



**Kajuju v Kithinji & another (Environment & Land Case E008 of 2021)
[2023] KEELC 668 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E008 OF 2021
CK NZILI, J
FEBRUARY 8, 2023**

BETWEEN

BRIDGET KAJUJU PLAINTIFF

AND

ROGERS KITHINJI 1ST DEFENDANT

FRANCIS MWEBIA 2ND DEFENDANT

JUDGMENT

1. Through a plaint dated 28.1.2021, the plaintiff sued his brother, the 1st defendant for breach of trust and an agreement in which the she exchanged 1/8 of an acre of her Parcel No. Abogeta L-Kiungone/637 with the 1st defendant's LR NO. Abogeta L-Kiungone/629 whereby the later was subdivided into three portions but he eventually declined to transfer the portion to her despite putting her into possession and causing her to undertake developments therein since 2006.
2. Instead, the plaintiff averred the 1st defendant fraudulently transferred her portion as L. R No. Abogeta/L-Kiungone/1294 to the 2nd defendant hence depriving her of the property. The plaintiff prayed for a permanent injunction against eviction or any other interference thereof, rectification of the register by deregistering the 2nd defendant and replacing him with her name of the true owner.
3. The 1st defendant was duly served with summons to enter appearance and an affidavit filed by Kiogora Mugambi advocate on 22.2. 2021. By a defense dated 16.4.2021, the 2nd defendant denied the alleged fraud and averred that he was the legal and bonafide purchaser for value of LR No. Abogeta/L-Kiungone/1294, a resultant subdivision of the 1st defendant' land s since 2020. He denied that the plaintiff was occupying his land since her land lay elsewhere.
4. During the trial, the plaintiff as PW1 adopted her witness statement dated 28.1.2021 as her evidence in chief. She testified that her late father sub-divided LR No. 629 and 637 among her and the 1st defendant



- following which out of a mutual agreement they exchanged a 1/8 of an acre with the 1st defendant. PW 1 told the court that following the agreement she took possession of the portion given to her of the 1st defendant's land, sought approvals for developments from the defunct County Council of Meru and in 2006, she put up a commercial building on the suit land.
5. She testified that instead of the 1st defendant transferring the portion occupied to her, he fraudulently and in breach of trust transferred the same to the 2nd defendant in 2012 who thereafter issued a demand letter to her on 9.7.2020, seeking for the hand over the premises to him. In support of her claim, the plaintiff produced a copy of the records from LR No's. 1294, 637, an application for development permission, a receipt for payments and a demand letter as P. Exh 1-4 respectively.
 6. In cross examination by the 1st defendant, PW 1 insisted that the land was hers following the agreement in the presence of their mother. Further, PW 1 stated that the 1st defendant had purportedly sold everything he had including the portion she had developed without involving her or issuing a notice to that effect. In cross examination by the 2nd defendant, PW 1 said that the initial parcel of land was LR No. 394 which was subdivided into Parcel No's 637 and 629. Further, PW 1 testified that neither did the 1st defendant stop him from developing the portion nor did he order her to vacate the premises which developments are clearly shown in the photographs contained as No's 13 & 14 of the 2nd defendant's bundle of documents. Even though the commercial plot was hers, PW 1 said that it was the 1st defendant who has been collecting rental income since 2004. However, she admitted that she used to live on the premises between 1997 and 2004 given the complaints only arose after her mother passed on when the 1st defendant started issuing threats to her to vacate the land.
 7. PW 1 said that the 2nd defendant was aware of her developments as well as ownership rights and could not have legitimately acquired the land. She stated that she discovered the fraud on 23.9.2020 after a letter was written to Linda Kanana who lives on the suit premises. PW 1 also said that after the 1st defendant threatened her, out of fear she vacated the suit premises, which were eventually vandalized by the 1st defendant.
 8. The 1st defendant as DW1 told the court that the plaintiff was her elder sister who he had given a rental premise to occupy in 1990 after she was allegedly chased away from her marriage by her then husband. He confirmed that she occupied the suit land between 1990 and 2000. In his view PW 1 was given half an acre of the family land, but sold it to one Kimani in 1994 during the life time of their late father. DW 1 admitted that the shops belonged to his late father. In cross examination, DW 1 denied ever being a party to the alleged agreement to exchange a portion of his land with the plaintiff. Further, DW 1 insisted that all the developments on the suitland were his and not by the plaintiff. He said that he was not at liberty to notify the plaintiff when he subdivided, sold and transferred the suit land to several parties since she had no share in the suit land DW 1 admitted that Linda Kanana was his daughter, who was living in the suit premises though she objected to the transactions.
 9. DW 2 adopted his witness statement dated 2.2.2021 as his evidence in chief. His testimony was that the father to the plaintiff and the 1st defendant used to own LR No. 394 which he later on subdivided into LR No's. 629 and 637 in favour of the two parties. In addition, DW 2 said that in 2020 he was approached by the 1st defendant who sold and transferred LR No. 1294 to him for Kshs.1450,000/=. He eventually took vacant possession on 1.10.2021 after acquiring a title deed for the same on 23.9.2020. He denied that the plaintiff was occupying his land. DW2 however admitted that he had sued the 1st defendant's daughter one Linda Kanana in Nkubu ELC No. 4 of 2021. DW 2 also produced the sale agreement dated 9.7.2020, an acknowledgement receipt for payments dated 18.9.2020, a copy of green card title deed, a demand letter and photographs as D. Exh No. 1 – 6 (a) & (b) respectively.



