



**Harun (Practicing Law as Nelson Harun & Company Advocates) v Land Registrar,
Kajiado North District & another; Perirose Limited (Interested Party) (Environment and
Land Case 340 of 2017) [2024] KEELC 5906 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 340 OF 2017
MN GICHERU, J
SEPTEMBER 17, 2024**

BETWEEN

**NELSON HARUN (PRACTICING LAW AS NELSON HARUN & COMPANY
ADVOCATES) PLAINTIFF**

AND

LAND REGISTRAR, KAJIADO NORTH DISTRICT 1ST DEFENDANT

V.H. RATTANSI 2ND DEFENDANT

AND

PERIROSE LIMITED INTERESTED PARTY

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendants both jointly and severally.
 - a. A declaration that the issuance of a parallel title deed to L.R. Kajiado/Loodariak/411 by the 1st defendant at the instigation of the 2nd defendant while fully aware that the plaintiff had custody of the original title deed was fraudulent.
 - b. A declaration that the subdivision of the suit land into L.R. No. Kajiado/Loodariak/3534 and 3535, resultant parcels, on the strength of a forged and fraudulent title deed procured by the defendants was illegal, null and void and of no legal effect.
 - c. A declaration that the issuance of a parallel title deed for the suit land by the 1st defendant and the subsequent subdivision into the resultant parcels were corrupt transactions within the meaning of Section 158 of the *Land Act* and that the resultant title deeds were null and void and of no legal effect.



- d. A declaration that the title deed held in trust by the plaintiff herein is still the bona fide title deed for the suit land and should continue to be so held by the plaintiff subject to the interest of the contracting parties and subject to any consequences for breach of contract.
- e. A declaration that the actions of the 2nd defendant in procuring a parallel title deed for the suit land while fully aware that her advocate, the plaintiff, had custody of the original title deed was a breach of trust, confidentiality and confidence expected between advocates and their clients.
- f. An order that the 1st defendant do rectify the land register by the cancellation, amending and/or rectification of the entire registrations and/or entries against the suit property that fall subsequent to the registration of the 2nd defendant as registered owner as at 17th August 2011.
- g. A prohibitory injunction do issue prohibiting the defendants whether directly, or through their servants and/or agents from dealing, alienating or in any manner whatsoever disposing off the suit land or any subdivisions that may have been created by the defendants from the resultant parcels.
- h. A permanent injunction do issue restraining the defendants, their servants and/or agents and/or assigns and nominees from interfering with the intent to resell the suit land so as to refund the 2nd defendant's deposit pursuant to breach of contract.
- i. Exemplary, aggravated and primitive damages for fraudulent conveyance and fraudulent conduct.
- j. Costs of this suit.
- k. Interest on damages and costs.
- l. Such other or further relief that this court may deem fit and just to grant.

This is as per the plaint dated 23/10/2013.

2. The plaintiff's case is as follows. He acted for the 2nd defendant in a land purchase transaction whereby the 2nd defendant was buying L.R. Kajiado/Loordariak/411. The land was registered in the name of Tiati Ene Parseiyi. The plaintiff was also instructed by the family of the land owner to institute a succession cause because the said owner was deceased. The interested party became the equitable/beneficial owner of the suit land and the 2nd defendant entered into a sale agreement with said party to purchase the suit land at a consideration of Kshs. 180,000/- per acre or the market value whichever was higher. The plaintiff caused the suit land to be transferred to the 2nd defendant and obtained a title deed in her name. To date, the plaintiff has the said title deed in his custody. It is dated 8/9/2011.
3. In the year 2012, the second defendant failed to pay the full purchase price for the suit land. She instructed the plaintiff to resell the land and refund the deposit to her bank account. The second defendant also held a meeting with the plaintiffs' wife at Westgate Shopping Mall and reiterated that she was no longer interested in the suit property. In due course, the plaintiff received information that some individuals were preparing parallel title deeds to the suit property. Further inquiry at the Land Registry at Ngong revealed that the suit land had been subdivided into two resultant parcels. The plaintiff contends that the actions of the defendants are corrupt within the meaning of Section 158 of the [Land Act](#) and the resultant title deeds are null and void. He has pleaded many particulars of fraud, breach of trust, confidentiality and confidence on the part of the defendants.
4. In support of his case, the plaintiff filed the following evidence.
 - i. Witness statements by himself and his wife both dated 23/10/2013.



