



**Muvea v Nzomo (Environment & Land Case 728 of 2017)
[2024] KEELC 4073 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4073 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 728 OF 2017**

JG KEMEI, J

MAY 7, 2024

BETWEEN

MORRIS MBEVI MUVEA PLAINTIFF

AND

BONIFACE MWILU NZOMO DEFENDANT

JUDGMENT

1. Vide the Complaint dated the 4/9/2017 the Plaintiff filed suit against the Defendant seeking orders for a permanent injunction against the Defendant, his agent and or employees / servants from trespassing or interfering with the land parcel known as Murang'a/Ithanga Phase 1/85 (hereinafter the suit land) and in addition sought for orders of eviction and costs of the suit.
2. The Plaintiff averred that he is the registered owner of the suit land and therefore entitled to quiet and indefeasible title possession occupation and use of the land. That the Defendant has unlawfully trespassed onto the land to his detriment as to loss and damage.
3. The Defendant denied the claim of the Plaintiff and stated that he purchased the land from the Plaintiff's father in 1999 with the knowledge of the family, took possession and commenced the construction of his family home and thereafter settled therein. He denied the claim of trespass and stated that the Plaintiff therefore has no right to the land as he has been in occupation for a period of over 18 years.
4. In his counterclaim he pleaded fraud on the part of the Plaintiff in the manner in which he acquired title to land with the knowledge that the same had been sold to him as well as obtaining registration without his consent and or knowledge.
5. The Defendant sought the following orders;



- a. An order for the cancellation of the names of the Plaintiff from the register of land title Murang'a/Ithanga Phase 1/85.
 - b. An order that the Defendant be registered as proprietor of the freehold interest in land title Murang'a/Ithanga Phase 1/85 and a title be issued to the Defendant.
 - c. General damages for unlawful conversion of the Defendant's property by the Plaintiff.
 - d. Costs of this suit.
6. The Plaintiff filed his reply to defence and counterclaim dated 4/3/2019. He denied that Kalunde Kioko ever sold the suit land to the Defendant and put him to strict proof. That the Plaintiff lawfully acquired the suit land by transmission from the estate of Kalunde Kioko. He denied the particulars of fraud pleaded in the Counterclaim and urged the Court to dismiss the Counterclaim with costs.

The evidence

7. The Plaintiff Morris Mbevi Muvea testified solely as PW1. He adopted his witness statement dated 4/9/2017 in chief. He also produced copies of documents listed in the list of documents of even date as P.Ex. 1-2 namely copy of title deed issued on 5/7/2013 and Court Ruling in Thika CMCC Succ. Cause No 483 of 2004.
8. PW1 testified that he was the registered owner of the suit land and vide the Ruling in Succession Cause No. 483 of 2004 the Defendant was found to be in the said parcel illegally. Accordingly, therefore the Defendant has trespassed on the suit land and despite demand having been issued, he continues to be in illegal occupation hence the suit. That the suit land belonged to his grandmother (Kalunde Kioko) and his father did not file Succession proceedings in her estate before he sold the land to the Defendant.
9. In cross, PW1 admitted that the Defendant is his neighbor of many years. That the land belonged to his grandmother and his father had a right to inherit from his mother's (Kalunde Kioko) estate. That his father had no capacity to sell the suit land and PW1 was not present when the sale took place and was not involved in the transaction.
10. On the other hand, the Defendant, Boniface Mwilu Nzomo took the stand as DW1 and adopted his witness statement dated 7/11/2018 as his evidence in chief. He also produced documents in the list of documents of even date namely; a copy of sale agreement dated 8/5/1999; minutes of clan meeting dated 24/11/1999; Chief's letter dated 15/10/2004; Letter to Executive Officer of the Court dated 8/3/2012; application for caution dated 8/3/2012; copy of caution dated 8/3/2012 and photographs of Defendant's property as Dex1 – 7 in support of his case.
11. DW1 testified that he bought a portion of the suit property known as plot No. 85 measuring 2 acres on 8/5/1999 from Muvea Kioko and immediately took possession of it by cultivating thereon. That in 2003 he completed construction of his matrimonial home on the land and lived there without any interference from the Plaintiff. That Muvea pointed out to him, the area he had acquired but unfortunately Muvea died before officially transferring the property. That before his demise Muvea, sold an additional ½ acre to him at Kshs. 25,000/- to cater for his medical expenses. That later on 7/11/2005 he purchased another ½ acre from the Muvea Kioko's wife Ruth Kamene Mubea in the presence of her three sons thus bringing the total acreage to three. That he accompanied Ruth Kamene to the area chief where she was keen to file succession proceedings in respect of her mother in law's estate to enable her transfer his share to him in line with the purchaser's agreement. However, he did not know the outcome of the succession cause despite attempts including writing to the Executive



Officer of the Court. That notwithstanding he continued living peacefully on the 3 acres until he was served with the instant suit pleadings.

