



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 68 OF 2018**

**FRANCIS NKONGE ..... APPELLANT**

**VERSUS**

**PATRICK KITHINJI MURIUKI .....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF ISIOLO .....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. E. Ngigi (S.R.M.) delivered on 14<sup>th</sup> December 2018, in Isiolo ELC No. 56 of 2013)*

**JUDGMENT**

**A. PLEADINGS**

1. The appellant had been sued in the lower court by the 1<sup>st</sup> respondent claiming he had purchased Plot No. 1235 measuring 0.05 Ha. Bulla Pesa area from one Mugambi Rinturi the then registered owner, took vacant possession and commenced developments but the 2<sup>nd</sup> respondent's officers warning him the property belonged to the 2<sup>nd</sup> appellant.
2. The 1<sup>st</sup> respondent had sought for a declaration that he was the lawful owner by virtue of purchase and a permanent injunction restraining both the appellant and the 2<sup>nd</sup> respondent from interfering with his quiet possession and or ownership of the plot. Alongside the plaint, the 1<sup>st</sup> respondent sought for temporary orders of injunction.
3. The appellant entered appearance, put in a defence and counter-claim alleging to be the one who had fenced the Plot No. 1800 Bulla Pesa but which the 1<sup>st</sup> respondent had fraudulently and illegally renamed as Plot No. 1238 and placed building materials on it.
4. In his counterclaim, the appellant averred he bought the plot for value from one Isaack Kirea Kigatiira previously owned by Ester Gachamu M'Rinyiro, took vacant possession and fenced using barbed wire and wooden posts.
5. He sought for declaration that he was the rightful owner of **Plot No. 1800 Bulla Pesa** on the locality allegedly claimed by the 1<sup>st</sup> respondent as **Plot No. 1238** and a permanent injunction restraining the respondents from any interference.
6. The 1<sup>st</sup> respondent replied to the defence and counterclaim and denied that **Plot No. 1800** existed on the ground where Plot No. 1238 was situated, alleged it did not exist and that the appellant had no legal basis to it or deserved any if alleged prayers in his counterclaim.

**B. SCENE VISIT**

7. On 8.9.2015, the court ordered for a scene visit by both the County Physical Planner and County Land Surveyor and each of the parties was ordered to hand over documents for the verification.
8. By a report filed in court on 24.3.2016, the County physical planning officer made findings that the appellant had failed to present his papers for verification by the clerk to the County Council. Eventually, the PDP for Plot No. 1238 was done dated 12.4.2013 in favour of one Mattias Mugambi Rinturi who continued to pay rates till 21.7.2015 when he sold the plot to the 1<sup>st</sup> respondent.

**C. TESTIMONY**

9. The 1<sup>st</sup> respondent's testimony was that he had bought the land. He produced a sale agreement dated 12.9.2013, site inspection report, letter dated 19.2.2013 from the 2<sup>nd</sup> respondent for virification of ownership, physical planning map and a rates clearance receipt as **P exh 1** –

6.

10. The appellant told the court he owned the plot by virtue of purchase on **29.6.1990** at **Kshs. 40,000/=** as per a sale agreement **exh 1**, surveyor's report as **D exh 2**, allotment letter as **D exh 4**. He insisted his plot was superimposed with **Plot No. 1238**, since he had carried due diligence before purchase. He insisted his ownership documents were genuine.

11. Further, the appellant alleged there was fraud given he had not been supplied with the site inspection report and more so, when the 1<sup>st</sup> respondent lacked an allotment letter or balloting form.

12. The appellant's other witnesses were Esther Gachamu M'Rinyiro who confirmed she was the initial owner of the plot as per **D exh 1**, which the land was allocated to her by the chief Hassan Kinyua in 1981 long before the demarcation or survey was undertaken in the area. She confirmed she sold the plot in 1989 to the appellant as per **D exh 5**. According to her, the chief represented the government in allocating her that land.

13. DW3 told the court he witnessed the sale agreement and developments on the suit property. He denied witnessing any alleged construction by DW1.

14. DW4 confirmed the appellant bought the land, built a house and confirmed the plots were being dished out by the area chief. She produced **D exh 6** as the one given by the area chief but without plot numbers. According to him, as the village elder, he was certain that the rightful owner of the plot was the appellant.

15. DW6 was the assistant chief of the area who told the court that he was certain the plot belonged to the appellant though at the time it was issued to him by the then area chief, it did not have plot numbers. He insisted the 1<sup>st</sup> respondent was not a resident of the area. DW6 largely repeated the evidence of DW3, 4 and 5 save to add that the custodian of land registration details fell under both the lands department and County office.

16. The trial court rendered its decision finding the 1<sup>st</sup> respondent's suit proved leading to the appeal herein.

