



Osoro (Holding Specific Power of Attorney suing on behalf of Pius Matunda Onganga & Christine Memba Ongondo) v Mwangi & another (Environment & Land Case 272 of 2017) [2023] KEELC 18639 (KLR) (3 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 272 OF 2017**

OA ANGOTE, J

JULY 3, 2023

BETWEEN

SHADRACK ONGARO OSORO (HOLDING SPECIFIC POWER OF ATTORNEY SUING ON BEHALF OF PIUS MATUNDA ONGANGA & CHRISTINE MEMBA ONGONDO) PLAINTIFF

AND

JOHN MWANGI 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LTD 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a Plaint dated 21st April 2017 through which he sought for the following orders:
 - a. Permanent injunction restraining the defendants by themselves, servants and/ or agents from dealing with Plot Number S112 Share Certificate No. 7052 Embakasi Ranching Company Limited in any manner whatsoever.
 - b. Mandatory injunction compelling the 2nd Defendant to forthwith rectify and revert the ownership of Plot Number S 112 Share Certificate No. 7052 Embakasi Ranching Company Limited by reversing the illegal transfer to the 1st Defendant.
 - c. A declaration that the Plaintiffs are the absolute and legal owners of parcel of land known as Plot Number S112 Share Certificate No. 7052 Embakasi Ranching Company Limited.
 - d. General damages.



- e. Costs of this suit.
 - f. Any other relief this honourable court may deem fit and expedient to grant.
2. The Plaintiff's case was that at all material times, the donors of the Power of Attorney were the registered owners of Plot Number S112 Share Certificate No. 7052 Embakasi Ranching Company Limited; that they purchased the suit land from Tabitha Wanjiru Njau vide sale agreement dated 17th June 1999 and that they fenced the suit property with sisal and other plants and have been cultivating maize on the suit property until 2015.
 3. It was averred by the Plaintiff that he visited the suit property on 13th October 2016 and found a building being put up and that he reported the matter to the area chief and recorded a statement.
 4. The Plaintiff averred that he reported the matter to Embakasi Police Station and to Ruai Police Station and was issued with OB No.07/13/10/2016; that on the same day, the Plaintiff reported to the 2nd Defendant's office and was asked to pay a site visit fee of Kshs. 20,000 and that he paid the fee on 9th February 2016 and the site visit was conducted by the 2nd Defendant's officials on 13th October 2016, who confirmed that there was a building being put up.
 5. According to the Plaintiff, the said transfer was done without the Plaintiff's consent; that the 2nd Defendant was under an obligation to prevent fraudulent transfers in their records and that the Defendants have colluded to dispossess the donors of the Power of Attorney of ownership of the suit land.
 6. The 1st Defendant opposed the suit by way of a Statement of Defence. He denied that the Plaintiff is the legal owner of all that parcel of land demarcated and allocated as Plot No. V7909 situate in Ruai, Embakasi within Nairobi City County; that his plot number V70909 is distinct from the Plaintiff's purported plot No. S112 as indicated in his pleadings and that he is the bona fide owner and is legally in possession of Plot No. V7909 as evidenced by the Share Certificate and receipts duly issued by the 2nd Defendant.

Hearing and Evidence

7. PW1, the Plaintiff, relied on the written statement in which he averred that he holds a Specific Power of Attorney on behalf of Pius Matunda Ongaga and Christine Momba Ongondo who are his nephew and his wife respectively and that the two bought the suit property from Tabitha Wanjiru Njau.
8. It was averred that the two donors of a Power of Attorney (purchasers) paid all the necessary fees to the 2nd Defendant and were issued with a non-member certificate after allocation of the said plot; that they fenced the property and cultivated maize on the suit land until 2015 and that when he visited the suit land on 13th October 2016, he was surprised to find a building being put up by the 1st Defendant.
9. The Plaintiff produced a bundle of documents which included a copy of the Power of Attorney dated 29th March 2017; the Sale Agreement dated 17th June 1999 and the transfer documents; copies of the non-member certificate; copies of photos showing the building being put up; a copy of the OB No. xxxx and a copy of a banker's cheque number xxxx for Kshs. 20,000/- dated 9th February 2017. PW1 also presented the original share certificate in court.
10. During cross-examination, PW1 stated that he was not there when his niece and her husband bought the land, rather they showed it to him after they purchased it. He stated that when he found the structure on the land, he went to the 2nd Defendant to confirm ownership and that he was given a surveyor who showed him the land, being Plot No. S112.



