



REPUBLIC OF KENYA



**Marita v Mbugua & 2 others (Environment & Land Case 1632 of 2016)  
[2022] KEELC 15415 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15415 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1632 OF 2016**

**MD MWANGI, J  
DECEMBER 5, 2022**

**BETWEEN**

**GEORGE AMBOGO MARITA ..... PLAINTIFF**

**AND**

**JOYCE WAIRIMU MBUGUA ..... 1<sup>ST</sup> DEFENDANT**

**JULIA NDUNYU KAMWARA ..... 2<sup>ND</sup> DEFENDANT**

**ROYSAMBU HOUSING CO-OP SOCIETY LTD ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff in this case avers that sometimes between December 20, 2007 and October 2008, he entered into a written agreement with the 1<sup>st</sup> defendant for purchase of plot Nos 312 & 313 Roysambu Zimmerman. The Plaintiff in his amended plaint alleges that he paid the agreed purchase price for both plots to the 1<sup>st</sup> Defendant. The transaction was entered into with the knowledge/concurrence of the 3<sup>rd</sup> Defendant who had allotted the plots to the 1<sup>st</sup> Defendant.
2. The Plaintiff allegedly took possession of the plots, cleared the same and fenced the same and fenced around them and was awaiting the certificates and transfer forms from the 3<sup>rd</sup> Defendant to process title.
3. The Plaintiff avers that contrary to his expectation, the 1<sup>st</sup> Defendant offered the same plots for sale to the 2<sup>nd</sup> Defendant. The Plaintiff asserted that the intended sale and transfer to the 2<sup>nd</sup> Defendant was fraudulent, irregular and intended to defeat his title over the 2 plots. He particularized the allegations of fraud against the Defendants jointly and severally at paragraph 8 of his amended plaint. He accused the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants of destroying the beacons of the plots but he affirms that he is in actual possession.
4. The Plaintiff prayed for judgment against the Defendants jointly and severally for: -



- a. A permanent injunction restraining each of the Defendants jointly and severally, either by themselves, their agents, servants and/or employees from transferring, offering for sale to any other person/party or in any other way dealing with and/or interfering with plots numbers 312 and 313 Roysambu, Zimmerman owned by the Plaintiff and a further declaration that the Plaintiff is the owner/proprietor of plot Number 312 and 313 Roysambu, Zimmerman, Nairobi.
- b. Re-beaconing of the plots by an independent surveyor/and or a surveyor appointed by the court at the expense of the 2<sup>nd</sup> Defendant.
- c. The 3<sup>rd</sup> Defendant be ordered to reissue a letter of allotment to Plaintiff, sign transfer documents & write a recommendation letter to Nairobi Lands registry to facilitate transfer in favour of the Plaintiff in default Land registrar to execute the transfer documents in Plaintiff's favour.
- d. Costs of the suit and interest.

#### **Response by the 2<sup>nd</sup> Defendant.**

5. In response, the 2<sup>nd</sup> Defendant filed a statement of defence and counter-claim. The 2<sup>nd</sup> Defendant averred that she was an innocent purchaser of value from the 1<sup>st</sup> Defendant with the authority of the 3<sup>rd</sup> Defendant.
6. The 2<sup>nd</sup> Defendant denied that the Plaintiff was ever in possession of the suit property. She averred that she took possession of the plots immediately after purchasing them.
7. The 2<sup>nd</sup> Defendant affirmed that the agreement between the 1<sup>st</sup> & 2<sup>nd</sup> Defendant was before the alleged agreement between the Plaintiff and the 1<sup>st</sup> Defendant, allegedly of October 13, 2008. The 2<sup>nd</sup> Defendant has since obtained a transfer from the 3<sup>rd</sup> Defendant and a lease/allotment from the City Council of Nairobi who are the holders of the head title.
8. I wish to note that no defence was filed against the counter-claim by the 2<sup>nd</sup> Defendant.
9. In his counter-claim, the 2<sup>nd</sup> Defendant prays for restraining orders against the Plaintiff, general damages for wrongful trespass and destruction of property, aggravated damages as well as costs.
10. The 3<sup>rd</sup> Defendant had filed a statement of Defence dated August 6, 2014, denying the Plaintiff's claim. At paragraph 8 of the said statement of Defence, the 3<sup>rd</sup> Defendant alleged that the suit properties had since been repossessed by the City Council of Nairobi since they lie on a riparian reserve.
11. This matter proceeded to hearing. The Plaintiff testified in his case. The 2<sup>nd</sup> Defendant too together with one other witnesses.

