



**Sabaniah v Sabaniah (Environment & Land Case 16 of 2021)  
[2022] KEELC 15066 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15066 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**

**ENVIRONMENT & LAND CASE 16 OF 2021**

**JM KAMAU, J**

**NOVEMBER 24, 2022**

**(FORMERLY IN THE ENVIRONMENT & LAND COURT AT KISII CASE NO. 503 OF 2013)**

**BETWEEN**

**HERNER NYANDUKO SABANIAH ..... PLAINTIFF**

**AND**

**PRISCAH NYABOKE SABANIAH ..... DEFENDANT**

**JUDGMENT**

1. The parties herein are co-wives and widows of the late Sabaniah Ondieki who died in 2015. The Plaintiff filed a suit on December 19, 2013 claiming that in 1983 the Defendant married the Deceased as a second wife and the latter was brought to the suit property LR No West Mugirango/siamani/168 measuring 0.8 Hectares albeit temporarily before she moved to her land LR No West Mugirango/Bomwagamo/1529 given to her by her Deceased husband, 4 Kilometers away. But in July 2015 the Defendant breached the temporary license and built a posho mill and a permanent pit latrine on the suit land. The Plaintiff therefore seeks a Declaration that the defendant's license is determined, an Eviction order as well as a Permanent Injunction restraining the defendant from "in any way whatsoever trespassing on the Plaintiff's parcel of land West Mugirango/siamani/168 till the Hearing and determination of this suit".
2. On the January 23, 2014 the defendant filed a statement of defence denying the plaintiff's claim. She admitted that both of them are wives of the late Sabaniah Ondieki but that at the time of filing the suit Ondieki was still alive. She averred that the Plaintiff is registered as the owner of the suit property to hold the same as a trustee for herself and the defendant. She therefore denied acts of trespass and that her development of part of the suit land was done in full glare of the Plaintiff, knowledge and co-operation. She even installed electricity supply on the suit land. She concluded her defence by averring that the Plaintiff did not have capacity to license her since the defendant is also a beneficial owner of the property. Both parties filed witness statements and list of documents. The defendant filed her version



of statement of issues on June 23, 2017. Both parties were also ordered to agree on a joint valuer for the 2 parcels of land. This was duly complied with and the same were filed in court on June 2, 2018. They are dated February 24, 2018. The matter was referred to mediation on April 10, 2019 but the same did not yield any results. On May 22, 2019 the Deputy Registrar informed the court that the parties did not reach a settlement and the dispute found its way back to the court for Hearing.

3. The hearing of the case kicked off on April 20, 2022 with the Plaintiff testifying that West Mugirango/siamani/168 is registered in her name. it measures 2 Acres. She said that she married the Deceased just before Kenya attained independence in 1963. She said that her husband allowed the defendant to live on the suit land temporarily but that when he died, the latter put up permanent houses and a posho mill in 2012 and a pit latrine without the Plaintiff's consent. The defendant's land is LR No North Mugirango/bomwagamo/1519 which she owns exclusively but wherein she has not put up anything but her husband had planted tea for her on North Mugirango/bomwagamo/1529. She further testified that when the defendant put up a posho mill on the suit land, their late husband allowed her to use the posho mill but not put up any further buildings. She wound up her evidence in chief by producing the following documents:
  1. A copy of the title deed in respect of LR West Mugirango/ Siamani/168
  2. A copy of official search for LR West Mugirango/ Siamani/168
  3. A copy of the demand notice dated November 19, 2013.
4. On cross examination by Mr Ochwangi, Herner said that nobody has ever evicted her from the suit land which is at Nyangoso. She said she could not remember when the defendant married her husband who died in 2015 by which time the defendant was still on the suit land. She said it was not true that on January 12, 2015 there was a meeting that resolved that the defendant should stay on the suit land and that the title deed issued to the plaintiff should be rectified.
5. On re-examination by Ms Nyaenya, the plaintiff said that the defendant was on the suit land defiantly. When answering questions from the court, the Plaintiff said that she and her 3 sons and the defendant occupy the suit property peacefully and that she doesn't know what acreage the defendant could be in occupation of. Maybe 1 Acre and that she had nothing in writing to show that the defendant had been told to vacate the suit land.
6. PW2, Kennedy Mong'are, the plaintiff's 3<sup>rd</sup> born and 1<sup>st</sup> son to her testified that the defendant is his step-mother. He said that his written statement dated February 1, 2022 was a replica of that of his mother's further statement of February 1, 2022. On cross-examination this witness said that by the time he was born in 1968 the defendant had not married his father. She found him on the suit land in the early 1980's. He said that the land was registered in his mother's name in 1999. He also admitted that he didn't have anything to show that the defendant had been prevented from putting up anything on the suit land. He said that the defendant lives on the land with her 5 sons and 3 daughters and that there is a fence separating the 2 families which was put up by his late father and elders in the 1990s.
7. Before the land was registered in the plaintiff's name, the elders resolved that his father puts up a house for the defendant on West Mugirango/ Bomwagamo/ 1528 and also plants tea for her but he never put up the house and that this was minuted down though he has never seen those minutes. He said that the boundary between the 2 families' portions has always been respected and that it is very clear on the ground as to who occupies where. He was aware there were minutes to this effect dated January 12, 2011 and he could recognize his father's signatures in the minutes which were shown to him. On re-examination the Plaintiff's son said that his late father consented to the suit land being registered in the Plaintiff's name.



