



**Magiri & another v Mtile & another (Environment & Land Case
123 of 2016) [2023] KEELC 546 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 123 OF 2016
MAO ODENY, J
FEBRUARY 1, 2023**

BETWEEN

PETER NTEERE MAGIRI 1ST PLAINTIFF

MARGARET KARIMI NTEERE 2ND PLAINTIFF

AND

SELINA SIDI 1ST DEFENDANT

SAMMY KATANA MTILE 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated May 16, 2016 and filed on May 20, 2016, the Plaintiffs herein sued the Defendants jointly and severally seeking the following orders: -
 - a. A declaration that the Plaintiffs are the owners of the portion of land known as Kilifi/Kibokoni Block M 13D/110.
 - b. An order of mandatory injunction requiring the Defendants, their servants and or agents to demolish the houses and any other developments made by them on the Plaintiffs' piece of land known as Land Portion Kilifi/Kibokoni Block M 13D/110 Malindi and remove the debris resulting from the said demolition forthwith and in any event within 7 days of service of the Honourable Court's order and failure of which the Plaintiffs be at liberty to engage the services of a contractor who will demolish the said developments made by the Defendants on the said land and remove the debris resulting therefrom and the cost incurred thereby be paid by the Defendants in any event within a time to be specified by the Honourable Court, should this become necessary.
 - c. A permanent injunction restraining the Defendants either by themselves servants, agents, employees, legal representatives or any other person claiming interest through them from



interfering in any way with the Plaintiffs quiet possession, use and enjoyment of Kilifi/ Kibokoni Block M 13D/110 Malindi.

- d. Damages for trespass and unlawful retainer.
- e. Mesne profits in the sum of Kshs 50,000.00 from the year 2007 upon issuance of the Honourable Courts Order till eviction.
- f. Special damages of Kshs 20,000.00.
- g. Costs and interests of the suit.
- h. Any other relief this Honourable Court shall deem fit and just to grant.

Plaintiff's Case

2. PW1 Peter Nteere, the 1st Plaintiff adopted his written statement dated May 11, 2016 as evidence and produced the documents in the list of documents dated May 16, 2016 as PEXH 1-8. He testified that he was first allocated Plot 109 within the settlement scheme and issued with a title in 1996, but later advised by the surveyors to do an exchange since there were some cashew nut trees on the said plot belonging to Changawa and that exchange was done by the surveyor and he was subsequently issued with a title to the suit property in the year 1998.
3. PW1 stated that sometime in 1996, he had constructed concrete pillars on the four corners of the suit property and it was not until the year 2015 when he was informed that someone had erected structures on the suit property. He stated that he approached the said Changawa who informed him that the structures belonged to the 1st Defendant.
4. On cross examination by Mr Shujaa counsel for the Defendants, PW1 stated that there was no written agreement exchanged between himself and Changawa and that he never appeared before the Land Control Board. He added that there was no lawyer present during the exchange and that it was a just a purchase.
5. PW2 Stella Kinyua, Land Registrar Kilifi, produced a copy of the beneficiary list and green card pertaining to the suit property as PEXH 9 'a' and 'b' and testified that the suit property was reserved for Changawa Shuli and a title deed issued to him on July 1, 1996. That the suit property was then transferred to the Plaintiffs herein on February 4, 1998 and thereafter, there was no any other transaction recorded.
6. PW3 William Safari Charo equally adopted his written statement dated May 17, 2019 and told the court on cross examination that he witnessed the sale agreement between the Plaintiffs and Changawa over the suit property but did not affix his signature thereon.
7. PW4 Walter Okoth, the surveyor who carried out the survey at the Kibokoni Settlement Scheme, similarly adopted his written statement dated May 17, 2019 and testified that the two plots mentioned herein were allocated to the two parties (the Plaintiffs and Changawa) who agreed to swap. That they each surrendered their respective titles to him and he followed up on the procedure to conclusion. He added on cross examination, that the parties gave him signed documents which he forwarded to the lands registry together with a consent from the Land Control Board (LCB) which he personally obtained.



Defendants's Case

8. DW1 Selina Sidi adopted her written statement dated July 22, 2016 as evidence and produced the documents entailed in the list of documents as DEXH 1-3. She testified that she was given the suit property by her grandfather and that she was not present when the survey was done.
9. DW2 Sammy Katana Mtile also adopted his witness statement and told the court that he was a witness to sale agreement of the suit property between Changawa and his wife, Selina. On cross examination, DW2 told the court that DW1 paid Kshs 50,000/- for the suit property but the same was never indicated in the sale agreement which he personally drafted.
10. DW3 Mkala Lewa told the court that he was a witness to the sale agreement and he witnessed the said Changawa being given the purchase price, Kshs 50,000/-.
11. Counsel agreed to file submissions but at the time of writing this judgment only the Defendants' counsel had complied.