#### **Evidence adduced on behalf of the Plaintiff.**

12. The Plaintiff adopted his witness statement dated May 10, 2019 as his evidence in chief. In a nutshell, the Plaintiff stated that he entered into an agreement for sale of the 2 plots with the 1<sup>st</sup> Defendant on December 20, 2007. He paid a down-payment and later cleared the balance. Thereafter he went and fenced the plots. He was cultivating on the shamba and planting crops, upto about June 2008 when he was summoned at Kasarani Police Station and confronted with allegations of forcible detainer, and entry into someone's land.



13. In cross-examination, the Plaintiff confirmed that the 2<sup>nd</sup> Defendant is in actual occupation of both plots, where she runs a school, for over 10 years as far as he knew. The 1<sup>st</sup> Defendant had actually been charged at Makadara Law Courts with a criminal case. He stated that he did not know its outcome.
14. The Plaintiff confirmed that he has since become aware that the 2<sup>nd</sup> Defendant has a lease from the City Council of Nairobi, which he however, termed as fake.
15. The Plaintiff finally confirmed that his agreement was not attested.

**Evidence adduced on behalf of the 2<sup>nd</sup> Defendant.**

16. The 2<sup>nd</sup> Defendant testified in her case and adopted her witness statement dated October 26, 2021 as her evidence in chief.
17. It was DW1's testimony that at the time of purchasing the suit properties, in January 2008, she was serving as an assistant chief of that area. She had requested some elders to help her get land. Two of the elders one Mr Muthemba and Mr Mwangangi informed her about someone who was selling 2 plots next to her school. They organized a meeting between DW1 and the said seller (1<sup>st</sup> Defendant) at the 2<sup>nd</sup> Defendant's school. The seller was the 1<sup>st</sup> Defendant in this case.
18. DW1 testified that she entered into an agreement in respect of plots number 312 and 313 with the owner on January 30, 2008. The owner showed her the share certificates and they too physically went to the ground. There was one structure in the land and some big trees. The owner had been rearing pigs on the suit premises.
19. After executing the agreement for sale, the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant went to the 3<sup>rd</sup> Defendant's offices at Githurai where the 1<sup>st</sup> Defendant transferred the plots to the 2<sup>nd</sup> Defendant with the consent of the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant amended their records accordingly to reflect the change of ownership and further issued the 2<sup>nd</sup> Defendant with 2 certificates in her name. She thereafter took actual physical possession of both plots moving her school to the suit premises.
20. The 2<sup>nd</sup> Defendant has since acquired leases of the 2 plots, the subject matter of this case from Nairobi City County Government.
21. In cross-examination, the 2<sup>nd</sup> Defendant confirmed that she acquired the plots from the 1<sup>st</sup> Defendant. She confirmed that she took possession and has continued being in possession after the court issued status quo orders.
22. DW1 asserted that the structures that were on the land after she bought the plots belonged to the 1<sup>st</sup> Defendant. That was where she had been rearing pigs from.
23. DW1 further affirmed that she was not aware of the previous agreements, if any, between the Plaintiff and the 1<sup>st</sup> Defendant.
24. DW1 started constructing on the plots immediately after taking possession of the same. The Plaintiff was aware since the lorries that were delivering building materials to the suit properties were even passing through his land that was adjacent to the suit premises.
25. DW1 in answer to the Plaintiff's question, asserted that she fully paid the purchase price to the 1<sup>st</sup> Defendant and had no issue whatsoever with her.