8. When the Plaintiff closed her case I ordered the parties to proceed to the probate court but I immediately vacated the order when informed that the suit land was not part of the deceased's estate.
9. The defendant testified that Zephaniah Ondieki, the husband to both parties died in 2015 and that the Plaintiff was her co-wife. She got married to him in 1980 and brought to the suit land where she has lived all along. Residential and business premises were put up for her on the suit land including a posho mill and houses for her children. She also planted tea on the suit land in the lifetime of her late husband and that there is a clear boundary separating the 2 families put up by her late husband in 1999. She said that the Plaintiff's land is bigger than hers in size but she is contented with what she has. She said that the dispute started during the lifetime of their husband occasioning the demarcation and that this suit was filed when their late husband was still alive.
10. She also testified that she did not settle on the suit land as a licensee and that she and her husband signed the minutes of January 12, 2011 to the effect that the suit land be divided into two equal portions between the parties herein. The area chief and District Officer, were equally present. She also said that her husband died on December 19, 2015.
11. On cross-examination by Ms Nyaenya for the plaintiff, the defendant said that they have always lived on the suit land and that she all along thought the suit land is registered in the name of their late husband until 2013 when the Plaintiff unlawfully felled some of her trees. In 2011 the late Mr Ondieki asked for the Title deed to the suit land for rectification but the Plaintiff refused to give it to him. She said in re-examination that her son died in 1986 and was buried on the suit land without any objection from the Plaintiff or her husband.
12. On further cross-examination by Ms Nyandoro, Priscah said that she could not tell whether the Plaintiff ever contributed to the purchase of the suit land but that the same was not hereditary. Her husband put up a permanent house for his son Julius although she herself was living in a house made of iron sheets and mud on the sides. But the permanent house she lives in was put up after her husband's demise. She also stated that the parcel of land LR No North Mugirango/bomwagamo/ 1529 measuring 1 Acre was bought for her by her late husband. On re-examination she said that the Plaintiff also has other parcels of land given to her by their deceased husband. When asked by the court, the defendant said that there was nothing peculiar about the suit land.
13. DW2 Augustino Nyaribo Otweka, a clan elder said that he knows the late Zephaniah Ondieki who was his age mate and who died about 3 years ago. He had 2 wives who are the parties in court and both lived on the suit land. The 2 have families and their respective portions are clearly demarcated since 1996 and that the defendant has never been told to vacate the land and further, her son was buried on the suit land 15 years ago.
14. On cross-examination, the clan elder said that the late Ondieki bought the suit land long before he married the Plaintiff and he also confirmed that Ondieki died in 2015.
15. The second defendant's witness, John Mokaya, a pastor with Jesus Revival Evangelical Ministry, said that he knew the parties as Ondieki's wives. In 1996 the Chief, Assistant Chief and other people including himself attended a meeting called for by the late Ondieki who wanted to sub-divide the suit land equally between his 2 wives but to the deceased's surprise he discovered that the plaintiff had already transferred the land to herself.
16. The land was demarcated and there are minutes to that effect. But the title deed could not be surrendered by the Plaintiff because she said that one of her sons had kept it. On cross-examination he said that the meeting that resolved to have the land sub-divided into 2 between the parties herein took place at the DO's office in 2011. He said that Zephaniah was his uncle – his father's brother and that



the deceased built a semi-permanent house for the defendant and on re-examination he admitted that the defendant still lives on the suit land now, in a permanent house.

17. The last witness, Evans Momanyi Matunda testified that Zephania Ondieki died about 5 years ago on December 19, 2015 leaving behind 2 widows, Herner and Priscah both of who live on the same piece of land with a boundary separating them and that the defendant was placed on the land when she got married to the deceased. He further stated that the boundary was placed in 1996 when a dispute arose between the 2 widows.
18. On cross-examination by Ms Nyandoro, Evans said that he understands the geography of the area very well because he stays in the neighbourhood and that Zephaniah had several parcels of land in different places. He said that the deceased had taken his 2 wives to the lands office for the rectification of the title deed but the same was not surrendered by the Plaintiff and therefore the exercise could not take place. This was thought necessary after marrying the 2<sup>nd</sup> wife.
19. After carefully listening to the witnesses testifying and looking at the submissions made on behalf of the parties, I am first left bewildered as to what the Plaintiff meant by describing her husband in paragraph 3 of her plaint as follows:

"The plaintiff and the defendant both wives of one Sabaniah Ondieki noalive".

20. It gives the impression that by December 19, 2013 the husband to both parties had already died. But in her undated statement filed contemporaneously with the Plaint, she described him in the first paragraph of the said statement as

".....who is still alive....."

21. I cannot understand why the said husband to both parties was not made a party to the suit since both testified that he died in 2015. In fact, the defendant produced the certificate of death for the late Ondieki showing his date of death as December 19, 2015 and after issues had been filed and the suit having been certified ready for hearing. Since both parties agree that the suit Land LR No West Mugirango/ Siamani/168 initially belonged to him his impact in the case would have been very important. At best even if he did not live to testify he would have been given an opportunity to record a statement and should have shed light on how the land got to be registered in the name of the plaintiff and how the defendant got settled on the same. Anyway, dead folks tell no tales.
22. The plaintiff has invited this court to find that LR No West Mugirango/ Siamani/168 was given to her by the late Sabaniah Ondieki, the husband to both parties. What she is unable to explain is how the defendant was allowed to settle on the said land together with her children and also how and why the late Ondieki came to have the land demarcated and a boundary marked between the parties each of them occupies. A copy of Judgement dated January 22, 2016 between the same parties in Nyamira Principal Magistrate's Court Civil Suit No 184 of 2015 has been brought to my attention. Only that they have interchanged their positions with the 1<sup>st</sup> Plaintiff in the lower court becoming the defendant herein and the defendant in the lower court being the Plaintiff in this case. The learned trial magistrate, Honorable RM Kitagwa was cautious and rightly so to stay clear of the ownership dispute of the suit land which was already before this court and marked his boundaries within what was beyond him, burial dispute.
23. The plaintiff has told the court that the suit land was transferred in her name by their late husband. She says that she is the one who allowed the defendant to occupy the suit land albeit temporarily in 1999. Is it the Plaintiff who allowed the defendant to stay on the suit land or their late husband? The defendant on the other hand says that it is their late husband who gave her the portion she occupies



and even built a house for her and another one for her son thereon. The building of the additional permanent house on the suit land by the defendant after the husband's death was just a perpetuation of her stay on the land.

24. As the plaintiff testified, the permanent buildings and a Posho Mill were built in the lifetime of their husband since paragraph 7 of the Plaintiff reads as follows:

"Sometimes in July 2013 the defendant without justifiable cause or lawful excuse, has built a permanent pit latrine thereon, and has installed a posho mill thereon and has breached the temporary courtesy/license extended to her to temporarily stay on the suit land parcel West Mugirango/ Siamani/168, notwithstanding the Plaintiff's request to move out, in effect terminating the license."

25. By this time December 19, 2013, the late Sabaniah Ondieki was still alive. On the other hand, the defendant's 2<sup>nd</sup> witness says that she was allowed to stay on the land by her late husband. The question is not who allowed the defendant to settle on the suit land but on what condition and for how long. The defendant has produced in her bundle of documents, minutes of a meeting held on January 12, 2011 which according to the defendant the late Mr Ondieki the land was to be sub-divided between his 2 wives. I have struggled to read the said minutes but the same are so faint. The minutes and the contents thereof are disputed by the Plaintiff.

