



REPUBLIC OF KENYA



**KENYA LAW**  
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**Juma (Suing as the Legal Rep of Raphael Ajuma Otinda) v Muluma & 3 others (Environment & Land Case 147 of 2014) [2022] KEELC 15101 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15101 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 147 OF 2014  
AA OMOLLO, J  
NOVEMBER 10, 2022  
FORMERLY HCC 15 OF 2007**

**BETWEEN**

**PAMELA AKINYI JUMA (SUING AS THE LEGAL REP OF RAPHAEL AJUMA OTINDA) ..... PLAINTIFF**

**AND**

**BENARD F MULUMA ..... 1<sup>ST</sup> DEFENDANT**

**EVERLINE HELLEN OJIAMBO (SUING AS REP OF AGGREY BARASA OKHAYA) ..... 2<sup>ND</sup> DEFENDANT**

**SELLA AYUMA ..... 3<sup>RD</sup> DEFENDANT**

**BENSON SAJJA MUGENI ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit vide a plaint dated June 4, 2007 and filed on the same day. The plaint was later amended and re-amended and filed on August 12, 2013. In the re-amended plaint, the plaintiff pleaded that by a handwritten contract dated July 3, 2001, the plaintiff agreed to sell to the 1<sup>st</sup> defendant a portion of his land No Sama/Luanda-Mudoma/432 measuring 50 ft by 100 ft at Kshs 55,000. That a deposit of Kshs 15,000 was paid on execution.
2. The plaintiff pleaded further that after a few months, the 1<sup>st</sup> defendant duped the plaintiff into signing some documents lying that it was for correction of names for finalising the land agreement. That the 1<sup>st</sup> defendant went further to obtain Land Control Board consented and demarcate the purchased portion on the ground and subdivide to register himself as the owner of a subdivided portion number Samia/Luanda-Mudoma/2292. The plaintiff lists the following as the particulars of the fraud;
  - a. Duping plaintiff as to size of land



- b. Failing to physically demarcate land
  - c. Interfering with land records
  - d. By-passing plaintiff in the transaction
  - e. Refusing to pay full purchase price
  - f. Grabbing a larger portion of land and in records only.
  - g. Failing to heed notices
  - h. Boasting about the unlawful acquisition
  - i. Failing to honour promises
  - j. Avoiding the plaintiff
3. It is pleaded further by the plaintiff that on learning of the fraud, he lodged a caution on the 1<sup>st</sup> defendant's title Samia/Luanda – Mudoma/2292. Despite this caution, the 1<sup>st</sup> defendant colluded with the Land Registrar to have it removed, subdivided it and sold portions thereof to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff accused the 1<sup>st</sup> defendant of breaching their contract and now wants the said contract cancelled. He filed this suit to be granted the following orders;
- a. An order that the contract of sale of land dated July 3, 2001 is hereby rescinded for misrepresentation and breach and the subdivision of parcel number Samia/Luanda/Mudoma/432 into parcel No Samia/Luanda/Mudoma/2292 is ordered cancelled and the register be rectified accordingly.
    - (aa) An order that the contract of sale of land dated July 3, 2001 be rescinded for misrepresentation, breach and illegality by statute and the subdivisions of parcel number Samia/Luanda/Mudoma/432 into parcel No Samia /Luanda/Mudoma/2552, 2553 and 2554 be ordered cancelled and the register be rectified and restored into the name of Raphael Ajuma Otinda (deceased).
  - b. Refund of Kshs 45,000/= to the defendant
    - (bb) The 1<sup>st</sup> defendant be refunded his Kshs 15,000/= by the plaintiff
    - (bc) The 1<sup>st</sup> defendant do return the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants any money received by him as the purchase price.
  - c. Costs of the suit
  - d. Any other or further relief.
4. The defendants filed a joint defence and denied the plaintiff's claim in toto. The defendants pleaded that the plaint does not disclose any reasonable cause of action and urged the court to dismiss the suit with costs.
5. The hearing of the case commenced on October 18, 2021 with the evidence of the plaintiff as PW 1. She adopted her statements dated February 5, 2014 and further statement dated April 15, 2021. PW 1 is the legal representative of Raphael Ajuma Otinda – deceased who sold the disputed land to the 1<sup>st</sup> defendant. PW 1 said they decided to sell a portion of their land measuring 50 x 100 to take care of medical expenses of their son Erick Owino who was sick. That later, they learnt the 1<sup>st</sup> defendant had