- ii. Copy of title deed in the name of the 2nd defendant.
 - iii. Copy of sale agreement between the 2nd defendant and Perirose Limited dated 29/11/2011.
 - iv. Copy of certificate of official search for the suit land dated 2/11/2011 in the name of the second defendant.
 - v. Copy of letter dated 8/8/2013 revoking the appointment of the plaintiff as the 2nd defendant's agent.
 - vi. Copy of title deed in the name of Tiati Ene Parseiyi dated 13/11/1991.
 - vii. Copy of ID, P.I.N. and certificate of death dated 10/5/1996, 7/4/2010 and 15/4/2010 respectively for Tiati Ene Parseiyi.
 - viii. Copy of certificate of confirmation of grant in Machakos Succession Cause No. 660 of 2010 dated 28/7/2011.
 - ix. Copy of an undated witness statement by the plaintiff filed on 15/2/2015.
 - x. Other relevant documents.
 - xi. Witness statement by Santai Ole Laaraya dated 15/2/2015.
5. The 1st defendant did not file or serve any appearance or defence. The 2nd defendant in an amended defence and counterclaim dated 26/4/2017 has replied to the plaintiff's claim as follows.
- Firstly, it is denied that Perirose Limited was ever the equitable/beneficial owner of the suit land. Secondly, the price asked for by the seller for the suit property was Kshs. 50,000/- per acre and not Kshs. 80,000/- per acre as claimed by the plaintiff. Thirdly, the price of Kshs. 180,000/- per acre claimed by plaintiff was a scheme by him to defraud the 2nd defendant. Fourthly, the 2nd defendant paid the plaintiff a total of Kshs. 42,000,000/- in several installments being the full purchase price at the rate of Kshs. 80,000/- per acre. Fifthly, the 2nd defendant did not have any dealings at all with Perirose Limited. Sixthly, the 2nd defendant did not at any time intend to sell the suit land. Seventhly, the 2nd defendant was not aware that the plaintiff had the title to the suit land in his possession because he had reported to her that he had lost it and was searching for it. The defendant pleads five particulars of the plaintiff's fraud vide paragraph 18 of the defence. For the above and other reasons, the 2nd defendant prays for the dismissal of the plaintiff's suit with costs.
6. In the counterclaim, the 2nd defendant seeks the following reliefs against the plaintiff.
- i. Dismissal of the plaintiff's suit.
 - ii. Kshs. 35, 530,000/-
 - iii. Interest of 18% per annum calculated from the date that the last installment of the purchase price to the suit property was paid by the 2nd defendant to the plaintiff till the date of refund in full.
 - iv. General damages, exemplary damages, damages for mental and emotional torture, time lost and loss from unjustified withholding of the title deed.
 - v. Costs, interest and any other suitable orders/reliefs deemed appropriate by this court.
7. The 2nd defendant's case in the counterclaim is as follows. In the year 2011, the plaintiff who was the 2nd defendant's lawyer informed her that there was land for sale at a price of Kshs. 80,000/- per acre. The 2nd



defendant out of trust of her lawyer agreed to purchase 100 acres and she instructed him accordingly. The plaintiff did not disclose to the 2nd defendant that the said land was subject to a succession cause and that he was acting for the beneficiaries of the same land. The plaintiff later disclosed to the 2nd defendant that the total acreage was 450 acres. He also encouraged her to purchase the entire parcel. She agreed to do so and to this end, she paid a total of Kshs. 42 million to the plaintiff, albeit in installments. The plaintiff then caused the suit land to be transferred to the 2nd defendant. Later on, the plaintiff arbitrarily increased the purchase price to Kshs. 180,000/- per acre which the 2nd defendant refused to pay. He also refused to disclose the identity of the sellers to the 2nd defendant. Out of curiosity, the 2nd defendant decided to investigate the history of the suit land. She located it with the assistance of the Ngong Land Registry and the area assistant chief. She discovered that the plaintiff had failed to communicate with the land owners as a result of which they had made a report to the assistant chief. That is when the fraud perpetrated by the plaintiff came to light. The sellers had instructed the plaintiff to sell only 200 acres at Kshs. 50,000/- per acre and not Kshs. 80,000/- as he had made the 2nd defendant to believe. Secondly, the plaintiff had only paid Kshs. 6, 470,000/- which was purchase price for 129 acres. the sellers could not trace the plaintiff because he refused to pick their calls.

