



Peitz & another v Elms; National Land Commission (Interested Party) (Environment & Land Case 657 & 612 of 2013 (Consolidated)) [2024] KEELC 6558 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6558 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 657 & 612 OF 2013 (CONSOLIDATED)**

**LN MBUGUA, J
OCTOBER 3, 2024**

BETWEEN

FRIENDRICH PEITZ 1ST PLAINTIFF

TIMOTHY WANGAI MWATHE 2ND PLAINTIFF

AND

GUY SPENCER ELMS DEFENDANT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

1. At the heart of the dispute is the land parcel LR. No. 2327/117 (Original no. 2327/11/1) situated in Karen Nairobi which is closely related to an adjustment parcel L.R. No. 2327/10. The 2nd plaintiff in the case ELC 657 of 2013 claims that parcel 2327/117 was bought by the 1st plaintiff from Roger Bryan Robson and that the 2nd plaintiff has a Power of Attorney from the 1st plaintiff enabling him to assert the claim of ownership of the suit property.
2. Another suit was filed being ELC 612 of 2013 in which one Francis Odinga Waluchowas claiming parcel L.R. 2327/10 which was also apparently sold to Friendrich Peitzby Roger Bryan Robson.
3. Guy Spencer Elms, the defendant in the two suits avers that he is the executor of the will of ROGER BRYAN ROBSON (hereinafter Robson), and that the latter never sold the two parcels.
4. On 15.5.2019, the two suits ELC 612 of 2013 and ELC 657 of 2013 were consolidated and the latter file became the lead suit. However, on 23.4.2024, a consent was recorded between the parties in case ELC 612 of 2013 in the following terms;



- i. That the Plaintiff's suit in NRB ELC No. 612 of 2013 be and is hereby marked as withdrawn with no orders as to costs;
 - ii. That the 1st Defendant's Counterclaim in NRB ELC No. 612 of 2013 be and is hereby allowed in terms of prayers a), b) c), d) and e) of the Counterclaim dated 22th May 2019;
 - ii. That there be no orders as to costs with respect to the Counterclaim in NRB ELC No. 612 of 2013."
5. Thus the judgment herein relates to the case ELC 657 of 2013.

Plaintiffs case

6. Vide a plaint filed in court on 3.6.2013, the plaintiffs contend that the 1st plaintiff is the registered owner of parcel L.R. No. 2327/117 (herein after the suit property) measuring 0.2052 acres. That on 30.4.2010, the 1st plaintiff gave a Power of Attorney to the 2nd plaintiff in respect of the said land, and that the 2nd plaintiff has been in possession of the said land since year 2010. However, on 20.5.2013, the defendant entered the suit property and prevented the 2nd plaintiff from developing the same.
7. The plaintiffs seek the following orders in the suit;
- i. A permanent injunction restraining the Defendant whether by himself or acting through his agents, servants and or employees from accessing, entering into, remaining on or dealing with the suit property.
 - ii. General damages for trespass.
 - iii. An eviction order directed at the defendant his servants, employees and or agents should any of them set foot on the suit property.
 - iv. Costs of this suit together with interest on (2) and (4).
 - v. Any other relief this Honourable Court may deem just and fair to grant.
8. The 2nd plaintiff Timothy Wangai Mwathe testified as the plaintiffs' sole witness (PW1). He adopted his witness statement dated 31.5.2013 as his evidence. He produced the 7 documents in their bundle of even date as P-Exhibit 1-7. He contends that he had known the 1st plaintiff for 18 years and that the said 1st plaintiff had married his cousin. That on 30.4.2010, the 1st plaintiff gave him a Power of Attorney over the suit property, of which he took possession thereof.
9. He avers that the 1st plaintiff used to keep horses, poultry and pets on the said property. That sometime in May 2013, PW1 desired to fence the land, but on 13.5.2013, he was prevented from doing so by the defendant. He later got assistance from the police, but the defendant continued to threaten him.
10. In cross-examination, PW1 stated that by the time he filed the suit, the 1st plaintiff was already dead. He doesn't know when he died, he doesn't have the Grant of Letters of Administration and he has no identification documents of the said 1st plaintiff. He was not given the title document of the suit property, and he is not aware of the legal regime that was governing the conveyance in which the 1st plaintiff acquired the suit property. He was only given the conveyance document at page 16 of his bundle.
11. PW1 never met Robson and he is not aware that the said Robson was staying on the suit property or that he (Robson) died in the year 2012.



12. That though 1st plaintiff was married to his cousin, he doesn't know when the two got married. He has no utility bills for the property or land rate payments.
13. In re-examination, PW1 stated that this case relates to parcel L.R. No. 2327/117 and that none of the bills availed by the defence refer to this particular parcel.

Defense Case

14. The defendant filed a Defence and Counter claim on 9.7.2013, averring that pursuant to a will dated 24.3.1997, he is the executor of the will of Robson, and that prior to his death, Robson was the registered owner of the suit property. He avers that there was a conveyance of 1.3.1961 which restricted the selling of the suit property independently of parcel L.R. No. 2327/10, as the suit property could only be accessed through the other parcel. That the power of Attorney held by the 2nd plaintiff is void ab initio as it was witnessed by an advocate who was struck off the roll of advocates in year 2009 (Gitao Ngige).
15. The defendant contends that he was given a power of Attorney by Robson on 28.1.2010.
16. In the counterclaim, the defendant avers that the conveyancing of 9.2.1994 handing over the property from Robson to the 1st plaintiff was fraudulent and therefore seeks judgment in the following terms;
 - i. A declaration that the Conveyance dated 9th February 1994 is fraudulent;
 - ii. A mandatory injunction for the delivery up of the fraudulent Conveyance dated 9th February 1994 and destruction of the said Conveyance either by the Interested Party, this Honourable Court and/or the Defendant;
 - iii. A permanent injunction restraining the Plaintiffs, their servants and or agents from accessing, entering into interfering in any manner and/or dealing with the Suit Property and Adjacent property.
 - iv. General Damages for trespassing on the Suit and Adjacent Property together with interest thereon at court rates from date of judgment until payment in full;
 - v. Cost of this Suit together with interest thereof at court rates from the date of judgment until payment in full;
 - vi. Such other or further relief that this Honourable Court may deem fit to grant.
17. The sole witness for the defence is Guy Spencer Elms, the defendant who testified as DW1. He adopted his rather lengthy witness statement containing 139 paragraphs dated 15.1.2020 as his evidence. He produced the 50 documents in his equally voluminous trial bundle running from page 1-622 as D-exhibits 1-50. He also produced D-exhibit 51 which is a search filed in a supplementary list dated 2.5.2023.
18. DW1 has introduced himself as an Advocate of the High Court of Kenya practicing as such with the firm of Messrs Raffman Dhanji Elms & Virdee Advocates and he is also the sole Executor of the Will of one Roger Bryan Robson – deceased. He avers that parcels L.R. No. 2327/10 referred to as “Property A” and L.R No. 2327/117 as “Property B” (and jointly referred to as “No. 95 Ushirika Road”) were obtained by one Roger Bryan Robson through a single Conveyance dated 4th May 1978 from Nancy Worsely Javens. A copy of the said Conveyance is at pages 1-3 of the Defendants’ Bundle of Documents.
19. DW1 has given a detailed account of his close relationship with Robson which even culminated in Robson giving a Power of Attorney to him as detailed in his witness statement. He avers that Robson



died on 8.8.2012, and on 30.10.2013, a Grant of Probate of will of the deceased was issued, appointing him (DW1) as the sole executor of the will of Robson. DW1 then appointed caretakers of the property namely Daniel Kisinga and Boniface Mithini.

20. That while carrying out his duties as the executor of the will of the deceased in safeguarding the assets of Robson, DW1 found that there were suspicious activities on the suit land. An attempt to do a search at lands registry to verify the registration status of the suit property was not fruitful as the file was missing. DW1 was however able to trace the original documents relating to the root of the title which included;
- i. Conveyance dated 28th December 1955 of L.R No. 2327/10 between Karen Building Company Limited and Frank Albert Bailey.
 - ii. Conveyance dated 1.3.1961 of L.R. No. 2323/117 between Ernest Victor Benn & Violet Emily Benn and Frank Albert Bailey (which contains the restriction against selling Property A without Property B).
 - iii. Conveyance dated 15th July 1965 of both Titles between Frank Albert Bailey and Martin Taylor & Beatrice Taylor;
 - iv. Conveyance dated 5th July 1967 of both Titles between Martin Taylor & Beatrice Taylor and Richard Leslie Naish.
 - v. Conveyance dated 30.12.1970 of both Titles between Richard Leslie Naish and Edward Hayden Chittleburgh & Winifred Hayden Chittleburgh; and
 - vi. Conveyance dated 26.10.1973 of both Titles between Edward Hayden Chittleburgh & Winifred Hayden Chittleburgh and Gilbert Charles Javens & Nancy Worsley Javens.

DW1 has availed the above Documents at pages 82-107 of his bundle of documents.

21. DW1 reiterates that the purpose for the reason for such a joint acquisition of Property A and B is that it is physically impossible to access the Property B without having access to the Property A, since property B is landlocked with no easements, pathways, covenants, license and/or any other permission over any other properties surrounding Property B.
22. DW1 also located amongst Roger's papers, an Official Search dated 27th April 2006 over Property A which shows that as at that date, Robson was still the registered proprietor of that Property A. The said search has been availed at pages 108-111 of the Defendants Bundle of Documents. Adding that another official search of 27.4.2006 on same property clearly reflects ownership of property "B" as the search is inclusive of entries "with other lands" since 1965.
- This Official Search also shows two (2) entries registered at numbers 18 and 19; number 18 being a Mortgage to Habib Bank Limited in favour of Kshs 380,000/= and number 19 being a Notification of Charge by the Commissioner of Income Tax for Kshs 2,000,000/= registered on 18th May 1992.
23. That there are no other entries on the registration status of the suit property, in particular, there was no re-conveyance of the Mortgage from Habib Bank Limited.
24. That on 25.4.2013, DW1 was shocked to learn from the care taker, Daniel that there was invasion on the suit land. The police got involved in one way or the other. DW1 learnt that there were persons claiming ownership of the suit property through purchase from Robson vide two conveyancing of 9.2.1994. The claimants were Francis Odinga Walucho, plaintiff in the case ELC 612 of 2013 in respect of parcel L.R. No. 2327/10, and the 1st plaintiff herein in respect of parcel 2327/117.



25. DW1 set out to carry out his own investigations which revealed that the conveyancing were done on the same date of 9.2.1994, using same font and style and were endorsed by Kassam and Company advocates, a firm of advocates who could not be traced. He also found that the signature of Robson in the two conveyancing documents were completely different from Robsons signature in the will and his other documents.
26. DW1 also found that the Power of Attorney allegedly given by the 1st plaintiff to the 2nd plaintiff dated 30.4.2010 was only registered on 30.5.2013, three years from the date of execution. He further stated that the advocate who witnessed the document was one Gitao Ngige, an advocate who had been struck of the roll of advocates in year 2009.
27. DW1 has given an account of the avalanche of litigation which ensued after the death of Robson, where various parties including one Agnes Kariuki staked a claim on the suit land, this in turn required DW1 to defend the interests of Robson's estate using his own resources in such cases as NRB ELCNO. 80 OF 2015 Guy Spencer Elms (Suing as the Personal Representative of the estate of Rogers Bryan Robson-Deceased vs, Agnes Kariuki Kagure.
28. DW1 avers that in his quest to defend the estate of Robson, he has been threatened, shot at and was even charged in criminal cases (which were withdrawn), yet he has no personal interest in the suit property. He reiterates that the suit property was never sold by Robson and that the 1994 conveyancing transactions were fraudulent.
29. The Nations Land Commission was brought on board as an interested party, but they did not file any documents or participate in the trial.

Submissions

30. The plaintiff did not file any submissions.
31. The submissions of the defendant are dated 10.7.2024 where it is averred that the plaintiffs have no locus standi to bring this suit for the following reasons; that the verifying affidavit was only sworn by the 2nd plaintiff contrary to the provisions of Order 1 rule 13 of the *Civil procedure rules*. To this end, the defendant has cited the cases of *Alfred Njau & 5 Others vs, City Council of Nairobi* [1983] eKLR and *James Ndugi & 4 Others v Jamleck Waithaka Kinyua & 7 Others* (2022) eKLR; Further, no Grant of Letters of Administration had been obtained in respect of the 1st plaintiff by the time the suit was filed as envisaged under Section 80 (2) of the *Law of Succession Act*. To this end reference was made to the case of *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo & Another* [1987] eKLR.
32. On the Power of Attorney, it was submitted that the same was not registered as required under Section 4 of the *Registration of Documents Act* and as set out in the case of *Kenneth Omollo Simbiri & Another vs, Daniel Ongor* (2020) eKLR. In addition, the said Power of Attorney had expired as the donor was deceased by the time the suit was filed. On this point, reference was made to the case of *Ummer Suleiman Kara v. Maa Zabeen Sidik* (2014) eKLR.
33. It was submitted that the purported transfer of the suit property by Robson to the 1st plaintiff was fraudulent in that there was an express restrictive covenant against the sale of the suit property separately from parcel 2327/10.
34. It was further submitted that the consent judgment entered into on 23.4.2024 in the case ELC 612 of 2013 was a judgment in rem affecting the suit property too. It was also submitted that the signature of Robson as indicated in the conveyance dated 9.2.1994 was different from Robsons known signatures.



