



Wanyonyi & another v County Government of Bungoma & 4 others (Environment & Land Case 105 of 2016) [2024] KEELC 5248 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 105 OF 2016**

**EC CHERONO, J
JULY 10, 2024**

BETWEEN

ASHON SIKOLIA WANYONYI 1ST PLAINTIFF

PATRICK KISAKA MUNIAFU 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF BUNGOMA 1ST DEFENDANT

COUNTY LAND REGISTRAR BUNGOMA COUNTY 2ND DEFENDANT

THE NATIONAL LAND COMMISSION 3RD DEFENDANT

PERMANENT SECRETARY MINISTRY OF LANDS 4TH DEFENDANT

HON ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

A. Introduction And Pleadings

1. This suit was commenced by way of a plaint dated 10th August, 2016 where the Plaintiff is seeking against the defendant the following orders;
 - a. A declaration that the Plaintiffs are the ultimate owners and proprietors of all that parcel of land known as Ndivisi/Muchi/1399 less a portion measuring 0.13Hactres that was compulsorily acquired by the government.
 - b. The permanent secretary Ministry of Lands, Chief Land Registrar and County Land Registrar Bungoma County be ordered to cancel, revoke and or annul al leases, tenants and or charges in respect of the suit parcel of land namely Ndivisi/Muchi/1399.
 - c. An eviction order for any structure or premises unlawfully erected on the suit parcel of land.



- d. An injunction restraining any or the Defendants by themselves, their agents and or servants restraining them from entering, remaining and r in any way interfering with the suit parcel namely NDIVISI/MUCHI/1399.
 - e. Costs and interests of the suit.
 - f. Any other relief this Honourable Court deems fit to grant.
2. The Plaintiffs aver that they are the administrators and legal representatives of the estate of the late Reuben Wanyonyi Sikolia who died intestate on 3rd November. 1978. The plaintiffs contend that prior to his demise, the deceased was the owner of all that parcel of land known as NDIVISI/MUCHI/1401, 1245 and 1399 respectively which covered the entire central business district of Webuye town. They averred that that saw the government compulsorily acquire some portions of his land to establish public utilities. The plaintiff further averred that it was during the said acquisition that most parts of the deceased's land was irregularly registered, encroached or grabbed by third parties in cahoots with officials of the de funct Webuye and Bungoma Municipal Council.
 3. It is further averred that Ndivisi/Muchi/1401 was unlawfully registered in the name of the County Council of Bungoma as a whole instead of the 3.2 hectares which had been acquired but later surrendered back to the estate of Reuben Wanyonyi after various suits were filed, to wit; Bungoma HCCC No. 100 OF 1998, Bungoma SPC CC NO. 452 OF 2006 and Bungoma HCC Appeal No. 110 OF 2011.They stated that part of LR No. Ndivisi/muchi/1399 (hereinafter referred to as 'the suit land') measuring 0.13Ha was compulsorily acquired vide Gazette Notice No. 3093 on 23/10/1974 for construction of a Police Station but once the register was opened, it was given the name of Broderick Falls and registered in the name of Bungoma County Council. The Plaintiffs aver that the 0.13ha was to be curved off from the entire 1.77ha which was the entire area of the suit land. They averred that the suit land was extensively, irregularly and illegally encroached, grabbed, sublet and alienated to individuals and private developers without the knowledge and permission of the estate of Reuben Wanyonyi- deceased.
 4. The plaintiff further alleged that it is not clear how the said individuals and private owners acquired the plots on the suit land. It was averred that the defunct County council of Webuye and Bungoma have been instrumental and robust in orchestrating fraud by issuing fake, phony and superimposed leases. The Plaintiffs set out particulars of fraud against the Defendants and asked the Court to grant the orders sought in their plaint.
 5. Upon being served Summons, the 2nd, 4th and 5th Defendants entered appearance and filed a joint statement of defence dated 1st July, 2019 denying the Plaintiff's claim and putting them to strict proof thereof.
 6. The 1st defendant entered appearance and filed a statement of defence dated 26th November, 2020 where it averred that Reuben Wanyonyi was never registered as the owner of the suit land. It also averred that the suit land was registered in the name of Bungoma County Council on 02/10/1970 with the same being the 1st registration and a portion measuring 0.13ha was acquired for purposes of realigning the Webuye-Kiminini road. It stated that during the adjudication and registration of the suit land, the said Reuben Wanyonyi never raised any objection/complaint and therefore the registration of the suit land in the name of Bungoma County Council was above board. Further, it was stated that no complaint was raised when the Government compulsorily acquired the 0.13ha. The 1st Defendant further averred that the Plaintiffs' claim was statute barred and thus an abuse of the Court process and urged the Court to dismiss it with costs.



7. When the matter came up for directions, Parties confirmed compliance with Order 11 and agreed to proceed with the hearing by way of viva voce evidence.

