



**Hunjan v Khan (Environment & Land Case 865 of 2016)
[2022] KEELC 13378 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 865 OF 2016
EK WABWOTO, J
OCTOBER 6, 2022**

BETWEEN

SURJIT SINGH HUNJAN PLAINTIFF

AND

NAHEED A. KHAN DEFENDANT

JUDGMENT

1. This suit was instituted *vide* a plaint dated July 26, 2016 seeking for the following orders: -
 - a. A permanent injunction barring the defendant by herself or anybody claiming on her behalf or through her from staying in or occupying Flat No 7, Block C On Land Reference No 209/3090, Kileleshwa, Nairobi County
 - b. Eviction of the defendant from Flat No 7, Block on Land Reference No 209/3090 Kileleshwa, Nairobi County.
 - c. Kshs 450,000/- being collected but unremitted rent and further Kshs 75,000/- per month from July 2016 until vacation of the suit premises.
 - d. Damages for unlawful occupation of the suit property.
 - e. Any other relief that this honourable court may deem fit to grant.
2. Upon being served with the plaint and summons to enter appearance, the defendant herein duly entered appearance, filed a statement of defence and counterclaim dated October 28, 2016. Pursuant to the counterclaim, the defendant herein sought various reliefs, *inter alia*:-
 - a. A declaration that the transfer of lease lodged on the December 31, 2015 at the Central Lands Registry at Nairobi was fraudulently registered by the plaintiff.



- b. An order nullifying and/or quashing the plaintiff's illegal title to Land Reference No 209/3090 Flat No 7, Block C, Kileleshwa, Nairobi and all subsequent dealings arising therefrom.
 - c. An order directed to the Central Lands Registry at Nairobi to delete, exclude and effect correction of the untrue and misleading information to the ownership of all that property known as Land Reference No 209/3090, Flat No 7 Block C, Kileleshwa Nairobi
 - d. A mandatory order directed to the plaintiff to release to the defendant the original Transfer of Lease document signed by the defendant and the previous owner of the suit property.
 - e. The plaintiff shall bear the costs of transfer of the suit property into the defendant's name.
 - f. General damages.
 - g. Costs of the counter claim.
 - h. Any other relief as this honourable court shall deem fair and just to grant.
3. From the record, the plaintiff's suit was dismissed by my brother Justice Eboso on September 25, 2018, and it was directed that the defendant's counter claim to be heard on February 25, 2019. Due to some unexplained reasons the hearing of the counter claim did not take place on the February 25, 2019. Later on 3/02/2022 the plaintiff filed an application seeking leave of the court to file reply to defence and defence to counter claim. The application came up before my brother Justice Eboso who delivered a ruling on October 23, 2020 as follows:-
- a. The plaintiff is hereby granted an extension of 15 days within which to file reply to defence and counterclaim.
 - b. The plaintiff shall pay the defendant throw away costs of Kshs 10,000 within 30 days from today.
 - c. In default of (b) above, the extension order herein shall stand vacated and any consequential pleadings filed by the plaintiff shall stand struck out.
4. The plaintiff did not comply with the directions issued by the court pursuant to the ruling delivered on October 23, 2020 but still filed an application dated June 20, 2022 seeking to stay proceedings pending the hearing and disposal of an intended appeal in respect to the ruling delivered by Justice Eboso on September 25, 2018. The said application was heard before this court on June 30, 2022 wherein the same was dismissed with costs to the defendant and the court directed the matter to proceed for hearing. Ultimately the defendants counterclaim proceeded for hearing on June 30, 2022.

The Evidence

5. The defendant testified as the sole witness on June 30, 2022. She adopted her witness statement dated October 28, 2016 and also produced the list and bundle of documents dated the same day.
6. It was the defendant's testimony that she purchased the suit property from one Satpal Sira for Kshs 4,300,000/=. The purchase price was paid in instalments until its completion.
7. It was also her testimony that she continues to be in occupation and possession of the suit property and that the transfer of the same to the plaintiff was irregular, fraudulent and unlawful since she was a bona fide purchaser for value.
8. On cross-examination, she stated that she paid for the property in cash and the same had not been registered in her name because her late husband fell ill and had to travel abroad for treatment before



giving her the necessary documentations. She also stated that she has not taken out any succession proceedings. She also admitted receiving some money from the plaintiff on behalf of her husband which according to her was to be used for her late husband's treatment in Pakistan in August 2008. She also admitted that the plaintiff and her late husband were good friends who had many dealings together.