8. The 2nd defendant agreed as follows with the original sellers, the extended clan and the area assistant chief. Since the sellers had already received Kshs. 6, 470,000/- which was purchase price for 129 acres, the 2nd defendant would pay the sellers for 71 acres being the balance of the 200 acres that she initially wished to purchase. The purchase price for the 71 acres would be Kshs. 100,000/- per acre. The suit property would be subdivided and the sellers would get back the 250 acres that they did not intend to sell. The agreement was implemented as a result of which the suit land was subdivided into L.R. Kajiado/Loordariak/3534 and 3535 with the former owned by Tipaya Ole Korio and Lasit Ole Korio and the latter by the 2nd defendant.

The 2nd defendant now claim Kshs. 35, 530,000/- from the plaintiff being the difference between the Kshs. 42,000,000/- that he paid to the plaintiff and the Kshs. 6, 470,000/- that the plaintiff paid to the original owners of the land for the 129 acres.

9. In support of her defence and counterclaim, the 2nd defendant filed the following evidence.
 - i. Witness statements by the 2nd defendant, Julius P. Ntinai and Tipaya Ole Korio dated 26th and 27th January 2015.
 - ii. Copies of cheques paid to the plaintiff amounting to Kshs. 22,000,000/-.
 - iii. Electronic Money transfer voucher showing transfer of Kshs. 20 million from the 2nd defendant to the plaintiff on 28/1/2011.
 - iv. Copy of original title for the suit land in the name of Tiati Ole Parseiyi dated 13/11/1991.
 - v. Copy of title for the suit land in the name of the 2nd defendant dated 8/9/2011.
 - vi. Copy of title deed for L.R. Kajiado/Loodariak/3535 dated 30/7/2013 in the name of the 2nd defendant.
 - vii. Copy of police abstract dated 28/6/2013.
 - viii. Copy of mutation for the suit land dated 31/7/2013.
 - ix. Copy of letter dated 17/6/2013.
 - x. Copy of statutory declaration.



- xi. Copy of application for the consent of the Land Control Board.
 - xii. Copy of consent of the Land Control Board dated 14/6/2013.
 - xiii. Copy of transfer form duly registered on 2/8/2013.
 - xiv. Copy of records for the Perirose Limited dated 17/10/2023.
10. The plaintiff filed a reply to defence and defence to the counterclaim dated 14/1/2015 in which he avers as follows.
- Firstly, the Land Registrar has no jurisdiction to sanction the subdivision of the suit land and only a court of law has such power. Secondly, the suit property was purchased from the owners by the interested party which sold it to the 2nd defendant at Kshs. 20,000/- per acre. Thirdly, the 2nd defendant has never demanded a refund of Kshs. 29, 530,000/- and the claim for the sum is an afterthought. Fourthly, the 2nd defendant owes the plaintiff fees for various cases he handled for her including Succession Causes 1597/2004 and 451 of 2008. The plaintiff filed a total of 19 new documents on 4/4/2022 in his defence to the counterclaim.
11. At the trial on 18/10/2023, the plaintiff testified by adopting his witness statement and documents as his evidence. He was then cross-examined by the counsel for the 2nd defendant. He admitted while under cross-examination that the 2nd defendant was registered as the owner of the suit land on 8/9/2011 and the sale agreement is dated 29/9/2011. Secondly, the plaintiff admitted that the KRA P.I.N. certificate for Tiati Ene Parseiyi, the original owner of the suit land was obtained on 7/4/2010 yet she had died on 8/6/2005. Thirdly, the plaintiff admitted that he did not file the order that transmitted the suit land to the 2nd defendant. When the 2nd defendant testified on 6/5/2024, she was not subjected to any cross-examination because the plaintiff did not turn up in court even though the date had been taken by the consent on 18/10/2023.
12. Counsel for the parties were to have filed written submissions by 7/8/2024 but by the said date no such submissions had been filed. As I write this judgment in late August, I do so without the benefit of the written submissions by either side.
13. I have carefully considered all the evidence adduced by both sides including the witness statements, documents and testimony at the trial. I find that the following issues arise.
- i. Whether the interested party ever owned the suit land.
 - ii. Whether there is a valid sale agreement between the 2nd defendant and the interested party
 - iii. Whether the plaintiff accounted for all the money transferred to him by the 2nd defendant.
14. On the first issue, I find that the interested party never owned the suit land. There are many reasons for this finding but a few will suffice. Firstly, there is no sale agreement between the interested party and the original owners of the suit land. A sale agreement is a prerequisite to any valid land sale. Contracts for sale of land in Kenya must be in writing to be valid as per Section 3 of the [Law of Contract Act](#). Secondly, the interested party has not adduced any evidence to prove payment of purchase price to the owners of the land. Payment of the requisite purchase price is another prerequisite to a valid sale of land transaction. Thirdly, other missing evidence includes evidence of transmission or transfer, valid transfer forms, payment of stamp duty and valuation report. Finally, there is no copy of title deed in the name of the interested party.
15. On the second issue, I find no valid sale agreement between the second defendant and the interested party. The second defendant became registered as the owner of the suit land on 8/9/2011. The sale



