



**Karumu Company Limited v Njoroge (Sued as the personal representative of the Estate of Amos Kinyanjui Njoroge - Deceased) (Environment & Land Case 661 of 2016) [2022] KEELC 14649 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14649 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 661 OF 2016  
OA ANGOTE, J  
NOVEMBER 3, 2022**

**BETWEEN**

**KARUMU COMPANY LIMITED ..... PLAINTIFF**

**AND**

**FAITH WAMBUI NJOROGE ..... DEFENDANT**

**SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF AMOS  
KINYANJUI NJOROGE - DECEASED**

**JUDGMENT**

**Background**

1. *Vide* a Plaint dated June 20, 2016, which was orally amended on October 25, 2021, the Plaintiff seeks the following reliefs against the Defendant;
  - i. A permanent injunction restraining the Defendant by herself, her agents, servants and/or employees from trespassing upon, disposing of, selling, charging or in any way interfering with L.R No 13479 which property is fraudulently numbered as 13478/15 and registered as L.R 64162.
  - ii. An injunction restraining the Defendant from entertaining any dealings in LR 64162.
  - iii. An injunction restraining the Chief Registrar of titles from entertaining or registering any dealings touching on title I.R 64162.
  - iv. General damages for trespass
  - v. Costs of the suit.



2. The Plaintiff averred in the Complaint that it is and has at all material times been the registered proprietor of L.R No 13479 South East of Limuru Town (hereinafter the suit property) and is in the process of acquiring title for the same and that the suit property is a portion of agricultural freehold L.R 152/8 South East of Limuru Town which the Plaintiff planned for, and obtained government approvals for its sub-division into 68 sub-plots, 65 of which numbers 1,2,3,6-21 and 23-68.
3. The Plaintiff averred that on the approved sub-division scheme plan, the Plaintiff's company shareholders were to be allocated plots for residential use while sub-plots 4, 5 and 22 were reserved for development of a motel/shops, company offices, a church and a nursery school.
4. The Plaintiff's case is that the survey was approved in 1986; that upon change of user, L.R 152/8/1 morphed into L.R 13478 comprising of 65 residential user portions which were designated as L.R 13478/1-13478/65 (deed plans 128801 to 128865) and L.R 152/8/2 morphed into L.R 13479 (deed plan no 128798 representing plot number 5 in the sub division scheme meant for company offices).
5. According to the Plaintiff, L.R No 152/8/3 morphed into L.R 13480 (deed plan 128799 corresponding to sub-plot 4 in the sub-divisional scheme plan meant for motel and shops development) while L.R 152/8/4 morphed into L.R 13481 (deed plan 128800 corresponding to sub-divisional scheme plan plot No 22 for church and nursery school).
6. According to the Plaintiff, the deceased, Amos Kinyanjui Njoroge, was one of its shareholders and was duly allocated L.R 13478/65 (deed plan 128865) for title L.R 56344; that the above notwithstanding, Mr. Njoroge subsequently and without the approval of the Plaintiff procured a deed plan no 188640 in 1994 replicating the features of the 1987 Director of Survey approved deed plan 128798 for L.R 13479 and presented the irregularly procured deed plan 188640 to the Commissioner of Lands to secure title L.R 64162.
7. It was averred that the Defendant further fraudulently purported to amend the approved sub-divisional scheme and survey plan (F/R 179/19-20) for L.R 152/8 S.E of Limuru, which plans were approved in 1983 and 1986 respectively, causing the Director of Surveys to sign a fraudulent deed plan and the Commissioner of Lands to issue title IR 64162 on the strength of a fraudulent deed plan 188640. The Plaintiff seeks a revocation of the Certificate of Lease I.R 64162 issued to the Defendant.
8. The Defendant filed a Defence in which she denied the averments set out in the Complaint and averred that the deceased Defendant was initially allocated Plot No. 42 (L.R No 13478/65); that in a meeting held on 23<sup>rd</sup> January, 1990, it was agreed that the plot be exchanged with Plot No 5 since the Plaintiff had declared the former a public cemetery and that the exchange was done with the consent of the Plaintiff.
9. The Defendant averred that at the time of his death, the deceased was the registered proprietor of the property known as L.R No 13478/15 and having obtained the letters of administration, she is entitled to manage the same; that the Plaintiff's claim is barred by Section 7 of the *Limitation of Actions Act*; that further, the Plaintiff's suit is fatally defective because the verifying affidavit attached to the Complaint has been executed by a person who is not a Director of the Plaintiff.

