



**Terer v Chumo (Environment & Land Case 494 of 2013)  
[2023] KEELC 17342 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17342 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 494 OF 2013**

**JM ONYANGO, J**

**MAY 11, 2023**

**BETWEEN**

**GEDION TERER ..... PLAINTIFF**

**AND**

**ABRAHAM KIPRUTO CHUMO ..... DEFENDANT**

**JUDGMENT**

1. In his Complaint dated 28<sup>th</sup> October, 2013, the plaintiff alleges that he is the registered proprietor of land parcel number Nandi/Ndulele/1046 (hereinafter referred to as the suit property), having purchased the same from the defendant. He avers that he took possession of the suit property immediately after it was transferred to his name on 24<sup>th</sup> August, 2009. He made extensive developments on the suit property and enjoyed quiet possession thereof until 2011 when the defendant without any colour of right forcefully re-entered the buildings thereon and placed his locks on the doors. The defendant then lodged a caution on the suit property thus depriving him of the use and enjoyment thereof.
2. The plaintiff therefore seeks the following reliefs:
  - a. A declaratory order that the Plaintiff is the lawful owner of L.R No. Nandi/Ndulele/1046
  - b. A permanent injunction restraining the defendant, his agents and/or servants from encroaching, developing, selling, sub-dividing, running the premises therein or in any other way interfering with L.R No. Nandi/Ndulele/1046.
  - c. A declaratory order holding that the restriction registered against the suit parcel of land at the instance of the defendant is unlawful and that the same is lifted.
  - d. An order for mesne profits to be assessed by the court.
  - e. Costs of the suit.



- f. Interest.
  - g. Any other of further reliefs that this reasonable court may deem fit to grant (sic).
3. The defendant filed a Statement of Defence and Counterclaim dated 29<sup>th</sup> November, 2013. He admits that the Plaintiff is the registered owner of the suit property but denies that the Plaintiff paid the purchase price in full. He further denies that the Plaintiff carried out any developments on the suit property. He alleges that the defendant fraudulently had the suit property registered in his name.
4. In his Counterclaim, the Defendant avers that he has an overriding interest in the suit property and that the registration of the same in the name of the defendant was irregular and it ought to be reversed. He prays for the following reliefs:
- a. An order that the registration of the plaintiff as the owner of L.R No. Nandi/Ndulele/1046 be revoked, annulled or reversed.
  - b. A declaration that the defendant is the owner of the parcel known as L.R No. Nandi/Ndulele/1046.
  - c. A permanent injunction to restrain the plaintiff by himself, his agents or servants from interfering in any way with the defendant's quiet enjoyment of his property.
  - d. Costs
  - e. Any other relief.
5. The suit proceeded for hearing on diverse dates between July 2016 and October 2022 when both parties testified and called their witnesses.

#### **Plaintiff's Case**

6. The Plaintiff testified as PW1 and called one witness. He told the court that he is based in New Jersey in the U.S.A. It was his testimony that he purchased the suit property pursuant to a sale agreement with the defendant dated 24<sup>th</sup> August, 2009 for a consideration of Kshs.1,000,000/=. He paid a deposit of Kshs.100,000/= upon signing the agreement and the balance of Kshs.900,000 was paid on 21<sup>st</sup> July, 2010 through his brother Richard Terer. He told the court that he bought a commercial plot with incomplete structures on it. He took immediate possession of the plot, had it transferred to his name and completed the structures thereon. He produced a title deed and extract of the register to show that he was the registered owner of the suit property.
7. The plaintiff testified that sometime in March 2011 the Defendant placed a restriction on the plaintiff's title. He subsequently went to the suit property, changed the locks on the doors and took possession of the property claiming that he had not been paid the balance of the purchase price. This is what prompted the Plaintiff to file this case.
8. Upon cross-examination, the Plaintiff admitted that he did not obtain consent of the Land Control Board. He also admitted that the property was transferred to him on 24<sup>th</sup> August, 2009 before he paid the full purchase price. He stated that according to the sale agreement, the balance was to be paid by 31<sup>st</sup> December, 2009 but the same was paid on 21<sup>st</sup> July, 2010 although he was unable to confirm how his brother made the payment. He was also unable to confirm if the defendant signed the transfer form. He stated that he did not have any receipts or valuation report to prove that he had developed the suit property. He confirmed that he received a demand letter dated 7<sup>th</sup> September, 2011 from the



