



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mbaluka v Nguli (Environment & Land Case 61 of 2018)  
[2024] KEELC 6902 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6902 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 61 OF 2018  
TW MURIGI, J  
OCTOBER 16, 2024**

**BETWEEN**

**ALBANUS MWENDWA MBALUKA ..... PLAINTIFF**

**AND**

**MUTUA NGULI ..... DEFENDANT**

**JUDGMENT**

1. By an amended Plaintiff dated 19<sup>th</sup> November 2019, the Plaintiff prays for judgment against the Defendant for:-
  - a. A declaration that the Plaintiff is the lawful proprietor of parcel number 9731/1/6A.
  - b. Vacant possession of the suit property L.R. number 9731/1/6A 9731-Portion 6A.
  - c. A permanent injunction restraining the Defendant by themselves, their agents and/or employees whatsoever from entering, remaining thereon, disposing off, trespassing on the suit premises.
  - d. General damages for trespass and Mesne profit.
  - e. Costs of the suit and interest at court rates.
  - f. Any other further relief this court may deem fit and just.
2. The Defendant filed an amended statement of Defence dated 25<sup>th</sup> November 2013 denying the Plaintiff's claim.

**The Plaintiff's Case**

3. The Plaintiff Albanus Mwendwa Mbaluka testified as PW1 and called 3 witnesses in support of his case.



4. He adopted his witness statement dated 21<sup>st</sup> February 2011 as his evidence in chief. He also produced the documents in the list and supplementary list of documents in support of his case.
5. The Plaintiff testified that on 1<sup>st</sup> April 2008, he purchased Plot No. 9731/1/6A measuring 10 acres situated within Emali from Mutisya Mulu for Kshs 450,000/=. That after completion of the sale Mutisya Mulu gave him vacant possession of the suit property.
6. He further testified that after he completed paying the purchase price, they engaged Geo Info Surveyors who subdivided Plot No. 9731 to 9731/6A. He went on to state that on 11/02/2011 he instructed Geo Info Surveyors to demarcate 10 acres from Block No. 6 measuring 34 acres in size and was thereafter issued with a beacon certificate on 11/02/2011. That during the subdivision exercise, Block No. 6 was divided into part A measuring 10 acres and part B measuring 24 acres. He testified that his portion of 10 acres was comprised in part A of Block 6 while Mutisya Mulu remained with part B measuring 24 acres.
7. He went on to state that in the year 2009 his farm manager one Munywoki (deceased) informed him that the Defendant had trespassed into his land and was carrying out illegal activities thereon. That despite being duly served with a demand notice, the Defendant persisted in carrying out his illegal activities on the suit property.
8. According to the Plaintiff, the Defendant illegally occupied and sold part of his land to third parties who have since erected transmissions lines without his consent.
9. He further testified that land parcel No. 100 and 101 are reflected on the map for land parcel No 9731/1 and added that he is the owner of land parcel No. 100 measuring 10 acres. He explained that land Parcel No. 100 measuring 10 acres was initially Portion No.6A while parcel land parcel No. 101 measuring 24 acres was initially portion No.6B.
10. He stated that the two survey plans together with the maps from the Ministry of Lands and Physical Planning confirm the same position over the suit property. He urged the court to grant the orders as sought in the plaint.
11. On cross examination, he testified that Mutisya Mulu sold the suit property in his capacity as one of the administrators of the Estate of Mulu Mutisya.
12. He admitted that the co-administrators did not sign his sale agreement and confirmed that it was executed after the grant in respect of the Estate of Mulu Mutisya was confirmed on 09/03/2009.
13. He further confirmed that his sale agreement indicates that he purchased portion No. 6 within L.R No 9731 and not Plot No. 6A as stated in his plaint.
14. He admitted that he had not taken any legal action against Domitala Katila the person whom the Defendant sold the property to even if she would be affected if he is given vacant possession of the suit property. He further admitted that the suit property had been sold to KETRACO. When referred to the sale agreement between the Defendant and Domitala Katila, he stated that it was executed a day before he filed the present suit.
15. In re-examination, he testified that Plot No. 6A and 6B came into existence after he paid the purchase price in full and added that he was not shown the sale agreement between KETRACO and Domitala Katila.
16. PW1 Mutisya Mulu testified that he is the son of the late Mulu Mutisya. He adopted his witness statement dated 8/5/2013 as his evidence in chief. He informed the court that he is the owner of Plot No. 9731/1. He confirmed that he sold Plot No. 9731/1/6A measuring 10 acres to the Plaintiff vide