12. In cross, DW1 informed the Court that he bought the land belonging to Kalunde Kioko deceased, from his son, Muvea Kioko. That at the time Muvea had not petitioned for succession of the estate of Kalunde Kioko. That he also bought a second portion of land from Ruth Kamene in 2005 but did not avail the sale agreement in Court. That he financed the petition for the succession of the estate on the undertaking that he would be included as a creditor of the estate but as fate would have it he did not participate in the proceedings. DW1 was referred to the copy of Judgement dated 16/2/2012 whereby his purchase of 3 acres was found to be illegal and null. DW1 conceded that he did not appeal against the said Judgement but disagrees with the finding.
13. DW2- Bernard Wambua Muvea like the witnesses before him, relied on his witness statement dated 7/11/2018. It was his testimony that the Defendant purchased 2.5 acres from his father, Muvea Kioko and another ½ acre from his mother, Ruth Kamene to finance the succession proceedings. That he witnessed all the agreements between the Defendant and his parents and the Defendant is entitled to 3 acres sold to him.
14. In cross, DW2 acknowledged that the Defendant bought the land from his father though the land was still registered his late grandmother's name Kalunde Kioko. That his mother filed succession proceedings with the aim of transferring to the Defendant his portion of the land and according to DW2 the succession case was not determined. That currently the land is fraudulently registered in the Plaintiff's name.
15. DW3- Ruth Kamene Muvea testified and adopted her witness statement dated 7/11/2018 and testified that the Plaintiff is her son and the Defendant is a purchaser having sold him a ½ portion of the land. She informed the Court that she could not recall what she recorded in her witness statement but stated that she was prepared to give her evidence in Court as follows; That her husband sold 2 acres of land initially and later 0.5 acres to defray medical costs. After her husband's demise she again sold 0.5 acres to the Defendant totaling 3 acres. That the land initially belonged to her mother in law and urged the Court to give the Defendant his 3 acres of land and not to evict him.

The Written Submissions

16. The Plaintiff through the firm of J. K. Ngaruiya & Co. Advocates filed submissions dated 30/5/2023. He rehashed the background of the case and submitted that DW3, his mother applied for a grant of administration in respect of the estate of Kalunde Kioko and the suit land was distributed as follows; DW3 got 3 acres, the Defendant and Plaintiff got 3 & 2 acres respectively. Dissatisfied with the said mode of distribution, the Plaintiff in Succ. Cause No 483/2004 claimed sole ownership of the entire suit land and was so decreed by the Court which also found that the sale of 3 acres to the Defendant was illegal and voidable. That the transaction of sale between the Defendant and DW3 amounted to intermeddling in the estate of a deceased person as provided under Section 45 [Law of Succession Act](#).
17. Moreover, it was argued that that the Defendant's counterclaim fails since he lacks the requisite Land Control Board (LCB) consent as provided under Section 6 (1)(a) of the [Land Control Act](#). That having produced his title deed, the Plaintiff has demonstrated that he is the owner of the suit land entitled to the rights enshrined under Section 24 [Land Registration Act](#).
18. On behalf of the Defendant, the firm of Mbiyu Kamau & Co. Advocates filed submissions dated 8/8/2023. He rehashed the facts of the case and evidence adduced at the hearing and submitted that he has a valid claim in the suit land as a bona fide purchaser without notice of any defect in title. That the Defendant further claims adverse possession having lived on the suit land for 24 years now without



interruptions. That the Plaintiff's suit filed five years after he was registered as the owner is malicious and an afterthought and urged the Court to allow the Defendant's claim.