Defendant's advocates asking for the balance of the purchase price but according to him the balance had been paid by that date.

9. Edwin Kiprono Cheluget who introduced himself as an advocate of the High Court of Kenya testified as PW2. He told the court that in August 2010 he prepared an addendum to the sale agreement in respect of land parcel no. Nandi/Ndulele/1046. He produced the said addendum as Plaintiff's exhibit 2. He stated that the vendor appeared before him in person and confirmed that he had received the balance of Kshs.900,000/=. He stated that by the time the addendum was prepared the purchaser had obtained a title for the suit property.
10. Upon cross-examination, he stated that the addendum was signed by Richard Terer and Abraham Kipruto Chumo. He admitted that Richard did not have a Power of Attorney to transact on behalf of his brother. He confirmed that the land in question was agricultural land and was therefore subject to consent of the Land Control Board but the plaintiff obtained his title without the consent of the Land Control Board and prior to compliance with the terms of the sale agreement which required him to pay the balance of the purchase price by 31<sup>st</sup> December, 2009. He stated that he was not aware that Richard did not receive a Prado motor vehicle nor did he witness the purchase of a motor vehicle. He also denied having seen proceedings from the subordinate court. He told the court that the addendum did not specify the mode of payment.

### **Defendant's Case**

11. The Defendant testified a DW1. He admitted having sold the suit property to the Plaintiff at an agreed purchase price of Kshs.1,000,000/= It was his evidence that the plaintiff paid a deposit of Kshs.100,000/= upon signing the sale agreement but he never paid the balance of Kshs.900,000/= by 31<sup>st</sup> December, 2009 as agreed. He denied having signed any transfer form. He also denied having sought the consent of the Land Control Board. He told the court that he had not given the plaintiff vacant possession and that he was still occupying the land. He stated that the suit property was already developed at the time he sold it to the Plaintiff.
12. It was the Defendant's testimony that Richard Terer, the Plaintiff's brother gave him a Prado vehicle registration No. KBE 984 U as security for the balance of the purchase price in respect of the suit property but he later returned the said vehicle to Richard as there was an issue with the logbook. He stated that Richard subsequently sued him over the said vehicle in the Chief Magistrate's Court.
13. In cross-examination he denied having been paid the balance of Kshs.900,000/= though he signed the addendum which states that he was paid. He stated that at the time he signed the addendum he had been given the Prado by Richard Terer although it is not mentioned in the said addendum. He admitted that anyone reading the addendum would conclude that he had been paid in full.
14. The Defendant stated that he has since evicted the plaintiff's brother Richard from the suit property as the plaintiff had not paid the balance of Kshs.900,000/=.
15. Judith Cheptich, the Land Registrar, Nandi County testified as DW2. She told the court that the Defendant was registered as the owner of the suit property on 6<sup>th</sup> March, 2006 and he was issued with a title on 8<sup>th</sup> March, 2006. In support of the said registration was the transfer form, application for consent of the Land Control Board, Letter of Consent and evidence of payment of stamp duty. In contrast to that, the only document in support of the registration of the Plaintiff as the owner of the suit property on 24.8.2009 was a copy of the sale agreement. She said there was no transfer form or consent of the Land Control Board, nor was there any evidence that stamp duty had been paid. She stated that in view of the fact that those critical documents were missing from her parcel file, the transfer was not valid.