26. The 2<sup>nd</sup> Defendant too called one George Mwangangi Munene as her witness (DW2) in the case. DW2 was a witness to the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant together with one John Muthemba who had since passed on.
27. In cross-examination DW2 confirmed that the 1<sup>st</sup> Defendant owned the plots which she sold to the 2<sup>nd</sup> Defendant. He resides in the neighbourhood and is a village elder therefore well versed with all the issues involving the suit premises.
28. Though the 3<sup>rd</sup> Defendant participated in the proceedings, it did not call any witness.

### **Court's Directions**

29. The court directed parties to file written submissions. The Plaintiff and the 2<sup>nd</sup> Defendant complied. The court has had the opportunity to read through their submissions.

### **Submissions by the Plaintiff.**

30. In his submissions, the Plaintiff summarized his case and avers that he and the 1<sup>st</sup> Defendant agreed on a purchase price for the 2 plots at Zimmerman, plots No 312 and 313 at Kshs 350,000/-. The Plaintiff made a commitment of Kshs 20,000/- on the December 20, 2017, and a commitment agreement was signed. Later on October 13, 2018, the Plaintiff alleges that he paid the entire purchase price and the same was acknowledged by the 1<sup>st</sup> Defendant through an agreement. The transfer was to be effected immediately thereafter.
31. It is the Plaintiff's submissions that he entered into the suit premises and started developing the same after signing the commitment with the 1<sup>st</sup> Defendant. However sometimes in the year 2008, police from Kasarani Police Station summoned him and informed him that he was on the suit premises illegally.
32. The Plaintiff further alleges that upon producing his documents, the 1<sup>st</sup> Defendant was charged with the offence of obtaining money by false pretence from the 2<sup>nd</sup> Defendant at Makadara Law Courts in Criminal Case No 3938/2008. He was allegedly treated as a witness for the prosecution and his documents treated as exhibits.
33. The Plaintiff alleges that the 2<sup>nd</sup> Defendant entered the suit premises unlawfully and that is why he filed this case in court. The Plaintiff states that the documents by the 2<sup>nd</sup> Defendant are contradictory. He points out that the 2<sup>nd</sup> Defendant purportedly obtained the lease documents in 1998 yet she had supposedly entered into the transaction with the 1<sup>st</sup> Defendant in January 2008.
34. Again the Plaintiff alleges that the documents by the 2<sup>nd</sup> Defendant indicate that she formalized the transaction with the City Council of Nairobi in the year 2004. He terms the said documents as forgeries and urges the court not to rely on them.
35. The Plaintiff urges the court to allow his case which he affirms he has proved 'beyond reasonable doubt.'

### **Submissions by the 2<sup>nd</sup> Defendant**

36. On her part, the 2<sup>nd</sup> Defendant in her submissions points out that there is no dispute that the two plots, the subject matter of this case initially belonged to the 1<sup>st</sup> Defendant Joyce Wairimu Mbugua. Whereas the Plaintiff alleges to have bought the same vide an agreement dated October 13, 2008, the 2<sup>nd</sup> Defendant's position is that she bought the same vide an agreement dated January 30, 2008.