- a sale agreement dated 01/04/2008 for Kshs 450,000/= . He denied selling the suit property to the Defendant or to any other person.
17. On cross examination, he testified that he subdivided his land into two portions, A and B. He stated that he is illiterate and he could not read or write. He went on to state that Sammy Mutuku witnessed the sale agreement between him and Plaintiff while his brother Stanley Katholi and his late witness Margeret Mbaki witnessed the sale agreement between him and the Defendant.
  18. He testified that his brother Stanley Katholi and his wife Margaret Mbaki (deceased) signed the sale agreement between him and the Plaintiff and the sale agreement between him and the Defendant. He further testified that he sold his land to 4 people namely the Plaintiff, the Defendant, Katila and Chief Kalali. That apart from the Plaintiff, he had not shown the other purchasers the boundaries of their respective parcels. He denied the allegations that he had subdivided his land into four portions.
  19. In re-examination, he testified that he was not involved in the preparation of the affidavit dated 27<sup>th</sup> September 2014 and added that it was not read over to him. He reiterated that he sold Plot No. 6A measuring 10 acres to the Plaintiff.
  20. PW2 Rogers Gasewa the Principal Surveyor testified that land parcel No. Mbitini/Nzai Block1/Nzai Farm 100 is a full block derived from L.R. No. 9731/1 whose acreage and dimensions are shown in the survey plan. He further testified that though he could not tell from the RIM the acreage of parcel No. 100, but he could tell from his expertise that parcel No. 100 was 10 acres in size.
  21. He went on to state that according to their records, parcel No. 100 has never been subdivided and that if it was, the records were never availed to their office. He produced the map, the PDP as exhibits in support of his evidence.
  22. In cross examination, he testified that the RIM was authentic as it was compiled from the field notes and the computation file produced by a licensed Surveyor. He further testified that once the RIM is submitted to their office, they cross examine all the documents availed by the Surveyor. He confirmed that the title for Plot No.100 was not the same as for Plot No. 9731/1/6A. According to PW3, No.9731/1/6 were planning numbers.
  23. PW3 Romana Ngina Kitusa a private Surveyor testified that she prepared a report for Plot No. 6A which is now registered as title No. Mbitini/Nzai Block 1 (Nzai Farm/100).
  24. She further testified that the mother title for the suit property is L.R.9731 and that she got the map from the Director of Survey. That according to her survey, Block No. 6 was subdivided into portion No. 6A measuring 10 acres and portion No. 6B measuring 24.8 acres. It was her testimony that the Plaintiff is the owner of Plot No.6A. She produced her report as exhibit 5.
  25. In cross examination, she reiterated that the Plaintiff is the owner of Plot No. 6A and has since been issued with a title deed for the same. She admitted that the map prepared by the Director of Survey for Mbitini/Nzai Block 1 does not have the letter 6A but title numbers. She stated that she did not identify land parcel No. 100 in her report because the exercise had not been done.
  26. She testified that the release letter by the Director of Survey dated 8/02/2019 was addressed to the Surveyor who presented the work so as to publish the maps and that as at February 2019 the work was still ongoing. She stated that she identified Plot No. 6A in her report as Plot No. 265 and that she got the number from Geo Info survey who had carried out the subdivision.
  27. She further testified that Geo Info Survey proposed to subdivide the land into 6A and 6B. She went on to state that there were no stamps in the documents that she had received from Geo Info Survey



to show that the subdivision was approved, since they were just a guide to show her how they carried out the subdivision on the ground.