11. PW1 denied knowing the 1st Defendant and asserted that he was not aware of Plot No. V7909; that he was only shown Plot No. S112 which is the same land that the 1st Defendant has developed and that both sets of documents seem to refer to the same plot and are from the 2nd Defendant.
12. DW1, the 1st Defendant, relied on his written statement in which he averred that he is a non-member shareholder of the 2nd Defendant, Embakasi Ranching Company Limited and that he is lawfully and in actual possession of Plot No. V7909 on Land Reference No. Nairobi/ Block 105, which the 2nd Defendant has confirmed is distinct from the Plaintiff's Plot No. S112.
13. According to the 1st Defendant, on 24th October 2016, the 2nd Defendant approved the 1st Defendant's application for the purchase of one share as a non-member; that on the same day, the Chairman authorized preparation of his non-member certificate of plot ownership and that the Chairman further endorsed on the said certificate, subject to full payment of the requisite purchase fee of Kshs. 1,300,000 and other mandatory charges for registration, being for a beacon certificate and site visit fees.
14. DW1 asserted that he paid the purchase price vide two bankers' cheques for Kshs. 400,000 and Kshs. 900,000 all dated 25th October 2016; that he paid Kshs. 50,000 for a beacon certificate, site visit fees of Kshs. 20,000 as well as Kshs. 108,000 being stamp duty and transfer fees to facilitate registration of the suit property in his favour.
15. According to DW1, he commenced construction of the house on the land on 15th November 2016 upon issuance of authority to develop by the 2nd Defendant; that he has enjoyed peaceful, quiet and uninterrupted possession of Plot No. V7909 since he purchased it and that his family has been residing in the permanent house he constructed on the land since 31st March 2017.
16. He testified that he would be heavily prejudiced and would suffer substantial injustice as he invested Kshs. 4,954,325 being total construction costs.
17. DW1 produced a bundle of documents which included copies of two bankers' cheques drawn in favour of the 2nd Defendant dated 25th October 2016; official receipt by Embakasi Ranching Company Limited dated 27th October 20216 for Kshs. 20,000 being payment for site visit; a copy of banker's cheque dated 1st November 2016 for Kshs. 158,000 to the 2nd Defendant for stamp duty and beacon certificate and a copy of authority to develop the land by the 2nd Defendant dated 15th November 2016.
18. During cross-examination, DW1 stated that when he took possession of the land, it had nothing as it was bushy with sisal plants.

Submissions

19. Counsel for the Plaintiff submitted that the Plaintiff has proved his case on a balance of probability as required by the law. Counsel submitted that this is a clear case of collusion between the 1st and 2nd Defendants to fraudulently dispossess the Plaintiffs of the suit property, which they had acquired via a sale agreement in 1999 and which transfer was effected by the 2nd Defendant on 15th May 2012.
20. According to the Plaintiff's Counsel, the 1st Defendant trespassed into the suit property on or about October 2016 and within a span of three months, had constructed his house, notwithstanding reporting his actions to the police station and the 2nd Defendant herein. Counsel submitted that the Plaintiffs were the initial purchasers of the suit property and that they took possession of the same.
21. Counsel for the 1st Defendant submitted that the Plaintiff has not proved a prima facie case to warrant this court to grant the reliefs sought; that allegations of fraud must be strictly proved, which threshold the Plaintiff failed to meet; that equitable rights cannot defeat the rights of a bona fide purchaser for



value without prior notice and that the injunctive and declaratory rights sought by the Plaintiff are hollow and the suit lacks a firm legal substratum.

22. Counsel submitted that the 1st Defendant's transactional documents, being the bankers' cheques for payment of the subject plot, official receipts, non-member share certificate and authority to develop are prima facie proof of ownership of Plot No. V.7909 on Land Reference No. Nairobi/ Block 105, and that the documents were procedurally issued. They submitted that the transaction was above board and that the 1st Defendant followed the due process preceding the acquisition.
23. The 1st Defendant's Counsel submitted that the Plaintiff failed to adduce any permissible evidence to show that he was in physical control and custody of the suit property; that the Plaintiff's complaint of trespass to Ruai Police Station should not be viewed in a favorable light as the Plaintiff failed to give this court reasons why he never preferred criminal charges against the 1st and 2nd Defendants.

Analysis and Determination

24. This court has considered the Plaintiff's suit and the Defendant's rebuttals. The issue for determination is who between the Plaintiff and the 1st Defendant is the legal owner of the suit land.
25. In this suit, the Plaintiff, acting under a Power of Attorney, has laid claim to Plot No. S112 of the 2nd Defendant's land, on behalf of his Principals. The Plaintiff's case is that the 1st Defendant, in collusion with the 2nd Defendant, illegally and fraudulently transferred the Plaintiff's suit to himself and constructed a permanent structure on it in 2016 without the Plaintiff's consent. The Defendant has however averred that the Plaintiff's property, Plot No. S112, is distinct from the 1st Defendant's property, V7909.
26. Sections 107, 109 and 112 of the *Evidence* Act provide that:

“ 107.

