



REPUBLIC OF KENYA



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**Etemesi v Balongo (Environment and Land Appeal E055 of 2021)
[2023] KEELC 17317 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E055 OF 2021**

DO OHUNGO, J

MAY 10, 2023

BETWEEN

PETER RODGERS ETEMESI APPELLANT

AND

ERIC TIMOTHY BALONGO RESPONDENT

*(Being an appeal from the judgment and decree of the Principal
Magistrate Court at Butere (Hon. F. Makoyo, Principal Magistrate)
delivered on 2nd November 2021 in Butere MCELC No. 7 of 2020)*

JUDGMENT

1. The background of this appeal is that through plaint dated April 9, 2020, the respondent averred that he is the registered proprietor of parcel of land known as Marama/Buchenya/1361 (the suit property) having acquired it through a public auction conducted on October 23, 2015 at Sabatia Shopping Centre within Butere Sub County. That the suit property previously belonged to the appellant who had charged it in favour of Molyn Credit Limited as security. That despite being issued with a title deed on December 9, 2015, the appellant failed to give vacant and quiet possession of the suit property. He therefore prayed for an order of vacant possession, that the police and area assistant chief supervise the eviction, loss of proceeds of farming at Kshs 100,000 per year from December 9, 2015 and costs of the suit.
2. The appellant filed his defence and counter claim dated May 30, 2020 and averred that he was not aware of the sale until May 11, 2020 when he was served with pleadings in the case and that the respondent acquired the suit property through fraud and misrepresentation. The appellant therefore sought dismissal of the respondent's suit and for cancellation of the respondent's title.
3. Upon hearing the matter, the subordinate court (F. Makoyo, Principal Magistrate) delivered judgment on November 2, 2021 ordering appellant to vacate within three months failure of which eviction would



be enforced under the supervision of the police and area Assistant Chief. The court also dismissed the appellants' counter claim and awarded the respondent costs of the suit.

4. Aggrieved by the judgment, the appellant filed this appeal on November 24, 2021. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
 1. That the learned trial Magistrate erred in law and fact by failing to find that by virtue of continued use of the subject property known as Marama/Buchenya/1361 the appellant's interest in the said property was an overriding interest pursuant to Section 30 of the repealed Registered *Land Act* Cap 300, now Section 28 of *Land Registration Act*, 2012.
 2. That the learned trial Magistrate erred in law and fact by failing to find that the respondent as the proprietor was and remains subject to all unregistered overriding interests including the appellant's continued occupation and use of the subject property.
 3. That the learned trial Magistrate erred in law and fact by failing to consider the appellant's constructive trust and that the registration of the respondent as proprietor was for all intents and purposes, subject to the appellant's said interest.
 4. That the learned trial Magistrate erred in law and fact by failing to find that the respondent's claim was, for all intents and purposes, statute barred.
 5. That the learned trial Magistrate erred in law in failing to hold that the appellant has been in actual, open, continuous, peaceful utilization of the suit property in total exclusion of the respondent for over a period exceeding 12 years.
 6. That the learned trial Magistrate failed to consider that the title held by the respondent had been extinguished by operation of law.
 7. That the learned trial magistrate failed to appreciate the law, given the fact that the entire suit was incompetent, statute time barred, fundamentally defective and a mere abuse of the due process of court.
 8. That the learned trial Magistrate failed to take into account the appellant's Counter Claim dated May 30, 2020.
 9. That the learned trial Magistrate failed to consider that the respondent does not hold a good title to land parcel known as Marama/Buchenya/1361 given that the procedure used by the respondent was unlawful and illegal given that he never appeared before an advocate for execution of the land transfer forms and neither attended the land control board to obtain consent to transfer the suit land.
 10. That the learned trial Magistrate failed to take into account that the appellant was never given statutory notice prior to purported public action of the suit land.
5. The appeal was canvassed through written submissions. The appellant filed his submissions on September 26, 2022 and argued that the learned trial Magistrate failed to consider that the appellant had exclusive use of the suit property continuously and peacefully for a period in excess of 12 years and that the respondent's title had been extinguished by operation of the law. Further, that by virtue of continued use of the suit property, the appellant had established an overriding interest over the property. Reliance was placed on the case of *Hezekiel Muriithi Njoka v Joseph Muriuki Muriithi [2018] eKLR*.