Analysis and Determination

19. Having considered the pleadings, evidence and submissions tendered before Court, the issues that fall for determination are;
 - a. Whether the Defendant has succeeded in impeaching the title of the Plaintiff.
 - b. Whether the Plaintiff has proven his case;
 - c. Who bears costs?
20. The Plaintiff's case is a claim for declaration of ownership over the suit land having obtained it by way of transmission from the estate of Kalunde Kioko, deceased. According to him the Defendant who is occupying the suit land is doing so illegally and is guilty of trespass. He maintains that his parents had no legal capacity to sell the land which initially belonged to his grandmother, Kalunde Kioko, without grant of letters of administration having been sought and obtained.
21. Objecting to the suit, the Defendant averred that he purchased the suit land in three portions; the first and second portions from the late Mubea Kioko, son of Kalunde Kioko and the third portion from Ruth Kamene, Mubea's wife and also Plaintiff's mother. All the purchased lands totaled 3 acres and that he purchased for consideration inter alia to defray the medical expenses of the late Mubea Kioko and finance the succession proceedings filed by Ruth Kamene. That the Plaintiff obtained title fraudulently despite knowledge that a portion of the suit land had been sold to him by his parents. In addition, that the Plaintiff purported to cause the registration of the land in his name when he had no registrable interest over his 3-acre portion and lastly that he obtained registration over the land including his portion without his consent.
22. It is not in dispute that the suit land measuring 2.6 has was owned by Kalunde Kioko the family's matriarch. She had one son Mubea Kioko who lived on a separate land with his family. Kalunde Kioko lived on the suit land with her grandson, the Plaintiff until her death. The Plaintiff is the grandson of Kalunde Kioko and son to Mubea Kioko. It is not disclosed when she died but upon her demise his son Mubea Kioko sold 2 acres of the suit land in 1999 to the Defendant. The agreement dated the 3/5/1999 was exhibited in evidence. The sale was for 2 acres at the price of Kshs. 64,000/-. Evidence was led by the Defendant that he was put in possession immediately and he started farming and constructed a family home. Pictures of the permanent house was presented in evidence.
23. Evidence was also led that in 1999 there arose a dispute between Kioko and the Plaintiff over the suit land in which Kioko wanted the remove the Plaintiff from the land. The dispute was discussed in a meeting held on the 24/11/99 where the clan in the presence of the local administration represented by the chief and two assistant chiefs resolved that the Plaintiff should be given 2 acres of the land. The Plaintiff was not present in the meeting. No evidence was led to show the outcome of this resolution of the elders.
24. Fast forward in the year 2000 Kioko suffered ill health and sold ½ acre of land to the Defendant to defray medical expenses, bringing the total acreage to 2.5 acres. No agreement was exhibited in support of this averment.
25. The Defendant led evidence that Kioko Mubea met his demise before he transferred the land to him. It is also not in dispute that Kioko Mubea did not petition for succession of the estate of Kalunde Kioko, his mother prior to selling the land to the Defendant.



26. Evidence was also led by the DW1, DW2 and DW3 that in 2005 Ruth Kamene Mubea sold another ½ acre to the Defendant for purposes of financing the succession expenses relating to the estate of Kalunde Kioko, the owner of the land. The agreement of sale was not presented in court.
27. Unknown to Kamene Mubea, it would appear that the Plaintiff had outsmarted his kin and kindred alike when he sought and obtained letters of grant of administration in the estate of Kalunde Kioko, his grandmother. Neither a grant of administration nor a confirmation of grant of administration were presented in evidence by any of the parties. But a close scrutiny of the Judgment on the succession Court in No 483 of 2004 alludes to the fact that the Plaintiff petitioned for succession in the year 2004. It is not clear if Kioko Mubea, his father was still alive then.
28. Ruth Kamene Mubea armed with the information that the Plaintiff had obtained grant of letters of administration in the estate of her mother in law, took out summons for confirmation of grant and proposed the mode of distribution of the estate of the matriarch. The subject asset being the 8-acre land left behind by Kalunde Kioko. She proposed that the suit land be shared as follows; 3 acres to herself, 2 acres to the Plaintiff and 3 acres to the Defendant. Kamene recognized the sale of the 3 acres to the Defendant and wanted the Court to grant him 3 acres as a creditor of the estate. The Plaintiff objected to the proposed distribution of the land and the Court in its judgment delivered on the 16/2/12 agreed with him and ordered the certificate of confirmation of grant be issued to him and that the suit land devolves to the Plaintiff as a sole heir. DW3 admitted in evidence that this judgment has not been appealed against, set aside and or vacated.
29. Following the issuance of the certificate of grant of representation in line with the judgement of the Court aforesaid, the suit land was transmitted to the Plaintiff and registered as owner on the 5/7/2013. 5 years later, the Plaintiff filed the instant suit seeking orders of eviction of the Defendant.
30. It is therefore not in dispute that the Plaintiff is the registered owner of the suit land. A copy of the title issued on 5/7/13 was produced in support. In this case the Defendant's contention is that the Plaintiff obtained title through fraud and particulars of fraud have been framed under para 14 of the Counterclaim. The Plaintiff was faulted for acquiring title to the suit land while knowing that it had been sold to the Defendant and without the consent of the Defendant.
31. Section 26 of the [Land Registration Act](#) mandates the Court to recognize the person whose name appears on the title as prima facie owner of the land. It also provides two instances where a title can be impeached/challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
32. According to *Black's Law Dictionary*, 10th Edition at page 775, fraud is defined as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.
33. In the case of [Vijay Morjaria v. Nansingh Madhusingh Darbar & Another](#) [2000] eKLR, Tunoi, JA. (as he then was) 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