9. Having tendered her evidence and relied on the documents on record, the defendant proceeded to close her case.
10. The plaintiff never called any witness during the hearing of the counter claim and as such his case was equally closed.

Submissions by the Defendant.

11. The defendant file her submissions dated July 18, 2022 through the firm of Tariq Khan & Associates Advocates. Counsel submitted that the plaintiff had not called any witness to controvert the defendant's case and as such the court should proceed to enter judgment in favour of defendant as prayed for in the counter claim. Counsel cited the cases of *Midas Touch Investment Limited –vs- Primecom communications Ltd* (2019) eKLR, *Netah Njoki Kamau & Another –vs- Eliud Mburu Mwaniki* (2021) eKLR and *Kenya Power & Lighting Company Ltd –vs- Rassul Nzembe Mwadzaya* (2020) eKLR, where courts separately held that a party seeking to challenge any fact during trial must do so by adducing evidence to rebut the same.
12. According to the plaintiff, it was submitted that there was no privity to the contract between the plaintiff and defendant and that the plaintiff was a stranger to the agreement for sale that was entered into between the defendant and Mr Satpal Singh Sira. Counsel also submitted that the defendant's late husband was not privity to the said agreement for sale. Relying on the case of *Lucy Nungari Ngigi & 4 others –vs- National Bank of Kenya Ltd & another* (2015) eKLR where it was held that: -

“It is well stated that as a general rule at common law that the doctrine of the privity of contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it.”

It was also submitted that the essence of this doctrine of “privity of contract” is that only the persons who negotiated and signed agreement and therefore privity to the same are entitled to enforce its terms. The defendant also submitted that pursuant to section 3(3) (a) and (b) of the *Law of Contract* cap 23 laws of Kenya and section 44(i) of the *Land Registration Act* to the effect that the plaintiff not being privity to the agreement for sale between the defendant and Satpul Singh Sira, cannot cause the court to dispose the defendant from her legitimate interest in the suit property as a *bonafide* purchaser for value.

13. Counsel also submitted that as per the evidence adduced in court, the defendant had provided the court with the following: -
 - i. An agreement for sale.
 - ii. A copy of the original lease dated April 17, 1996
 - iii. A share certificate.
 - iv. A list of shareholders from Elite View Management Limited.
 - v. A list of all owners of apartments at Elite View.
 - vi. A lease agreement dated January 1, 2008.



vii. An affidavit from the vendor Mr Satpal Singh Sira confirming the ownership of the suit property.

And that this was conclusive evidence that the defendant is the rightful undisputed legal owner of the suit property

14. It was also submitted that it was not clear how the property was transferred to the plaintiff's name when the alleged creditor was Pritesh Bhimjani. It was further submitted that the defendant had proved that he alleged directors of the management company ie Elite View Management Limited did not consist of Rasbish Light and Lishul Rasbish thus the consent was fraudulent in nature and as such the transfer of the lease to the plaintiff was fraudulent. Counsel urged the court to revoke the plaintiff's title basing on the evidence that was tendered.
15. On the remedies sought, counsel submitted that the defendant having proved her counterclaim was entitled to the remedies sought therein. Reference was made to the cases of *Michael Njiiri Kariuki -vs- Ferdinand Ndungu Waititu & 3 others* (2021) eKLR and *Arnabemy Limited -vs- Attorney General* (2014) eKLR and further stated that the defendant should be awarded general damages of Kshs 8,000,000/-

The Plaintiff's Submissions

16. The defendant's submissions were dated July 26, 2022 and was filed by Otieno Okeyo & Co Advocates. Counsel began by submitting that, by the fact that the plaintiff has not called any witness to testify during the hearing of the defendant's Counterclaim does not necessarily mean that the defendant is entitled to the orders sought. Counsel submitted that it was still within the defendant's obligation to prove her case to the required standard.
17. It was submitted that no evidence had been adduced by the defendant to prove the following: -
 - i. That the plaintiff undertook the registration of the subject transfer or played any role in the registration of the same.
 - ii. The ingredients of the fraud appearing on the registration of the same.
 - iii. No fraud had been proved on the part of the plaintiff.
18. Counsel also submitted that the Registrar of Titles was not a party to this suit and hence an order nullifying or quashing the plaintiff's title to the suit property cannot be issued.
19. It was also submitted that the defendant had not produced any single receipt to show how payments of the subject property were made neither did she produce any acknowledgment from her lawyer handling the transaction. Counsel also submitted that no evidence had been adduced to prove that the plaintiff has in his possession the alleged transfer instrument.
20. On the prayer for general damages, Counsel submitted that the same was unproven and is unmerited. Counsel concluded his submissions by making reference to the following cases *Gichinga Kibutha -vs- Caroline Nduku* (2018) eKLR, *Shanabal Ltd-vs- County Government of Machakos* (2018) eKLR, *George Kyalo Kilunda -vs- Ponjaws Limited* (2021) eKLR, *Lucy Njeri -vs- Isaac Wangoya Mwangi & another* (2018) eKLR and *Charterhouse Bank Limited (Under Statutory Management) -vs- Frank N Kamau* CA No 87 of 2014 (2016) eKLR.



Issues for Determination.

21. I have carefully analyzed the pleadings and the documents relied on by the parties. I have also considered the submissions filed by the plaintiff and the defendant. In analyzing the issues in dispute, I formulate that the following issues fall for determination: -
- i. Whether the defendant has proved the particulars of fraud.
 - ii. Who is the legal owner of the suit property?
 - iii. Whether the defendant is entitled to the prayers sought in the counterclaim.
 - iv. What orders should issue as to costs.

Analysis and Disposition

Issue no 1 whether the defendant has proved the particulars of fraud.

22. The Court of Appeal in [*Kinyanjui Kamau v George Kamau*](#) (2015) eKLR, held as follows:

“It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged”

23. The defendant pleaded and particularized fraud against the plaintiff which were outlined in her counterclaim dated October 28, 2018.

24. A party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud. In the case of [*Vijay Morjaria vs Nansign Madhusihn Darbar & another*](#) (2000) eKLR, the Court of Appeal 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

The same procedure goes for allegations of misrepresentation and illegally as outlined under order 2 rule 4 of the [*Civil Procedure Rules*](#). As regards the standard of proof, the Court of Appeal in the case of [*Kinyanjui Kamau vs George Kamau*](#) (2015) eKLR expressed itself as follows:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved. (See *Ndolo Vs Ndolo* (2008) 2 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; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

25. In the instant case, counsel for the defendant submitted that the defendant had proved her case and her evidence remained uncontroverted by the plaintiff who never called any witness.



26. From the evidence tendered, it was the defendant's testimony that on June 11, 2007, she entered into a sale agreement in respect to Flat No 7, Block C on Land Reference No 209/3090, Kileleshwa, Nairobi County with Mr Satpal Singh Sira for purchase of the same. The purchase price was Ksh 4,300,000/- which Ksh 1,600,000/- had been paid prior to the execution of the agreement and Ksh 400,000/- paid upon execution of the agreement and the remaining balance of Ksh 2,300,000/- was paid to the vendor (Mr Sira) within 60 days of the transfer in favour of her.
27. It was also her testimony that she was able to complete payment of the balance and the vendor released the completion documents to her late husband upon which she subsequently instructed her Advocates Tariq Khan & Associates Advocates to prepare a transfer of lease which was duly prepared and the same was signed by the vendor Mr Satpal Singh Sira. The transfer was released to her late husband for transmission to her but her husband fell sick and travelled to Pakistan for treatment where he passed away before giving her the documents, However the said documents had been left with the plaintiff for safe custody since the plaintiff was a close friend to her late husband.
28. The defendant further testified that moved into the property on January 30, 2016 and she has been staying there since then. She also stated that on June 24, 2016 she was surprised when received a letter from the plaintiff's advocates indicating that the plaintiff was the registered owner and was claiming rental proceeds from her to the tune of Ksh 6,390,000/-. Upon investigating as to how the same was registered in the names of the plaintiff, she was shocked to find out that the plaintiff had fraudulently transferred the suit property and had it registered in his name. The defendant also testified that the transfer of the lease document lodged at the lands registry by the plaintiff was forged and fraudulently done.
29. The logical conclusion to be drawn from the above evidence is that the registration of the suit property in the names of the plaintiff was illegal and fraudulent. It was illegal and fraudulent because it was intended to deprive the defendant ownership of the suit property without following and adhering to the requirements stipulated by the law. Further, the testimony of the defendant was uncontroverted since the plaintiff never called any witness to counter the evidence of the defendant. In the case of *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR the court stated that: -
- “...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a lease or a certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”
30. Being guided by the aforementioned authority, the plaintiff was unable to demonstrate how the said property was registered in his name and in view of the foregoing it is the finding of this court that the defendant has proved the particulars of fraud as pleaded at paragraph 3 of her counterclaim dated October 28, 2016.