28. She stated that the Surveyor's worksheet is a guide to assist the Director of Survey to prepare the final map. She stated that the worksheet was not signed and did not indicate the name of the Surveyor who had done the work and that it was different from what she was shown.
29. She further testified that during the court site visit, she identified parcel No. 6A which touches the main road. When referred to the Survey report prepared by Geomatics Survey, she testified that Plot No.6A was described as Plot No. 6D.
30. On re-examination she testified that Plot No. 6A and 6D fit the description of the suit property and explained that the correct number was Plot No, 6A. She asserted that in her report, Plot No.100 is the same as Plot No. 6A. She testified that her report tallies with the final map and that the release letter does not contradict her report in any way.

### **The Defence Case.**

31. The Defendant Mutua Ngulu testified as DW2 and called one witness in support of his case.
32. DW1 Daniel Felix Onyango an Assistant Surveyor at Geomatics Survey Limited testified on behalf of Benson Kathenge (deceased) and produced his report.
33. According to DW1, the report by Benson Kathenge identified 4 parcels of land namely 6A, 6B, 6C and 6D. He stated that parcel No. 6D fronting Mombasa Road belongs to the Defendant. He further testified that they used a sketch map prepared by the Defendant to locate the suit property since they did not have a title as at the time when they prepared report.
34. He confirmed that parcel number 100 was reflected in the RIM.
35. On cross examination, he reiterated that the late Benson Kathenge relied on the sketch map prepared by the Defendant to carry out the survey exercise since the land had not been surveyed. He further testified that the sketch map identified parcels No. 6A, 6B, 6C and 6D and added that parcel No. 6A was at the extreme end and does front Mombasa road while Plot No. 6D fronts Mombasa road. Concluding his evidence, he testified that his findings were based on the map that was prepared by the Defendant.
36. The Defendant Eluid Mutua Nguli testified as DW2. He adopted his witness statement dated 21/2/2019 as his evidence in chief. He also produced the list of documents in support of his case.
37. It was his testimony that the Estate of the late Mulu Mutisya owned large parcels of land including L.R. No 9731 (original No. Part of 7390). That he was introduced to Mutisya Mulu through an agent on or about February 2009 who informed him that the estate had been distributed and that parcel No. 9731 had been subdivided into three portions.
38. He testified that Mutisya Mulu informed him that he was allocated portion No. 6 which he had subdivided into Portion No. 6A, 6B, 6C and 6D which he identified on the map.
39. That on 12<sup>th</sup> March 2008, he purchased portion No. 6D measuring 10 acres, touching Mombasa Road from Mutisya Mulu. He went on to state that on 28<sup>th</sup> October 2010, he sold 5 acres to Domitila Katila. It was his testimony that he purchased the suit property earlier than the Plaintiff.
40. On cross examination, he testified that that they did not involve a Surveyor when he purchased 10 acres and added that Mutisya Mulu identified the suit property on the ground and not on the map. He testified that he was in occupation of the suit property and that the Plaintiff was not his neighbour. According to DW2 the Plaintiff was referring plot No. 6D as Plot No. 6A.



41. After the close of the hearing, both parties agreed to file and exchange their written submissions.

### **The Plaintiff's Submissions.**

42. The Plaintiff's submissions were filed on 4<sup>th</sup> March 2024.

43. On his behalf, Counsel identified the following issues for the court's determination:-

- i. Whether or not L.R No. 9731/1 was subdivided into two portions or four portions?
- ii. Whether or not the Plaintiff owns the disputed portion of land?
- iii. Whether or not the Plaintiff is entitled to the relief sought in the Plaintiff.

44. As regards the first issue, Counsel submitted that after the Plaintiff purchased 10 acres from Mutisya Mulu, they engaged a Surveyor who subdivided land parcel No. 9731/1 into two portions, A and B. Counsel further submitted that the Plaintiff's evidence was supported by PW2 and PW4 who confirmed that land parcel No. 9731/1 was subdivided into two portions thereby giving rise to L.R. No. 100 and 101 as per the registered maps.

45. Counsel submitted that the Defendant did not engage a Surveyor during the sale but relied on the report prepared by a private surveyor. Counsel argued that the report by Benson N Kathenge confirmed that surveys are based on data/maps that have been authenticated by the Director of Survey. That with regards to the survey report produced by the Defendant, no data was authenticated as the Surveyor relied on the sketch map prepared by the Defendant. To buttress this point, Counsel relied on Section 32 of the Survey Act.

46. Counsel submitted that the survey report by PW3 is the correct reflection of the plan that was registered and authenticated by the Director of Surveys. Counsel submitted that PW4 authenticated that L.R 9371/1 was subdivided into 2 portions and hence, the allegations by the Defendant that the land parcel No 9731/1 was subdivided into 4 portions was baseless and unknown to the Director of Surveys.

47. On the second issue, Counsel submitted that although both the Plaintiff and Defendant were claiming to have purchased 10 acres comprised in L.R. No. 9731/1, Mutisya Mulu categorically stated that he only excised 10 acres in favour of the Plaintiff and was yet to show the other purchasers the boundaries of their respective portions.

48. Counsel further submitted that PW2 stated that he was waiting for the Defendant to pay the entire purchase price before he could excise his portion of land and that there was no evidence to show that the Defendant paid the entire purchase price.

49. It was further submitted that the sale agreement between Mutisya Mulu and the Defendant does not state that the Defendant purchased Plot No. D or the exact location of the portion sold to the Defendant.

50. Concluding his submissions, Counsel submitted that the Plaintiff has proved his case on a balance of probabilities and is entitled to the orders sought in the Plaintiff.

### **The Defendant's Submissions**

51. The Defendant's submissions were filed on 12<sup>th</sup> March 2024.

52. On his behalf, Counsel outlined the following issues for the court's determination:-

- i. Whether there exists a property known as L.R. No. 9731/1 6A – 9731/1/ portion 6;



- ii. Whether the Plaintiff is the lawful proprietor of parcel of land known as L.R. No. 9731/1 6A – 9731/1 Portion 6A;
  - iii. Whether the Plaintiff is entitled to the reliefs sought.
53. As regards the first issue, Counsel submitted that none of the parties produced any title to show that land parcel No. L.R. No 9731/1/6A or 9731/1 Portion 6A exists.
54. It was submitted that the Plaintiff did not adduce any documentary evidence to show that land parcel No. 9731/1/6A or 9731/1 Portion 6A exists.
55. With regards to the second issue, Counsel submitted that the Plaintiff did not adduce any evidence to show that he is the owner of Plot No. 9731/1/6A or 9791/1 Portion 6A. It was argued that the sale agreement dated 1/4/2008 was for the sale of portion 6 within land parcel No. 9731/1 and not for 9731/1/6A or 9731/1 portion 6A.
56. Counsel contended that the Plaintiff did not produce any documents to show the alleged subdivision of parcel No. 9731/1/6A or 9731/1 portion 6A. Counsel further contended that parties are bound by their pleadings and hence any evidence that does not support the pleadings is of no probative value.
57. Concluding his submissions, Counsel submitted that the Plaintiff is not entitled to the orders sought as he did not adduce any evidence to show that Plot No. 6A exists. He urged the court to dismiss the suit with costs.

**Analysis And Determination**

58. Having considered the pleadings, the evidence on record and the respective submissions, the following issues arise for determination:-
- 1. Whether land parcel No. 9731/1 was subdivided and if so into how many portion; and
  - 2. Whether the Plaintiff is entitled to the orders sought.

