



**Kariuki v Kawa & 2 others (Civil Suit 325 of 2011)
[2024] KEHC 9066 (KLR) (Civ) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9066 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 325 OF 2011

CW MEOLI, J

JULY 23, 2024

BETWEEN

JONAH NJUGUNA KARIUKI PLAINTIFF

AND

**FRANCIS KIIO KAWA ALIAS BENARD MULWA MWENZWA 1ST
DEFENDANT**

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

GATHII IRUNGU & CO. ADVOCATES 3RD DEFENDANT

JUDGMENT

1. Jonah Njuguna Kariuki (hereafter the Plaintiff) instituted the present suit that is primarily founded on the torts of fraud and misrepresentation, by way of the plaint dated 8.08.2011. The Plaintiff sought against Francis Kiio Kawa alias Benard Mulwa Mwenzwa, the Hon. Attorney General and Gathii Irungu & Co. Advocates (hereafter the 1st, 2nd and 3rd Defendants respectively) special damages in the sum of Kshs. 931,747.60, general damages, costs and interest.
2. The Plaintiff averred that at all material times, the 1st Defendant herein falsely represented himself as the registered owner of the parcel of land known as L.R. No. Nairobi/Block 110/882 (the subject property). The Plaintiff averred that on the premise of said false representation, the 1st Defendant on 21.06.2005 caused the subject property to be advertised for sale and subsequently re-advertised on 23.06.2005, the 1st Defendant providing therein certain telephone details.
3. It was averred that the Plaintiff called the telephone number provided in the advertisement to enquire on the subject property, and upon conversing with one Mr. Koigi, received information that the said property belonged to his brother, namely Kimani. That subsequently, the Plaintiff while in the



company of one Mr. Muriuki, visited the subject property. That upon demanding a copy of the title document in respect of the said property, the Plaintiff was informed that the same was in the possession of the 3rd Defendant herein, the latter of who later availed copies of the title document and official searches pertaining to the subject property.

4. The Plaintiff averred further that both he and his wife conducted an independent official search dated 12.07.2005 with the Nairobi District Land Registry, on the subject property, the results which confirmed the 1st Defendant as being a joint proprietor thereof (vide Search No. 197/7/05) together with Mr. Kimani. That both searches were duly signed by Land Registrar J.N. Kimani, an employee/agent of the 2nd Defendant.
5. The Plaintiff averred that after his confirmation of the status and ownership of the subject property, an agreement of sale dated 5.08.2005 between the 1st Defendant and the Plaintiff, was prepared by the 3rd Defendant (in its capacity as lawyer for the 1st Defendant). By the said agreement, the Plaintiff agreed to purchase the subject property from the 1st Defendant at a negotiated price of Kshs. 920,000/- out of which Kshs. 645,000/- would be paid to the vendor and the balance of Kshs. 275,000/-, directly with the Nairobi City Council to settle outstanding dues.
6. That pursuant to the agreement, the Plaintiff incurred expenses in the total sum of Kshs. 931,747.60, particularized at paragraph 12 of the plaint as follows:
 - i. Purchase price paid to the 1st Defendant Kshs. 645,000/-
 - ii. Sums paid to Nairobi City Council in obtaining the Clearance Certificate Kshs. 123,542.60/-
 - iii. Stamp duty paid to KRA Kshs. 60,205/-
 - iv. Valuation report fees Kshs. 20,000/-
 - v. Cost of fencing the subject property Kshs. 55,000/-
 - vi. Conveyance fees Kshs. 3,000/-
 - vii. Payment for development plan Kshs. 25,000/-
7. The Plaintiff pleaded that subsequently, the requisite transfer documents were signed by both the 1st and 3rd Defendants, the latter handing the original title document to the Plaintiff, which title later turned out to be forged.
8. Allegations of fraud and misrepresentation against the 1st Defendant are particularized as follows at paragraphs 13 and 15 of the plaint:-

“Particulars of misrepresentation:

- i. That the 1st Respondent was the registered owner of L.R. No. Nairobi/Block 110/882.
- ii. Presentation of Identity Card No. 5334634 in the names of Francis Kiio Kawa.
- iii. In truth and fact the said presentations were false and untrue and the same was confirmed by the official search of 12th June 2005 as true.
- iv. Registrar of persons produced an identification report in court showing the 1st defendant was Bernard Mulwa Mwendwa ID No. 03336380.
- v. The consequences of the matters aforesaid, the plaintiff has suffered loss and damages as particularized in paragraph 12 herein above.



