



**Njenga v Kinuthia & another (Environment & Land Case
21 of 2020) [2022] KEELC 3249 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 21 OF 2020**

JG KEMEI, J

JUNE 6, 2022

BETWEEN

JOSEPH KINUTHIA NJENGA PLAINTIFF

AND

HANNAH WANGARI KINUTHIA 1ST DEFENDANT

SAMUEL MWAURA FELIX KARIUKI 2ND DEFENDANT

JUDGMENT

1. It is the plaintiff's case that on the 1/10/2009 he purchased a portion of one acre of land from the 1st defendant at the consideration of Kshs 2.9 Million. That the 1st defendant showed him the temporary boundaries of the said one-acre piece and put him in possession thereof. That having been put in possession he commenced construction of his house in 2011 and completed in 2015 without any objections from the defendants.
2. Fast forward to 2013, the Plaintiff acquired the second one acre piece of land from the 1st Defendant at the sum of Kshs 5.0 Million.
3. It is the case of the plaintiff that the sale agreements dated the 4/2/2013 were executed for both Parcels by the 1st defendant and his brother Francis Kigo Kinuthia whom he had empowered vide a power of Attorney to act on his behalf in the transaction.
4. Both plots being Parcel numbers LR No 164/74 and 75 respectively were excised from the larger Parcel LR No 164/26/6 owned by the 1st defendant. Though the Parcels were conveyed to the Plaintiff vide a conveyance dated the 4/12/2013 it is the Plaintiffs case that the acreage of Parcel 75 measured 0.3203 of a hectare instead of 0.4005 ha contracted in the agreement of sale. He avers that Parcel 75 was less by 0.20 acres contrary to the agreement of the parties.



5. Consequently, it is his case that the defendants caused the resurvey of the adjacent lands; transferred the 0.2 acres on which his house stood to Parcel 73 owned by the 2nd defendant in breach of the agreement for sale and warranty on Parcel 75 and further on the 1st defendant's representation on the 1st sale agreement that the boundaries of Parcel 74 would ultimately be surveyed and fixed to safeguard his house.
6. In his pleading he avers that the actions of the Defendants in resurveying, sale and transfer of 0.2 acres from Parcel 75 to Parcel 73 (owned by the 2nd defendant) were willful and fraudulent which actions have occasioned him loss and damages. Particulars of fraud on the part of the defendants were pleaded in para 14 of the Plaintiff.
7. Asserting that he has fulfilled his contractual obligations to the 1st defendant, he sought specific performance of the agreements dated the 4/2/2013 in respect to the portion of 0.2 acres in Parcel 73 to safeguard his home constructed thereon.
8. Vide an amended plaintiff dated 21/4/2021 and filed on 23/4/2020 he urged the court to find in his favour and grant the orders sought against the defendants as follows;
 - a. A declaration that the registration, of the 2nd defendant as legal owner of 0.20-acre portion comprised in L.R no. 164/73 where his home is erected is null and void.
 - b. An order do issue directing the District Surveyor to survey out the 0.20 acre portion in L.R No. 164/73 where the home by the Plaintiff is erected and register the Plaintiff as the legal owner.
 - c. In the alternative, Judgment for the plaintiff jointly and severally against the defendants in the sum of Kshs. 29 Million.
 - d. Costs of the suit.
9. Vide her amended defence dated the 12/5/2021 and filed on the 21/9/2021 the 1st defendant opposed the plaintiff's claim. she admitted para 1-8 of the plaintiff's claim.
10. With respect to the acreage of Parcel 75, it was the 1st defendant's case that the plaintiff executed the transfer of the said Parcel measuring 0.3203ha and is estopped from denying the same.
11. She denied any collusion with the 2nd defendant; resurvey of Parcels 74 and 75; excision of 0.2 acres from Parcel 75 and adding it to Parcel 73 and sought to put the Plaintiff to strict proof.
12. While denying the particulars of fraud, she contended that she sold Parcels 73 and 75 as is and the Plaintiff had the duty to ascertain the acreage before executing the transfer in his favour. She averred that the claim of the Plaintiff is time barred.
13. Vide a further amended statement of defence and counterclaim dated the 8/7/2021 and filed on the 9/7/2021, The 2nd defendant denied the plaintiff's claim.
14. The 2nd defendant averred that he is the registered owner of Parcel 73 (original No being 164/26/4) having purchased the same from the 1st defendant vide an agreement of sale in May 2015 and transfer registered on the 5/8/2015 in his favour.
15. The 2nd defendant contends that to the contrary the plaintiff has trespassed on to his land Parcel 73 to the extent of 0.3789 of an acre despite the existence of beacons demarcating both Parcel 73 and 74 belonging to the 2nd defendant and plaintiff respectively. He pleaded particulars of encroachment, illegal and wrongful possession of a portion of Parcel 73 in para 30 of the counterclaim which he claims has occasioned him financial and economic loss. He sought the following orders in his counterclaim;