## Hearing & Evidence

10. PW1 informed the court that he is and has been the secretary of the Plaintiff's board since 1978; that he has been duly authorized to swear the Affidavit by the Plaintiff; that sometime in 1974, the company acquired land being L.R 152/8 South of Limuru Town; that the property was acquired with the aim of settling the company's shareholders and that the property was informally sub-divided into 65 portions and those members with one share were asked to ballot first and those with two shares came later.



11. PW1 stated that after the formal sub-division, it was advised that the members remain with the plots allocated to them during the informal exercise; that three additional plots were created for utilities being Plot No 4 which became L.R No 13480, Plot No 5 which became L.R No 13479 and Plot No 22 which became L.R 13421 and that Amos Kinyanjui Njoroge was allocated Plot No 40 which corresponded with L.R 13478/65.
12. PW1 stated that in the process of re-allocation of L.R 13479, they discovered that it had been interfered with to read L.R 13478/15; that someone had duplicated a Deed Plan for L.R No 13479 which was fenced off by the Defendant; that the files in respect of the three public utilities disappeared from the lands office and re-appeared in March without the Deed Plans and that they obtained certified copies of the Deed Plans from the survey office.
13. During cross-examination, PW1 testified that he is in custody of all the documents in relation to the company; that the title for L.R 13478/15 is in the names of Amos Kinyanjui Njoroge; that the minutes in the Defendant's bundle relate to a complaint by the deceased and that it is true that the deceased produced receipts which were found to have been issued by the company and that the balloting was done in 1974.
14. It was the testimony of the Plaintiff that whereas the deceased and his friend paid an extra 1000, they were not entitled to more shares, that the money was for "mbuzi" for "wazees"; that the Defendant was allocated Plot number 42 which became L.R 13478/65; that title L.R 13478/15 belonged to Charles Ndungu Wangige and that the document indicating that L.R 13478/15 belongs to the deceased did not originate from the Plaintiff neither did its directors sign the transfer documents.
15. It was the evidence of PW1 that he is unaware that the deceased has been on the property since 1994; that they only discovered the fraud in the year 2011; that they have not wound up the company; that Plots No 65 and 15 are still on the ground and are undeveloped; that they gave the deceased plot 65 and not 15 and that L. R. No. 13479 and L. R. No.13480 have been re-numbered to read 13478/15 and 13478/65.
16. DW1 informed the court that he is the son of the late Amos Kinyanjui; that prior to his death, his deceased father, Amos Kinyanjui, was the registered proprietor of L.R 13478/15; that his father purchased two shares from the Plaintiff although he was only allocated one parcel of land and that this caused a dispute between the deceased and the Plaintiff which was arbitrated upon by the D.O, Kiambaa.
17. DW1 stated that in a meeting chaired by the Assistant Commissioner, it was agreed between the Plaintiff and the deceased that his plot number 42 should be exchanged with plot 5 and that after the exchange, he took possession of the suit property and remained in possession thereof until his demise in 2000.
18. In cross-examination it was his testimony that he does not have the receipts issued to his father by the Plaintiff; that they have the title deed for the suit property; that he has not seen an allotment letter for the land; that there was a dispute with respect to the exchange of the plots and the same is not an afterthought and that the letter he produced is genuine.