**Whether Land Parcel No. 9731/1 Was Subdivided and if so into how many Portions**

59. At paragraph 5(b) of the amended plaint, the Plaintiff pleaded that the Defendant had by collusion, fraud and without justification unlawfully faked and back-dated the sale agreement dated 12<sup>th</sup> March 2008 between him and Mutisya Mulu. He listed the particulars of fraud as follows:-.....
- i. The Defendant purported to enter into a valid sale agreement with Mutua Nguli on the 12<sup>th</sup> March, 2008 an agreement which is not genuine with sole interest of defrauding the Plaintiff.
  - ii. Authoring a backdated Sale Agreement with MUTUA NGULI with th esole intent of defrauding the Plaintiff off his property and without any consideration of the Plaintiff’s rights and interest.
  - iii. Attempting to defraud the Plaintiff of his property.
  - iv. Attempting to sell a portion of the Plaintiff’s land to a third party one Domitila Katila on 28<sup>th</sup> October, 2010 when the Defendant was well aware that he had no property rights to do so.



It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of *Vijay Morjaria v Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)* Tunoi JA 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

60. Similarly, in the case of *Kinyanjui Kamau v George Kamau [2015] eKLR* the Court of Appeal held that:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs 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 Civil cases, the standard of proof is on a balance of probabilities. Although the standard of proof for fraud is not beyond reasonable doubt it is higher than proof on a balance of probabilities.

61. Although the Plaintiff pleaded and listed the particulars of fraud, he did not lead any evidence in support of his allegations. From the foregoing, I find that the Plaintiff did not prove fraud on the part of the Defendant.
62. The dispute herein revolves around a portion of land measuring 10 acres emanating from land parcel No. 9731/1.
63. It is not in dispute that Mutisya Mulu (PW1) is the owner of land Parcel No. 9731/1. It is also not in dispute that he was allocated 34.50 acres vide the certificate of confirmation of grant dated 9<sup>th</sup> March 2009 issued in the Estate of Joseph Mulu Mutisya (DEX3).
64. The Plaintiff testified that after he purchased 10 acres comprised in land parcel No. 9731/1 from Mutisya Mulu, they engaged Geo Info Surveyors to demarcate 10 acres in his favour. That after the subdivision of parcel No 9731/1, he was issued with a beacon certificate. It was his testimony that Block 6 was subdivided into A and B.
65. PW2 testified that he subdivided his land into two portions namely A and B.
66. The Defendant on the other hand testified that Mutisya Mulu subdivided land parcel No. 9731/1 into four portions namely 6A-6D. He stated that he purchased Portion No. 6D from Mutisya Mulu who identified to him the plot on the ground and not on the map.
67. The evidence on record shows that land parcel No.9731/1was originally surveyed by Geo Survey Limited. PW4 stated that in order to establish the portion of land, they acquired the survey plan folio registration No. 41 which reflects the true dimension of land parcel No. 9731. That they also sought for the subdivision scheme for the original land from Geo Info survey Limited who subdivided the land and established that Plot No 265 was the original Plot No 9731/6A. According to PW4, Block



No. 6 was subdivided into two portions namely 265(6A) measuring 10 acres and the balance 264 being Plot No. 6B measuring 24.8 acres. She testified that the measurement of Plot No. 6A (265) tallies with the measurement on the beacon certificate.

68. The law governing the survey of property is found in Section 32 of the Survey Act which provides as follows:-

No land shall be deemed to have been surveyed or un-surveyed until the plan thereof has been authenticated by the signature of the Director or of a Government Surveyor authorised in writing by the Director in that behalf or by affixing of the seal of the survey of Kenya.”

69. In the matter at hand, PW2 testified that they received the survey plan derived from parcel 9731 from a licensed surveyor which shows the acreage and dimension of parcel 100. The release letter dated 8/2/2019 shows that the subdivision of 9731 was approved by the Director of Survey for new parcels 2-362

70. From the foregoing, it is crystal clear that land parcel No. 9731/1 was subdivided into two portions.

### **Whether The Plaintiff is entitled to the orders Sought**

71. The Plaintiff is seeking for a declaration that he is the lawful owner of Plot No. 9731/1/6A having purchased the same from Mutisya Mulu vide a sale agreement dated 1<sup>st</sup> April 2001. PW1 testified that he sold Plot No 6A to the Plaintiff for Kshs. 450,000/=.