10. In cross examination, DW 2 admitted that there was in existence permanent buildings at the frontside of the Suitland at the time he bought the plot, but could not tell who had constructed them. He however clarified that he bought the land together with all its developments as per paragraph 9 of the sale agreement. DW 3 was Gilbert Gitonga. He testified that he was the one who introduced DW 2 to DW 1 regarding the transactions. Further DW 3 confirmed that the plot had a permanent stone building though he could not tell who had erected it.
11. At the close of the defence, parties were to put in written submissions by 21.12.2022. It was only the defendants who filed their submissions dated 1.11.2022 and 7.11.2022 respectively. The 1st defendant has submitted that he lawfully sold and transferred the suitland to the 2nd defendant, inclusive of all the developments thereon. He submitted that the plaintiff never exchanged any land with him since she sold part of her land Parcel No. 631 to Darlington Kimani in 2001. Further DW 1 submitted that he never took over the alleged 1/8 of an acre from the plaintiff's land neither did he approve of any developments to his plot or consent to approved any building plans from the defunct county council of Meru in favour of the plaintiff.
12. It was also submitted that since the plaintiff failed to produce any evidence that they made an agreement to exchange some parcels of land; the court should find the transactions with the 2nd defendant above board for the plaintiff had no legal interest on the land.
13. As regards the 2nd defendant, it was submitted that the 1st defendant had capacity to sell and transfer the suitland to the 2nd defendant and that the sale agreement was in line with Sections 3 (3) of the Law of Contract Act. Further, the 1st defendant submitted that the title deed possessed by the 2nd defendant under Section 26 of the Land Registration Act was valid and has not been impeached through cogent evidence by the plaintiff especially on fraud to the required standard guided by the caselaw of Virjay Morjaria v Nansing Madhusing Darbar & another [2000] eKLR.
14. The 2nd defendant submitted that he was a bonafide purchaser for value without notice going by the holding in Lawrence Mukiri v AG & 4 others [2013] eKLR. It was submitted that the evidence tendered was clear that the plaintiff was never in occupation of the suit premises hence has no basis to claim trespass to her land by the 2nd defendant so as to be entitled to the reliefs sought. The court was urged to be guided by the holding in Printing and Numerical Registering Co. v Sampson [1875] LR 19, 462 – 465.
15. The court has carefully gone through the pleadings, issues for determination, filed by the parties, evidence tendered and the submissions filed.
16. The issues falling for the court's determination are: -
 - (i) If the plaintiff and the 1st defendant exchanged any portion of land and under what terms.
 - (ii) If the 1st defendant put the plaintiff into occupation of the suit land, allowed her to develop the same with an understanding that the property was hers and he would eventually transfer it to her.
 - (iii) If the 1st defendant breached the trust or agreement made between him and the plaintiff by selling and transferring the suitland to the 2nd defendant.
 - (iv) Whether the plaintiff has proved any collusion or fraud between the defendants on the manner the suit premises was sold, transferred and registered under the 2nd defendant's name.