## **Submissions**

19. The Plaintiff's counsel submitted that L.R 13478/15 of title I.R 64162 is as a result of fraud and the said property is actually L.R 13479 (Deed Plan 128798); that the true L.R 13478/15 Deed Plan 128815 is a sub-divisional plot of L.R 13478, the re-designation of residential user block L.R 152/8/1 and that it is apparent that there was tampering of the survey plan because it indicates both L.R 13479



and L.R 13478/15 as Plot reference numbers for the same ground location. According to counsel, the irregularly and fraudulently acquired Deed Plan 188640 of Amos Njoroge's title I.R 64162 has also been added as a plot alongside Deed Plan 128794.

20. The Defendant's counsel submitted that the Plaintiff has laid out grave allegations of fraud on the part of the Defendant as well as the Director of Surveys and the Commissioner of Lands/Registrar of Titles and that the Plaintiff was required to strictly prove the same, which it has failed to do contrary to the decision of the Court of Appeal in *Kinyanjui Kamau vs George Kamau Njoroge* [2015] eKLR.
21. It was submitted by the defense that the deceased paid a sum of Kshs 2,387 for two shares entitling him to two plots; that a dispute arose with respect to the Defendant's allocations which was finally resolved vide a meeting of January 23, 1990 where it was agreed that his Plot No 42 would be exchanged for Plot No 5 and that the exchange required a new deed plan to be issued.

### **Analysis & Determination**

22. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
  - i. Whether the suit is competent?
  - ii. Whether the Plaintiff has proven the allegations of fraud as against the Defendants?
  - iii. Whether the Plaintiff is entitled to the orders sought.
23. The Defendant has alleged that the suit is time barred. Section 7 of the *Limitation of Actions Act* provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

24. Indeed, the aforesaid section makes it clear that a claim founded on recovery of land should be filed within a period of 12 years, failure to which it will be time barred. However, this section does not stand in isolation. Section 26 of the same Act provides that:

“Where, in the case of an action for which a period of limitation is prescribed, either—

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or



(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

25. Under section 26 of the *Limitation of Actions Act*, where fraud is alleged as in this case, time does not begin to run until the fraud is discovered or could have with reasonable diligence been discovered. This position was affirmed by the Court of Appeal in the case of *Kenya Ports Authority vs Timberland(K)Ltd* [2017]eKLR.
26. The Plaintiff herein asserts that it discovered the fraud in respect of the suit property in 2011 when it sought to obtain Deed plan 128798 to facilitate acquisition of the title for L.R 13479 which had been re-allocated to the company in 2007. This assertion by the Plaintiff has not been rebutted. The period between the discovery of the alleged fraud in 2011 and the filing of the suit in 2016 is less than the anticipated 12 years. In the circumstance, the Court finds that the suit is not time barred.
27. According to the Defendant, the suit is fatal because the verifying affidavit has been signed by Renson Karugu Waiganjo who is neither a Director nor a shareholder of the Company. The Defendant in this respect adduced a copy of a search showing the Plaintiff’s Directors/Shareholders as Kiara Huingi, Joseph Kariuki & Kimani Mwangi.
28. The Court has considered the record. The Plaintiff was accompanied by a verifying affidavit sworn by one Renson Karugu Waiganjo who stated that he is a Director of the Plaintiff and is duly authorized to act on its behalf. Further to this, the Plaintiff filed a written authority to institute and continue proceedings which indicates that Renson Karugu Waiganjo has been given authority to institute and continue with these proceedings by the Plaintiff’s Directors.
29. At this point, it is crucial to point out that Renson Karugu’s designation in the Plaintiff’s company is not in issue. This would in any event be an internal matter. What is in issue is whether he has the requisite authority to commence and sustain these proceedings on behalf of the Plaintiff.
30. Order 4 Rule 1 (4) of the *Civil Procedure Rules* provides that where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. There being no evidence to show that the Plaintiff is not an officer of the Company and, there being no contestation as to the validity of the authority so issued, the Court finds no merit in this objection.
31. The Plaintiff has instituted this suit seeking inter-alia permanent injunctive orders restraining the Defendant from any dealings with L.R No 13479 allegedly fraudulently numbered as 13478/15 and registered as L.R 64162. It is the Plaintiff’s case that it is a land buying company and sometime in the 1970’s, it acquired a large parcel of land known as L.R 152/8 situate in South East of Limuru Town.
32. It is not disputed that the Plaintiff informally sub-divided the property into 65 sub-plots where they settled their shareholders; that between 1981 and 1984, a formal sub-division was carried out in line with the Commissioner of Lands sanctioned sub-division scheme which incorporated 3 more non-residential specific user sub-plots being plot 4, 5 and 22 which were set aside for shop/motel, company offices and church/nursery school respectively.
33. According to the Plaintiff, sometime in 1992, the Commissioner of Lands processed and released the titles to the Company which in turn issued them to its shareholders; that whereas the deceased Amos Kinyanjui Njoroge was issued with Title L.R 56344 for L.R 13478/65, he proceeded to fraudulently acquire Deed Plan Number 188640 for L.R 13478/15 which replicates the genuine L.R 13479.



34. It was argued by the Plaintiff that sometime in 1994, the deceased caused the Commissioner of Lands to issue him with title I.R 64162 in his name adopting L.R 13478/15 as the new parcel number whilst in reality L.R 13478/15 was already in existence and had been issued to Charles Ndungu Wangige and that it was only in 2011 that the Plaintiff discovered the fraud when it sought to obtain Deed plan 128798 to facilitate acquisition of the title for L.R 13479 which had been re-allocated to the company in 2007.
35. In support of its case, the Plaintiff adduced in evidence the sub-divisional scheme plan for L.R 152/8, approved sub-divisional plan for L.R 152/8 of February 2, 1983, May 12, 1983 and May 18, 1987, approved survey plan FR 179/19-20, a list of plot allocations dated January 7, 1991, Deed Plan 128798 for L.R 13479 dated March 3, 1987, correspondence between the Plaintiff and the Commissioner of Lands with respect to the sub-divisions and a copy of the search for title I.R 64162 for L.R 13478/65 dated March 12, 2012.
36. On the other hand, it is the Defendant's case that the deceased Amos Kinyanjui Njoroge is the rightful proprietor of the property L.R No 13478/15 having been so registered on 16<sup>th</sup> December, 1994 and that the deceased paid for two shares in the company and was entitled to two plots.
37. According to the Defendant, the deceased was only allocated one plot being plot number 42- L.R No 13478/65 leading him to lodge a complaint with the Plaintiff company and that during the hearing of the dispute, it was revealed that all the plots had been allocated and the only available remedy was for the deceased to be refunded his monies.
38. It was averred by the Defendant that in a meeting chaired by the Assistant Chief and members of the Plaintiffs' Company, it was agreed that the deceased's plot No 42 be converted into a public cemetery and in its place, he would be allocated plot no 5.
39. DW1 adduced into evidence grant of letters ad-litem intestate issued on March 27, 2006, Grant I.R 64162 registered on December 16, 1994, minutes of the plot dispute heard on October 1, 1984 and May 3, 1985, letters by the deceased to the Chief Kiambaa dated 19<sup>th</sup> December, 1989 and January 23, 1990, sub-division scheme for L.R No 152/8, Kiambaa Division and the company search form issued by the Registrar of Companies in respect to the Plaintiff.
40. The Defendant has adduced into evidence a search of the property-L.R 13478/15, which shows that the deceased, Amos Kinyanjui Njoroge, is the registered proprietor of the suit property having been so registered on December 16, 1994 under the *Registration of Titles Act*. By dint of the provisions of Section 107 of the *Land Registration Act*, the law applicable to the title held by the Defendant is the *Registration of Titles Act*, Cap 281 Laws of Kenya (now repealed).
41. The repealed Section 23 (1) of the *Registration of Titles Act* (RTA) and the new Section 26 (1) of the *Land Registration Act*, No. 3 of 2012 embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. Section 23 (1) of the *Registration of Titles Act* provides as follows:-
  - “23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”



42. Whereas title is protected, the protection can be removed and title impeached, if it is proved to have been procured through fraud or misrepresentation to which the person is proved to be a party, or where it is procured illegally, un-procedurally, or through a corrupt scheme.
43. The Plaintiff contends that the Defendant's title to L.R 13478/15 was acquired fraudulently. In determining this assertion, the court will be guided by Section 107 of the *Evidence Act* Cap 80 which provides that:
- “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.”
44. The *Black's Law Dictionary* defines fraud 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. Fraud, as applied to contracts, 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 unconscientiously advantage is taken of another.”
45. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR where the Court 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.”
46. The Plaintiff has particularized the elements of fraud against the Defendant as fraudulently obtaining a deed plan 188640 without the knowledge and approval of the company; purporting to retroactively amend the official approved sub-divisional scheme plan and survey plans(F/R 179/19-20) for L.R 152/8 S.E; fraudulently causing the Director of Surveys to sign a fraudulent deed plan 188640 and fraudulently causing the Commissioner of Lands and Registrar of Titles to issue title IR 64162 on the strength of a fraudulent Deed Plan.
47. The Court has considered the totality of the evidence. The Plaintiff has succinctly set out the history of its acquisition of the suit property being L.R 152/8 and its subsequent sub-division into different parcels of land, all of which is undisputed. The point of divergence is the Defendant's acquisition of L.R 13478/15 which the Plaintiff contends is L.R 13479 which was reserved for a public utility.
48. The Court has considered the Deed Plan no 128798 of March 3, 1987 for L.R No 13479 vis a vis the Deed plan 188640 dated August 17, 1994 for 13478/15. The two are identical in respect of size and location. Clearly, this cannot be because one piece of land cannot have two deed plans.



49. The documents adduced shows that L.R 13478/15 was already in existence by 1994, the same having been issued to Charles Ndungu Wangige. Indeed, it has not been alleged that Charles Ndungu Wangige sold L.R 13478/15 to the deceased.
50. Further, whereas the Defendant asserts that the Plaintiff agreed to exchange the deceased's plot 42 with Plot No 5, no evidence was adduced by the Defendant to confirm this position. In any event, it is clear that Plot 5 was already set aside for company offices. In the circumstances, the only conclusion that this court can arrive at is that the Defendant was involved in a fraudulent scheme resulting in the registration of the suit property into his name.
51. It is trite that where a person's title is under attack, he/she must of necessity give an account of its acquisition. In the case of *Munyu Maina vs Hiram Gathiba Maina* [2013]eKLR, the Appeal Court held that: -
- “We stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
52. In the present circumstances, the Defendant has completely failed to show how the deceased acquired the title to the suit property. No evidence was produced to show that in addition to LR No. 13478/65 which was allocated to the deceased, he acquired a second share and that the Plaintiff agreed to allocate him a second plot which had already been reserved for public purpose.
53. For the reasons given above, I allow the Plaintiff's claim as follows:
- a. An order is hereby issued cancelling the title for L.R. No. 13478/15 and registered as I.R 64162 in the name of Amos Kinyanjui Njoroge (deceased).
  - b. A permanent injunction does hereby issue restraining the Defendant by herself, her agents, servants and/or employees from trespassing upon, disposing off, selling, charging or in any way interfering with L.R No 13479 which property is fraudulently numbered as 13478/15 and registered as I.R 64162.
  - c. An injunction does hereby issue restraining the Defendant from entertaining any dealings in I.R 64162.
  - d. An injunction does hereby issue restraining the Registrar from entertaining or registering any dealings touching on title I.R 64162.
  - e. The Defendant to pay the costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022.O.**

**A. ANGOTE**

**JUDGE**

**In the presence of;**

Mr. Ochieng for Plaintiff

Mr. Burugu for Defendant