- a. A mandatory order directed at the plaintiff, his servants, employees, representatives, agents and /or any other person claiming through him to vacate the encroached portion of the Land Reference Number 164/73 measuring approx. 0.1534 Ha or 0.3789 acres and remove all the structures thereon and restore the 2nd Defendants property to its original state within 30 days of the orders being issued.
 - b. That if the plaintiff does not comply with the order in a above the 2nd defendant be at liberty to evict the plaintiff from Parcel 164/73 under the supervision of the officer commanding Police Station, Tigoni Police Station, Kiambu County as the plaintiff's cost.
 - c. An order directed at the plaintiff to furnish this honourable court with an account of financial benefits derived from encroaching land reference Number 164/73 and judgement be entered against the plaintiff for the said sums.
 - d. An order directed at the plaintiff to pay the 2nd defendant mesne profits equivalent to rent payable for land measuring 0.153 ha or 0.3789 acres in the area from the 17/6/15
 - e. Interest on c and d above at court rates from the due date until payment in full
 - f. Costs of the counterclaim
 - g. Any other relief that this honourable court may deem fit and appropriate.
16. In his reply to amended defence and defence to the 2nd defendant's counterclaim, the plaintiff contended that the transfer of 0.2 acres to the 2nd defendant was illegal null and void on account that the 1st defendant had no title to pass to the 2nd defendant because of the prior arrangement between the 1st defendant and the plaintiff. He blamed the 1st defendant for failing to transfer 2 acres purchased to the plaintiff and in breach fraudulently ceded 0.2 acres to the 2nd defendant which land he had already constructed his home.
 17. He was emphatic that his possession and development of 0.2 acres in Parcel 74 was pursuant to the agreement with the 1st defendant dated the 1/10/2009 under special conditions No 3 of the said agreement and the survey plan annexed to the agreement and the purported transfer of the same to the 2nd defendant is null and void. He denied trespass, loss of mesne profits and damages.

The evidence of the parties

18. The plaintiff led evidence as PW1 in support of his case. He relied entirely on his witness statement dated the 21/4/2021 as his evidence in chief. In addition, he produced documents listed in his list of documents of even date and marked PEX 1-11.
19. In his testimony he informed the Court that he purchased two plots measuring two acres in 2009 and 2013 respectively from the 1st defendant, that is Parcels 74 and 75. Parcel 74 measuring one acre was purchased in 2009 and concluded in 2010. That he was shown the boundaries by the 1st defendant and was put in possession and in 2011 started constructing his family home in earnest. It was his testimony that he was represented by his brother Francis Kigo Njenga in the transaction as he then resided in the Unites States of America. That unknown to him the 1st defendant sold Parcel 73 in 2015 thus encroaching on his Parcel of land where his house stood. He informed the court that he reported the matter to the police and that investigations are still ongoing.
20. As to why there were three agreements with respect to the purchase of the two Parcels of land, PW1 responded that the agreement of 2009 was ratified by executing a new one in 2013 in respect to Parcel



