



REPUBLIC OF KENYA



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**M'impwi v M'thiruaine (Environment and Land Appeal
E110 of 2021) [2023] KEELC 18652 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E110 OF 2021**

CK YANO, J

JULY 12, 2023

BETWEEN

JUSTUS MUGAA M'IMPWI APPELLANT

AND

FRANCIS KAMUTA M'THIRUAINE RESPONDENT

JUDGMENT

1. The appellant in this appeal moved the trial court vide a plaint dated March 4, 2020 and amended on December 21, 2020 seeking orders of permanent injunction restraining the respondent from committing any acts of trespass or in any way interfering with the quiet possession and ownership of parcel No Athinga/Athanja/8864 (the suit land), a declaration that the land belongs to the appellant, an order directed to the land registrar to cancel the certificate of title issued to the respondent and register the appellant as proprietor of the suit land, eviction of the respondent and mesne profits for loss of user.
2. It was the appellant's case that he was the registered proprietor of the property which he bought from one M'Arungai M'M'Nguya in 1979 and has been in occupation since then. That in November, 2012, he embarked on developing the said property but on several occasions around that time, the respondent committed acts of trespass on the said land by carrying into it building materials without the appellant's consent and threatened the appellant's workers who were fencing the land.
3. The appellant further averred that the respondent fraudulently caused subdivision of the suit land which created Athinga/athanja/8864 and caused the same to be registered in his name.
4. The appellant's claim was denied by the respondent vide the defence and counter claim dated January 26, 2021 in which he stated that he was the grandson to M'Arungai M'Nguya, the original owner of the disputed land. That the appellant was given half of the said on condition that he would construct business premises for respondent on the other half. That after the demise of the respondent's



grandfather, the appellant kept on promising to transfer the land as agreed but eventually did not. That the matter ended with Njuri-Ncheke elders and lands office who advised amicable settlement, but the appellant fraudulently transferred 0.060 acres which was registered as land parcel No Athinga/Athanja/8864. The respondent counter claimed for transfer of one half of land reference No Athinga/Athanja/3500 measuring 0.60 acres and compensation for the other half.

5. Evidence was led by the appellant as the sole witness at the trial and adopted his witness statement as evidence. He stated that he bought parcel No Athinga/Athanja/3500 from M'arunga M'Nguya in 1979, took possession and developed it. That in 2012, the respondent unlawfully trespassed onto the land and deposited building materials thereon without the appellant's consent. That the matter was reported to the police and the respondent was charged and convicted in Tigania Criminal case no 1793 of 2012. That the respondent then caused fraudulent subdivision of the land to yield parcel No. Athinga/Athanja/8864.
6. On cross examination the appellant clarified that he had agreed to take care of a son of the seller by the name Thomas Mwenda. He further admitted that he agreed to have the respondent construct on the land on condition that he makes some compensation which he never did and the transaction was cancelled.
7. The respondent adopted his witness statement dated June 18, 2019 as his evidence in chief and was cross-examined and re-examined. His evidence was that his grandfather gave the appellant a section of parcel No 3500 Athinga/Athanja Adjudication section on condition that he would put up a building on behalf of the respondent on that land. That when the respondent's grandfather passed on, the appellant reneged on the agreement and later transferred 0.060 acres to the respondent instead of 0.60 acres.
8. Upon considering the matter, the trial court ordered as follows:
 - a The title deed Athinga/Athanja/8864 in the defendant's names cannot be cancelled since fraud on the defendant part has not been proved.
 - b The plaintiffs' own evidence does not favour the plaintiff's case. The suit herein is dismissed with costs.
 - c The defendant's counterclaim is allowed in terms that an order do issue to transfer one half of land reference Athinga/Athanja/3500 (0.60) acres to the defendant
 - d The claim for compensation by the defendant as stated in the counterclaim is dismissed.”
9. The appellant was aggrieved by that judgment and filed this appeal on the following grounds-;
 - 1 That the learned Trial court misapprehended the appellant's case which was based on both trespass and fraud and only addressed himself to the issue of fraud and completely left out the issue of trespass thereby occasioning a miscarriage of justice.
 - 2 That the learned trial magistrate erred in law and fact by failing to consider the appellant's claim of trespass against the respondent on land parcel No. 3500 Athinga/Athanja Adjudication Section which claim was well grounded and uncontroverted.
 - 3 That the learned trial magistrate erred in law and fact by misconstruing and placing over-reliance on P exh 2 and thereby made an error in allowing the respondent's counter-claim based on the contents of the said document whereas-;