16. She stated that the fact that the registration was effected on the date of the sale agreement means there was no time to apply for consent of the Land Control Board as it was not possible to apply for the said consent and get it on the same day. She told the court that according to the sale agreement she had in her records, only Kshs. 100,000 had been paid and the balance of the purchase price was to be paid by 31<sup>st</sup> December, 2009. The registration had therefore been effected before the full purchase was paid and without the consent of the Land Control Board.
17. At the close of the defendant's case the parties were granted time to file their final submissions and the plaintiff's submissions were filed on 10.2.2023 while the Defendant's submissions were filed on 10<sup>th</sup> November, 2022.

### **Plaintiff's Submissions**

18. Learned counsel for the Plaintiff submitted that the Plaintiff purchased the suit property from the Defendant and paid the full purchase price. It was his submission that the addendum produced by the plaintiff affirmed that the defendant had received the sum of Kshs.900,000/- being the last and final instalment. He submitted that the defendant's evidence to the effect that he executed the addendum by mistake or that he was given a vehicle in lieu of the balance of the purchase price should be disregarded as it violates the parole evidence rule. He placed reliance on the case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR for the proposition that a document's meaning should be derived from the document itself without reference to anything outside the document.
19. Counsel further submitted that the plaintiff was the legitimate owner of the suit property the same having been transferred to him by the defendant and the defendant is therefore estopped from denying that he caused the said transfer hence he should not be relieved of his obligations under the said contract. Counsel cited the case of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] eKLR and *Pickard v Sers* 112 E.R 179.

### **Defendant's Submissions**

20. On his part, learned counsel for the defendant submitted that the Plaintiff acquired title to the suit property through fraud or a corrupt scheme. It was his contention that even though the parties entered into a sale agreement on 24.8.2009 for the sale of the suit property at an agreed price of Kshs.1,000,000/=, the plaintiff only paid Kshs. 100,000 and proceeded to have the title transferred to him on the date the agreement was entered into without paying the balance or obtaining the consent of the Land Control Board. He relied on the cases of *Kibiro Wagoro v Francis Nduati Macharia & Another* [2018] eKLR and *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] E.A 314 for the proposition that fraud must be pleaded and proved to a standard above a balance of probabilities.
21. He further relied on the cases of *Mogeri Mirieri Nyanganyeria v District Land Registrar Thika & 2 Others* [2018] eKLR and *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR for the proposition that when a registered proprietor's title is challenged, he must prove that he acquired it lawfully because if a document of title was not acquired through a proper process then the title cannot be a good title. He urged the court to revoke the plaintiff's title as he was of the view that the court could not grant the reliefs sought by the plaintiff.

### **Issues for Determination**

22. Having considered the pleadings, evidence on record and the rival submissions as well as the authorities cited by counsel, the following issues fall for determination:



- i. Whether the plaintiff lawfully acquired the suit property from the defendant
- ii. Whether the plaintiff's title is liable to be cancelled.
- iii. Whether the plaintiff is entitled to the reliefs sought in the Plaintiff.
- iv. Whether the defendant is entitled to the reliefs sought in the Counterclaim.