Defendants'submissions

12. Counsel relied on Section 26 (1) of the *Land Registration Act* and submitted that where a registered owner's title is challenged, then he/she must furnish evidence showing how they validly acquired the land and that the plaintiff has failed to do so.
13. Counsel cited the cases of *Munyu Maina v Hisham Gathiba Maina* [2013] eKLR quoted in *James Peterson Kinyungu Bandi -v- Ngumbao Ngonda Dzomo & 5 others* Civil Appeal No 16 of 2020.
14. Counsel further stated that no LCB consent was properly obtained as required under section 6 (1) of the *Land Control Act*, Cap 302 Laws of Kenya, as such the purported transfer of the suit property to the Plaintiffs was void and urged the court to dismiss the plaintiff's case with costs and allow the counterclaim as prayed.

Analysis and Determination

15. The issues for determination are as follows:
 - a. Who is the legal proprietor of the suit property?
 - b. Is the Plaintiff entitled to the reliefs sought?
 - c. Whether the Defendant is entitled to the reliefs sought in the counter-claim?
 - d. Who should bear the costs of the suit?
16. It is not in dispute that the suit property is registered in the Plaintiffs' names. Section 24, 25 and 26 the *Land Registration Act* No 3 of 2012 provides for indefeasibility of title but Section 26 excludes from protection of law titles to property obtained fraudulently or through misrepresentation, to which a person is proved to be a party and where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.
17. In this case, it is not disputed that the suit property was first registered in favour of Changawa Shuli Kivondo and a title issued on July 1, 1996. Thereafter, the suit property was transferred to the Plaintiffs herein. The Plaintiffs explained that when the area was marked as a settlement scheme, they were allocated Plot 109 which is adjacent to 110. Thereafter, the Plaintiffs allegedly agreed with the owner of Plot 110, Changawa Shuli Kivondo, to swap their respective plots.



18. This evidence was corroborated by the Surveyor PW4 Walter Okoth's who carried out who carried out the survey at the Kibokoni Settlement Scheme, and stated that the two plots were allocated to the two parties (the Plaintiffs and Changawa) who agreed to swap.
19. It is also on record that they each surrendered their respective titles to DW4 who followed up on the procedure to conclusion and confirmed that he obtained LCB consent.
20. PW2 Stella Kinyua, Land Registrar Kilifi, further corroborated this evidence by production of the beneficiary list and green card pertaining to the suit property whereby she confirmed that the suit property was reserved for Changawa Shuli and a title deed issued to him on July 1, 1996 and was then transferred to the Plaintiffs on February 4, 1998 and no other transaction was recorded.
21. The Defendants alleged that the Plaintiffs acquired the suit property fraudulently and or irregularly. It is trite that the burden of proof lies on the Defendants to prove the irregularity and or fraud.
22. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
23. The onus was therefore on the Defendants to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by the Court of Appeal in *Central Bank of Kenya Limited -v- Trust Bank Limited & 4 Others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”
24. From the evidence on record I find that the Defendants did not prove the irregularity/fraud to the required standard. In their pleadings filed herein, the 2nd Defendant asserted that she purchased the suit property from Changawa Shuli Kivondo on May 20, 1994 when it was unregistered. At the trial herein however, the 2nd Defendant departed from that position and stated that the land had instead been given to her by her grandfather. Her witnesses on the contrary maintained that the 2nd Defendant purchased the suit property from Changawa Shuli at a consideration of Kshs 50,000/-.
25. With such contradictions, it is not clear how the Defendants acquired interests in the suit property. Was it a gift from the 2nd Defendant's unidentified grandfather, or was it a sale and purchase transaction? The Defendants did not provide any evidence that payment was done for the suit property.
26. The evidence before this court reveals that the Plaintiffs are the registered owners of the suit property having established how they acquired the same. Section 26(1) above clearly provides that a Certificate of Title issued by the Registrar to a purchaser of land upon a transfer is prima facie evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner and that such title cannot be challenged except on the ground of fraud or misrepresentation to which the person is proved to be a party. There is no evidence to link the Plaintiffs to any fraud or misrepresentation.



27. The upshot is that I find that the Plaintiffs have a valid claim over the suit property and that the Defendants are trespassers.
28. Trespass is actionable per se as was held in the case of *Park Towers Ltd v John Mithamo Njika & 7 others* (2014) eKLR where the court held that: -
- “I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”
29. Further, In *Duncan Nderitu Ndegwa v KP& LC Limited & Another* (2013) eKLR P Nyamweya J held: -
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass”
30. I find that that the Plaintiffs are entitled to damages for trespass of Kshs 300,000/- but the claim for special damages was not proved therefore it fails. The counterclaim is dismissed with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF FEBRUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