- i. The said document was in relation to an objection that was withdrawn without any finding being made.
 - ii. The said document contains a claim by a third party who withdrew the same before veracity of his statement could be tested through cross examination and appropriate findings made.
 - iii. The document does not in any way disapprove the appellant's contention that he bought land parcel No. 3500 Athinga/Athanja Adjudication section nor support the respondent's contention that the appellant was to transfer 0.60 acres and not 0.060 to the respondent.
- 4 That the learned trial magistrate erred in law and fact by allowing the respondent's counter claim without any or any sufficient evidence to allow the same and thereby unlawfully deprived the appellant of this property.
- 5 That the judgment of the learned trial magistrate is against the law and weight of evidence on record.
10. The appellant prays for the appeal to be allowed with costs, the judgment of the trial court dismissing the appellant's claim to be set aside and judgment be entered for the appellant in terms of prayer (a) of the amended plaint and the judgment of the trial court allowing the respondent's counter-claim be set aside and substituted with an order dismissing the counter claim with costs.
11. The appeal was canvassed by way of written submissions. The appellant filed his submissions on June 5, 2023 through the firm of Mithega Kariuki Advocates while the respondent filed his on June 7, 2023 through the firm of Maitai Rimita & Co Advocates.

Appellant's Submissions.

12. The appellant identified three issues for determination namely whether the appellant proved his claim on fraud, whether the appellant proved his claim on trespass and costs of the appeal.
13. On the first issue of fraud, the appellant submitted that from the evidence of both parties, the following facts are not contested; that the suit property herein belonged to one M'arungai M'm'nguya who gave the suit property to the appellant, that the appellant wrote a letter for the transfer of the suit land dated July 9, 2012 and another letter cancelling the transfer dated November 29, 2012 when the respondent trespassed thereon, that there is an order from the High Court dated December 19, 2012 restraining the respondent from interfering with the appellant's land and that the respondent's title was processed and obtained in the year 2020 during the pendency of the suit.
14. The appellant submitted that it is an already established fact that the suit land was given to the appellant by the respondent's grandfather and what is contested is whether the same was subject to a condition that he takes care of Thomas Mwenda as propagated by the appellant or on condition that he builds a house for the respondent as alleged by him.
15. The appellant further submitted that the respondent in his evidence confirmed the existence of Thomas Mwenda and further confirmed that he had a medical condition. That interestingly, he denied that the appellant took care of him, but later confessed to have visited the appellant in Nairobi accompanying Thomas Mwenda to undergo treatment for his mental condition.
16. The appellant pointed out that the respondent stated that the land was given to the appellant by his grandfather on condition that the appellant would construct a house for him and further alleged that he



