



**Wafula v Luswa & another (Environment & Land Case 62 of 2019)
[2023] KEELC 17318 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 62 OF 2019**

DO OHUNGO, J

MAY 9, 2023

BETWEEN

GREGORY MASAKHA WAFULA PLAINTIFF

AND

WASIKE LUSWA 1ST DEFENDANT

PIUS WANYAMA WENANI 2ND DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on September 25, 2006 when the plaintiff filed a plaint dated September 21, 2006 as Bungoma HCCC No 56 of 2006 (Bungoma). Pursuant to an order made on May 21, 2019, the matter was transferred to this court.
2. The plaintiff averred in the plaint that he was the administrator of the estate of Kwova Nambafu (deceased) who was the registered proprietor of land parcel number Bunyala/Sidikho/64 (suit property) and that despite obtaining confirmation of grant, he was unable to distribute the estate because the defendants unlawfully and fraudulently subdivided the suit property into land parcel numbers Bunyala/Sidikho/1778, Bunyala/Sidikho/1779 and Bunyala/Sidikho/1780 and transferred the subdivisions to themselves. That the deceased passed away on May 6, 1974, yet the defendants allege that the land was transferred to them sometime in 2002 and 2004.
3. The plaintiff therefore sought judgment against the defendants jointly for an order for rectification of the register to cancel title numbers Bunyala/Sidikho/1778, 1779 and 1780 so that the land revert to its original Bunyala/Sidikho/64. He also prayed for eviction of the defendants from the suit property and for costs of the suit.
4. The first defendant passed away on December 15, 2010 and was substituted by his son Wasike Tatim Kassim pursuant to an order made on March 5, 2014. The plaint was however not amended.



5. The defendants filed a defence dated October 23, 2006 and amended on November 2, 2016 whereby they denied the plaintiff's allegations and averred that the said Kwova Nambafu was still alive and as such any certificate of death procured in his name could have been procured through fraud . That they were bona fide purchasers for value of their portions and therefore denied the allegations of fraud against them. The first defendant averred that he purchased the suit property in 1976 and immediately settled therein after being given vacant possession by Kwova Nambafu. The second defendant averred that he was a purchaser for value without notice. They therefore prayed that the suit be dismissed with costs.
6. At the hearing, the plaintiff testified as PW1 and adopted his witness statement dated July 26, 2021 as his evidence in chief. He stated that Kwova Nambafu was his father and was the registered owner of the suit property. That his father died on May 6, 1974 and was buried on the suit property. That by the time the first defendant's father was transferring the suit property to his name, PW1's father had already passed on and that following the transfer, which according to him was fraudulent, the defendants forcefully took possession of the suit property.
7. He added that Wasike Luswa was his cousin who moved into the suit property after PW1's father's demise claiming to have purchased the suit property. He also stated that prior to his father's demise, they were living on the suit property but moved to their uncle's place after his death since they were children. That he started the process of filing for succession in respect his father's estate in 2002 and that the second defendant moved into the suit property sometime the same year.
8. Aineah Nyongesa Wakhungu testified as PW2 and adopted her witness statement dated July 26, 2021 as her evidence. She stated that the plaintiff is her cousin and that the plaintiff's father died on May 6, 1974 leaving behind land parcel number Bunyala/ Sidikho/64. She further stated that the first defendant's late father fraudulently transferred the suit property to his name and forcefully took possession thereof.
9. Jackson Wambusi Usao testified as PW3 and adopted his witness statement dated July 26, 2021 as his evidence. He stated that the plaintiff is his nephew and that the plaintiff's father died on May 6, 1974 leaving behind land parcel number Bunyala/Sidikho/64 and the first defendant's late father fraudulently transferred the suit property to his name and forcefully took possession thereof. He added that as at the time of Wasike Luswa's demise, he was living in his father's home separate from the suit property but was cultivating on the suit property and that Wasike Luswa's family was in occupation of the suit property as at the date of his testimony.
10. The plaintiff's case was then closed.
11. During defence hearing, the first defendant testified as DW1 and stated that he is a son of Wasike Luswa who was the owner of parcel numbers Bunyala/Sidikho/1778 and 1780. He urged the court not to interfere with the said properties and added that Kwova Nambafu attended the Land Control Board sometime in 1974. That Kwova Nambafu disappeared, and he could not ascertain his whereabouts.
12. The second defendant testified as DW2 and stated that he purchased parcel number Bunyala/ Sidikho/1779 from Wasike Luswa on February 12, 2004 at a consideration of Kshs 135,000. He urged the court not to interfere with the said parcel.
13. Herbert Mwenya Kandawala testified as DW3. He stated that Wasike Luswa purchased the suit property on February 7, 1976 from Kwova Nambafu and on July 12, 1976, the parties went to the Land Control Board and obtained consent to transfer the suit property. He added that he obtained the information from his then headmaster who was a member of the Land Control Board.