26. It is the defendant's case that the plaintiff got the Title to the suit land fraudulently. One thing I noticed from the minutes is that the Deceased's Identity Card Number bore the number xxxx. He died in 2015 at the age of 79 years. As I held in the Nyamira ELC No 92 of 2021, *Shadrack Nyaberi Mwakae v David M Omoganda Ong'era and others*, a person of that age could not have possessed a National Identity Card with 8 digits. The contents of the so-called agreement/consent is quite illegible to ascertain the contents thereof. I helplessly tried using my glasses to read the "clearer" copy in the filed supplementary list of documents dated April 22, 2022 but in vain. It could therefore not help this court. The defendant's evidence that the plaintiff stole the title deed to the suit land was unsubstantiated and there is no credible evidence in court. The fact that the land was transferred to the Plaintiff in 1999 after the defendant had already married the deceased in 1983 demonstrates the intention that the deceased intended the land to so remain the property of the plaintiff. Should the defendant have seriously wished the Court to believe the transfer of LR No West Mugirango / Siamani /168 to the Plaintiff was marred with fraud, then evidence should have been tendered to prove that the whole scheme was not only hatched but also how it was executed. In any case, under Order 2 Rule 10 (1) (a) of the *Civil Procedure Rules* particulars of fraud upon which a party relies have to be specifically pleaded. The defendant did not mention fraud anywhere in her statement of defence but only averred that the suit land was registered in the name of the Plaintiff in trust for both parties, the Plaintiff and the defendant. Breach of trust must also be specifically particularized. This was not the case here. The plaintiff averred in her Plaintiff and also gave evidence that the defendant was given the parcel of land known as LR No West Mugirango/bomwagamo/ 1529 which was registered in her name, about 4 Kilometers away from the suit land. The defendant could not explain why she was entitled to 2 parcels of land whereas the plaintiff had no share in the latter parcel of land.

Section 24(a) of the *Land Registration Act*, Act No 3 of 2012 provides:

"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".



27. The rights of a proprietor are enshrined under section 25 of the Act as follows:

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.....”

Section 26 provides that:

- a. 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,.....

But being conscious that not all title deeds are genuine, the legislature did not stop there. It proceeded with a qualification:

.....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.

28. *The Black's Law dictionary* defines fraud as follows:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

29. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR Justice Sila Munyao held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.”

30. However, *Solomon Omwega Omache & another v Zackery O Ayieko & 2 others* (2016) eKLR it was stated that the court has the duty to uphold the sanctity of the records from the Lands office.

31. Section 80 (1) of the *Land Registration Act* No 3 of 2012 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.”



32. In *RG Patel v Lalji Makanji* (1957) EA 314 the court expressed itself as follows:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"

33. Given the seriousness of the allegations, the onus was on the defendant to provide evidence to the court of the alleged fraud which evidence must meet the standard of proof as was underscored by the Court of Appeal in *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the court rendered itself as follows:

"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."

34. In the case of *Urmila w/o Mabendra Shab v Barclays Bank International Ltd & another* [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

35. The position that emerges is that evidence of especially high quality and strength is required to prove fraud in land cases. It is a daunting and burdensome task to prove fraud in any civil case. In the instant case, the defendant needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of the Plaintiff.

36. Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable doubt, but above balance of probabilities. No evidence was tendered to this end by the defendant at least to verify her allegations.

37. However, from the evidence tendered in court, the defendant has not proved fraud at all.

38. In the absence of evidence, I am therefore unable to impeach the plaintiff's title deed in respect to LR No West Mugirango/siamani/168 or even find that it was acquired fraudulently and the Plaintiff then accordingly succeeds in her claim No (a) in the prayers in the plaint. As for prayer No (b) I order the defendant to vacate from the parcel No West Mugirango/siamani/168 within the next 18 months from the date hereof. She will also be at liberty to remove all her belongings and particularly the buildings she has put there as well as the trees thereon. In the alternative, the defendant is at liberty to engage the Plaintiff for purposes of the purchase or exchange of the portion she occupies on the suit land. But the latter is subject to the plaintiff's willingness and discretion.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 24TH DAY OF NOVEMBER 2022.**

**MUGO KAMAU**

**JUDGE**

In the Presence of: -

Court Assistant: Sibota

Plaintiff: N/A

Defendant: Mr. O chwangi