written the size of land sold as 200 x 200 ft. The 1<sup>st</sup> defendant also failed to pay the balance of Kshs 40,000/=. PW 1 continued that the 1<sup>st</sup> defendant secretly subdivided the land, curved out half an acre which he registered in his name.

6. The witness blamed the 1<sup>st</sup> defendant for illegally causing the deceased to be arrested and charged in court. That while the deceased was in detention in Korinda Prison, the 1<sup>st</sup> defendant brought surveyors who hived off a portion bigger than what was sold. The plaintiff said they tried to demand the balance of the purchase price through the Provincial Administration but the 1<sup>st</sup> defendant was hostile. Instead, he went on to illegally sell parts of this portion to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. PW 1 confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have developed the sold portions.
7. In the further statement, PW 1 stated that they only signed a handwritten agreement which was written in English on July 3, 2001 and received a payment of Kshs 15,000 only. According to the witness, they did not understand English but believed that what was sold was a plot (50 x 100ft). She denied signing the 2<sup>nd</sup> agreement that is partly typed and partly inserted in hand. PW 1 avers that her husband never signed any application for Land Control Board consent for the 1<sup>st</sup> defendant and that no such application has been annexed. The plaintiff took issue with the date of letter of consent to transfer dated August 7, 2001 which is said to have been issued on the same date of the meeting and also earlier than when the register for LR 2292 was opened on December 20, 2001. The witness produced the documents filed as exhibits in support of the plaintiff's case.
8. During cross-examination, PW 1 denied that the 1<sup>st</sup> defendant was sold a plot measuring 200ft by 200 ft. She further denied that the purchase price was paid in full nor that the deceased attended before the land control board for consent to subdivide. PW 1 also denied seeing a surveyor come to measure the sold land. In re-examination, PW 1 that they only received a call about the surveyor that was on the land when they were in court. She reiterated that what was sold was 50 x 100ft plot and she did not know that the 1<sup>st</sup> defendant made additional payment of Kshs 30,000/=.
9. The plaintiff's daughter Salome Akinyi Ajuma testified as PW 2. She adopted her witness statement filed on February 5, 2014. PW 2 told the court that on July 3, 2001 while at Funyula shopping center, she got a call from her parents asking to go see them. On arrival at home, she was told the intention and purpose of selling a portion of their land. PW 2 repeated the evidence of PW 1 with regard to the size of land sold and the amount of money paid. It is her evidence that since the 1<sup>st</sup> defendant declined to pay the balance and took extra 3 plots, the whole land should revert back to the estate of the deceased.
10. In cross-examination, PW 2 stated she did not protest the sale because they needed money for treatment of their brother. That the 1<sup>st</sup> defendant recorded the agreement in an exercise book and as the secretary, he wrote what he wanted. That she was not present during the survey nor witness the payment of any balance. PW 2 was not aware if her father took the 1<sup>st</sup> defendant before the Land Control Board and according to her, their land No 432 is still intact. In re-examination, PW 2 said that when the deposit was paid, no survey exercise took place. That the land was surveyed in 2009 while they were all absent. That the land sold was 50 x 100 ft and she has never seen the balance being paid. This evidence brought to a close the plaintiff's case.
11. The defendants opened their case on October 18, 2021 with the evidence of the 1<sup>st</sup> defendant as DW 1. He stated that Raphael Ajuma – deceased approached him intending to sell him land. DW 1 said the deceased showed him a portion which was already demarcated to be excised from LR No Samia/Luanda-Mudoma/432. That he accepted to buy the portion at an agreed price of Kshs 55,000/=. It is his evidence that on July 3, 2001 a handwritten agreement was drawn by the surveyor called Peter Malugo Musigo and on which date, a down payment of Kshs 15,000/= was given.