14. Herbert Mola Indaamah testified as DW4 and stated that the second defendant is his cousin and that the second defendant purchased parcel number 1779 from Wasike Luswa sometime in 2004.
15. The Defence case was then closed. Parties thereafter filed and exchanged written submissions.
16. The plaintiff submitted that it is not in contention that he is the son to the late Kwova Nambafu who was the registered proprietor of the suit property and that he has sufficiently demonstrated that Wasike Luswa hatched a fraudulent scheme and irregularly transferred the suit property. That although his father died in 1974, the first defendant still claims that his father purchased the suit property from Kwova Nambafu in 1976 after Kwova Nambafu's death. He therefore urged the court to allow his case as prayed.
17. The defendants filed separate submissions both dated November 23, 2022. The first defendant submitted that it is not true that Kwova Nambafu died on May 6, 1974 as alleged by the plaintiff. That the alleged deceased only disappeared after selling the suit property to Wasike Luswa vide an agreement dated February 7, 1976. He therefore urged this court to dismiss the suit with costs and consider that they have been in the suit property for more than 40 years.
18. On his part, the second defendant submitted that he legally bought parcel number 1779 from Wasike Luswa and that he has been utilizing the said property since 2004. He therefore prayed that the suit be dismissed with costs.
19. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether fraud has been established and whether the reliefs sought should issue.
20. Fraud is a serious allegation that must be pleaded and proved to a standard above balance of probabilities but not beyond reasonable doubt. See [Kuria Kiarie & 2 others v Sammy Magera \[2018\] eKLR](#) and [John Mbogua Getao v Simon Parkoyiet Mokare & 4 others \[2017\] eKLR](#). Further, a litigant cannot leave fraud to be inferred from the facts. He must specifically plead fraudulent conduct and distinctively prove it. See [Adam v Adam & 3 others \(Civil Appeal 103 of 2019\) \[2022\] KECA 501 \(KLR\) \(1 April 2022\) \(Judgment\)](#).
21. The plaintiff built his allegations of fraud around the theory that Kwova Nambafu passed away on May 6, 1974, yet Wasike Luswa became registered proprietor on January 8, 2002, long after the said death. Simply put, his case is that Kwova Nambafu could not have sold the suit property in death.
22. In their defence, the defendants disputed the claims of Kwova Nambafu's death and put the plaintiff to proof. According to them, Kwova Nambafu simply disappeared. In an effort to demonstrate that Kwova Nambafu is deceased, the plaintiff produced a certificate of death issued on December 13, 2001 and which states that Kwova Nambafu died on May 6, 1974 and that his death was registered on December 13, 2001, some 27 years later. A note in the certificate indicates that the entries in the register of deaths from which the certificate was compiled are also dated December 13, 2001. No explanation has been given as to the wide gap in time and the reasons for the late registration. After obtaining certificate of death on December 13, 2001, the plaintiff did not file any succession proceedings until the year 2004. For someone who is questioning the defendants' titles on account of dates, the plaintiff's dates do not quite add up. The plaintiff seems to be asking the court to infer fraud based on his analysis of the dates. The law however is that fraud cannot be inferred. It must be specifically proven to the required standard.
23. The plaintiff has failed to establish fraud. In the circumstances, the reliefs sought cannot issue. I find no merit in the plaintiff's case and I therefore dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF MAY 2023.



D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Plaintiff in person

The 1st Defendant in person

The 2nd Defendant in person

Court Assistant: E. Juma