B. Parties Evidence.

8. PW1 Patrick Kisaka Muniafu adopted his witness statement dated 10th August, 2016 as his evidence in chief and produced the documents contained in his list of documents dated 10th August, 2016 as PExhibit 1-7. The witness testified that the suit land was to be registered in the name of Reuben Wanyonyi but instead was put in the name of Broderick Falls. He reiterated the contents of the plaint and stated that the Government was to acquire 0.13 ha only from the 1.77ha and surrender back the remaining portion but this did not happen. In cross-examination by the 1st Defendant, PW1 stated that Reuben Wanyonyi died in the year 1987 without knowing that the land was registered in the name of the Bungoma County Council. It was his further evidence that the compulsory acquisition was done on 23/10/1974 and Reuben was compensated for 0.13ha. He stated that he was not an administrator of the estate of the deceased and that he had brought this claim because the deceased raised him.
9. PW2 Ashon Sikolia Wanyonyi stated that Reuben Sikolia- deceased was his father and that he was an administrator of his estate together with his brother Luka Wanyonyi. He adopted his witness statement dated 10th July, 2016 as his testimony-in-chief and relied on the documents already produced by PW-1. He stated that sometime in the year 1971, he was arrested and charged for defending the suit land from individuals who had encroached thereon and was later acquitted of the charges. The witness stated that the government acquired 0.13ha of the suit land leaving a portion measuring 1.77ha which was to revert to Reuben Wanyonyi-deceased but to their surprise, it was fraudulently registered in the name of Bungoma County Council (defunct) which name was later removed.
10. On cross-examination by the 1st defendant, the witness stated that the suit land was at the time of the hearing not registered in anyone's name. The witness was stood down until 28/11/2023 when he again took the witness stand and produced a further plaintiffs list of documents dated 21/09/2023 which contained three items i.e. a plaint dated 09/08/2011 for HCCC No. 78 of 2011, a certificate of grant for the estate of Reuben Wanyonyi and certificate of search for the suit property as P-Exhibit 8,9 and 10. When re-examined on these fresh documents, the witness elaborated the contents of the said exhibits.
11. The defendants did not call any witnesses and they closed the defence case.

C) Parties Submissions.

12. After the close of their respective cases, parties took direction for filing of submissions. Only the Plaintiff filed written submissions which the Court has also considered.

D) Analysis And Determination.

13. I have considered the pleadings by the parties, the evidence adduced, the written submission by the plaintiff and find the one and singular issue for determination is whether the plaintiffs are entitled to the orders sought?
14. Before I proceed to discuss the single issue for determination, this Courts mind is drawn to the pleadings of the 1st, 2nd, 4th and 5th defendants where it was averred that the suit herein is statute barred under Section 7 of the Limitations of Actions Act, CAP 22 Laws of Kenya. This provides that an action for recovery of land may not be brought after 12 years from the date the cause of action accrued. From the pleadings and the evidence adduced, the suit land was registered in the name of Bungoma County Council and the 1st defendant's predecessor on 02/10/1970.



15. There is however an exception to this provision and it is prescribed in Section 26 of the very Act which stipulates as follows;

“Where, in the case of an action for which a period of limitation is prescribed, either-;

- a. The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b. The right of action is concealed by the fraud of any such person as aforesaid; or
- c. The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it;

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

- i. In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- ii. In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

16. In the case of *Virginia Kairigo Runji v Christopher Nthia Gacuthe & 17 Others* (2020) KLR, Angima held as follows;

“10. It is evident from the application and the draft plaint that the Applicant’s claim is based upon recovery of land which has a separate limitation period of 12 years prescribed under Section 7 of the Act. There is no provision under the Act for the extension of the limitation period prescribed under Section 7 of the Act. It would thus appear that the legislature did not intend to provide for extension of time with respect to cases for recovery of land unless the case fell within the exceptions set out in Section 26 of the LAA. The court shall consider the provisions of the said section later in the ruling.

11. The Court of Appeal of Kenya had occasion to consider the interpretation of Section 27 of the LAA in the case of *Mary Osundwa V Nzoia Sugar Company Ltd* [2002] eKLR. In the said case, the High Court had granted leave, by consent of the parties, to the Appellant to file suit against the Respondent in a claim of alleged breach of contract, a matter which fell outside the provisions of Section 27 (1) of the LAA. In allowing the appeal, the Court of Appeal held, inter alia, that:

“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. The action must be founded on tort and must relate to the tort of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries



to the plaintiff as a result of the tort. The section does not give jurisdiction to extend time for filing suit in cases involving contract or any other cause of action than those in tort. Accordingly, Osemo J had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent can neither be here nor there; the parties could not confer jurisdiction on the judge by their consent.”