...

Particulars of the fraud, forgery and misrepresentation;

- i. Making a National Identity Card purporting to be Francis Kiio Kawa when his actual name was Benard Mulwa Mwenzwa of I.D 3336380.
 - ii. In the offices of Gathii & Co. Advocates on 24th February 2006 presented himself as Francis Kiio Kawa and signed the transfer in that capacity knowing that he was Bernard Mulwa Mwenzwa.
 - iii. Presenting a forged title deed for Nairobi/Block 110/882 and purporting to say that it's a genuine title belonging to Francis Kiio Kawa and Samson Kungu Kimani." (sic)
9. The Plaintiff further averred that the 1st Defendant was subsequently arraigned in court in Criminal Case No. 972 of 2007 before the Chief Magistrate's Court at Nairobi, on charges of forgery and uttering false documents in relation to the subject property.
10. The Plaintiff further averred that while the fraudulent acts or misrepresentation were primarily perpetrated by the 1st Defendant, the 2nd Defendant whose agents/servants in the Ministry of Lands facilitated the 1st Defendant's fraudulent actions involving obtaining monies from the Plaintiff by way of false misrepresentation and were therefore liable. The Plaintiff further alleged against the 3rd Defendant of knowingly enabling the fraudulent acts by the 1st Defendant at all material times.
11. Moreover, the Plaintiff stated that the 2nd Defendant had a statutory duty under Section 36 of the Registered *Land Act* to provide him with accurate particulars of the subsisting entries in the Registry relating to the subject property. And that pursuant to Section 79 of the Registration of Titles Act, the official search obtained in respect of the subject property constituted a statutory guarantee by the 2nd Defendant and which the Plaintiff relied on as accurate.
12. The 1st and 2nd Defendants neither entered appearance nor filed a defence. On its part, the 3rd Defendant filed a statement of defence dated 30.04.2014 denying the averments in the plaint and liability as against itself. More particularly, the said Defendant averred that any actions undertaken by itself were purely within its professional duties and guided by the instructions given by its clients and/or the relevant parties involved.
13. The suit proceeded to ex parte hearing, during which the Plaintiff testified as PW1. Adopting his signed witness statement dated 8.08.2011 as his evidence-in-chief and further producing his list and bundle of documents if like date, as P. Exh. 1-19. He said he worked with H.W. Gichohi & Co. as an accountant at the material time. He prayed that his claim be allowed. Ruth Emboyoga who identified herself as a teacher was PW2. She too adopted her executed witness statement dated 8.08.2011 as her evidence-in-chief. PW3 was Hellen Wakio Gatari a teacher by profession and wife to the Plaintiff similarly adopted her witness statement as her evidence-in-chief. This marked the close of the Plaintiff's case.
14. The 1st and 2nd Defendants despite service effected upon them pursuant to the orders previously made by this court on 13.10.2022, did not participate in the trial. Regarding the 3rd Defendant however, a consent was recorded with the Plaintiff on 4.12.2023, to the effect that the said Defendant be excluded from the suit and that it would tender affidavit evidence to account for its professional role regarding the subject matter of the dispute.
15. Thereafter, only the Plaintiff filed written submissions in compliance with the court's directions. Counsel for the Plaintiff anchored his submissions on the decisions in *Derry vs Peek* LR 14 App case 337, [1889] UKHL1 and *Mikooh Exquisite Limited v Simple Homes Development Consortium*



Limited & 2 others [2019] eKLR on the principles applicable to a claim founded on fraud. Counsel further citing the definition of fraudulent misrepresentation found in Black's Law Dictionary. Counsel asserted that the Plaintiff had proved that the 1st Defendant acted in a fraudulent manner by misrepresenting to the Plaintiff, that he had legal title to dispose of the subject property and by presenting a forged title deed upon the Plaintiff's purchase of the said property.

