



**Rufus & another v Kirima (Environment & Land Case 95 of 2013)
[2022] KEELC 2636 (KLR) (13 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2636 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 95 OF 2013**

**CK NZILI, J
JULY 13, 2022**

BETWEEN

GLORY NKUENE RUFUS 1ST PLAINTIFF

MARTIN KOOME KIAMBATI 2ND PLAINTIFF

AND

GORGE KIRIMA ALIAS GEORGE KIRIMA MUGAMBI DEFENDANT

JUDGMENT

Introduction

1. The plaintiffs as administrator(s) of the late Rufus Kiambati M'Ikuri deceased and the owner of L.R No. Kiirua/Naari/Maitei/59 hereinafter the suit land sued the defendant for allegedly trespassing into and leasing out and or cultivating part of the suit hence denying them their right to use, occupy and or own the said suit land despite its distribution out of the succession cause and subsequent attempt to subdivide and transfer the same to the beneficiaries. They sought for an order to stop the defendant from his said acts afore pleaded and a permanent injunction from entering, cultivating, building and or interfering with their quiet occupation.
2. The defendant denied the claim, averred there had been previous suits over the suit land and a succession cause. Further the defendant averred that there was in existence of a caution over the suit land.
3. Additionally, the defendant urged the court to order the district land registrar and surveyor Meru to visit and establish the actual boundary dimensions between the suit land and L.R No. Kiirua/Naari/814. He sought for a declaration that he had acquired the suit land by way of adverse possession hence he was entitled to be registered as an adverse owner in place of the plaintiffs.



Evidence

4. The plaintiffs case was the suit land was initially owned by the late Marion Nkongwe Rufus with effect from January 22, 1974 following whose death her father sought for and obtained a title deed under his name as per the entry of June 21, 1981 in the green card, grant of letters of administration issued on 19.6.2006, certificate of confirmation of grant, ruling and judgment in Meru High Court ELC No. 321 of 1993 which he produced as P. exh 1, 2, 3, 4 & 5 respectively.
5. In cross examination the PW 1 stated late mother acquired the land in 1974. That after the death of her deceased mother the process of succession was legally initiated and that the defendant's objection was dismissed since he was not a family member. She insisted the defendants in Meru H.C ELC suit had abated as indicated in P. exh No. 4.
6. DW 1 adopted his witness statement dated April 15, 2015 and produced the documents in his list of documents dated April 16, 2019 as D. exh 1-36 respectively.
7. In cross examination DW 1 admitted he used to stay on the suit land and allegedly constructed a house therein in 1967. He stated the late Rufus had allegedly colluded with land officials to take away his late father's land as per D. exh (7) even though D. exh 18 and 19 showed the registration occurred after a confirmation of grant.
8. Regarding the suit in 1993, DW 1 insisted the land officials colluded with the late Rufus and declined to hear his late father's complaint. Asked by the court DW 1 testified he was occupying about 23 acres of the suit land; that his prayer was that the boundary be established; that he had not pleaded any fraud illegalities and or collusion nor had he lodged a complaint with the police for any investigations to be commenced over the manner in which the plaintiffs had acquired the suit land.
9. DW 2 adopted his witness statement dated December 15, 2015. He confirmed that it was the plaintiffs who were occupying the land and that he had planted wheat thereon. He could not tell how he allegedly became a registered owner yet he at one time he had built a house thereon for the 1st defendant.
10. DW 3 adopted his witness statement dated December 15, 2015. He stated he was present during the land adjudication and saw the defendants deceased father fencing the suit land. Further he confirmed the plaintiffs late father occupied the land in 1973, planted wheat and continued leasing the land to third parties. DW 3 stated it was DW 1 who was occupying the land at the time of his testimony.

Written Submissions

11. With leave of court parties filed written submissions dated February 9, 2022 and February 8, 2022 respectively. According to the plaintiffs the issues for determination are; whether the plaintiffs are the legal owners of the suit land; If they acquired the land lawfully, and lastly if they were entitled to the prayers of permanent injunction.
12. On the first issue the plaintiffs submitted they had proved the manner of acquisition and ownership as per Sections 24, 25 & 26 of the [Land Registration Act](#) hence their title deed was protectable in law given the defendant did not plead and or produce anything to show any illegalities, fraud, collusion, misrepresentation or overriding interests as per Section 26 & 28 of the [Land Registration Act](#) to the required standards.
13. Reliance was placed on [Willy Kipsongok Morogo v Albert K. Moorgo](#) [2017] eKLR, Bullen & Leake & Jacobs, *precedence on pleadings 13th Edition* at page 421 [Kenya Power and Lighting Co. Ltd v Sheriff Mulama Habib](#) [2018] eKLR, [Giella v Cassman Brown & Co. Ltd](#) [1973] EA 358. [Justice Magare](#)



Bosire v Isaac Omboga [2018] eKLR *Margaret Njeri Wachira v Eliud Waweru Njenga* [2018] eKLR and *Shadrack Kuria Kimani v Stephen Gitau Nganga & another* [2017] eKLR.

14. On the other hand, the defendant submitted the suit land had no title deed due to the caution lodged on January 10, 1977 by his late father contrary to the official search dated August 29, 2017.
15. The defence submitted that any purported land registration since there was a caution was fraudulent and that any developments thereon by the plaintiffs were with full knowledge that the suit land had a case and a caution. He urged the court to allow his counterclaim.
16. Having gone through the pleadings, evidence and written submissions the issues commending themselves for my determination are:
 - (a) If the plaintiffs have pleaded and proved ownership of the suit land.
 - (b) If the defendants defence and counter claim is valid in law.
 - (c) If the defendant has proved any defence and counterclaim to the suit.
17. It is trite law that parties are bound by their pleadings and issues flow from pleadings. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. In this suit the plaintiffs pleaded that the suit land was registered on January 22, 1974 in favour of the late Marion Rufus Kiambati, the wife to the late Rufus Kiambati who obtained the same out of a succession cause. The plaintiffs produced a copy of the record for the suit land, grant and a confirmed grant as P. exh 1-2. Similarly, the plaintiffs produced a ruling from the Probate Court in which the defendant's objection to the confirmed grant was dismissed and the suit namely Meru ELC No. 321 of 1993 was declared to have abated.
18. No evidence was tendered by the defendant to show that the abated suit was reinstated after a successful appeal to the order made on 6.3.2013. Similarly, there is no evidence produced that the confirmed grant issued on October 9, 2007 in favour of the plaintiffs was set aside, reviewed and or revoked in favour of the defendant.
19. It is trite law that fraud must be specifically pleaded and proved to the required standard as held in *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 others* [2015] eKLR.
20. In this suit, the defendant has not pleaded any fraud, illegality, collusion or misrepresentation in the manner the plaintiffs acquired the title in the first instance and the land came to the possession of the late Rufus Kiambati. The defendant did not produce any complaint letter or seek any summon the Land Registrar and any of its officials to attend court and clarify when and how the caution lodged in 1977 was removed and registration thereafter effected in favour of the plaintiffs..
21. In absence of any such evidence my finding is that the plaintiffs title to the land remains unchallenged both from the title the record was opened in 1974, and the subsequent changes in 1981. The onus was on the defendant under Section 107 to 109 of the *Evidence Act* to prove fraud, illegality and misrepresentation.
22. In *Emfil Ltd v Registrar of Titles Mombasa & 2 others* [2014] eKLR the Court of Appeal held that allegations of fraud are serious in nature hence their degree of proof was higher than in the ordinary suits.
23. It was not enough for the defendants to testify that there was fraud without pleading the same and calling evidence to back up such allegations.



24. The defendant in an attempt to cast aspersion on the title deed sought to produce the elders award. In my view the elders have no jurisdiction to determine matters relating to Registered Land and which fall ideally on the Probate Court. See *Khayadi v Hebert Aganda* [1988] eKLR.
25. Again, once the defendants' suit abated no evidence was tendered by the defendant if the same was not revived. Instead of seeking to reinstate that suit the defendant opted to pursue his claim through this claim.
26. The defendant filed a defence dated April 26, 2013, in the body of the defence the defendant did not plead any counterclaim in line with Order 7 Rule 5, 7 & 8 of the *Civil Procedure Rules*. Even though the prayers in the defence were assessed and paid for as a counter claim, it was not titled as a counterclaim and accompanied by a verifying affidavit to that effect as required under Order 7 Rule 5 *Civil Procedure Rules*.
27. In *Bridge Up Container Services Ltd v C.F.C Stanbic Bank Ltd* [2011] eKLR, the court held a counter claim must of necessity be accompanied by a verifying affidavit verifying the correctness of the averments therein.
28. In *Kenya Commercial Finance Co. Ltd v Richard Nkwesera Onditi* Civil Application No. Nairobi 329 of 2009 the Court of Appeal held courts have wider powers and will not automatically strike out offensive pleadings and must rise up to the higher justice by sustaining the case if there would be no prejudice to the other party.
29. In this suit the plaintiffs did not reply to the defence and the purported counter claim. That notwithstanding, I find the same not fatal given parties were able to ventilate their respective claims. See *Nicholas Kiptoo Arap Salat v IEBC & 7 others* [2014] eKLR. Be that as it may a counter claim in *Kibona v Tansan Timber Co. Ltd* [1995-1998] 1 EA 121 was held as a case on its own right completely different from the plaintiff's case which calls or succeeds on its own merits. The court held it had to be headed by the term counter claim in bold capital letters.
30. In *Samaki Industries Nairobi Ltd v Samaki Industries (K) Ltd* [1995 – 1998] 2 EA 369, the court held a counter claim was substantially a cross suit and an independent suit.
31. The plaintiffs have attacked the defendant's claim by stating that previous suits had abated and that the matters raised in the defence were determined by a competent court to finality. More particularly, the plaintiffs have produced the previous decisions and a decree in the Probate Court and the order declaring the defendant's suit to have abated.
32. As indicated above there was no evidence tendered that the judgment dated November 14, 2018 had been appealed against by the defendant as well as the order confirming abatement made on March 6, 2016 in Meru ELC No. 321 of 1993. In absence of such evidence after 2016, I find the defendants exhibits no's 1-29 irrelevant and of no probative value as against the plaintiffs oral and documentary evidence.
33. Further and as regards D. exh 30-36, there was no specific pleading in the body of the defence over a boundary dispute between Parcel no. L.R Kiirua/Naari/814 and the suit premises. The court also has no powers to handle a boundary dispute in terms of Section 18 of the *Land Registration Act*. Further the defendant did not call any evidence to prove any encroachment or trespass of his land by the plaintiffs.
34. Therefore, I find the defendant's evidence in support of his defence and counter claim lacking merits, unsubstantiated and falling short of the threshold as to regards fraud, illegality and misrepresentation. The same is dismissed with costs.



35. Consequently, I find the plaintiffs have proved ownership to the suit land hence entitled to protection of the law by way of a permanent injunction. An order shall therefore issue directed at the defendant to deliver up vacant possession of the suit land forthwith and a permanent injunction to issue barring and restraining the defendant, his agents, servants or employees from entering into, trespassing or in any way whatsoever interfering with the plaintiffs' quiet enjoyment and occupation of the suit premises.
36. Costs of the suit shall be borne by the defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 13TH DAY OF JULY, 2022

In presence of:

Gikundi for plaintiff's

Defendant in person

HON. C.K. NZILI

ELC JUDGE