- (v) If the 2nd defendant was a bonafide purchaser for value without notice.
- (vi) If the plaintiff is entitled to the orders sought.
17. The plaintiff pleaded that the initial land Parcel No. LR 394 initially owned by their late father was subdivided into LR No's 629 and 637 out of which the two mutually agreed to exchange 1/8 of an acre, took possession of her portion and sought for the approvals from the defunct County Council of Meru to develop with the full knowledge of the 1st defendant, but in flagrant breach of the agreement/trust, he fraudulently sold and transferred the same to the 2nd defendant. She prayed for the reversal of the transfer, registration in her favor and for a permanent injunction.
18. Even though the 1st defendant was served with summons to enter appearance and given time to file a defence, none was filed. He nevertheless attended court and gave his testimony in opposition to the suit. Similarly, the 1st defendant filed written submissions as alluded above.
19. On his part the 2nd defendant averred that he was a bonafide purchaser for value without notice of any alleged prior agreement or exchange of the suit land between the plaintiff and the 1st defendant. He insisted that the process of the sale, transfer, registration and the taking over vacant possession was lawful since the plaintiff's land fell elsewhere and not in the suit premises.
20. In support of her claim, the plaintiff produced P. Exh No. 1, a copy of records for LR No. 1294 which indicated that the suit land was a subdivision of LR No. 754, came under the name of the 1st defendant on 5.10.2012 and later on in the name of the 2nd defendant, on 23.9.2020.
21. The plaintiff also produced P. Exh No. 2, for LR. No. 637 a subdivision of LR No. 394 which the plaintiff acquired on 7.10.1995 from Sammy Murithi and was closed for subdivision on 12.5.2003 into Parcel No. 981 and 982. The plaintiff's 3rd exhibit was an application for development permission relating to LR No. 629 for a commercial building from the defunct County Council of Meru and a receipt thereto as P. Exh No. 4 issued on 24.6.2006 by the county clerk.
22. Section 28 of the [Land Registration Act](#) provides that a title holder's rights are subject to overriding rights among them trusts including customary trusts. The plaintiff based her claim on both the breach of trust by her brother, the 1st defendant and an alleged fraudulent transaction between the defendants to defeat her possessory and occupational rights to the land following a voluntary taking over, possession under the promise that the land was hers and that she could develop it.
23. Trust must not only be pleaded but must also be proved to the required standards. In *Mumo v Makau* [2002] IEA 170, the court held that trust was a question of fact to be proved by evidence. In *Juletabi Africa Adventure Ltd & another vs Christopher Michael Lockley* (2017) eKLR the court cited with approval *Twalib Hatayan Twalib Almed Al-Hedy & others* (2015) eKLR where it was stated that trust according to Black Law Dictionary 9th edition was an enforceable right solely in equity to the beneficial entitlement of property to which another holds title at the request of another for the benefit of a third party. The court said that constructive trust was an equitable remedy imposed by the court against one who has acquired property by wrong doing and arises where the intention of the parties cannot be ascertained so as to guard against unjust enrichment.
24. On the other hand, the court stated that a resulting trust was a remedy imposed by equity where property is transferred under circumstances which show that the transferor did not intend to confer a beneficial interest upon the transferee which unlike constructive trust, the court will readily look at the circumstances of the case and presume or infer the transferor's intention, like where a person advances the purchase money, whether or not the property is transferred to his name, being immaterial.



25. In this suit, the plaintiff has pleaded and testified that there was a mutual exchange of 1/8 of an acre each from their inherited parcels of land whereof, with full knowledge and approval of her brother, the 1st defendant and parents, she applied for and was granted permission to undertake construction of a commercial building in 2006, but instead of honoring his promise, the 1st defendant subdivided the land into parcel numbers 1293, 1294 and 1296 and refused to transfer one of the portions to her, which she was occupying during her parent's lifetime but purported to chase her away soon after the demise of her mother. The plaintiff averred and testified that she discovered the transfer in favour of the 2nd defendant in 2020.
26. In his testimony DW 1 told the court that he indeed gave out of a portion of his land to the plaintiff when she disagreed with her former husband and came back to her parents homestead between 1990 and 2000. He also admitted that the plaintiff acquired half an acre as her inheritance in 1994 but allegedly disposed it off. In his view, the 1st defendant testified that the alleged shops belonged to his late father and not the plaintiff,³ though his late father never chased her away while he was still alive from where she was living. DW 1 vehemently denied any alleged promise over 1/8 an acre or an agreement to that effect since he never took over any alleged 1/8 of an acre belonging to the plaintiff.
27. DW 1 in cross examination admitted that his land was sub-divided while PW 1 was still in occupation and sold to the 2nd defendant since her building remained therein, yet he never stopped her in the 1st instance from developing the suit premises. Further, PW 1 said that the 1st defendant used force, intimidation and threats to chase her any from the suit land after the demise of her mother and was the one collecting rent after she left the premises. She insisted both her homestead and rental shops were on Parcel No. 1294 though she could not tell if it was Linda Kanana in occupation after she was thrown out of the suit premises in 2004, which facts were well known by the 2nd defendant.
28. In *Kazungu Fondo Shutu and another vs Japhet Noti Charo and another* (2021) eKLR, the land in issue was in the name of a brother alleged to have been holding it in trust for the family but who had breached the same, subdivided the land and began selling the subdivisions to third parties. The court cited with approval *Juletabi case* (supra) which held that the law did not imply and the court never presumes a trust except in cases of absolute necessity. Further, the court held that it could only imply a trust in order to give effect to the intention of the parties which intention must be clearly determined before a trust could be implied. Additionally, the court held that the onus under Sections 107-109 of the *Evidence Act* lay with the one alleging the trust to place material before the court demonstrating that there was a family agreement to hold the property for the benefit of the wider family members, for the court to imply constructive trust and further for the court to find the 1st respondent to have acquired the property by way of any wrong doing for unjust enrichment claim to be inferred. As to the issue of bonafide purchaser, the court cited with approval *Katende v Harrinder & Co Ltd* [2008] 2 E.A 173, on what a bonafide purchaser has to prove including that he holds a certificate of title, he purchased in good faith, he had no knowledge of the fraud, the vendor had a valid title, he purchased without notice of any fraud and he was not party to any fraud.
29. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. Order 2 Rule 4 of the Civil Procedure Rules provides that a party shall in any pleading subsequent to a plaint plead specifically any matter raised therein, The general rule is that evidence tendered by a party should not deviate from the pleadings. In *David Sironga, Ole Tunkai v Francis Arap Mage & 2 others* [2014] eKLR the court held that parties in an adversarial system the parties are the ones who set the agenda and subject to the rules of pleadings, each party is left to formulate its own case in its own way and by so doing it avoids surprise at the trial. In *IEBC v Stephen Mule Mutinda & 3 others* [2014] eKLR, the court said its duty was to adjudicate the specific matters in dispute as raised in the pleadings