- 74 and the other related to Parcel 75, effectively leading to two agreements with respect to Parcel 74 and one for Parcel 75.
21. When being shown the sketch map (proposed subdivision), PW1 confirmed that he purchased Parcel D which refers to Parcel 74. That Parcel C- or 73 belonged to the 2nd defendant. Both C and D measure 0.4 ha each. That he identified his plot No 74 as early as 2009 using the proposed subdivision plan. He confirmed from the deed plan that plot D is situate in the same place as in the subdivision plan aforesaid. Further he confirmed from the deed plan of Parcel 75 measures 0.3203 ha or 0.8 acres although according to the agreement of sale he purchased one acre. As to whether Parcel 75 was encroaching on Parcel 73, the witness responded that it is Parcel 73 that had encroached on his land Parcel 74.
 22. The witness informed the Court that the Defendants colluded to resurvey the lands. In cross he stated that he had not produced any evidence in support of any resurvey of Parcels 75 and 73.
 23. He informed the court that he constructed his home on the property in 2011 and obtained building plan approvals in 2015, 4 years later. That he realized in 2015 that the acreage of Parcel 75 was less by 0.2 acres.
 24. Francis Kigo Njenga, the plaintiff's older brother testified as PW2. He adopted his Witness statement dated 21/4/2021 as his evidence in chief. It was his testimony that he was duly appointed to act for PW1 vide a Power of Attorney donated to him. He reiterated PW1's testimony on purchase of the Parcels of land from the 1st Defendant; first Parcel of land on 1/10/2009 before Catherine Karanja, Advocate for Kshs. 2.9M. The second Parcel of land was bought at Kshs. 5M through Maina Njuguna Advocate. That he executed both agreements dated 4/2/2013 and later the two conveyances for the subject Parcels both dated 4/12/2013. That unknowing to him, the conveyance for Parcel 75 transferred 0.3203 ha instead of 0.4005ha agreed. PW2 also accused the 1st Defendant of deceitfully transferring the sold land less one acre and fraudulently reselling it to the 2nd Defendant.
 25. In cross-examination, PW1 was firm that the acreage for Parcel 75 in the transfer is different from the acreage in the sale agreement. That he constructed PW1's house from 2011 to 2015. That the construction approval was obtained after construction had commenced and he did not know the approval date. Shown page 94 of Plaintiff's bundle, PW2 confirmed the approval was given on 7/1/2015, way after he had acquired the land and had built thereon before the land was subdivided. He conceded that the 2nd Defendant complained in 2015 but PW2 did nothing about it. He denied constructing the house in 2015 but said it was occupied in 2015 though he did not have a copy of occupation permit to that end.
 26. That marked the end of the Plaintiff's case.
 27. The 1st Defendant did not call any witness.
 28. The 2nd Defendant, Samuel Mwaura Felix Kariuki testified as the sole witness in defence.
 29. DW1 relied on his witness statement dated 8/7/2021 as his evidence in chief. He produced the documents to wit copy of conveyance dated 17/6/2015 for Parcel 164/73, copy of search for Parcel 73, copy of his survey plan/deed plan, copy of his Advocate's Demand letter dated 2/10/2015, copy of the reply to demand from the Plaintiff's advocates dated 13/10/2015, copy of his Advocate's response dated 21/10/2015, copy of the Beacons certificate dated 5/11/2015 for Parcel 73, copy of the survey report date March 2020, copy of valuation report, copy of valuation report dated 10/7/2021.
 30. In cross-examination, DW1 stated that before purchasing his Parcel 73, he was not aware of any agreement between the Plaintiff and the 1st Defendant. DW1 maintained that the Plaintiff's sketch plan was not reflective of the ground position on plots 73, 74 and 75. That Parcel 74 has encroached on



- Parcel 73 and the Plaintiff's building was on his land with Beacons R5 and R6 across it. Regarding the Plaintiff's 2020 valuation report, he stated that the value would be higher than the stated KShs. 29M.
31. DW1 denied the Plaintiff's testimony that he begun construction in 2011 and occupied the house in 2015. That DW1 entered into a sale agreement for his land in 2015 after the 1st Defendant pointed out to him the beacons of the land and transfer was registered in August 2015. That he bought his land free from any encumbrance and anyone's possession or occupation of the impugned 0.2 acres for which he paid KShs. 14M. However, DW1 added that there was a make shift construction on the land which he presumed belonged to the 1st Defendant though he did not make any enquiries thereto.
 32. In re-examination, DW1 was adamant that he was not a party to the Agreement of 2009. In relation to P.exh 9, the surveyor's report at page 69 of the Plaintiff's trial bundle, DW said the dotted line thereon is the boundary of plot numbers 73 & 74. That the subject house was built in 2016 despite demand letters to desist from his Advocates.
 33. In re-examination, DW1 was adamant that the subject house was built in 2016 despite demand letters from his Advocates.