#### **D. GROUNDS OF APPEAL.**

17. The appellant's complaints are that the trial court: did not assess and appreciate the facts, evidence and the law in the matter hence fell into a wrong decision finding in favour of the 1<sup>st</sup> respondent when there was no evidence from the 2<sup>nd</sup> respondent's disregarding the appellant's evidence on fraud; failing to rely on relevant facts and applying irrelevant fact reaching a wrong decision: dismissing the counterclaim which was well founded.

#### **E. WRITTEN SUBMISSIONS**

18. With leave of court, parties filed written submissions dated 13.9.2021 and 12.10.2021 respectively.

19. The appellant submits he produced exhibits over the ownership and location of the plot by private surveyor at page 48 – 55 of record of appeal and called five witnesses whose evidence corroborated his claim together with evidence that the 1<sup>st</sup> respondent was a stranger to the land and neighbourhood which evidence the trial court failed to consider.

20. Two, it is submitted the appellant was the one who took possession earlier than the 1<sup>st</sup> respondent which history the trial court overlooked.

21. Three, it is submitted the 1<sup>st</sup> respondent did not call the vendor who allegedly sold the property to him and neighbours unlike the appellant.

22. Four, it is further submitted the transfer in favour of the 1<sup>st</sup> respondent had not been effected in the official documents of the 2<sup>nd</sup> respondent and therefore the failure to call the officers of the 2<sup>nd</sup> respondent was fatal to the case.

23. The appellant also submits the case was based on a fraudulent PDP in the hands of the alleged seller to the 1<sup>st</sup> respondent hence the 1<sup>st</sup> respondent's exhibits were suspect, unusual, an unauthentic and unreliable.

24. Lastly, it is submitted the trial court failed to consider relevant facts but considered irrelevant facts, which were not supported by both the pleadings and the evidence tendered at the trial.

25. On the other hand, the 1<sup>st</sup> respondent submits the documents in support of his claim were not challenged at all unlike the appellant's exhibits which lacked responses from the Council, were not fraudulent, lacked requisite approvals and hence his assertion as to ownership was not legitimate. Reliance is placed on **Susan Mumbi –vs- Kefala Grebedhin HCC No. 332 of 1993, Danson Kimani Gacina & Another –vs- Embakasi Ranching Co. Ltd [2014] eKLR, Caroline Awinja Ochieng & Another –vs- Jane Ann Mbithe Gitau & 2 Others [2015] eKLR**, on the proposition that in proving ownership, there must be unbroken chain of documents showing the true owner on a balance of probabilities.

26. In absence of a single document emanating from the allottee, the appellant's assertion of **Plot No. 1800** remain hallow and invalidated since an area chief has no mandate in law to allocate land.

27. The 1<sup>st</sup> respondents also submits the veracity of the 1<sup>st</sup> respondent's case was buttressed by the survey report dated 24.3.2016. Reliance is placed *Hubert L. Martin & 2 Others –vs- Margaret J. Kamar & 5 Others [2016] eKLR* on the proposition that where a court is faced with two or more titles over the same land, it has to make an investigations from the root of the title and follow all the processes and procedures that brought forth the two titles at hand and that the title which conforms to the procedure and can properly trace its roots without a break in the chain, should be upheld.

28. This being a first appeal, the court is mandated to re-hear or re-appraise itself of the record, come up with its own independent findings and conclusion bearing in mind that the trial court had the benefit of hearing and seeing the witnesses. See *Selle & Another –vs- Associated Motor Boat Company Ltd & Others [2016] eKLR*.

#### **F. ISSUES FOR DETERMINATION**

29. The issues commending themselves for determination are:-

- 1) **Whether the two plots refer to one and the same land.**
- 2) **If (1) above is true, who between the appellant and the 1<sup>st</sup> respondent proved to hold a better title to the land.**
- 3) **If the appeal has merits.**
- 4) **What is the order as to costs.**

30. It is trite law that parties are bound by their pleadings and issues flow from pleading as held in the case of *Stephen Mutinda Mule & 3 others –vs Electoral and Boundaries Commission & another*.

31. The 1<sup>st</sup> respondent's claim was that he purchased Plot No. 1238 measuring 0.05 situated at Bulla Pesa area from the then registered owner Mattias Mugambi Rinturi for value by a sale agreement dated 12.9.2013, took vacant possession and while commencing developments on it, an officer of the 2<sup>nd</sup> respondent on 31.9.2013 stopped him alleging the plot belonged to the appellant herein.

32. He sought for declaratory orders that he was the bonafide owner and a permanent injunction restraining the 2<sup>nd</sup> respondent and the appellant from interfering with his ownership.

33. The appellant put in a defence and counterclaim alleging the land on the ground was Plot No. 1800 which he had acquired from one Isaack Kigea Kigatiira, who had previously bought from one Esther Gachamu M'Rinyiro, took vacant possession and fenced but the respondents had fraudulently and illegally renamed as **Plot No. 1238**, trespassed into and threatened to develop without any approvals.