16. Counsel contended that the above fraudulent acts were undertaken with the intent of defrauding the Plaintiff by inducing him to purchase the subject property from the 1st defendant who ab initio had no title in the subject property. That the fraud was perpetrated with the willful connivance and assistance of the agents/employees/officials of the 2nd Defendant. The Plaintiff thereby incurring loss and other incidental costs, the refund of which he was entitled to. Counsel citing inter alia, the decision in *Ouma v Nairobi City Council* (1976) KLR 304 regarding proof of special damages. He therefore urged the court to grant the reliefs sought in the plaint.
17. The court has considered the Plaintiff's pleadings, evidence and submissions on record, and is of the view that the issues falling for determination are whether the Plaintiff has proved fraudulent misrepresentation against the 1st and 2nd Defendants; and if so, the reliefs available to him.
18. Regarding the first issue, the ingredients of the tort of fraud and/or misrepresentation were considered by the Court of Appeal in *Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019)* [2021] KECA 144 (KLR) (19 November 2021) (Judgment). The Court adopting the definition of 'fraud' found in Black's Law Dictionary, 9th Edition at page 131 as follows:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

19. In the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, the same court stated concerning fraud and misrepresentation that:

“The law is clear, and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

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

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a



reasonable doubt as in criminal cases...” ...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

20. Similarly in its earlier decision in *Urmilla w/o Mahendra Shah v Barclays Bank International Ltd and Another* [1979] KLR 76; [1976-80] 1 KLR 1168, the Court of Appeal stated that:-

“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. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned.”

21. Thus, here the Plaintiff bears the burden to prove his claim for fraud and misrepresentation, to a standard of proof higher than the classical standard of balance of probabilities applicable in civil cases, but not beyond reasonable doubt. This is true despite the 1st and 2nd Defendants not participating in any way in the suit.
22. By his plaint, the Plaintiff particularized the allegations relating fraud and misrepresentation, in paragraphs 13 and 15 respectively. Concerning proof thereof, the Plaintiff relied on the oral and documentary evidence which was not challenged in any way. The thrust of the Plaintiff's case was that he and his wife (PW3), were drawn to newspaper notices in the Daily Nation dated 21.06.2005 and 23.06.2005 advertising the sale of the subject property (P. Exhibit 4). On calling the telephone number 0721 XXX 172 provided in the advertisement, PW3 spoke with one Mr. Koigi who informed her that the subject property belonged to his brother named Samson Kungu Kimani and whose personal contact was telephone number 0724 XXX 459. The Plaintiff having spoken to the said Mr. Kimani, visited the subject property in the company of PW3 and one Mr. Muriuki, an agent of Mr. Kimani.
23. When the duo later met Mr. Kimani, they were informed that the subject property was registered in the joint names of Kimani and his brother-in-law, one Mr. Francis Kii Kawa, and that the sale was prompted by an intention to sever ties between the two alleged owners. Eventually, the parties settled on the negotiated purchase price of Kshs. 920,000/- less any outstanding land rents and rates owed to the relevant authorities, the Plaintiff and PW3 being informed that the original title deed to the subject property was in the custody of the 3rd Defendant.
24. However, Mr. Kimani provided details of the said property to enable an official search at the Ministry of Lands, before the next steps. According to the Plaintiff, the official search (P. Exhibit 5) confirmed that the subject property was indeed jointly owned by Mr. Kimani and Mr. Kawa whom the Plaintiff and PW3 met on 5.08.2005, the said Mr. Kawa at the time impersonated by the 1st Defendant who gave his personal telephone contact as telephone number y 0721 XXX 454.
25. Thereafter, the parties visited the offices of the 3rd Defendant for purposes of executing the sale agreement (P. Exhibit 7), which was done. Whereupon Mr. Gathii, proprietor of the 3rd Defendant, handed the Plaintiff and PW3 the alleged original title document to the subject property accompanied by the sale agreement, the land transfer document and copies of the national identity cards in respect of the transferors/vendors (P. Exhibits 10, 7, 8 and 9 respectively). That pursuant to the agreement the Plaintiff proceeded to make payments in cash, being the mode requested by the alleged vendors, in the sum of Kshs. 645,000/- to the 1st Defendant, in the presence of PW2 and PW3.
26. Besides taking possession of the subject property, the Plaintiff and his wife subsequently settled the outstanding land rents and rates, and undertook a valuation of the said property. They also presented the requisite documentation at the Ministry of Lands for the transfer of the subject property to them, having paid the requisite stamp duty and related charges. However, on 26.08.2006 during a visit to