12. DW 2 continued that before paying the sum of Kshs 15,000/= the surveyor took measurement of the plot and found it to be 200ft by 200ft and the measuring was done in the presence of all the parties. The 1<sup>st</sup> defendant avers that when he made a payment of Kshs 30,000/= they signed a fresh agreement which they backdated to July 3, 2001. He also contends that it is the deceased who applied for Land Control Board consent to subdivide the land into 2 portions which consent was given under minute 54/8/2001 dated August 7, 2020 and ref No 0503/2001. The witness added that the deceased also applied for and obtained the consent to transfer on the same date under ref No 63/8/2001 and ref No 567/2001. That the deceased executed the transfer in his favour, without any coercion.
13. DW 1 denied that what was sold to him was a portion measuring 50 x 100ft. and denied acquiring his title fraudulently. According to him, the entire purchase price was fully paid with Kshs 10,000/= paid on the date of execution of the transfer on December 20, 2001. He asserts that the plaintiff is just being greedy by bringing this case. He concluded that his co-defendants legally and rightfully acquired their suit portions from him. He urged the court to dismiss the suit.
14. Under cross-examination by Mr Wanyama learned counsel for the plaintiff, DW 1 gave dates on how he paid the purchase price in full adding that the seller signed all the documents. That on page 2 of the application for consent to transfer it is not dated when the document was signed. DW 1 admitted that consent to transfer was issued on August 7, 2001 while the register for parcel No 2292 was opened on December 20, 2001. That the land sold to him was already demarcated with sisal boundaries. That the measurement of the land was done in the presence of PW 1 and her husband. According to DW 1, the deceased wanted to sell this land a second time in 2007 and when he objected, they started bringing issues.
15. Peter Malingu Musigo gave evidence as DW 2. He admitted preparing the handwritten agreement dated July 3, 2001. DW 2 said he used to work with Arch Surveys offices at Funyula where the deceased and his wife (PW 1) and the 1<sup>st</sup> defendant visited and expressed an intention to sell land. That he accompanied them back to the ground to confirm existence of the land and ascertain their measurements. DW 2 said he took measurements of the portion showed to him which returned 200 ft by 200 ft. He avers that it is after this exercise of measuring that they visited the deceased home and an agreement was drawn. He gave the names of the people present and who signed the agreement as Raphael Ajuma Otinda, Benard Mulumia, Pamela A Juma, Kennedy Mangeni, Wilson Bwire Okuju and himself.
16. In cross-examination, DW 2 said the plot already had a boundary and he confirmed its size as 200ft and 200ft in the presence of concerned parties. That besides Kshs 15,000/= he did not witness the payment of the balance.
17. The 3<sup>rd</sup> defendant's witness Mr Wilson Bwire adopted his witness statement dated March 13, 2020. DW 3 said he was present when the deceased sold a portion of his land to the 1<sup>st</sup> defendant at an agreed price of Kshs 55,000/=. That PW 1 witnessed the agreement and also witnessed the measuring of the land. He contended that the 1<sup>st</sup> defendant is entitled to the land he purchased. In cross-examination, DW 3 said he only witnessed the handwritten agreement and the payment of the deposit of Kshs 15,000/=. He never witnessed the payment of any additional payments. This also marked the close of the defendant's case.
18. The plaintiff filed his submissions on March 9, 2022 starting by giving a summary of the evidence adduced. The plaintiff submitted that the handwriting experts report which confirmed that the deceased signature in the transfer documents was different from the known signature, that there was never Land Control Board consent to obtained to subdivide or transfer. They supported that argument



with the holding in the case of *David Sironga Ole Tukai vs Francis Arap Muge & 2 others* (2014) eKLR which held thus:

“The following five fundamental conclusion in our view, are self-evident and flow directly from the above express provisions of the Land Control Act:

- i. All transactions involving agricultural land situate in a land control area are void for all purposes unless the land control board within that land control area has sanctioned them.
- ii. Even declaration of a trust in agricultural land situated in a land control area is not spared; without consent of the land control board, it is also void.
- iii. Consent of the relevant Land Control Board must be obtained within six months of the making of the agreement relating to agricultural land. The High Court however has power, for good reason, to extend the period for applying for consent.
- iv. Where the transaction is ultimately void for lack of consent, any money or consideration paid by a would-be purchaser is recoverable as a debt.
- v. It is a criminal offence punishable by imprisonment or fine or both to pay or receive payment in respect of a void transaction or to take possession or remain in possession of land, which is the subject of such void transaction...”

19. The 1<sup>st</sup> defendant filed his submissions on June 3, 2022 also giving a summary of the evidence adduced by both sides particularly the evidence of their evidence. He submits that there was no breach of the contract and that he followed due process in acquiring title for the sold portion by producing the respective documents. The 1<sup>st</sup> defendant took issue with the examiner’s report stating that the drawer did not annex a licence to confirm that he is a licenced document examiner. They also state that the piece of evidence did not comply with section 35 (1) (b) of the *Evidence Act* cap 80 because the maker was not called. The 1<sup>st</sup> defendant added that he has not been charged with any offence of forgery. They urged the court to dismiss the suit.
20. The issues arising for determination of this suit based on the pleadings and evidence adduced are two;
  1. First is whether the 1<sup>st</sup> defendant breached the contract and if yes, whether the same can be cancelled.
  2. Whether or not the 1<sup>st</sup> defendant fraudulently subdivided LR 432 and illegally transferred one of the resulting numbers LR No 2292 to himself.
  3. Who meets the costs of the suit?
21. From the evidence, there is no dispute that the two parties (plaintiff and 1<sup>st</sup> defendant) entered an agreement to sell and buy a portion of land comprised in parcel No Samia/Luanda-Mudoma/432. There is also no dispute that a handwritten agreement was signed. What is in dispute is the size of the land sold and whether or not the entire purchase price was paid. The plaintiff accuse the 1<sup>st</sup> defendant of breach for hiving off more than what was sold and also failing to pay the price in full.
22. PW 1 and PW 2 confirmed they signed the handwritten agreement as witnesses to the deceased who was selling. In the handwritten agreement, PW 1 said because they do not know how to read or write English, they trusted the 1<sup>st</sup> defendant who was preparing the agreement to write the correct size of land sold as 50ft by 100ft. PW 1 said the agreement was prepared by the 1<sup>st</sup> defendant yet this is not true as



brought out by the evidence of DW 2. Secondly, DW 2 said that before he prepared the agreement, they first went to the portion marked for sale and he carried out the measurements which was 200ft by 200ft. This witness said that it was after the measurement that the agreement was drawn and that the portion was already demarcated. The handwritten agreement clearly stated the size of the land sold as 200ft by 200ft. This court finds the defence of not understanding English as to be without merit as the plaintiff had the option of requesting the agreement to be written in the language they understood. There was no evidence led that they were coerced into signing the handwritten agreement so the plaintiff knew what portion they were selling and they did not deny that the portion sold was already demarcated. I therefor find that the question of the size sold was not breached by the 1<sup>st</sup> defendant.

23. The second limb of the breach was that the 1<sup>st</sup> defendant had not paid the whole purchase price. The 1<sup>st</sup> defendant said that when he made the second payment of Kshs 30k, they signed another agreement that was partly typed and partly inserted in hand. The plaintiff denied this second agreement. She has relied on a report of a document examiner which reported that the signature of the deceased vendor was forged. This particular document was also witnessed by PW 1. Her signature on the document was not examined. It is not sufficient to say I did not sign when she is indicated as witnessing the signature of the buyer and the seller. If her signature is not a forgery, then she ought to have told the court whose signature she was witnessing.
24. The document examiner in his report (par-1) dated March 4, 2021 introduced himself as a retired Commissioner of Police and forensic document examiner. *Black's Law Dictionary* defines forensic as "of, relating to or involving the scientific methods used for investigating crimes."