### **Analysis and Determination**

23. The Plaintiff's case is that he is the registered proprietor of land parcel number Nandi/Ndulele/1046 measuring 0.05 hectares having purchased the same from the defendant at an agreed purchase price of Kshs. 1,000,000/=. He produced the title deed as plaintiff's exhibit 3. The Defendant however claims that the plaintiff obtained his title fraudulently as he did not pay the full purchase price nor did he obtain consent of the land Control Board. In his Defence the defendant set out the following particulars of fraud against the plaintiff:
  - i. "The plaintiff made false representations to the defendant that he was in a position to pay the balance only to turn up later with a motor vehicle Reg. No. KBE 984U Toyota Prado which he falsely pretended that it was a good deal or value for Kshs.900,000 but which later turned out to be the subject of litigation vide ELD CMCC No. 510 of 2011.
  - ii. Failing to tell the defendant that motor vehicle Reg. No. KBE 984U Toyota Prado did not have valid documents.
  - iii. Forging consent documents without a Land Control Board meeting.
  - iv. Pretending at the time of making the agreement that he had money in cash only to come later and said he wanted to give a motor vehicle aforesaid in consideration (sic)
  - v. Registering himself irregularly as the owner of the dispute parcel without paying the full consideration and without going through the requisite process that includes going to the Land Control Board."
24. Upon being cross-examined by counsel for the defendant, the plaintiff conceded that he had the suit property transferred to his name on the day they entered into a sale agreement with the Plaintiff even though he had only paid Kshs.100,000. He also conceded that he did not attend any meeting of the Land Control Board.
25. Indeed, the Land Registrar who testified as DW2 stated that that the transfer was not valid as the critical registration documents were missing from her records. These include the consent to transfer, Transfer form and evidence of payment of stamp duty. She said that since the transfer was effected on the same day the sale agreement was signed by the parties, there was no room to seek the consent of the Land Control Board as it was not possible to apply for consent and get it on the same day. She confirmed that the suit property was agricultural land and consent of the Land Control Board was therefore required before transfer.
26. Even though the plaintiff produced an addendum to the sale agreement signed by the defendant and the plaintiff's brother Richard Terer indicating that Kshs.900,000 being the balance of the purchase price had been paid, this was disputed by the defendant who said that he never received the sum of Kshs.900,000. He said that Richard had offered him a motor Vehicle Registration no. KBE 984U Toyota Prado in lieu of the outstanding balance of Kshs.900,000. The fact that the plaintiff was unable



to prove when and how the said balance was paid casts a doubt on the veracity of the addendum. PW2 who drafted and attested the addendum did not witness the payment and he said that the mode of payment was not specified. He also stated that Richard Terer did not have a Power of Attorney to transact on behalf of Gedion Terer.

27. In the case of *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015]eKLR the court stated as follows;

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land”.

28. The fact that the plaintiff caused the suit property to be registered in his name before he paid the full purchase price and without obtaining the consent of the Land Control Board or presenting the necessary registration documents to the Land Registrar renders his title irregular, unlawful and invalid as the said title was obtained unprocedurally or through a corrupt scheme.
29. The second issue I have to determine is whether the plaintiff's title ought to be cancelled. Section 26 of the [Land Registration Act](#) provides as follows:-

26.

- (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.



(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

30. Having arrived at the finding that the plaintiff's title was obtained unprocedurally, it follows that the said title has to be cancelled in line with section 80 of the [Land Registration Act](#).
31. Flowing from the above analysis it is my finding that the plaintiff has failed to prove his case and the same is hereby dismissed. Conversely, the Defendant has proved his case on a balance of probabilities. I therefore enter judgment for the defendant on the Counterclaim and make the following final orders:
- a. The Plaintiff's case is dismissed.
  - b. The registration of the plaintiff as the owner of L.R No. Nandi/Ndulele/1046 was unprocedural and unlawful and the plaintiff's title is hereby revoked and annulled.
  - c. A declaration is hereby issued that the defendant is the owner of the parcel known as L.R No. Nandi/Ndulele/1046 and the Land Registrar Nandi County shall rectify the register by cancelling the name of the plaintiff and registering the title in the name of the Defendant.
  - d. A permanent injunction is hereby issued restraining the plaintiff by himself, his agents or servants from interfering in any way with the defendant's quiet enjoyment of L.R No. Nandi/Ndulele/1046.
  - e. The plaintiff shall bear the costs of the suit and Counterclaim.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF MAY 2023.**

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**J. M ONYANGO**

**JUDGE**

**In the presence of;**

1. Mr. Tororei for the Plaintiff
2. Mr. Kibii for the Defendant

Court Assistant: A.Oniala