34. He also sought for a declaration he was the lawful owner of the plot with the same location, and posts and a permanent injunction stopping any dereference by the respondents, denied the contents of the defence, insisted **Plot No. 1800** did not exist in law and in fact on the ground.

35. In order to prove his title, the 1<sup>st</sup> respondent produced **P exh 1 – 5** a sale agreement, site inspection report, letter dated 19.2.2013, physical planning map on ground position and a rates clearance map.

36. The appellant did not object to the production of **P exh 1 – 5** of page 108 of the record of appeal. There is no indication the appellant called to question the authenticity, reliability and origin of the aforesaid documents.

37. The 1<sup>st</sup> respondent was categorical in his evidence that Bulla Pesa and Kambi Ya Juu are two separate places though bordering each other and that they are situated in different places. He was also categorical that the issue of locality of the two plots on the ground had been addressed in the site report dated 29.3.2016 conclusively indicating his **P exh 1-5** were also held by the 2<sup>nd</sup> respondent in their records on ownership.

38. While being cross examined by the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent was clear he took and submitted his said exhibits for verification by the enforcement officer, Inspector Okoth who confirmed that the documents were genuine.

39. On the other hand, the appellant produced his exhibits as affidavit sworn on 4.6.1990, letter dated 10.6.2002 seeking for verification of ownership, a map, sale agreement, letter of allocation, chief's letter and an affidavit by Esther Gachamu M'Rinyiro as **D exh 1 – 7**.

40. The appellant's documents did not contain anything linking the plot to the allocating office of the 2<sup>nd</sup> respondent. He did not shed any light on where he got the plot number as 1800 other than stating the area chief was the one allocating the parcels.

41. The affidavits sworn on 4.6.1990 and 17.10.1989 do not bear **Plot No. 1800**. Similarly, the sale agreements dated 29.6.1990 and 17.10.1989 do not indicate **Plot No. 1800**. The same case applies to the chief's letter dated 24.6.1981.

42. All the above documents were done before 2002 and therefore they bear no nexus with the letter dated 10.6.2002 in which Frontier Engineering wrote to the 2<sup>nd</sup> respondent.