37. The 2<sup>nd</sup> Defendant submits that the basis of the Plaintiff's case was the alleged sale agreement marked as PE2. The agreement is purportedly signed between the Plaintiff and the 1<sup>st</sup> Defendant without any attestation by a witness.
38. It is the 2<sup>nd</sup> Defendant's submissions that the alleged agreement offends the provisions of section 3(3) of the Law of Contract Act which bars the court from entertaining a suit brought upon a contract for disposition of an interest in land unless: -
- a. The contract upon which the suit is founded is: -
    - i. in writing.
    - (ii) is signed by all parties thereto and
  - b) the signature of each party has been attested by a witness who is present when the contract was signed by such party.'
39. The 2<sup>nd</sup> defendant made reference to the case of Patrick Tarzan Matu & another v Nassm Sheriff Nassir Abdulla & 2 others [2009] eKLR where the court struck out a plaint as the claim was founded on a contract for disposition of land that offended the provisions of section 3(3) of the Law of Contract Act.
40. The 2<sup>nd</sup> Defendant further made reference to the case of Daudi Ledma Morintat v Mary Christine Kiarie & 2 others [2017] eKLR where the court had upheld a preliminary objection against a suit for claim of land based on an oral agreement.
41. The 2<sup>nd</sup> Defendant argues that the Plaintiff's claim cannot therefore stand and ought to be dismissed with costs.
42. In respect to her defence and counter claim the 2<sup>nd</sup> Defendant argues that she was an innocent purchaser for value from the 1<sup>st</sup> Defendant which purchase was sanctioned by the 3<sup>rd</sup> Defendant the holder of head title. The 2<sup>nd</sup> Defendant submits that she was cleared by the 3<sup>rd</sup> Defendant. Upon clearance, the 2<sup>nd</sup> Defendant was issued with allotment letters by Nairobi City Council the predecessor in title to the Nairobi City County Government.
43. The 2<sup>nd</sup> Defendant averred that she has always been in possession of the suit premises from the time she purchased the same from the 1<sup>st</sup> Defendant. She runs a community school on the suit premises.
44. The 2<sup>nd</sup> Defendant submits that even if the Plaintiff had a valid agreement (which is denied), the sale agreement between the 2<sup>nd</sup> and 1<sup>st</sup> Defendants would rank higher considering that the 2<sup>nd</sup> Defendant has been in possession, she has already obtained transfers from the 3<sup>rd</sup> Defendant and a lease allotment letter from the Nairobi City County Government. She prays that her counter-claim be allowed.
45. The 2<sup>nd</sup> Defendant submits that she had demonstrated through evidence that the Plaintiff has been interfering with her quiet possession of the land and attempted trespass. The 2<sup>nd</sup> Defendant reiterates that no defence was filed to her counter-claim and there was no evidence adduced by the Plaintiff to rebut it.

### **Issues for Determination**

46. Having considered the pleadings filed in this case, the evidence adduced and the submissions filed by the Plaintiff and the 2<sup>nd</sup> Defendant, the court is of the view that the issues for determination in this matter are: -



- a. Whether the Plaintiff has established a valid and legal claim of ownership over the suit properties; if so, whether he is entitled to the reliefs sought.
- b. Whether the 2<sup>nd</sup> Defendant is entitled to the reliefs sought in her counter-claim against the Plaintiff.
- c. Who should bear the costs of the suit and the counter-claim by the 2<sup>nd</sup> Defendant.

**Analysis and Determination.**

**A. Whether the Plaintiff has established a valid and legal claim of ownership over the suit properties; if so, whether he is entitled to the reliefs sought.**

47. The Plaintiff's suit as rightly pointed out by the 2<sup>nd</sup> Defendant is premised upon an agreement for sale for plots No 312 and 313 which the Plaintiff produced in evidence as 'PE2'.
48. I have perused the said agreement. The said 'agreement' is undated. To me it looks more of an 'acknowledgment' than an 'agreement' in the strict sense of the word.
49. The agreement acknowledges an earlier one of December 20, 2007. It states: -

“Further to the agreement of December 20, 2007 that I was paid Kshs 20,000/- to the purchase of my two plots, I, Joyce Wairimu Mbugah a Kenyan citizen ID No 2022265 have received the balance of the purchase price from George Amogo Mariita on October 13, 2008 ID No 2011xxxx. The agreement is that the said plots (312 and 313) be transferred to the purchaser immediately to start processing of the title.

Seller- Joyce Wairimu Mbugua – ID 2122xxxx

Sign.....

Buyer – George Ambogo Marita – ID 2011xxxx

Sign.....”

50. The said agreement as pointed out by the 2<sup>nd</sup> Defendant in her submissions was not witnessed. The signature of each party signing has not been attested. From a look of the 'agreement' the ID number of the buyer is different on the body of the agreement, from the one indicated against her name at the point where she supposedly put her signature. On the body of the agreement, the ID number is indicated as 202xxxx. Against the seller's signature, the ID number is indicated as 2122xxxx. This is a serious flaw that the Plaintiff did not explain.
51. The issue that the 2<sup>nd</sup> Defendant raised in her submissions is the validity of the agreement in view of the provisions of section 3(3) of the Law of Contract Act.
52. Section 3(3) of the Law of Contract Act read together with section 38 of the Land Act, 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing, signed by all the parties and the signature of each party signing has been attested to by a witness who was present when the contract was signed by such a party.
53. The agreement/contract upon which the Plaintiff's case is based upon does not meet the mandatory provisions of the statutes cited above. I am in agreement with the decisions cited by the 2<sup>nd</sup> Defendant in her submissions.