The written submissions

34. The plaintiff filed his submissions dated 23/3/2022 through the firm of Njoroge Baiya & Co. Advocates while the firm of Mwaura Shairi & Co. Advocates filed submissions dated 13/4/2022 on behalf of the 1st Defendant and the 2nd Defendant's submissions dated 7/4/2022 were filed by the firm of Mwamuye Kimathi & Kimani Advocates.
35. The plaintiff submitted that the defendants admitted the contents of paras 4-11 of the plaint and according to order 2 rule 11 of the *CPR* it is deemed that the facts and allegations in the plaint were not traversed and effectively those facts are admitted and therefore no evidence is admissible in reference to the admitted facts. See the case of *Patrick Muturi Vs Kenindia Assurance Co Limited* (1993) eKLR.
36. It was submitted by the plaintiff and reiterated the evidence already adduced at the hearing. In addition, he submitted that the 1st defendant vide a survey carried out in 2013 fraudulently relocated 0.2 acres where his family home is registered to the name of the 2nd defendant. In acquiring the 0.2 acres together with his house the 2nd defendant connived with the 1st defendant to enrich himself unjustly and deprive him of his land. He urged the court to exercise its equitable jurisdiction and uphold the doctrine of constructive trust and proprietary estoppel as was enunciated in the case of *Willy Kimutai Kitilit Vs Michael Kibet* (2018) eKLR.
37. It was submitted that the 2nd defendant cannot be termed as an innocent purchaser for value without notice given that the evidence led by the 2nd defendant does not support a diligent purchaser.
38. In conclusion it was submitted that the 2nd defendant acquired the 0.2 acres of land unprocedurally and through fraud thus disentitling the 2nd defendant of the defence of bonafide purchaser for value without notice.
39. The 1st defendant submitted that the standard of proof in cases of fraud was higher than that of balance of probabilities required in ordinary cases. That the Plaintiff was aware that Parcel No 75 measured 0.3203 hectares at the time of executing the sale agreement dated the 4/2/2013. That by executing the transfer the Plaintiff agreed to the reduced acreage and is now estopped from denying the same. She relied in the case of *Josephine Mwikali Kikenye Vs Omar Abdalla Kombo & anor* (2018) eKLR in support of the proposition.



40. It was submitted that the court was duty bound to uphold the rights of the parties in a contract in situations where parties willingly entered into the contracts without any fraud, coercion, duress and or misrepresentation.
41. In conclusion the 1st defendant submitted that the plaintiff has not proved the allegations of fraud against the 1st defendant. It was argued that the agreement of sale was an open document, written in English, and that the size of the land was also expressed in both words and digit in the conveyance and the deed plan with no concealment. That the plaintiff failed to ascertain the details as set out in the conveyance. She accused the plaintiff of being casual and indifferent to important aspects of his contractual obligations. Referring to the terms of warranties in the agreement of sale, the 1st defendant argued that the parties were alive to the possibility that the measurement could change upon survey. That the plaintiff has failed to show that 0.2 acres were excised from Parcel 75 and sold to the 2nd defendant to form parcel 73 belonging to the defendant.
42. The dispute is primarily in respect to the position of the boundary between the plaintiffs land Parcel 74 and the 2nd defendants land Parcel 73. The 2nd Defendant submitted that the court does not enjoy the jurisdiction to hear the matter. That the matter being a boundary dispute falls within the province of section 18 (2) of the *Land Registration Act* which divests the court of jurisdiction and places the matter before the Land Registrar for hearing and determination in the first instance. It is only after the matter has been heard and determined by the Land Registrar that it can be escalated to this court. That the plaintiff has not demonstrated that he has exhausted the legal mechanism provided by statute. That this was the position taken by the Court in ELC No 1213 of 2015 between the parties.
43. As to whether the 2nd defendant acquired a valid title in parcel 73 the 2nd defendant relied on the provisions of section 24 of the Registered *Land Act* which provides that the registration of a person as to the proprietorship of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto. That the 2nd defendant purchased the suit land in 2015 free from all encumbrances. That the search on the land revealed that he is the registered owner. That the plaintiff has not proved fraud on the part of the 2nd defendant. equally no evidence was led by the plaintiff to proof any collusion and or fraud in the resurvey of the land. That indeed no evidence was led to show that the lands were resurveyed at all nor 0.2 acres was added to his Parcel of land.
44. Is the 2nd defendant a bonafide purchaser for value without notice? The 2nd defendant submitted in the affirmative.
45. As to whether the plaintiff has trespassed onto the 2nd defendants land, the 2nd defendant submitted that the plaintiff entered into the land without any permission of the 2nd defendant and erected illegal structures on the land. That the 2nd defendant did not acquiesce to the said trespass. The 2nd defendant sought damages in the sum of Kshs 164,815/- and general damages of Kshs 1.0 million.