17. I agree with the provisions of the law and the decisions by the Superior courts that a party seeking to recover land based on grounds of fraud must file a suit within 12 years as stipulated under Section 7 of the Limitations of Actions Act. Since the County Council of Bungoma (defunct) which is the predecessor of Bungoma County Government was first registered as proprietor of the suit land on 02/10/1970, it is more than 12 years since then and the plaintiffs have not brought themselves within the provisions of section 26 of the Limitations of Actions Act. As such, I find the Preliminary objection merited.
18. Though the 1st, 2nd, 4th and 5th Defendants’ entered appearance and filed their Statements of Defence, they did not call any witness and therefore failed to substantiate the allegations made in their Defence and produce any exhibits that would challenge the Plaintiffs’ testimony. In my view, the Defences on record remain mere averments and the Plaintiffs’ evidence remains uncontroverted. See the case of Kenya Power & Lighting Co Ltd ...Vs... Rasul Nzembe Mwadzaya [2020] eKLR where the Court held that:-

It is noteworthy that the Appellant in its amended Statement of Defence filed on 15th October 2012 denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schulter, Civil Appeal No.23 of 1997, where the Court of Appeal stated:-

“ In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted. In the case of John Wainaina Kagwe..Vs..Hussein Dairy Ltd[2013]eKLR, the Court of Appeal held as follows:-

“ The Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify meaning that the allegations in its defence with regard to the blame worthiness of the accident on the Appellant either wholly or substantially remained just that mere allegations. The Respondent thus never tendered any evidence to prop up its defence. Whatever the Respondent gathered in cross-examination of the Appellant and



his witnesses could not be said to have built up its defence. As it were therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....”

19. However, it ought to be noted that uncontroverted evidence cannot be taken on its face value. The Plaintiffs' have an obligation to prove their case the same way the Court has an obligation to interrogate the evidence adduced by the plaintiff to determine whether the same is merited. The Plaintiffs' have to discharge its burden of proof. See the case of Kenya Power & Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

20. Further the case of Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR, the Court held that:-

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

21. It is common ground that the Plaintiffs' suit is founded on the tort of fraud as a cause of action. The Black's Law Dictionary defines fraud as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

22. Further, J.G. Kemei, J in Gichinga Kibutha v Caroline Nduku [2018]eKLR held in part as follows on the subject of fraud:

“Fraud is essentially a common law tort of deceit and its essentials are:-

- a) false representation of an existing fact;
- b) with the intention that the other party should act upon it;
- c) the other party did act on it; and
- d) the party suffered damage.

With respect to a contract, fraud means and includes any of the acts set out below committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract:-



- a) the suggestion as a fact, of that which is not true by one who does not believe it to be true;
- b) the active concealment of a fact by one having knowledge or belief of the fact;
- c) a promise made without intention of performing it;
- d) any other act fitted to deceive; and
- e) any such act or omission or the law declares to be fraudulent.”

51. With respect to the standard of proof in cases of fraud, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau* [2015]eKLR had the following to say:

It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

- 23. The Plaintiffs’ in this case assert that the suit land belonged to Reuben Wanyonyi-deceased who surrendered 0.13 ha to the government and expected the residual portion of 1.77ha to revert to him but the same was irregularly and fraudulently registered in the name of Bungoma County Council and is now being occupied by individuals and private institutions.
- 24. The evidence as presented before this honourable court indicates that Bungoma County Council was registered as the first proprietor of the suit land on 02/10/1970 and that on 23/10/1974, a portion measuring 0.13ha was compulsorily acquired vide Gazette Notice 3093. Therefore, such registration vested the de funct Bungoma County Council now the County Government of Bungoma with absolute proprietorship rights which can only be impeached on grounds of fraud or misrepresentation under Section 26 of the *Land Registration Act* which is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land and that the same can only be challenged where the Certificate of title has been acquired fraudulently, unprocedurally or through a corrupt scheme. See *Elijah Makeri Nyangw vs Stephen Mungai Njuguna & another* [2013] eKLR, and *Chemei Investments Limited –vs- The Attorney General & others Nairobi Petition No. 94 of 2005*.
- 25. The plaintiffs alleged that Reuben Wanyonyi was the original owner of the suit land, but no evidence has been presented to support that assertion. As previously mentioned, the Bungoma County Council was registered as the first owner of the suit land as shown in the copy of the green card produced as P-Exhibit 1. The elements of fraud alleged by the plaintiffs have not been substantiated. This Court has not been told why Reuben Wanyonyi was not registered as the owner of the suit land initially and how the Bungoma County Council became the registered owner in 1970 yet the acquisition took place in 1974. I say so because the Plaintiff’s seem to argue that it was at the time of the compulsory acquisition that Bungoma County Council fraudulently transferred the suit land to itself. The Plaintiffs did not



produce any proof that the deceased was indeed the owner of the suit land. The fact that other parcels of land were reverted back to the estate of the deceased through previous cases filed does not sanitize the Plaintiffs' claim.

26. Section 107 to 109 of the Evidence Act provides:

Burden of proof

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- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.108.Incidence of burden.

The burden of proof in a claim or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

27. These provisions apply to all, including the Plaintiffs that anyone who wishes the Court to believe in the existence of any fact, or who would fail if no evidence were adduced by either side, has the burden to prove its existence

28. The upshot of my analysis is that the Plaintiffs have failed to prove their case on a balance of probabilities and as such, the same is hereby dismissed with costs.

29. Orders accordingly.

DATED SIGNED AND DELIVERED AT Bungoma THIS 10TH DAY OF JULY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wangila Masinde H/B for Mr. Sichangi for the plaintiff
2. Mr. Wesonga H/B for M/S Masengeli for the 1st Defendant
3. 2nd, 3rd, 4th, & 5th defendants/advocate-absent
4. Bett C/A

