



REPUBLIC OF KENYA



KENYA LAW
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**Ndondomi v Wambunya (Environment & Land Case 189 of 2015)
[2023] KEELC 17089 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 189 OF 2015**

DO OHUNGO, J

MAY 3, 2023

BETWEEN

ASMAN LUTOMIA NDONDOMI PLAINTIFF

AND

JOTHAM BAKHUYA WAMBUNYA DEFENDANT

JUDGMENT

1. By plaint dated 23rd March 2015, the plaintiff averred that he was the initial registered proprietor of the parcel of land known as East Wanga/Isongo/1781 measuring approximately 0.30 hectares and that by an agreement made sometime about 1991, he sold a 0.12 hectares portion of the parcel to the defendant who took vacant possession of his said portion. That sometime in 1999, the plaintiff subdivided East Wanga/Isongo/1781 in to two parcels namely as East Wanga/Isongo/2314 and East Wanga/Isongo/2315 whereby East Wanga/Isongo/2314 (suit property) was to be in the plaintiff's name and East Wanga/Isongo/2315 was to be in the defendant's name. That instead, the defendant caused both subdivisions to be fraudulently registered in his name.
2. The therefore sought judgment for cancellation of the registration of land parcel number East Wanga/Isongo/2314 in the defendant's name, registration of the said parcel in the plaintiff's name and that in the event the defendant fails to sign the transfer forms, the Deputy Registrar of this court be ordered to do so; a permanent injunction restraining the defendant, his agents and servants from trespassing, encroaching or in any other way interfering with the said parcel.
3. The defendant filed a defence in which he denied the plaintiff's allegations and averred that the plaintiff sold both parcels to him through agreements dated 29th January 1997 and 26th August 1999. He denied the allegations of fraud and added that he legally obtained title to East Wanga/Isongo/2314 (suit property). He therefore prayed that the suit be dismissed with costs.



4. The plaintiff testified on 19th November 2018 as PW1 and adopted his statement. He reiterated the contents of the plaint and further stated that after selling land parcel number East Wanga/Isongo/2315 to the defendant, the plaintiff remained in peaceful use and occupation of parcel number East Wanga/Isongo/2314 where he carried out farming activities besides erecting a semi-permanent house where he resided. That upon applying for the green card of parcel number East Wanga/Isongo/2314, he was surprised to learn that the said parcel had been fraudulently transferred to the defendant at a consideration of KShs 350,000 and that while the provincial administration was still arbitrating the dispute, the defendant forcefully evicted him from his home rendering him homeless. He further stated that the defendant was baking bricks on the suit property and had converted the plaintiff's semi-permanent house to a store.
5. The plaintiff later passed away on 29th April 2019 and was substituted on 12th October 2020 by his daughter Beatrice Opana Lutomia. The plaint was however not amended to reflect the substitution.
6. Beatrice Opana Lutomia testified as PW2 and stated that prior to his death, the plaintiff was residing on parcel number East Wanga/Isongo/2314. She added that she is residing on parcel number East Wanga/Isongo/2314 with her two children and that the defendant has never asked her to vacate.
7. Daudi kweyu testified next as PW3 and stated that the plaintiff was his uncle and that he was a witness when the defendant purchased one plot. He could however not remember the plot number and added that the plaintiff was living on the suit property before his demise and was buried therein. He also stated that PW2 does not reside on the suit property.
8. The plaintiff's case was then closed.
9. During defence hearing, the defendant testified as DW1 and adopted his witness statement dated 12th August 2013. He stated that vide a sale agreement dated 29th January 1997, he bought parcel number East Wanga/Isongo/2315 from the plaintiff and that later by an agreement dated 26th August 1999, he bought the remaining parcel number East Wanga/Isongo/2314 from the plaintiff. That the plaintiff was residing on parcel number East Wanga/Isongo/2314 and that the plaintiff later vacated the suit property as was agreed at the time of the sale agreement. The defendant added that he peacefully resided on the suit property until sometime around May 2015 when the plaintiff requested him to allow the plaintiff to bury his deceased wife on the suit property which request the defendant agreed to. That the plaintiff later started claiming rights over the suit property and the defendant reported the matter to the Chief who in turn referred the matter to the District Officer who determined that the suit property belonged to the defendant. He added that he legally acquired title to the suit property in 1999 and has been using the suit property since then.
10. Under cross examination and re-examination, DW1 stated that the first agreement was witnessed by an advocate while the second one in respect of the suit property was witnessed by a magistrate. That the parties who were present during the second agreement were DW1, the plaintiff, the magistrate, and the secretary and that after the agreement, the parties attended the Land Control Board for both parcels. DW1 further stated that he stopped using the suit property sometime in 2015, that the plaintiff and his wife are buried on the suit property and that the plaintiff's house is still on the suit property. He added that the plaintiff was buried therein by force.
11. Phyllis Anyango Bakhuya, the defendant's wife, testified as DW2. She stated that she witnessed the agreement pursuant to which her husband bought the suit property from the plaintiff. She thereafter contradicted herself and stated that she was not present during the agreement.
12. Defence case was then closed. Parties thereafter filed and exchanged written submissions.