Analysis & Determination.

46. Having considered the pleadings, the evidence adduced at the hearing, the written submissions and all the material placed before the court the issues that commend themselves are;
- a. Whether this court has jurisdiction to entertain this matter.
 - b. Whether the plaintiff has proven fraud against the defendants.
 - c. Whether the plaintiff has encroached/trespassed on Parcel 73.



- d. Is the 2nd defendant entitled to mesne profits?
- e. Costs of the suit.

Whether this Court has jurisdiction to entertain this matter.

47. Vide his preliminary objection dated May 4, 2020, the 2nd defendant had objected to this court's jurisdiction and this court considered it and found it unmerited pursuant to the ruling delivered on March 4, 2021. No appeal or Review of the said orders was preferred and as such the court's findings remain unchallenged and in force. Accordingly, the issue of jurisdiction is now moot and the court will proceed to determine this suit on its merits.

Whether the Plaintiff has proven fraud against the Defendants

- 48. The plaintiff has sued the defendants for a portion of 0.2 acres which was allegedly excised from Parcel 75 and added onto Parcel 73 belonging to the 2nd defendant.
- 49. It is on record that on the 1/10/2009 the plaintiff entered into a sale agreement with the 1st defendant for the purchase of Parcel 74 measuring approx. one acre. The land was later transferred to the plaintiff vide a conveyance dated the 4/12/2013.
- 50. On the 4/2/2013 the Plaintiff entered into another sale agreement with the 1st Defendant for the purchase of Parcel 75 measuring 0.4005 ha. On the 4/12/2013 the Plaintiff and the 1st Defendant executed the conveyance for the transfer of land Parcel No 75 for the land measuring 0.3203 hectares. It is the Plaintiffs case that Parcel 75 is less in acreage by 0.2 acres and that his house falls on the said portion and outside the boundaries of his two plots ; Parcel 74 and 75. He alleges that the missing 0.2 acres of Parcel 75 was sold and transferred to the 1st Defendant who is the registered proprietor of Parcel 73 and the said sale of 0.2 acres was willful and fraudulent on the part of the 1st and 2nd defendants.
- 51. The 1st defendant's submissions are that she sold Parcel No 75 to the plaintiff and the measurement was clearly indicated in both the conveyance and the deed plan annexed to it. That the plaintiff executed the transfer and he is estopped from claiming otherwise.
- 52. The 2nd defendant on his part has denied the allegations of fraud. He has argued that Parcel 75 does not abutt Parcel 73 registered in his own name. That the plaintiff has encroached on to his land to the extent of 0.3 of an acre.
- 53. The plaintiffs case is anchored in fraud. *Black's Law Dictionary*, 9th Edition defines fraud as thus;
 - “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”
- 54. Fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above the balance of probabilities but not beyond reasonable doubt. The court cannot infer fraud from the



pleadings. It must be pleaded in a particularized manner and proven by leading evidence. The former Court of Appeal for Eastern Africa in *R.G. Patel v Lalji Makanji* (1957) EA 314 stated as follows:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.” See also the case of *Koinange & 13 others v Koinange* [1968] KLR 23

55. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 Ch. D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

56. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. The onus is therefore squarely placed on the shoulders of the plaintiff to prove fraud on the part of the defendants.