43. It is also strange and inconceivable that the appellant through that letter was claiming to be the owner of an existing plot/developed plot and was waiting from the 2<sup>nd</sup> respondent to verify his or her ownership and thereafter allow the payment of all the necessary dues to the 2<sup>nd</sup> respondent. There was no evidence tendered if the aforesaid letter was ever received by the 2<sup>nd</sup> respondent on any date and if so whether it elicited any positive response from the said 2<sup>nd</sup> respondent.
44. Further, the appellant did not produce any evidence if he ever made a follow-up to regularize his ownership between 2002 and 2013 when he alleges the 1<sup>st</sup> respondent began to lay a claim.
45. The appellant alleged fraud and illegality against the 1<sup>st</sup> respondent. It is common knowledge that evidence was tendered including documents to the 2<sup>nd</sup> respondent. The appellant did not object or demonstrate any fraud or illegality of **P exh 1 – 5**.
46. It is trite law fraud and illegality must be specifically pleaded and proved. There were no specific pleadings over fraud and illegality. It is common knowledge fraud cannot be orchestrated by the 1<sup>st</sup> respondent alone. See *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & another [2000] eKLR*.
47. The appellant did not tender any evidence if he ever reported the alleged fraud or illegality at the very least to the 2<sup>nd</sup> respondent or the police and perhaps got an forensic report that the 1<sup>st</sup> respondent's documents did not emanate from the 2<sup>nd</sup> respondent and or were forgeries and or fraudulently obtained.
48. The appellant did not make any specific claim or allegations over the 2<sup>nd</sup> respondent that there was a double allocation or superimposition of the two alleged plots.
49. Even after parties were ordered to submit their respective documents for verification before the site visit, the appellant did not take that opportunity to subject himself to that process. After the report came out and was filed in court, the appellant did not challenge it yet it also confirmed that the 1<sup>st</sup> respondent's documents were genuine and emanated from the 2<sup>nd</sup> respondent.
50. In essence therefore, the appellant had the burden of proof which he failed to discharge to show his documents were pointing at the same plot, both on the ground and as to locality and that the 1<sup>st</sup> respondent had unlawfully and unprocedurally been issued the same plot by the 2<sup>nd</sup> respondent irregularly.
51. The appellant did not call the maker of the letter dated 10.6.2002 to shed light how he got to know Plot No. 1800 since it did not as stated above exist prior to that date in all the other documents held by the appellant.
52. The map produced by the appellant talks also of a developed plot yet all the evidence tendered before the court did not refer to any developments by either of the parties except a fence.
53. The appellant alleges he was sold the land by Isaack Kirea Kigatiira vide a sale agreement he produced, signed on 29.6.1990. Unfortunately, the appellant was not a party or signatory to that agreement. It is only the alleged seller who signed and the two witnesses but not the purchaser. The agreement is therefore contrary to the **Law of Contract Act** and the **Land Act**.
54. Turning to the report dated 24.3.2016 by the County physical planning officer who essentially is an employee of the 2<sup>nd</sup> respondent, the officer denied that the 2<sup>nd</sup> respondent ever received the letter dated 10.2.2002 to verify ownership. It indicates the plot owner as per their record was Mattias Mugambi Rinturi. This is the person who the 1<sup>st</sup> respondent pleaded and produced **P exh 1** to show he sold his **Plot No. 1238** and who the 2<sup>nd</sup> respondent received government rent and rates arrears from as per **P exh 5**.
55. The report also confirmed the registered owner had transferred the plot to the 1<sup>st</sup> respondent on 12.9.2013. The report further concludes the 2<sup>nd</sup> respondent was unable to verify the authenticity of the documents held by the appellant for lack of their submission in 2002 or payments of any rates or rent since the date he allegedly acquired the plot by way of purchase. The report concludes the lawful owner as the 1<sup>st</sup> respondent.
56. The onus was on the appellant to disapprove the findings of that report either by producing duly authenticated letter of allotment of **Plot No. 1800** issued in 1981 by the 2<sup>nd</sup> respondent on its predecessors in title prior to the coming into existence of the 2<sup>nd</sup> respondent in 2010, and or calling of the person(s) who alleged allocated the plot particularly the area chief.
57. The appellant did not challenge the scene visit report at all and or offer any explanation to the contrary why it was not conclusive on the issue of ownership and or the placement of the 1<sup>st</sup> respondent as the bonafide owner of the property both in the 2<sup>nd</sup> respondent's record as the custodian of the plots within the town and on the ground.
58. In *Jacinta Njeri Wanyoike –vs- Teresia Wanjiku Wainaina [2017] eKLR*, the court held where there are two sets of title deeds, there was need to ascertain their authenticity and or genuineness through evidence while in *Husein Noor Haji & Another –vs- Abdi Tari Abjula [2021] eKLR*, the court held letters cannot be used to prove ownership unless backed by the record of the allotting authority. Similar part developed plans in *Titus Musya Musee –vs- Francis Ichamui M'mwenda [2020] eKLR* were held not enough to prove ownership since they are mere planning tools. In the same case, the court has stated the minutes alone could not prove ownership since only express an intention to allocate land in *County Council of Meru & 2 Others –vs- PCEA thro' the Registered Trustees [2020] eKLR*. See also *Stephen Mburu & 4 Others –vs- Comat Merchant Ltd & Another [2012] eKLR*, *Mbau Saw Mills Ltd –vs- Attorney General & 2 Others [2014] eKLR*.

59. In this instant case, the appellant did not plead specifically and give details of any fraud or illegalities of the sale, transfer and ownership of **Plot No. 1238** in favour of the 1<sup>st</sup> respondent by the 2<sup>nd</sup> respondent.

60. In ***John Kaua Mbijiwe –vs- Haji Hassan Kalla Mohamed [2021] eKLR***, this court was faced with a situation where a party failed to object to the production of documents, or raise issues on the authenticity, correctness or legality of documents or failed to insist on the makers of the documents to produce them during cross examination.

61. The court held the burden of proof never shifts to the opposite party for each party has to demonstrate an unbroken and clear paper trail on how he or she acquired the property. See also ***Habiba Jattani Guyo –vs- Hassan Galgalo & Another [2021] eKLR***.

62. In this instance, the appellant did not call the County officer to verify that his plot was the same as **Plot No. 1238**. He never traced his **Plot No. 1800** to the 2<sup>nd</sup> respondent to show that any of the alleged previous owners as per his sale agreement were ever at one time allocated the plot by the 2<sup>nd</sup> respondent.

63. The appellant did not go behind his alleged seller(s) and trace the plot to the known allotting authority that is the 2<sup>nd</sup> respondent. He did not make any specific allegations or claims against the 2<sup>nd</sup> respondent for not issuing him with ownership documents so as to claim that he was first in time to be allotted the land. In absence of such evidence and failure to challenge the authenticity of the 1<sup>st</sup> respondent's documentation, the trial court was right in its decision.

64. The upshot is that the appeal herein lacks merits. The same is dismissed with costs to the 1<sup>st</sup> respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 2<sup>ND</sup> DAY OF MARCH, 2022**

**IN PRESENCE OF:**

**MWIRIGI FOR 1ST RESPONDENT - PRESENT**

**ANAMPIU FOR APPELLANT - PRESENT**

**KINYANJUI FOR 2ND RESPONDENT**

**COURT ASSISTANT – KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**