- the subject property, they learned of third parties laying claim to the property and whose telephone contacts matched those of Mr. Kimani and the 1st Defendant. Later noting certain discrepancies in the documentation tendered to the Plaintiff for purposes of processing of the title and especially the signatures, the Plaintiff sought a meeting with the 1st Defendant to seek clarification, without success. The Plaintiff had lodged a caution on the subject property, on 13.10.2006.
27. This turn of events prompted the Plaintiff to report the matter to the police, who arrested and arraigned the 1st Defendant in court with criminal offences, namely Forgery, Personation and Obtaining money by false pretenses contrary to sections 349,382 and 313 of the Penal Code,respectively . Following a full trial, the 1st Defendant was convicted on all the three counts on 16.09.2011 and sentenced to 2 years imprisonment.
 28. In support of his oral evidence, the Plaintiff produced documentary evidence including copies of the newspaper advertisements (P. Exh. 4); a copy of the letter of instructions dated 7.06.2005 (P. Exh. 3) the purport of which is that Mr. Kawa/the 1st Defendant had placed the original title document in respect of the subject property, in the custody of the 3rd Defendant herein; an official search on the subject property, the application for official search dated 12.7.2005 and the certificate of official search dated 18.7.2005 (P. Exh. 5) . The certificate of official search confirms that Mr. Kawa and Mr. Kimani were at all material times the registered owners of the subject property.
 29. The Plaintiff also produced the agreement for sale dated 5.08.2005 (P. Exh. 7) prepared by the 3rd Defendant and executed by Mr. Kawa/the 1st Defendant and Mr. Kimani on the one hand as vendors, and the Plaintiff and PW3 on the other hand, as purchasers, the key terms therein being that the purchase price was Kshs. 920,000/-, the portion thereof amounting to Kshs. 645,000/- being paid at execution and the remaining balance of Kshs. 275,000/- payable to Nairobi City Council by the purchasers. Also produced were the transfer documents (P. Exh. 8); National Identity Cards (ID) belonging to Bernard Mulwa Mwendwa (ID No. 3336380) and Francis Kiio Kawa (ID No. 5334634) both of which were purported to belong to the 1st Defendant (P. Exhibit 9); a copy of the title to the subject property dated 1.12.2000, purporting that the subject property belonged to Francis Kiio Kawa of ID No. 5334634 and Samson Kungu Kimani of ID No. 6830701 (P. Exh. 10) . According to the Plaintiff, both the ID and the title document were forgeries procured with the assistance/collusion of agents of the 2nd Defendant.
 30. Moreover, the Plaintiff tendered copies of the charge sheet, criminal proceedings and resulting judgment as P. Exh. 1 and 2. The former indicates the 1st Defendant's name as 'Bernard Mulwa' alias Francis Kiio Kawa. The particulars of the forgery charge contrary to section 349 of the Penal Code, brought against the 1st Defendant were that he forged the title deed in respect of the subject property by purporting it to be a genuine and valid document issued by the Ministry of Lands. On the second count of personation contrary to Section 382 as read with Section 36 of the Penal Code, the particulars were that 1st Defendant falsely presented himself to the 3rd Defendant as 'Francis Kiio Kawa' with intent to defraud. The particulars in the third count of obtaining by false pretenses contrary to Section 313 of the Penal Code, were that the 1st Defendant through false pretenses that he was in a position to sell the subject property, obtained the sum of Kshs. 645,000/- from the Plaintiff and PW3.
 31. According to P. Exh. 2 which is the record of proceedings in Nairobi Criminal Case No. 972 of 2007, among the prosecution witnesses who testified were the real owners of the subject property, namely, Francis Kiio Kawa (PW2) and Samson Kimani (PW7). These witnesses produced the genuine title document in respect of the subject property, which differed from the one tendered by the Plaintiff herein (P. Exhibit 10). The two testified that they were the true owners of the subject property and that they had no hand in the fraudulent misrepresentation undertaken by the 1st Defendant herein.



Finally, the court found the 1st Defendant guilty, and there is no evidence that the said judgment has been challenged or otherwise set aside.