agreement is dated 29/9/2011. This is exactly 3 weeks after the land had been registered in the name of the second defendant. It is irregular and improper for the transfer to take place before the sale agreement. What makes the sale agreement even more irregular is its failure to acknowledge that by the time it was drawn, the transfer had already taken place.

16. Coming to the third and final issue, I find that the plaintiff has not accounted for all the money received by him from the 2nd defendant. The 2nd defendant has proved by cheques and electronic money transfer that she transferred a total of Kshs. 42 million to the plaintiff. She has also proved that the only amount that the plaintiff paid to the land owners was Kshs. 6, 470,000/-. This proof is in the 2nd defendant's evidence. The balance of Kshs. 35, 530,000/- remains unaccounted for. The plaintiff did not specifically deny receipt of Kshs. 42 million from the second defendant. He did not show how he spent the money. His explanation that he handled some work for the second defendant in succession causes numbers 1597/2004 and 451 of 2008 does not hold sway because he did not attach any evidence of the fees agreement between him and the second defendant. Again payment of unpaid fees should ordinarily be enforced through the laid down machinery of taxation of advocate/client bill and execution for the said costs. The plaintiff did not have any certificate of such costs on record or by consent that such fees be recovered from money set aside for the purchase of the suit land.
17. In paragraphs 20 and 22 of the plaint dated 23/10/2013, the plaintiff has made 19 particulars of fraud. Allegations of fraud must be proved to a standard higher than the ordinary standard of proof on a balance of probabilities as in ordinary cases. This was the holding in the case of *Elizabeth Kamene Ndolo v George Matata Ndolo*, Civil Appeal No. 128 of 1995 where it was held as follows.

“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 this case I find that not a single instance of fraud has been proved by the plaintiff against the 2nd defendant or any other party.

18. As for the 2nd defendant, there is credible and consistent evidence that she paid Kshs. 42 million to the plaintiff and more consideration to the owners of the suit land. The copy of title deed for L.R. No. 3535 as well as for the suit land are proof that she was registered as such regularly and through purchase and payment of valuable consideration. There is no evidence to the contrary. Under Section 26 (1) of the *Land Registration Act* (Cap 300 of 2012) it is provided as follows.

“The certificate of title issued by the Registrar ...shall be taken by all courts as prima facie evidence that the person named as proprietor ...is the absolute and indefeasible owner...”

This presumption has not been rebutted by the plaintiff who has failed to prove the authenticity of the title deed that he himself holds.

19. For the above stated reasons, I find no merit in the plaintiff's suit which I dismiss with costs to the second defendant. On the other hand, I find merit in the 2nd defendant's counterclaim which I allow in terms of prayers (ii), (iii) and (iv) (d) of the defence and counterclaim dated 26/4/2017.

It is so ordered.



DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 17TH DAY OF
SEPTEMBER 2024.

M.N. GICHERU

JUDGE