and not to pronounce on claims or defence not made by the parties otherwise it would amount to denial of justice.

30. In this suit the plaintiff directed the issues of breach of the trust solely to the 1st defendant. She filed a written claim and accompanied it with witness statement and exhibits showing the genesis of the suit land as forming part of their ancestral or family land. The plaintiff testified that the 1st defendant gave her vacant possession and caused her to develop the suit premises based on his promise and a commitment to transfer the land to her which promise he breached or dishonored by transferring the land to the 2nd defendant, oblivious of his earlier commitment and undertaking that the land solely belonged to her. The plaintiff in her pleadings, testimony and submissions urged the court to find the acts of the 1st defendant in putting her into possession, allowing her developments and occupation between 1994 – 2004 as a clear manifestation of a creation of a trust recognizable under Sections 25 & 28 of the *Land Registration Act*, which subsisted even after the transfer of the land to the 2nd defendant.
31. In *Vyas Industries Ltd v Diocese of Meru* [1982] KLR 114 and *Galaxy paints Co. Ltd v Falcon Guards Ltd* [2000] 2 E.A 385, it was held that a court of law should not base its decision upon an unpleaded issue. The 1st defendant did not controvert the plaintiff's claim by way of a defence on record. Any evidence therefore tendered on an unpleaded issues was not anchored in law, so as to vitiate the plaintiff's claim on beneficial interest to the land on account of trust. The 1st defendant failed to challenge the plaintiff's pleadings and testimony through known pleadings that he put her into possession, made representations by his actions, words and deeds, that she could occupy, possess and develop the suit land as her own with the understanding at that he would eventually transfer the land to her name.
32. In *Peter Kagunza Adaji v Sikukuu Martin Maiyo & another* [2017] eKLR, the court cited with approval *Chumo Arap Songok v David Kibiero Rotich* [2006] eKLR that parties are bound by their pleadings and that the court can only pronounce judgment on the issues arising from pleadings, unless a matter has been canvassed before it by parties to the suit and made an issue through evidence adduced and the party's submissions.
33. The 2nd defendant on the other hand has pleaded the sale, transfer and registration in his favour was lawfully made and that the plaintiff has no legal right over the suit land hence her claim was unmerited. Further, the defendants testified that the consent, notification and an approval of the transaction between them by the plaintiff was unnecessary. They further averred and testified that since the plaintiff was no longer in occupation of the suit land, her claim was unmerited.
34. There is no dispute that the suit land was agricultural in nature. The 2nd defendant did not produce any documents before the issuance of the title deed on 23.9.2020 in the nature of an application for land control board consent, letter of consent, transfer forms and the payment of stamp duty to demonstrate his bonafide in compliance of the law. It is trite law that when a title deed is in question all the paper trail towards its acquisition becomes relevant to the court. See *Dr. Arap Ngok v Justice Moiwo Keiwua & 4 others* [1997] eKLR, *Mwai Kibaki & Mathingira Wholesalers Company Limited & others Nyeri Civil Appeal No. 6 of 2017*.
35. The defendants kept away from this court, that paper trail. The 2nd defendant has not challenged the assertion by the plaintiff that he was aware that she was occupying the land at the time he purported to purchase the land together with her developments therein. He did not bother either to establish who was in occupation at the time. On the contrary, the 2nd defendant has said he took vacant possession of the land yet there is evidence that the demand letter was written to Linda Kanana to hand over vacant possession failing which the 2nd defendant sued her in *Nkubu ELC No. 4 of 2021*. In the plaint filed