- 1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

27. The Plaintiff thereby bore the duty to persuade this court that his suit is merited by adducing evidence to meet the burden of proof, which is on a balance probability.
28. In ascertaining between the parties' claims as to who is the rightful owner of the suit land, this court must interrogate the root of title and the documentary evidence presented by the parties. In the Court



of Appeal case of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR that was cited by the Plaintiff, the court stated that:

“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal.....”

29. With respect to unregistered property, tracing ownership is dependent on tracing the root of title by way of documentary evidence. This was held in *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 Others* [2015] eKLR as follows:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

30. Regarding the allegations of fraud, it is trite that fraud must not only be specifically pleaded, but it must also be proved to a standard of proof higher than on a balance of probability, but lower than beyond reasonable doubt.
31. The Court of Appeal in *Demutilla Nanyama Pururmu vs Salim Mohamed Salim* [2021] eKLR quoted with approval the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”(Emphasis ours)



32. As regards the standard of proof for fraud, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)

33. The allocation of plots in Embakasi Ranch is linked to membership in the scheme and the acquisition of shares. Members are allocated subdivided plots within the scheme and ownership certificates issued as proof of ownership. In order to prove ownership of a plot in the scheme, it was imperative for the parties to adduce an ownership certificate, receipts of payment, a ballot and a register of members with their name included.
34. In support of his case, the Plaintiff has adduced a Sale Agreement dated 17th June 1999 between Tabitha Wanjiru Njau, Pius Ongaga and Christine Memba, in respect of whom the Plaintiff holds a Power of Attorney; an ordinary share certificate in the name of Tabitha Wanjiru Njau; a non-member certificate of plot ownership in the Plaintiffs’ names; multiple receipts in the name of Tabitha Njau and photographs of the construction and a copy of a banker’s cheque of Kshs. 20,000 for a site visit dated 9th February 2017.
35. The Plaintiff has presented evidence of the root of title by adducing the sale agreement and documentary evidence of the ownership of the plot by the previous owner. The Plaintiff has also adduced a share certificate in the name of the Plaintiff’s principals. On this basis, this court is satisfied that the Plaintiff has established legal title to Plot No. S112 on a balance of probability.
36. On the other hand, the 1st Defendant has adduced copies of two bankers’ cheques drawn in favour of the 2nd Defendant dated 25th October 2016; the purported official receipt by Embakasi Ranching Company Limited dated 27th October 20216 for Kshs. 20,000t being payment for he site visit; a copy of the banker’s cheque dated 1st November 2016 for Kshs. 158,000 in favour of the 2nd Defendant for stamp duty and beacon certificate; a copy of authority to develop from the 2nd Defendant dated 15th November 2016 and photographic prints showing the newly constructed house & the perimeter wall.
37. The 1st Defendant averred that it purchased the suit property directly from the 2nd Defendant and that it is an innocent purchaser for value without notice of defect. Despite its claim, the 1st Defendant however failed to adduce evidence of a share certificate as proof of Plot No. V7909. Indeed, this court has no evidence as to the existence of V7909 and how it relates to Plot No. S112.
38. Having failed or neglected to enter the evidence of an official of the 2nd Defendant or any evidence corroborating the assertion that it bought the property from the 2nd Defendant, this court must find that the 1st Defendant’s claim is unfounded and that pursuant to the site visit conducted by the Plaintiff in 2016, Plot No. S112 is situated where the 1st Defendant has constructed his house.
39. What is apparent is that the 2nd Defendant unprocedurally allocated the suit property to the 1st Defendant with the aim of depriving the Plaintiff the plot. The documents held by the Plaintiff being first in time, and in the absence of a share certificate by the 2nd Defendant in the name of the



1st Defendant, it is the finding of this court that the Plaintiff has proved his case on a balance of probabilities.

40. The upshot of the forgoing is that this court finds that the Plaintiff's suit is merited. The Defendant is at liberty to pursue the 2nd Defendant for loss and damages, if at all. Regarding the Plaintiff's claim for damages, the Plaintiff neglected to present evidence or an estimate of the damages he is claiming.
41. In any event, considering that the 1st Defendant has already incurred a lot of money in developing the land, and in the absence of evidence to show that he intentionally trespassed on the suit property, I decline to award damages for trespass.
42. For those reasons, this court allows the Plaintiff's claim as follows:
 - a. Permanent injunction be and is hereby issued restraining the defendants by themselves, servants and/ or agents from dealing with Plot Number S112 Share Certificate No. 7052 Embakasi Ranching Company Limited in any manner whatsoever.
 - b. A declaration be and is hereby issued that the Plaintiffs are the absolute and legal owners of parcel of land known as Plot Number S112 Share Certificate No. 7052 Embakasi Ranching Company Limited.
 - c. The 1st Defendant to vacate the suit property within 60 days.
 - d. Costs of this suit to be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF JULY, 2023.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Wamote holding brief for Munga for 1st Defendant

Mr. Bosire for Plaintiff

Court Assistant: Tracy