34. In the case of *R. G. Patel v Lalji Makanji* [1957]EA 314, the Court stated thus:-
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
35. Fraud being a serious charge, it is trite that it must be pleaded and strictly proved to the standard higher than the balance of probabilities but slightly lower than beyond reasonable doubt. Courts cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to do so. It is the duty of the Court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.
36. It is not disputed that the land belonged to Kalunde Kioko until her demise. The Defendant admitted that he purchased the land from the parents of the Plaintiff. One agreement was produced dated the 3/5/99. The agreement in my view complies with the provision of Section 3(3) of the Law of contract Act in that it is in writing, executed by the parties and witnessed in writing. There was no evidence that the Plaintiff was a party to the said agreement. The contention of the Defendant that the land was sold to him with the knowledge of all family members is therefore unsupported. The Court cannot impute knowledge to the Plaintiff in the absence of evidence in support. Even if knowledge was properly placed the plaintiff was not the registered owner of the land.
37. The Court finds that fraud was not proven and the same remains a mere allegation.
38. The Defendant has contended that he has lived on the suit land since 1999 farming and subsequently settled his family by building a permanent residence and in his submissions submitted that he is entitled to the suit land through adverse possession. With due respect to the pleadings of the Defendant, it is clear that a claim of adverse possession was not pleaded and no evidence was led in support. This Court has held in many cases that submissions are the summary of a party’s case and can never take the place of evidence.
39. The Defendant has also alluded to a claim of trust in the submissions and just like the claim for adverse possession, the same was not pleaded nor proved in evidence.
40. With respect to the assertion of the defense of a bonafide purchaser without notice, a bona fide purchaser is someone who innocently purchases an asset, like a piece of property, without having any prior knowledge that someone else may be able to claim the title to the property. Save for his written submissions the defendant has not placed an iota of plea as a bona fide purchaser for value nor pleaded adverse possession or trust in his statement of defence.
41. Recently the CoA in the case of *Okoth v Nyaberi & Anor*. [2024] KECA 427 (KLR) affirmed the trial court Jdt that dismissed the appellant’s suit for want of proof and cited the holding in the Malawi Supreme Court decision in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, where the court quoted with approval an article by Sir Jack Jacob entitled entitled “The Present Importance of Pleadings” published in 1960, Current Legal Problems, at p.174 where the author had stated:
- “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into



the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

42. The CoA in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR in allowing an appeal that inter alia challenged trial court findings on unpleaded issues held as follows;-

"...Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail. It also follows that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings..."

43. Accordingly, and going by the above binding precedents, the issues of bona fide purchaser, adverse possession and trust having not been pleaded, do not fall for determination. Order 2 Rule 4 *CPR* underscores the importance of pleading material facts on which a party wishes to raise as his claim or defence in pleadings.

44. Having not justified the occupation of the land the Defendant remains a trespasser in the meaning of the word trespass stated in Section 3(1) of the *Trespass Act* which states as follows;

"Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

45. In the end the Defendant's counterclaim fails and I enter judgement in favour of the Plaintiff in the following terms;

- a. The Defendant is ordered to vacate the suit land within 180 days from the date herein.
- b. In default eviction orders shall issue forthwith
- c. A permanent injunction be and is issued against the Defendant his agent employees servants from trespassing interfering with parcel Number Muranga/ithanga Phase 1/85.



d. Costs of the suit and the counterclaim shall be in favour of the Plaintiff

46. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7TH DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent but served

Mbugua HB Mbiyu Kamau for Defendant

Court Assistants – Phyllis & Oliver

ORDER

The opening wordings of para 5 of the Judgment is amended to read the Defendant instead of the Plaintiff.

CONCLUSIONS

**AMENDED IN OPEN COURT PURSUANT TO PROVISIONS OF SECTION 99 OF THE
CIVIL PROCEDURE ACT VIRTUALLY AT THIKA THIS 20TH DAY OF JUNE, 2024 VIA
MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Amended online in the presence of

Ms. Njoka HB Ngaruiya for Plaintiff

Mbugua HB Mbiyu Kamau for Defendant

Court Assistants – Phyllis & Oliver