35. Finally, it was submitted that the defence had availed all documents pertaining to the root of the title, and that by the time the plaintiff was apparently buying the suit land, the same was already mortgaged to Habib Bank Ltd, and the re-conveyance there of is yet to be registered.

Determination

36. Before delving into the question(s) for determination, I have to point out that the file is rather voluminous and the net effect is that the hand written proceedings are tearing up. In order to maintain the sanctity of the record, the court has re-arranged the file in two volumes, such that the hand written proceedings are contained in volume one, whereas the rest of the documents are in volume two.
37. I have considered the pleadings, the evidence and the submissions of the defendant. On the one hand, the plaintiffs are claiming the suit property on the basis of purchase of the said land on 9.2.1994 from Robson. On the other hand, the defendant claims that Robson never sold the suit land, hence the same belongs to his estate. The question falling for determination is; which of the two claims is merited, and what are the appropriate orders to give.
38. The provisions of Section 107 of the *Evidence Act* stipulate that:
1. (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”
39. In *Samson S. Maitai & Another V. African Safari Club Limited & Another* [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

Also see *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR.

40. The verbatim words spoken by pw1 about the 1st plaintiff in cross examination read as follows;
- “I made the statement on 31.5.2013. At paragraph 2 thereof, I say I had known the 1st plaintiff for over 18 years. I knew him well as he was my in-law. I have used past tense because he is not alive. I have not produced any death certificate. I cant give exact date of his death and even the year unless I produce that on another date. I can’t recall the year of death. When I filed the suit in 2013, he was not alive.”
41. What emerges from the above extract is that the 1st plaintiff was deceased by the time this suit was filed, hence his claim was none existent. The 2nd plaintiff has not given any plausible explanation as to how he lodged the suit in the name of a deceased person. To make a sordid story worse, PW1 could not even tell when the 1st plaintiff died, not even the year of his death!. He doesn’t even know the whereabouts of his “cousin” who was allegedly married to the 1st plaintiff. For someone who claims to have known the 1st plaintiff for a record 18 years, his knowledge of 1st plaintiff is rather scanty and this makes his interests in this matter not just questionable, but distasteful too.



42. It is trite law that suits must be prosecuted by and against living persons, see- [Loice Wanjiru Meru & 3 others v John Migui Meru](#) [2017] eKLR. In the instant suit, the 2nd plaintiff has not filed the suit independently of the 1st plaintiff, which renders the entire suit hopeless for want of locus standi.
43. As for the Power of Attorney, the same is a classic case of “Murphy’s law, that “anything that can go wrong will go wrong anyway”, for there is nothing that appears to be right about the Power of Attorney produced by pw1 as an exhibit. As pointed out by the defendant, the said document is dated 30.4.2010, but was only lodged for registration at the Lands Registry on 30.5.2013. The hiatus of three years has not been explained. What more the defendant has availed the Law Society of Kenyas online data base at page 217 of defence bundle which shows that the advocate who witnessed the Power of Attorney, one Ngige Gitao had been struck off the roll of advocates as from year 2009.
44. The fact that the 1st plaintiff was dead as at the time the suit was filed further renders the Power of Attorney void ab initio. As rightly submitted by the defendant, the Power of Attorney is of the generic nature of an agency, such that the death of a principle terminates the agency, See Ummer [Suleiman Kara v. Maa Xabeen Sidik](#) (Supra).
45. [In re Estate of Wilfred Chege Muthemba \(Deceased\)](#) [2017] eKLR, it was stated that;
- “An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal”.
46. And in [Loice Wanjiru Meru & 3 others v John Migui Meru](#) (Supra), the court had this to say in respect of a Power of Attorney where the donor had died;
- “It is plainly clear on record that upon the death of Grace Wanjiru Migwi, the power of attorney donated to her son the Respondent stood extinguished by operation of law. That was the effect of her death on the Power of Attorney”.
47. And so it is in the instant suit that the Power of Attorney held by the 2nd plaintiff had been extinguished upon the death of the 1st plaintiff. What this portends is that the suit was dead on arrival.
48. Another point for consideration in regard to plaintiffs case is that PW1 had no history of the root of the title to the suit land. Indeed he had no title at all. In [Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 others](#) [2015] eKLR, it was stated that;
- “The acquisition of title cannot be construed only in the end result, the process of acquisition is material..”
- Also see [Munyu Maina vs. Hiram Gatuiha Maina](#) [2013] eKLR.
49. It was therefore not enough for PW1 to dangle the conveyance of 9.2.1994 as the mark of ownership to the suit property. To this end, the claim of the plaintiffs must fail.
50. On the other hand, I find that the defendant has given a consistent and plausible account of his interest in the suit property. That in essence, he has no interests at all, save to safe guard the interests of the estate of Robson. To this end, DW1 availed evidence of the death of Robson as well as the Grant of Probate thereof (page 72 of defence bundle).
51. The documents running from page 82-107 of defence bundle give minute details of the root of the title to the suit property, While exhibit 51 thereof is, an official search dated 25.4.2023 which indicates that the registered owner of the suit property is Roger Bryan Robson but the land was charged to