57. In the case of *Insurance Company of East Africa vs. The Attorney General & 3 others* HCCC135/1998 it was held that whether there was fraud is, however, a matter of evidence.

58. Equally in the case *Central Kenya Limited Vs Trust Bank Kenya Limited & 4 others* (1996) eKLR the onus of proving fraud is on the party that alleges to lay a basis through evidence that meet the standard of proof which is beyond that of a balance of probabilities, which is higher than in ordinary civil cases.

59. Section 26 of the *Land Registration Act*, provide as follows:

“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.”
60. The plaintiff has pleaded and particularized fraud and illegality under para 14 of the amended Plaint. I shall now analyze the case using the definition cited above, the law and precedents aforesaid to determine whether the Plaintiff has met the test.
61. It is not in dispute that the 1st defendant subdivided Parcel No LR 164/26 into 5 plots namely A B C & D measuring approximately 0.145 ha, 0.400 ha, 0.400 ha, 0.400 ha and 0.46 ha respectively. These plots correspond with the Survey Plan described as FR 536/40 dated the 30/10/2012. The plots are Parcel Numbers 71, 72, 73, 74 and 75 respectively.
62. According to the agreement for sale dated 1/10/2009 the Plaintiff purchased a portion of land measuring one acre and described on the subdivision plan as plot D (L.R NO 164/26) (now Parcel 74) in the sum of Kshs 2.9 Million from the 1st defendant. This is not in dispute. It is the evidence of the plaintiff that upon payment he was shown the boundaries of the land by the 1st defendant and put in possession whereupon he started construction of his house in 2011.
63. It is the plaintiff’s case that he was residing in the USA and so it fell on his older brother Francis Kigo Njenga who was a former Member of Parliament of the area to transact on his behalf. The said Francis Kigo Njenga executed the agreements on his behalf. According to the registered power of attorney on record he was duly appointed as such on the 27/8/2008.
64. To my mind there are two issues raised by the plaintiff under this subheading. The 1st is that Parcel 75 was less in acreage by 0.2 acres. Secondly that the defendants have fraudulently colluded to transfer the said 0.2 acres together with his house to Parcel 73 belonging to the 2nd defendant.
65. I shall analyze Parcel 74 first. According to the sale agreement of 2009 and that of 2013 the land measures one acre. The conveyance of 2013 discloses the land as one acre. The deed plan dated the 18/6/2013 measures 0.4 hectares which is one acre. The measurements in the proposed subdivision plan and the survey plan FR 536/40 agree at one acre for Parcel 74.
66. Parcel 75 is the last plot on the survey map. It measures 0.3203 hectares in the deed plan dated the 18/6/2013 and the survey plan FR 536/40 dated 30/10/2012. This FR was compiled as early as 25/2/2011. The measurement in the deed plan and the survey plan agrees with the acreage in the conveyance executed by the plaintiff which discloses 0.3203 hectares. The agreement for sale however states that the land is 0.4 hectares or one acre. The explanation given by the 1st defendant for the variation is that the shortage came about because of the land reserved for the riparian section along the river frontage. That in any event parties contemplated under special conditions in the agreement dated the 4/2/2013 which stated as follows;
- “The vendor warrants to the purchaser that the property measures one acre and the purchase price will be revised accordingly should this measurement be found to be otherwise.”
67. Was there a resurvey of the land by the defendants? The answer to this question lies in the survey reports prepared by the Government surveyors in 2019 and 2020. The report of 2019 stated as follows;
- “It seems the proprietor of LR. No. 164/74 assumed the existing boundary to be the correct boundary. OR the survey was done after the construction/purchase of the land OR the beacons placed during survey were not pointed out to the proprietors of the said Parcels.