13. The plaintiff urged the court to find that the defendant fraudulently transferred the suit property and that the second agreement is questionable as it was not drawn by an advocate. That minutes of the land control board in respect of the suit property were not produced and that DW2 contradicted herself by stating that she was present during the agreement. That the sale agreement in respect of the suit property is invalid as the judicial officer who allegedly witnessed it was never called as a witness and further that contrary to the defendant's allegations in the sale agreement that he paid a consideration of KShs 60,000, the register shows that the suit property was sold at KShs 350,000. The plaintiff therefore submitted that fraud has been proven and that the court ought to allow the plaintiff's case as prayed.
14. The defendant argued that the plaintiff has failed to prove his case to the required standard and that contrary to the plaintiff's allegations that the green card of the suit property indicates the purchase price as KShs 350,000, the said green card indicates the purchase price as KShs 60,000 which is the correct figure in the agreement and transfer documents. The defendant relied on *Kinyanjui Kamau v George Kamau* [2015] eKLR and urged the court to dismiss the plaintiff's case with costs.
15. I have considered the pleadings, the evidence, and the submissions. The issues that arise for determination are whether fraud has been established and whether the reliefs sought should issue.
16. There is no dispute that the defendant is the registered proprietor of the suit property. Consequently, the defendant 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 the defendant's certificate of title as conclusive evidence of proprietorship, unless of course 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. ...
17. The import of the foregoing provisions is 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.



18. The plaintiff has opted to attack the defendant's title on allegations of fraud. In those circumstances, the plaintiff is duty bound to prove fraud but to additionally show that the defendant was party to such fraud.
19. Fraud is a serious allegation. The party alleging it must plead it, particularise it, and strictly prove it. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. A party alleging fraud cannot simply expect the court to infer fraud from the facts.
20. I have looked at the particulars of fraud pleaded by the plaintiff. Among others, the plaintiff claimed that the defendant misrepresented the purchase price as KShs 350,000. A perusal of the sale agreement, the land control board consent, the transfer, and the copy of the register all show that the purchase price was KShs 60,000. Thus, the plaintiff's claims as to misrepresentation of the purchase price come to nought.
21. There is no dispute that the plaintiff subdivided East Wanga/Isongo/1781 into East Wanga/Isongo/2314 and East Wanga/Isongo/2315 following initial sale agreement with the defendant pursuant to which the defendant purchased East Wanga/Isongo/2315. The defendant's case is that he later purchased the remaining parcel number East Wanga/Isongo/2314 from the plaintiff through an agreement dated 26th August 1999. The defendant produced the agreement. It has not been alleged or even shown that the sale agreement dated 26th August 1999, the application for land control board, consent dated 15th September 1999 and transfer dated 21st September 1999 are forgeries. The burden of pleading and proving all that was upon the plaintiff.
22. In view of the foregoing, the plaintiff has not proved any fraud on the part of the defendant. That being so, the reliefs sought cannot issue. Consequently, I find no merit in the plaintiff's case and I dismiss it with costs to the defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma

