credibility of the PExh No (6) and the evidence of PW 3 & PW 4.
 42. At the time the plaintiff testified *de bene esse* and produced the original tile deed, the 1st defendant counsel present did not give dates, times, places and or specific details on when the plaintiff allegedly attended the land control board, visited the 2nd defendant to append his signatures. More importantly, the 2nd defendant did not produce and show the plaintiff as he testified an acknowledgment receipt of the alleged surrender of the original title deed so as to lead credence to the 2nd defendant's, pleadings,



- evidence and submissions that the plaintiff was fraudulent and or made fake title deed and that PW 3 & 4 were selective in investigations and that the forensic report was inconclusive.
43. Further, the 2nd defendant did not call the land registrar or the chairman of the land control board to shed light on how the title deed and DExh No's 1, 2 & 3 held by the 2nd defendant was the genuine as opposed to those in the custody of the plaintiff.
 44. It was the 2nd defendant who pleaded and DW 1 who testified that the plaintiff signed, submitted and or attended the land control board for the consent to charge his land. He who alleges must prove. The onus was on the 2nd defendant to produce the original land control board application forms and the consent together with the minutes of the land control board. Unfortunately, the 2nd defendant brought a witness who never participated in the whole process. Further, the 2nd defendant failed to summon other witnesses to support its pleadings.
 45. The 2nd defendant in cross examination put it to the plaintiff that he did sign DExh No's (1), (2) & (3) before Mr Thuraira Atheru advocate. PW 1 denied the said facts and went on to state that he did not know the said lawyer. The defence did not call the said lawyer alleged to have witnessed DExh No's 1, 2 & 3 yet he was within their reach and that of the court to come and identify on whether or not it was the plaintiff or someone else who appended his signatures and offered his land as a security.
 46. The 2nd defendant failed to call the maker of the DExh No's (1), (2) & (3) including the law firm of Kiautha Arithi and Co Advocates. A careful observation of DExh No's 1, 2 & 3 shows the signatures as different. At page 7 of the exhibit also lacks signature at the bottom. The plaintiff also denied the existence of his relationship with the postal address appearing on the guarantee form. The date when the plaintiff allegedly signed the application for consent of land control board is also missing.
 47. Further the 2nd defendant failed call the law firm of M/S Meenye and Kirima Advocates who witnessed the letter of offer and the signatures of the acceptance form by the plaintiff. The form is also undated, lacks the bank's signature and the stamp.
 48. With all these glaring inconsistencies and or mistakes, the 2nd defendant failed to call the makers and or witnesses to explain DExh No's 1, 2 & 3 to the court over the same and prove that indeed, the plaintiff willingly and or knowingly offered and or consented his property being charged and deposited an original title deed. No acknowledgment or surrender form of the alleged original title deed was brought by the 2nd defendant before this court.
 49. The 2nd defendant attacked the forensic report for being incomplete, unauthentic and or lacking probative value for the failure to compare the plaintiff's signatures with other signatures held by the bank, for failing to engage the land registrar or the chairman of the land control board and the bank officials.
 50. The plaintiff filed the forensic document examiner's report alongside the plaint on February 16, 2017. The plaintiff by his PExh No (8) dated April 6, 2016 raised the issue of forgery and attached a copy of the original title deed for the 2nd defendant's perusal. He also informed the 2nd defendant of the then ongoing criminal investigations. In PExh No 9 the 2nd defendant acknowledged receipt of PExh No 8 and said that they were looking into that matter and were going to revert shortly. Through PExh No (10) the 2nd defendant reverted back and took the view that the loan documents were indeed signed and executed on November 11, 2010 by the plaintiff before Mr Thuraira Atheru advocate.
 51. The 2nd defendant had the opportunity to make a report of fraud against the plaintiff and also surrender the rival documents in their custody duly signed by the plaintiff to PW 3. Similarly, there is no bar in law for the 2nd defendant to have mounted parallel investigations and come up with a different forensic



report in support of their defence. Submissions however forceful or powerful cannot replace pleadings and defence in law. See *Daniel Toroitich Arap Moi v Murithi* (2014) eKLR.