6. The appellant further submitted that the procedure used by the respondent to be registered as the proprietor of the suit property was flawed with illegalities and that the respondent does not hold good title. That the transfer forms were not executed before an advocate and that the auction sale never conformed with Sections 90 and 96 (2) of the *Land Act* and Rule 15 (c) of the Auctioneers Rules and was therefore illegal. In support of those submissions, the appellant relied on the case of *Consolidated Media Ltd & 3 others v Spire Bank Limited & another [2021] eKLR*. The appellant therefore urged the court to allow the appeal.
7. In response, the respondent argued that he rightfully acquired the suit property by following the correct procedure, that upon the sale by public auction, the onus shifted to the chargee to seek consent of the Land Control Board, that a successful transfer was effected and that he was issued with a title deed on December 9, 2015. That the appellant never adduced any evidence to show any form of misrepresentation, fraud, illegality or failure to follow the laid down procedures.
8. On whether the respondent was subject to unregistered overriding interests, the respondent argued that the appellant's continued occupation of the suit property was that of a defiance tenancy and cannot therefore be rewarded or said to be an unregistered overriding interest and further that the concept of constructive trust does not apply in this situation since the appellant had relinquished his rights on the suit property at the time when he registered a charge on it and thereafter being sold vide public auction. The respondent further argued that he is the proprietor of the suit property and that no constructive trust exists in favour of the appellant.
9. On the questions as to whether the statutory power of sale was properly exercised, the respondent argued that the appellant admitted under cross examination that he had defaulted in the repayment of his loan and that he was accorded opportunities to redeem the property. Relying on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR*, the respondent argued that the law does not protect defaulters and that court cannot re-write agreements between lenders and borrowers. The respondents therefore urged that the appeal be dismissed with costs.
10. This is a first appeal. This court's mandate is therefore to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*.
11. I have carefully considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether the appellant established fraud and misrepresentation and whether the reliefs sought by the parties ought to have issued.
12. There is no dispute that the respondent is the registered proprietor of the suit property. Consequently, he is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The said sections provide as follows:
 24. Interest conferred by registration
Subject to this Act—



- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
13. It follows therefore that the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
14. The appellant sought to attack the respondent's title on account of allegations of misrepresentation and fraud. Fraud is a serious allegation. It is for that reason that the law requires that an allegation of fraud be expressly pleaded, particularised, and strictly proven on a standard higher than that required in ordinary civil cases. This was restated by the Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR* as follows:
- It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo (2008) 1 KLR (G&F) 742* wherein the Court stated that:
- 'We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.' In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.
15. The respondent acquired title following exercise of chargee's statutory power of sale by Moly Credit Limited. The alleged shortcomings in the manner of the exercise of statutory power of sale and staging of the auction sale are all allegations that target the chargee and not the respondent. The appellant did not find it necessary to join the chargee to the proceedings so as to confront it with the allegations. He was too comfortable making the allegations behind the chargee's back and expecting the respondent to answer on behalf of the chargee. I agree with the learned magistrate that the appellant's allegations of fraud and misrepresentation did not target the respondent and were not proven to the required standard.
16. As regards the appellant's contention that that the respondent's title had been extinguished by operation of the law and that he had established an overriding interest over the property, I have perused



the appellant's defence and counterclaim as well as appellant's final submissions before the subordinate court and I note that none of those issues were raised by the appellant. Consequently, it is not open to the appellant to raise them at this appellate stage. Parties are bound by their pleadings.

17. In view of the foregoing, I find no merit in this appeal and I therefore dismiss it with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 10TH DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The appellant in person

Mr Otsyeno holding brief for Mr Achero for the respondent

Court Assistant: E. Juma