Issue no 2 who is the legal owner of the suit property?

31. In *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, the Court of Appeal stated that:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the



legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

32. In *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a lease or a certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

33. In Nairobi High Court Civil Suit No 1024 of 2005(OS), *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

34. In *Mwangi James Njebia v Janetta Wanjiku Mwangi & another* [2021]eKLR, the Court of Appeal stated as follows:

“38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the lands office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.”

35. In *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

36. I am persuaded from the evidence on record that the defendant is the genuine and lawful owner of the suit property. the defendant placed documents before the court showing that the suit property



was fraudulently transferred to the plaintiff without her knowledge and consent. The plaintiff did not adduce evidence at the trial in this case to controvert and or challenge the evidence of the defendant.

37. Having found as above, the court finds and holds that the defendant has proved and demonstrated that she is the legal owner of the suit property and the court holds as such.

Issue no 3 whether the defendant is entitled to the prayers sought in the counterclaim.

38. The third issue relates to the question as to whether the defendant is entitled to the remedies sought in the counterclaim. the defendant sought for; a declaration that the transfer of lease lodged on the December 31, 2015 at the Central Lands Registry at Nairobi was fraudulently registered by the plaintiff, an order nullifying and/or quashing the plaintiff's illegal title to Land Reference No 209/3090 Flat No 7, Block C, Kileleshwa, Nairobi and all subsequent dealings arising therefrom, an order directed to the Central Lands Registry at Nairobi to delete, exclude and effect correction of the untrue and misleading information to the ownership of all that property known as Land Reference No 209/3090, Flat No 7 Block C, Kileleshwa Nairobi, a mandatory order directed to the plaintiff to release to the defendant the original transfer of lease document signed by the defendant and the previous owner of the suit property, The plaintiff shall bear the costs of transfer of the suit property into the defendant's name, general damages and costs of the counter claim.
39. The court has made a finding to the effect that at all material times, the suit property belonged to the defendant, and that the registration of the suit property in the name of the plaintiff was illegal and fraudulent. It therefore follows that the defendant is the lawful and rightful owner of the suit property. The defendant is therefore properly entitled to prayer (a). Prayers (b) and (c) are orders annulling the fraudulent entries and title and restoring the defendant's registration and release of the original transfer of lease documents signed by the defendant which was handed over to the plaintiff by the defendant's late husband. Given the above finding, the defendant is in my view, properly entitled to the above reliefs. Reference can be made to section 80(1) of the [Land Registration Act](#) that grants this court powers to direct as such. The said provision provides as follows: -

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

40. On the plea for general damages, I note from the evidence that was tendered, the defendant has had uninterrupted and unchallenged possession of the suit property since the year 2007 and never at any point did she lose the actual possession and as such no basis has been laid to warrant an award of general damages. In the circumstances I will decline the same.

Issue no 4 what orders should issue as to costs.

41. The court is granted discretion under section 27 of the [Civil Procedure Act](#) to award costs. Evidently, costs usually follow the events unless special circumstances present themselves. The defendant, herein has succeeded in making her case and getting orders as outlined above. the defendant being the successful litigant is entitled to costs of this counterclaim to be borne by the plaintiff herein.

Final Orders

42. In conclusion, the defendant's counterclaim dated October 28, 2016 is merited. I therefore enter judgment against the plaintiff and issue the following final orders: -



- a. A declaration that the transfer of lease lodged on the December 31, 2015 at the Central Lands Registry at Nairobi was fraudulently registered by the plaintiff.
- b. An order nullifying the plaintiff's illegal title to the property known as Plot No 7, Block C on Land Reference No 209/3090 Kileleshwa, Nairobi County.
- c. An order directed to the Chief Land's Registrar at Nairobi for the cancellation of the plaintiff's title in respect to property known as Plot No 7, Block C on Land Reference No 209/3090 Kileleshwa Nairobi County.
- d. A mandatory order directed to the plaintiff to release to the defendant the original transfer of lease document signed by the defendant and their previous owner of the suit property.
- e. The claim for general damages is declined.
- f. The plaintiff shall bear the costs of the counter claim.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF OCTOBER 2022

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. Okeyo for the Plaintiff.

Ms. Athman for the Defendant.

Court Assistants: Caroline Nafuna and Philomena Mwangi.

E.K. WABWOTO

JUDGE