32. In this regard, Section 47A of the *Evidence Act* provides that:
- “A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”
33. The standard of proof in criminal cases is beyond reasonable doubt and therefore higher than the standard of proof prescribed in relation to civil claims founded on fraud, forgery and the like, namely, higher than the balance of probabilities. The court upon considering the evidence before it is satisfied that the Plaintiff has proved his case that the 1st Defendant knowing full well that he had no legal or other capacity to sell the subject property, impersonated the true owner Francis Kii Kawa, and thus misrepresented himself to the Plaintiff and his wife (PW3) with the sole intention of defrauding them of large sums of money through the purported sale of the subject property.
34. However, with regard to the 2nd Defendant, although the said Defendant was obligated to provide accurate and reliable information pertaining to the official search, the application and certificate of official search (P. Exhibit 5) tendered in evidence have not been shown to bear inaccurate or false information. Based on evidence before the Court, it appears that the forged documents in the transaction were the identity cards and title document held by the 3rd Defendant, both which were evidently procured by the 1st Defendant in furtherance of the fraud. The genuine title was produced at the trial by true the owners of the subject property. Thus, without more, it is difficult to find a nexus between the 2nd Defendant and the fraud in question. The case against the 2nd Defendant must fail and is accordingly dismissed. However, the court finds that the Plaintiff has proved his case against the 1st Defendant.
35. The next question is the reliefs available to the Plaintiff who sought general and special damages for the loss/expenses incurred because of the fraudulent misrepresentation. Regarding the prayer for general damages, no material was tendered, or submissions made thereon, and therefore the court declines to award any damages under that head.
36. Special damages claimed were particularized at paragraph 12 of the plaint as follows:
- i. Purchase price paid to the 1st Defendant Kshs. 645,000/-
 - ii. Sums paid to Nairobi City Council in obtaining the Clearance Certificate Kshs. 123,542.60/-
 - iii. Stamp duty paid to KRA Kshs. 60,205/-
 - iv. Valuation report fees Kshs. 20,000/-
 - v. Cost of fencing the subject property Kshs. 55,000/-
 - vi. Conveyance fees Kshs. 3,000/-
 - vii. Payment for development plan Kshs. 25,000/-



37. Special damages must be specifically pleaded and strictly proved. This was reaffirmed by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated that:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;

“Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.’”

38. The Plaintiff claimed the sum of Kshs. 645,000/- being the purchase price paid to the 1st Defendant under the sale agreement, and in that regard produced a statement of accounts in the name of his wife Hellen Wakio (PW3) as P. Exh. 11, indicating cash withdrawals made on various dates which monies were then paid over to the 1st Defendant. In addition to the sale agreement (P.Exh. 7) which indicated that payment of the purchase price was to be made upon the execution of the agreement, which event did in fact happen in the presence of PW3 and PW2 who, like the Plaintiff asserted that the purchase price was indeed paid upon execution of the sale agreement. This evidence being further confirmed by the fact that, pursuant to the agreement, the 1st Defendant handed over the purported title document and completion documents in respect of the subject property to the Plaintiff. Who proceeded to seek to effect the transfer before discovering that he had been defrauded. But not before he made further payments in settlement of rates and rents in respect of the subject property and erecting a fence.
39. From the established facts of the case, the 1st Defendant’s sole intention in executing the sale agreement was to defraud the Plaintiff, hence the insistence on cash payments towards the purchase price. The criminal court found as a fact that the 1st Defendant indeed obtained the sum of Kshs. 645,000/- from the Plaintiff through false pretenses. In these circumstances, the court finds that there is sufficient and unchallenged direct and indirect proof of payment of the sum of Kshs. 645,000/- to the 1st Defendant.
40. Concerning the expenses relating to conveyancing and valuation report, no receipts or other relevant documentation were produced and the court declines to grant the claims. The Plaintiff proved the sums paid to Nairobi City Council in respect of the land rent and rates comprising two cheques (P. Exh. 15), the first dated 8.11.2005 for the sum of Kshs. 115,793.60 and the second dated 2.02.2006 for the sum of Kshs. 7,749/-, making a total a sum of Kshs. 123,542.60.
- Exh. 16 represented the payment of stamp duty, for the respective sums of Kshs. 36,905/- and Kshs. 23,300/- totaling Kshs. 60,205/-.
- Exhibit 19 related to the expenses incurred in erecting a fence on the subject property, totaling a sum of Kshs. 18,115/.
41. Consequently, the court finds that special damages pleaded and proved amount to Kshs. 846, 862.60. This sum is awarded to the Plaintiff against the 1st Defendant with interest at court rates, from the date of filing suit until payment in full. The Court also awards the costs of the suit to the Plaintiff as against the 1st Defendant, while dismissing the case against the 2nd Defendant, with no orders as to costs.



DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Mungai h/b for Mr. Kiragu

For Defendants: N/A

C/A: Erick