- was present when this condition was given and that the appellant was also present. That the respondent also confirmed that his brother Justus was given land in the said meeting. That the respondent did not call any witness present.
17. The appellant submitted that in light of the two versions, it is his submission that the appellant's version holds more weight having been confirmed by the respondent. That the fact that the property was given to the appellant had been confirmed by both parties herein and thus it is only right to arrive at the conclusion that he is the rightful owner of the suit property.
 18. The appellant contended that the respondent visited him in 2010 and asked him for a space to construct a home and that he accepted to give him a space out of his lawfully held property on condition that he pays some compensation which the respondent agreed to. That subject to the agreement, the appellant wrote a letter dated July 9, 2012 authorizing the transfer and the appellant wrote another letter dated November 29, 2012 cancelling the transfer. That he also confirmed that he obtained his title in the year 2020
 19. It is the appellant's submissions that the title held by the respondent is illegal and as a result of fraud for the reason that the same was processed despite the appellant cancelling the said transaction vide the letter dated November 29, 2012 and the fact that there was a High Court order dated December 19, 2012 restraining any transaction over the suit property.
 20. The appellant submitted that where a title is challenged, the proprietor must ascertain that he obtained the same procedurally and relied in the court of appeal case in *Munyu Maina – Vs Hiram Gathiba Maina*, Civil Appeal No 239 of 2009.
 21. It is the appellant's submissions that the respondent's title to the suit property was obtained fraudulently or illegally in violation of the express cancellation of the transaction by the appellant and in contempt of the court order dated December 19, 2012 and thus the same was not sacrosanct and did not enjoy any protection.
 22. The appellant further contended that the respondent cannot therefore be allowed to benefit from his illegal acts of transferring the suit property to his name contrary to the cancellation letter by the appellant and the court orders dated December 19, 2012. The appellant relied on the case of *Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR, *Mistry Amar Singh – Vs Serwano Wofunira Kulobya* [1963]EA 408 and the case of *Nelius Muthoni Thegetha Vs Julius Ndungu Mwangi & another* [2020]eKLR.
 23. On whether the appellant proved his claim on trespass, the appellant submitted that having ascertained that the suit property is rightly owned by the appellant, it then follows that the respondent illegally and unlawfully trespassed on the suit property and put his building material thereon without the express authorization of the appellant.
 24. It is the appellant's contention that the respondent trespassed onto the suit property in 2012 and put building materials thereon after threatening the appellant's employee/agent who were undertaking a lawful construction. That the respondent also demolished the developments on the suit property and was arrested, arraigned in court and charged with the offence of breach of peace which he was convicted and fined the sum of Kshs 7,000/=.
 25. The appellant submitted that the respondent further confirmed that the developments of the appellant were demolished and confirmed that he has been on the suit property since then and that prior to the trespass the appellant was using the suit property and deriving profits therefrom. The appellant submitted that it is therefore lawful and just that the appellant is awarded damages for loss of user since



2012 to date as the respondent has been using the suit land. The appellant relied on the case of *Duncan Nderitu Ndegwa Vs KP & LC Limited & another* (2013) eKLR.

26. In light of the foregoing, the appellant invited the court to find that indeed the respondent trespassed into the appellant's land and proceed to award general damages for loss of user for the period that the respondent has been using the suit land. The appellant relied on the case of *Keiyian Group Ranch Vs Samwel Oruta & 9 others* [2021] eKLR.
27. The appellant urged, the court to find that the appellant herein is the rightful owner of the suit property and proceeded to set aside the judgment of the trial court and allow the appeal as prayed.

Respondent's Submissions.

28. The respondent submitted that the appellant's complaint that the trial court failed to address the issue of trespass and failed to consider the claim of trespass against the respondent on the suit land is misleading the court contrary to section 1 A(3) of the *Civil Procedure Act*. The respondent submitted that the issue of trespass is pegged on the proof of ownership of the land. That the respondent is the registered owner of LR No Athinga/Athanja/8864 and did not trespass on his own land.
29. It is the respondent's contention that he was convicted for an offence of creating disturbance in a manner likely to cause a breach of peace contrary to Section 395 (1) (b) of the *Penal Code* and argued that that conviction is not a conviction on trespass since they are unrelated.
30. The respondent submitted that the appellant did not prove his claim on ownership on the first limb for the court to consider the second limb of trespass. It is the respondent's evidence that he is the absolute indefeasible owner of parcel No. Athinga/Athanja/8864 and submitted that once the appellant failed to prove ownership of the said land the claim of trespass failed and the trial court was right not to labour on the issue of trespass.
31. The respondent submitted that the appellant's complaint on the court relying on P exh 2 wherein he introduced objection proceedings which was introduced for the court to rely on the same is baseless.
32. The respondent submitted that he proved his counterclaim to the required standards in law on the balance of probability. The respondent contended that the appellant did not buy the land and was allowed to construct a home on the portion of the land but was not supposed to retain the entire land for himself and referred the court to P exh 2. He submitted that the appellant was to transfer 0.60 acres of land to the respondent as agreed between the respondent's grandfather M'arungai M'nguya (deceased) and the appellant.
33. The respondent submitted that in the appellant's pleadings and during cross examination, he acknowledged that there was a condition between the respondent's grandfather and himself and that further he told the court in cross examination that he wrote a letter dated July 9, 2012 requesting that 0.06 acres of the parcel of land be transferred to the respondent. That the appellant was to transfer half of the building on the parcel No 3500 to the respondent but that he cunningly and fraudulently ended up transferring 0.06 acres and that that was not rebutted by the appellant hence the same stands. The respondent relied in the case of *Grace Zakayo Lenyamoi Vs Wilson Lonapo* [2019] eKLR.
34. The respondent submitted that the appellant made the respondent and his grandfather believe that he would transfer half of the suit land to the respondent but ended up transferring 0.06 acres to the respondent. The respondent contended that the appellant did not keep his word and was defrauding the respondent of his inheritance.