- before the Nkubu court, the 2nd defendant sought for eviction orders against the said Linda Kanana and for general damages for trespass.
36. The 2nd defendant would therefore not have been suing for eviction if at all he was in full occupation of the suit premises. His testimony before this court that he took vacant possession was therefore untrue and misleading.
 37. Similarly, DW 1 admitted that the said Linda Kanana was his daughter. If at all vacant possession was handed over and the transaction was above board, one wonders why the 1st defendant's daughter would be objecting to it to an extent of being sued. The demand letter sent to the plaintiff also indicated that the defendants were also aware of her beneficial interest or occupation rights otherwise they would not have been involved her at all and requested her to hand over vacant possession. To that end, I find the evidence by the defence witnesses inconsistent and unbelievable as to the issue of who was in occupation of the suit land at the time of the sale. See Patrick William Atiku v Olenja Ateku & another [2009] eKLR Elizabeth Cheboo v Mary Cheboo [1978] eKLR Mbutia Charagu v Kiarie Kaguru C.A No. 87 of 1986.
 38. In the cases of Jeremiah Kiilu Maitha vs Agnes Nyaki Mutie (2018) eKLR, Willy Kimutai v Michael Kibet [2018] eKLR, the courts held that the doctrines of constructive trust and proprietary estoppel were applicable and supersede the *Land Control Act* since they have now been elevated as doctrines of equity under Article 10 (2) (b) of *the Constitution*. See also Jackson Kamau Kanyuru vs Stephen Githinji Weru (2018) eKLR. The 2nd defendant other than conducting an official search should have undertaken due diligence to establish whoever was in occupation of the suit premises. Similarly, the 1st defendant was under a duty as provided in law to make full disclosure to the 2nd defendant on any pre-existing overriding rights over the suit premises by third parties such as the plaintiff and his daughter Linda Kanana.
 39. In Mwai Kibaki vs Mathingira (supra) the court held both the *Land Act*, the *Land Registration Act*, the Law of Control Act and the *Law of Contract Act* have a clear legal process on ownership and disposition of land. This court has not been given any evidence by the defendants, that all the steps necessary under the law for transfer of the land were followed. The defendants did not avail the land control board members and the land registrar to sustain their assertions that they followed the law to the letter in obtaining the title deed into the 2nd defendant name. In Arithi Highway Developers Ltd vs West End Butchery Ltd & 6 others (2015) eKLR the court held that the failure to follow procedures set out in memorandum and articles of association in the transfer of shares invalidated the transfer.
 40. In this suit, the plaintiff produced P. Exh No. (3) relating to Parcel No. 629. Out of the approvals made the plaintiff was able to take possession and use the suit premises between 1994-2000. There is no evidence that the 1st defendant objected to the developments therein and or gave a notice to the plaintiff to vacate his land. The evidence of the plaintiff is more credible and consistent unlike the 1st defendant as to the nature, circumstances and the manner in which the plaintiff took vacant possession of the suit promises, lived and extensively developed it without any resistance by the 1st defendant. In my view, the 1st defendant willing and voluntarily allowed the plaintiff to settle on the suit premises. He is thereof in law estopped from renegeing on the promise. To allow such a scenario would amount to the 1st defendant unjustly enriching himself.
 41. As to whether the 2nd defendant was a bonafide purchaser for value without notice, the 2nd defendant failed to tender any evidence of due diligence, notice to the plaintiff or the 1st defendant's daughter during the sale and the transfer. Therefore, I find the title deed held by the 2nd defendant subject to the overriding rights of the plaintiff. The same is cancelled and the land registrar directed to register the



land in favour of the plaintiff. A permanent injunction shall also issue restraining the defendants from interfering with the plaintiff's quiet possession and occupation of the suit premises.

42. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Muthomi holding brief for Kiogora Mugambi for plaintiff

Kirimi for Mukaburu for 2nd respondent

HON. C.K. NZILI

ELC JUDGE