Conclusion



This being a fixed survey they should agree on the available options.

Re-survey to be done to accommodate developments on the ground.

Implement the current survey as per the survey plan.”

68. Pursuant the court orders issued on 15/3/2019 in ELC 1213 of 2015 the Regional Surveyor Nairobi prepared a report which stated as follows;

“The survey field computations showed that the owner of Parcel 74 has encroached onto LR 73 and has built a permanent structure on a portion of it complete with a perimeter wall. The affected portion is 0.1534 hectares and is shown in the attached drawing.

Recommendation

From the findings above it is highly recommended that the owner of plot 74 should be compelled to respect the common boundary as described by beacons R3 and R4 and therefore should remove all the illegal structures that have been erected on the affected portion of LR No164/73.”

69. It is the plaintiff’s case that he was shown the land as per the proposed subdivision in 2009 and that he took over the land before the subdivision was concluded.
70. It is clear that despite the averments of the plaintiff that the defendants resurveyed the lands and took out 0.2 acres from Parcel 75 and added to Parcel 73, that the averment is unsupported by evidence. The surveyor’s reports alluded to earlier demonstrate that there was only one subdivision of the land which commenced as early as Feb 2011 – see the FR 536/40.
71. The second limb of the plaintiff’s case is that Parcel 75 which he acquired in 2013 was less by 0.2 acres. That the 0.2 acres was added to Parcel 73 together with his house and fraudulently sold to the 2nd defendant. I have seen that the measurement of this acquisition as shown in the agreement and the conveyance is at variance. The measurement in the agreement is one acre while in the conveyance is 0.3203 acres. Both the conveyance and the agreement are executed by the plaintiff.
72. I have perused the survey plan FR 536/40, the deed plan and it is clear as day as to the night that Parcel 75 borders the river and abutts Parcel 74. Parcel 74 lies in the middle of Parcel 73 and Parcel 75. Further the acreage in the deed plan and the survey plan is the same; 0,3203 hectares. According to the deed plan dated the 18/6/2013 the total area is 0.782 ha less riparian reserve area which is 0.05779 giving the net area of 0.3203 hectares or 0.8 acres leaving a balance of 0.2 acres. Out of this 0.1 acres has been taken up by the riparian area.
73. I have perused the title documents including the deed plan for Parcel 73 and it shows the measurement as one acre. If the proposition by the plaintiff was correct that 0.2 acres was added to Parcel 73, then Parcel 73 would then be less by 0.2 acres or more by the said measurement. That is not the position. The deed plans for the 3 properties are dated the 18/6/2013 and are based on the same survey plan - FR 536/40, which is the primary document used to register a deed plan. There is also no evidence to show that the 2nd defendant was sold land with a measurement higher than 0.2 acres.
74. The finding is that the plaintiff has failed to lead evidence to show that 0.2 acres was excised from this Parcel and added or sold to the 2nd defendant. No evidence of resurvey, sale, transfer of the said 0.2 acres by the defendants to the 2nd defendant.



75. In the main the court finds that the plaintiff purchased Parcel No 75 measuring 0.3203 Ha and that is what was conveyed to him. The contract of the land was therefore fully performed/satisfied and the issue of specific performance is now spent.
76. In the end it is the finding of this court that fraud has not been proved by the plaintiff.

Whether the Plaintiff has encroached/trespassed on Parcel 73.