35. The respondent submitted that the decision of the trial magistrate was just fair sound and well-reasoned and that the same ought to be reaffirmed by the court and dismiss the appeal with costs.

Analysis And Determination

36. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made and the authorities cited. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & another Vs Associated Motor Boat co Ltd* (1968) EA 123.
37. The issues I find for determination are whether the appellant proved his claim on fraud and whether the appellant proved his claim on trespass.
38. In paragraph 8a of the amended plaint, the appellant pleaded “that the respondent fraudulently because (sic) the subdivision of the suit parcel which created Athinga/Athanja/8864 and caused the same to be registered in his favour, the property of the plaintiff. However, no particulars of fraud were pleaded. The appellant did not give the particulars of fraud against the respondent that he was making reference to.
39. Under Order 2 Rule 10 (1) of the *Civil Procedure Rules*, it was incumbent upon the appellant to plead fraud specifically if that was one of his grounds in the suit against the respondent. That rule provides inter alia that:

“Every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded included without prejudice to the generality of the foregoing-

- a. particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies, and
- b. Where a party alleges any condition of mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies”

40. Whereas the appellant pleaded fraud against the respondent, Order 2 Rule 10 required that the particulars of such fraud ought to have been set out. And as rightly found by the learned trial magistrate, the law in that respect is couched in mandatory terms. Having failed to set out the particulars of fraud, the amended plaint offends the law and thus defective as found by the trial court.
41. In the case of *Kuria Kiarie & 2 others Vs Sammy Magera* [2018] eKLR, the Court of Appeal stated that;

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* (2008) 1KLR (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”



42. In this case while the appellant faulted the respondent for fraudulently causing the subdivision of the suit land, yet he found it unnecessary to set out the particulars of fraud, the failure therefore meant that he could not have been said to have proved fraud against the respondent .
43. The other issue is whether the trial court left out the issue of trespass thus causing miscarriage of justice. Section 3(1) of the *trespass Act* Cap 294 provides that-;
- “ Any person who without reasonable excuse enters, or remains upon or erects any structure on, or cultivates or tilts or grazes stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
44. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership without reasonable excuse. In this case, it is not in dispute that both the appellant and the respondent were claiming the suit land. In my view, the respondent could not have been guilty of trespass as he too was laying a claim on the land. The respondent therefore had reasonable excuse to enter the land to assert his right. It is therefore immaterial whether the issue was addressed or not, as no doubt the same could not have succeeded.
45. The prayers sought by the appellant were grounded on allegations of fraud. As already stated, the claim based on fraud was not sustainable as it was not in accordance with the law. It is trite law that the registration of a person as proprietor of any land can be cancelled on the basis of fraud. In this case, it was not enough for the appellant to allege fraud and not set out any particulars. He ought to have given the particulars of fraud and tender sufficient evidence that prove those particulars to the satisfaction of the court. In this case, I am not persuaded that there was any basis for the cancellation of the respondent’s title and the learned trial magistrate was correct in finding.
46. In totality my evaluation of the evidence and applicable law to the facts of this case shows that the learned trial magistrate arrived at the right decision and I find no reason to upset the findings of the trial court.
47. In the result, I find no merit in the appellant’s appeal and I dismiss it with costs.
48. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF JULY, 2023

IN THE PRESENCE OF

Court Assistant – V. Kiragu

Ms Gitari for appellant

Mwendwa for respondent

C.K YANO

JUDGE