"Forensic evidence is defined (Blacks law) as evidence used in court especially evidence arrived by scientific means (as with nuclear or toxicological and chemical analysis), by interpretation of patterns (as or by a combination of experimental and scientific analysis.)"
25. At page 2 of his report, the examiner said he had examined and compared the questioned signatures indicated by red arrows on exhibits 51 – 5A with known signatures also shown with red arrows in exhibits marked GNI – GN2. The examiner noted that all the samples sent to him were photocopies although he argues they were legible and clear for examination. The signatures of the 1<sup>st</sup> defendant was not compared with the questioned signatures of the deceased (Raphael Otinda). The examiner does not record that the questioned signatures were made in the hand of the 1<sup>st</sup> defendant. Since the plaintiff accused the 1<sup>st</sup> defendant of forgery, it was not sufficient to say the deceased did not sign the second agreement without associating the forgery with the 1<sup>st</sup> defendant. The place of examination of the documents is also not given taking note that the examiner introduced himself as retired so as ascertain that a forensic examination of the impugned signatures indeed took place.
26. The plaintiff further alleged fraud against the 1<sup>st</sup> defendant. The plaintiff denied that the deceased did not sign the application for Land Control Board consent for sub-division and the mutation form. The court notes that application for LCB consent to subdivide signed by the deceased is not amongst the document that were examined. The mutation form bears the name of the deceased and his signature. The person whose stamp appears on the documents (Geomatics services) were neither sued nor called as witnesses by the plaintiff. It is difficult to ascertain on what basis the 1<sup>st</sup> defendant should be held responsible for forgery of these two documents that do not bear his signature and that he did not draw.
27. The last item is the questioned LCB consent to transfer and the duly executed transfer form. The plaintiff avers not to have signed the application for consent. The plaintiff had pleaded that a few months after the execution of the handwritten agreement, the 1<sup>st</sup> defendant duped the deceased into signing some documents under the pretext that they were for correction of names to complete the



transaction. The pleadings thus confirms that besides the sale agreement, the deceased also signed additional documents albeit to their knowledge it was for correction of names. In the 1<sup>st</sup> defendant's documents particularly minutes of the LCB under minute no 504/2001, there was an application for consent to correct the deceased name from Juma Otinde to Raphael Ajuma Otinde. If there was a transaction to correct names, is the plaintiff being honest in denying signing the documents they deny their signatures? Further, there was no evidence called from the then District Commissioner's Office to counter that indeed the board did not sit on the dates when the impugned consents were issued.

28. This court holds the view that the alleged forgery of the signature on the impugned applications for consents cannot be a stand-alone evidence to prove the fraud. The signing of the application was one step. There was need to demonstrate that the LCB could or could not give letter of consent without the attendance of the deceased. The letters of consent produced by the 1<sup>st</sup> defendant have not been said to be forgeries.
29. The last item is the signing of the transfer form. The plaintiff avers that the deceased never signed the document and like the previous documents, relied on the examiner's report produced. As this document was witnessed by an advocate and it is indicated on the face of the form that PW 1 identified the deceased to the advocate. The plaintiff apart from denying the signature does not lay any basis whether she knew the advocate who is purported to have witnessed the signature of the deceased. Their case had quite abit of gaps that the production of a document examiner's report was not sufficient to fill. The law requires the standard of proof of fraud to be higher than just on a balance of probabilities. The burden was on the plaintiff to discharge and premised on the analysis provided, I find the plaintiff failed to meet the threshold.
30. In conclusion, I find that the plaintiff has not exhibited a *prima facie* against the defendants. Accordingly, the suit is ordered dismissed with costs to the defendants.

**DATED, SIGNED & DELIVERED ONLINE AT MILIMANI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**A. OMOLLO**

**JUDGE**

**Sent to advocates on record via email at BUSIA this 10<sup>th</sup> Day of November, 2022**

**DEPUTY REGISTRAR, ELC**

**BUSIA**