54. There are exceptions to the above provision couched as hereunder: -

“Provided that such suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract: -

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

55. The Plaintiff is not in possession of the suit premises as he admitted in his own words during cross-examination,

56. I have no choice but to dismiss the Plaintiffs suit with costs.

57. I wish this issue was brought up earlier. It is a point of law that should have been considered and determined in form of an application to strike out the suit or even by way of a preliminary objection. It would have saved a lot of judicial time.

58. I would go farther and state that the in spite of my above findings, the Plaintiff's case would still fail for want of proof. He had in his pleadings alleged fraud against the Defendants. As has been severally stated fraud must not only be pleaded but must be strictly proved.

59. In the case of *Vijay Morara v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi, J (as he then was), stated that fraudulent conduct must not only be distinctively alleged but must also be distinctively proved.

60. The standard of proof of fraud is higher than in ordinary civil cases as pronounced in *Kuria Kiaries & 2 others v Sammy Magera* [2018] eKLR which quoted with approval the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR. The Plaintiff, I must state did not adduce evidence to prove the alleged fraud.

61. The Plaintiff's case therefore fails.

### **B. Whether the 2<sup>nd</sup> Defendant has proved her counter claim.**

62. As regard the 2<sup>nd</sup> Defendant's Counter-claim, the court's finding is that she has proved her case on a balance of probabilities. Besides the agreement with the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant too has sub-leases with the city council of Nairobi, the predecessor in title to the Nairobi City County Government, the holder of the head title vide the agreements dated October 17, 2011 duly executed between the parties. She too has been in possession to boot.

63. I too must point that the Plaintiff did not even file a statement of defence to the 2<sup>nd</sup> Defendant's counter-claim neither did he give any evidence to contradict the 2<sup>nd</sup> Defendant's Counter-claim.

64. Accordingly, the court hereby allows the 2<sup>nd</sup> Defendant's Counter-claim and issues an order of Permanent Injunction restraining the Plaintiff by himself, his servants and or agents or employees from trespassing into or in any other way interfering with the 2<sup>nd</sup> Defendant's quiet possession use and ownership of plot numbers 312 & 313 at Roysambu, Zimmerman.

65. As regards general damages for trespass and destruction of property, trespass to land is actionable 'per se'.



66. In the case of *Park Towers Ltd v John Mithamo Njika & 7 others* [2014] eKLR which was cited with approval in the case of *Avid Developers Ltd v Blue Horizon Properties Ltd & 20 others* [2021] eKLR, the court held that where trespass is proved, a party needs not prove that he/she suffered any specific damage or loss in order to be awarded damages.
67. Damages however, shall be awarded depending on the unique facts and circumstances of each case. In this instance, the court will award the 2<sup>nd</sup> Defendant nominal damages of Kshs 100,000/- only.
68. The claim for aggravated damages was not supported by material facts. I decline to award the same.
69. On costs, I award the costs of the counter-claim and the suit to the 2<sup>nd</sup> Defendant.
70. In summary; -
- a. The plaintiff's case is dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
  - b. The 2<sup>nd</sup> defendant's counter-claim is allowed in the following terms;
    - i. An order of permanent injunction restraining the plaintiff by himself, his servants and or agents or employees from trespassing into or in any other way interfering with the 2<sup>nd</sup> defendant's quiet possession use and ownership of plot numbers 312 & 313 at Roysambu, Zimmerman.
    - ii. The 2<sup>nd</sup> defendant is awarded nominal damages of Kshs 100,000/ for trespass.
    - iii. The 2<sup>nd</sup> defendant shall have the costs of the counter-claim as against the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF DECEMBER, 2022.**

**MD MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr Kimathi for the 2<sup>nd</sup> defendant

N/A for the plaintiff, the 1<sup>st</sup> and 3<sup>rd</sup> defendants

Court Assistant- Hilda/Yvette

**MD MWANGI**

**JUDGE**