77. The *Trespass Act* Cap 294 defines trespass over land to mean any person who without reasonable excuse, enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
78. It is the 2nd defendant's case that the plaintiff has encroached upon his land, Parcel 73 to the extent of 0.1534 or 0.3789 acres as shown in the survey report of 3/2/2019 and that of 8/11/2019 by the Government surveyors. According to the surveyors' reports, the boundaries of Parcel 74 are clearly shown by beacons which exist on the ground. Beacons R5 and R6 run across the building /house of the Plaintiff.
79. It is the plaintiff's case that he was shown the boundaries in 2009 and that in 2011 he commenced the construction of the house. I have already shown that the subdivision scheme of the mother title was available as early as 2009 as admitted by the Plaintiff. The survey work was underway as early as 2011 and the deed plans were registered on the 18/6/2013. If the account of the Plaintiff is to be taken as factual, it therefore follows that the Plaintiff encroached on to the 1st Defendants land from 2009 – 2015. When the land was sold to the 2nd Defendant the trespass continued against the 2nd Defendant from 5/8/2015 when he became registered proprietor of the land.
80. I have seen the demand letters dated the 2/10/2015, and 21/10/2015 where the 2nd defendant's advocates brought to the attention of the plaintiff that the suit land is owned by the 2nd defendant and demanded to stop the encroachment. The 2nd defendant became registered as proprietor of the land on 5/8/2015 and immediately wrote to the plaintiff to desist from encroaching his land. According to the 2nd defendant he acted immediately to protect his property and there was no acquiescence in the wrong doing by the Plaintiff.
81. Section 24, 25 and 26 of the *Land Registration Act* enjoins this Court to take the 2nd defendant on the basis of the title (see official land search dated the 1/9/2015) as the absolute and indefeasible owner of the suit property. As an absolute owner the law entitles him to the enjoyment of the rights and privileges associated with such ownership which includes the exclusive use possession and enjoyment of the land without interference from any third party, the Plaintiff included.
82. I am satisfied from the material placed before me that the 2nd defendant is the registered proprietor of Parcel 73. The 2nd defendant has accused the plaintiff of encroaching upon his land and putting up a permanent house and therefore annexing a portion of 0.378 acres. The plaintiff having entered onto the 2nd defendant's land without lawful or justifiable cause amounts to trespass to land.
83. The 2nd defendant has sought orders for mesne profits equivalent to rent payable for land measuring 0.3789 acres in the area from 17/6/2015. Mesne profits are sums of money paid for the occupation of land to a person with right of immediate occupation, where no permission has been given for that occupation. In the case of *Maina Kabuchwa v Gachuma Gacheru* (2018)eKLR, the court held that:-

“Where a party claims for both mesne profits and damages for trespass, the court can only grant one.”



84. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“Mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

85. Order 21 rule 13 of the *Civil Procedure Rules* provides as follows:-

13.

- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—
 - (a) for the possession of the property;
 - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

86. The Court of Appeal in the case of *Attorney General v Halal Meat Products Limited* [2016] eKLR considered when mesne profits could be awarded. The Court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.”

87. According to the 2nd defendant’s valuation report on record which was not challenged by the plaintiff, rent for 0.4 ha in the area is Kshs 164,815 per month. Using the monthly rental as a basis, then he argued that the rental for the encroached portion is Kshs 63,127/64 per month.

88. Mesne profits as alluded above is a genre of special damages which must be proved. I am persuaded that the 2nd defendant has proved damages and the Court finds no reason to decline the same. Having granted the prayer, I see no reason to determine prayer No (c) as the same is repetitive.

89. In the end the plaintiffs case fails against the defendants.

90. Accordingly, I enter judgement in favour of the 2nd defendant in the counter claim as follows;

- a. A mandatory order directed at the plaintiff, his servants, employees, representatives, agents and /or any other person to vacate the encroached portion of the Land Reference Number



164/73 measuring approx. 0.1534 Ha or 0.3789 acres and remove all the structures thereon and restore the 2nd defendants property to its original state within 90 days of the date of this judgement.

- b. That if the plaintiff does not comply with the order in a above the 2nd defendant be at liberty to evict the plaintiff from Parcel 164/73 under the supervision of the Officer Commanding Police Station, Tigoni Police Station, Kiambu County at the plaintiff's cost.
- c. An order directed at the plaintiff to pay the 2nd defendant mesne profits equivalent to rent payable for land measuring 0.153 ha or 0.3789 acres in the area from the 21/10/2015 in the sum of Kshs 63,127/64.
- d. Interest on (c) above at court rates from the due date until payment in full.
- e. Costs of the suit and the counterclaim are in favour of the 2nd defendant.

91. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent

Ms. Mwaura for 1st Defendant

Kimani for 2nd Defendant

Court Assistant - Phyllis