72. The Plaintiff produced the sale agreement dated 01/04/2001 and acknowledgment of payments(PEX3). The sale agreement between the Plaintiff and PW1 states as follows in part:-

“Title Numbers - Portion No. 6 Within (L.R No. 9731/(1)

Area Situate - Emali

Size of Area Sold - Whole (10) Acres

Term – Absolute”

73. The Plaintiff testified that Plot No. 6A came into existence after the subdivision of Parcel No. 9731/1. PW1 insisted that he sold plot no 9731/1/6A to the Plaintiff. He denied selling Plot No. 6A to the Defendant or to any other person.

74. The Defendant on the other hand testified that he is the owner of plot No. 6D having purchased the same vide the agreement dated 12<sup>th</sup> March 2008 (DEX4). Clause No. 4 of the sale agreement states as follows:- “By this agreement the Vendor sells and the purchaser purchases ten(10) hectares of title No . 9731/1 which is described as Plot No. 6D in the subdivision map.” He stated that the Plaintiff was claiming his plot as Plot No. 6A

75. According to the sale agreement the Plaintiff purchased portion No. 6 within L.R. No 9731/1 measuring 10 acres.

76. He also produced a beacon certificate dated 13<sup>th</sup> March 2008(DEX11). PW1 testified that apart from the Plaintiff he did not show the other purchasers the boundaries of their respective parcels. In his evidence, he insisted that he sold portion No. 6A to the Plaintiff.

77. The Defendant did not adduce any evidence to show that PW1 excised 10 acres from land parcel No. 9731/1 in his favour. It is not in dispute that the Defendant did not involve a surveyor as at the time of the sale. The Defendant did not adduce any evidence to show that PW1 excised 10 acres in his favour.



His evidence that he purchased the suit property earlier than the Plaintiff holds no water since the seller denied selling to him the suit property. The Defendant produced an affidavit allegedly sworn by Mutisya Mulu who denied the same. The Defendant did not request to cross examine PW1 to challenge his averment. From the foregoing I find that the Defendant's claim lies with PW1 and not with the Plaintiff herein.

78. It is not in dispute that the suit was filed before the title was issued. PW2 testified that No. 9731/1/6 were planning numbers. The Plaintiff did not amend his plaint to reflect the parcel number for the suit property.
79. The Plaintiff also sought for a permanent injunction restraining the Defendant by himself or his employees or agents from entering, remaining, disposing of, or trespassing on the suit property. Having established that the Plaintiff is the owner of the suit property, I find that he is entitled to the order sought.
80. The Plaintiff also sought for general damages and mesne profits. He did not lead any evidence in support of his pleadings. Mesne profits are in the category of special damages. They must be pleaded and proved. No specific sum was claimed in the plaint as mesne profits. I therefore find that Plaintiff is not entitled to prayer No. (d) and (e) of the Plaint.
81. In the end, I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities as required. Consequently, I enter judgment in the following terms:-
  - a. A declaration I hereby issued that the Plaintiff is the lawful proprietor of parcel number 9731/1/6A.
  - b. An order of vacant possession of the suit property L.R. number 9731/1/6A 9731-Portion 6A be and is hereby issued..
  - c. An order of permanent injunction restraining the Defendant by themselves, their agents and/ or employees whatsoever from entering, remaining thereon, disposing off, trespassing on the suit premises.
  - d. The Plaintiff is awarded costs of the suit and interest.

.....

**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF OCTOBER, 2024.**

**IN THE PRESENCE OF:**

Ms Muluvi holding brief for Senior Counsel Eric Mutua

Mrs Nyaata for the Plaintiff.