Habib Bank Ltd. DW1 stated that no conveyance was ever done thereafter and his evidence to that effect has not been challenged.

52. Further, DW1 has availed the conveyance of 1.3.1961 which restricted the sale of the suit property independently of parcel 2327/10 and he has given a plausible explanation that the suit property is only accessible through the said parcel L.R. No. 2327/10. This again gives credence to Dw1's assertion that the transactions of 1994 on the suit land were fraudulent.
53. What more the death certificate at page 70 of defence bundle indicates that Robson passed away on 8.8.2012, and the invasions just happened thereafter. This again is a tell tale sign that the fraudsters were not on the land and only swarmed on that land, (sadly with the assistance of the police) after the death of Robson.
54. It is clear beyond peradventure that the plaintiffs are unbashed fraudsters. It is rather unfortunate that the police an entity entrusted with keeping peace and order chose to get muddy by assisting the fraudsters in their quest to circumvent justice to the extent of even having DW1 changed in courts of law.
55. This far, I find that the defendants claim in regard to the suit property is merited. What award should the court then grant? It is quite apparent that Dw1 has tried to safeguard the suit property of the deceased under very difficult circumstances, such that the land has now been invaded. This is an unacceptable state of affairs in a civilized society. The invasion amounts to trespass, hence damages are an appropriate award. In the case of *Rhoda Kiilu vs. Jiangxi Water and Hydro Power Construction Limited* (2019), eKLR where I awarded damages for trespass at sh 10 million, I cited the case of *Willesden Investment Limited vs. Kenya Hotels Properties Limited NBI H.C.C.C. No.367 OF 2000* where it was stated that;

“There is no mathematical or scientific formula in these type of cases and that the guiding factors are the circumstances in each case”.

56. To this end, I award the defendant general damages for trespass as against the 2nd plaintiff to the tune of Ksh. 7 000 000.

Final orders

1. The case of the plaintiffs is hereby dismissed.
2. The Counter Claim of the defendant is hereby allowed in the following terms:
 - a. A declaration is hereby issued that the Conveyance dated 9th February 1994 is fraudulent in respect of parcel L.R. 2327/117 and is hereby cancelled;
 - b. Any registration of ownership to the plaintiffs in respect of parcels L.R. No. 2327/117 and L.R. No. 2327/10 are hereby cancelled.
 - c. A permanent injunction is hereby issued restraining the Plaintiffs, their servants and or agents from accessing, entering into interfering or in any manner and/or dealing with the Suit Property L.R 2327/117 and Adjacent LR No. 2327/10.
 - d. The defendant (plaintiff in the counter claim) is awarded General Damages for trespass as against the 2nd plaintiff for Ksh. 7,000,000.



- e. The defendant (plaintiff in counter claim) is awarded costs of the suit against 2nd plaintiff. He is also awarded interests at courts rates from the date of delivery of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Shah for Defendant

Court assistant: Joan