52. The 2nd defendant pleaded and testified that the plaintiff was introduced to them by the 1st defendant and willingly signed and or consented to charge his property and gave personal guarantees for the loan.
53. After the plaintiff raised what DW 1 called red flags, there was no evidence tendered that the 2nd defendant took any remedial actions to safeguard its rights by cooperating with the police and or the plaintiff to establish the veracity of the plaintiff's and allegations that the title deed held by the 2nd defendant was a forgery and the loan had been procured through misrepresentation.
54. Even at the time, the defence testified there was nothing brought before the court to show that the 2nd defendant had made any efforts to trace the 1st defendant, to have him apprehended and or tried to distance itself from the conduct of the 1st defendant in causing them to execute and or offer for registration a charge over the plaintiff's property based on forged documents.
55. It was the 2nd defendant who was continuing to enjoy the charge against the property of the plaintiff. The onus was on the 2nd defendant to give a reasonable explanation on its innocence in charging the plaintiff's property. The 2nd defendant did not even seek for indemnity against the 1st defendant before this court if at all they insist the deed of indemnity was lawfully executed and personal guarantees given by both the plaintiff and the 1st defendant.
56. In *Hellen Atieng Wanyama v Cooperative Bank of Kenya Ltd* (2021) eKLR, the court was dealing with two title deeds which were different and where the bank had refused to produce the original title deed despite an opportunity to do so.
57. The court made a finding that there could not be a valid charge created over the title capable of being enforced against the plaintiff.
58. The plaintiff testified and produced his identity card which counsel for the 2nd defendant sought to have a look at during cross examination and noted it looked fine. The court has gone through the documents produced by the 2nd defendant. There is nowhere the identity card or pin card of the plaintiff was displayed yet there was crucial document before any loan could be offered to the 1st defendant.
59. The 2nd defendant did not establish the identity of the person who signed the PExh No's (1), (2) & (3) and perhaps bring out anything to show the title deed under their custody was belonging to the plaintiff. See *Jonathan Namalala Nyongesa v Multi Business Shooters Investors Ltd & 3 others* (2017) eKLR, *James Mogunde Mogunde (suing on behalf of estate of Edward Sakawa Nyasaka v Faulu Microfinance bank Ltd* (2019) eKLR, the facts were that the registered owner was not in the country, the identity of the signatory was in doubt and there were glaring inconsistencies in the title deed used to secure the loan. The court made a finding that the title deed used to secure the loan was fraudulent and proceeded to invalidate the charge.
60. From the evidence, it is clear that the documents used to create the charge were not genuine. The person who signed the documents was not the plaintiff. The 2nd defendant has not brought any of its witnesses, in the nature of its employees or agents who participated in the process herein to confirm that indeed it was the plaintiff who signed, executed the documents and surrendered an original title deed to the bank in favour of the 1st defendant. Incidentally there is no evidence that the 2nd defendant took any due diligence to ascertain the veracity of the documents presented by the 1st defendant. Even after the plaintiff made a complaint the 2nd defendant remained unperturbed.



61. The court has come to the irresistible conclusion that the charge was fraudulently done by the 1st defendant in tandem with the 2nd defendant, its agents and or employees. The deceased and his property are not liable for such a loan.
62. The same is declared null and void. The entry to the register relating to the plaintiff's title deed are hereby cancelled and shall revert to the names of the deceased as it was prior to its registration. The letter of offer, acceptance, guarantee and indemnity are also invalidated.
63. Consequently, the 2nd defendant cannot derive any rights and interests over both the guarantee, indemnity and the charge as regards the plaintiff's property.
64. As regards, damages, the plaintiff failed to tender any evidence in support of such claim. The plaintiff is still occupying the land. The same has not been transferred to a third party or sold by way of an auction. Therefore, I find the plaintiff has failed to establish if he has suffered anything extraordinary to be entitled to general damages. Costs to the plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 12TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Mr. Gichunge for Plaintiff

HON. C.K. NZILI

ELC JUDGE

