



REPUBLIC OF KENYA



KENYA LAW
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**Kilonzo v Kiiru & another (Environment and Land Case 398 of 2017)
[2019] KEELC 5111 (KLR) (24 January 2019) (Judgment)**

Kimantshi Kilonzo v Susan Wangari Kiiru & another [2019] eKLR

Neutral citation: [2019] KEELC 5111 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND CASE 398 OF 2017

JG KEMEI, J

JANUARY 24, 2019

BETWEEN

KIMANTHI KILONZO PLAINTIFF

AND

SUSAN WANGARI KIIRU 1ST DEFENDANT

THIKA LAND REGISTRAR 2ND DEFENDANT

JUDGMENT

1. The Plaintiff has sued the Defendants in a suit filed on the 12/6/17. In it he sought the following orders;
 - a. An order to the Land Registrar Thika Lands Office cancelling title Kakuzi/Kirirmiri Block 8/170 (suit) as regard the current registered owner and replacing it with the names of the Plaintiff herein depending with production of the prerequisite documents of the 1st Defendant herein.
 - b. Cost of the suit and other damages the Court may deem fit to grant.
2. The Plaintiff avers that in the month of September 1983, he bought two parcels of land from Muthithi Farmers' Cooperative Society (Society) vide share certificate No. 529 and was allocated Kakuzi/Kiririmiri /Block8/170 (suit land) and Kakuzi/Kiririmiri /Block8/177. That he took possession of the two parcels of land and constructed his home on parcel number Kakuzi/Kirirmiri Block 8/170 where he lives to date.
3. He averred that due to financial constraints he was not able to process the title for the suit land immediately. On 11/4/17 he discovered through an official search of the suit land that the 1st Defendant had become the registered owner of the land under unclear circumstances. He has pleaded and particularized fraud under para 9 of the plaint.



4. By leave of the Court the Plaintiff served the 1st Defendant by way of substituted service and a copy of such service is shown in the copy of the Daily Nation dated the 8/8/18 carrying the advertisement. The 1st Defendant failed to enter appearance and file a statement of defence prompting the Plaintiff to file a request for judgment in default thereof. The matter being a land matter, the Plaintiff was directed to list the matter for hearing at a formal proof.
5. At the hearing of the case the Plaintiff called two witnesses in support of his claim. He testified that he is the bonafide member of the society. He bought two shares vide certificate no 592 issued to him on the 1/9/1983. Through it he got allocated two parcels of land which he took possession constructed a home where he settled with his family todate. Due to financial constraints he informed the Court that he processed only one title out of the two which was for plot No 171 leaving 170. An official search carried out and dated 11/4/17 revealed that the suit land was registered in the name of the 1st Defendant as at 5/5/1989. With this revelation, he reported the matter to the Society who confirmed that they did not know the said 1st Defendant. He sought help from the Assistant Commissioner's office Makuyu which showed that no changes had been effected on the suit land.
6. Further he added that though the records at the Lands office indicate that the 1st Defendant is registered as owner of the suit land, he does not know her and neither has she come to the suit land to claim the same. He produced the following documents in support of his case; his identification card No 753825, share certificate No 529, letter from the society indicating that the suit land belongs to the Plaintiff, official search for the suit land dated the 11/4/17, green card for the suit land, demand letter to the 1st Defendant dated the 25/5/17.
7. PW2 - Charles Mwangi Ndungu stated that the Plaintiff was well known to him and that the Plaintiff worked for the Society while he was the Secretary to the Sacco in the 1960s. That the Sacco had purchased the land with contributions from members from colonial settler namely Tom Frazer. That he was aware the Plaintiff had purchased two shares from the Society and claims to be the one who signed the Plaintiff's share certificate. That through the share certificate the Plaintiff was allocated two plots namely 170 and 177. He stated that the 1st Defendant was unknown to him.
8. The Plaintiff submitted that the fact that the 1st Defendant obtained the title in her favour without the consent of the initial registered owner means it was obtained fraudulently which impugns her title. That the 1st Defendant failed to take notice of the proceeding entries in the register at the time of acquisition of the title in her favour. The Plaintiff is convinced that since the 1st Defendant failed to respond to the claims levied against her, his evidence is unchallenged and has proved his case on a balance of probabilities.
9. The Plaintiff did not file any issues for the determination by the Court. The Court will however take the liberty, based on the material placed before it, to draw the issues as will determine the suit.
10. Having considered the pleadings, the evidence tendered at the hearing and the written submissions of the Plaintiff and all the materials placed before the Court, the issues that fall for determination are as follows; whether the 1st Defendants became registered as owner of the suit land by fraud; whether the title of the 1st Defendant should be cancelled; who meets the costs of the suit.
11. The Plaintiff's cause of action is based on fraud. The Plaintiff under para 9 is couched as follows;
 - “9. Upon request of the green card for the suit property, the name of the Plaintiff had been fraudulently canceled under unclear circumstances without the knowledge and consent of the Plaintiff and the property transferred to the 1st Defendant.



Particulars Of Fraud By The 1st Defendant

- a). transferring land, No Kakuzi/Kiririmiri Block8/170 into her name without consent and knowledge of the Plaintiff.
 - b). forging/presenting transfer documents in respect of land parcel Kakuzi/Kiririmiri Block8/170 to the 2nd Defendant.
12. Section 27 of the Registration of Land Act cap 300 (now repealed) provides that the title of a registered owner shall not be subject to challenge except on the ground of fraud or misrepresentation for which the registered owner is proved to be a party. The Plaintiffs claim is based on fraud.
13. A similar provision is contained in 26 of the current Land Registration Act which states as follows;
- “ 26.
- (1) 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
14. It is clear from the above provision that a certificate of title is to be taken by Courts of law as a prima facie evidence that the person named therein is the defeasible and absolute owner subject to such encumbrances as endorsed on the title. It is also manifestly clear that it should not be subject to challenge except 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.
15. According to the green card submitted in evidence in this case the registered owner of the suit land is the 1st Defendant having been so registered on 5/5/89. I have examined the said green card and it is on record that the name of the Plaintiff was entered as owner on 5/5/89 being entry no 2 but against it is a cancellation against his names and the name of the 1st Defendant was entered on even date. There is no explanation on the record as to the circumstances that led to this. The Plaintiff did not call the Land Registrar to shed light on it either. However, the Plaintiff has averred in his evidence that the cancellation and or removal of his name from the register was fraudulent and carried out in unclear circumstances without his knowledge and consent. He has accused the 1st Defendant of this fraud and particularized the fraud. The onus is therefore on the Plaintiff to prove fraud even where the Defendant has not controverted the claim, as has happened in this case.



16. Fraud must be pleaded and proved to the required standard by anyone who alleges fraud in a case. The former Court of Appeal for Eastern Africa in *R.G. Patel versus 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.”

17. Black’s Law Dictionary defines fraud as follows;

“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”.

18. 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”.

19. 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.

20. 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 was on the Plaintiff to prove fraud on the part of the Defendant. He did discharge that duty.

21. The Plaintiff claimed that the 1st Defendant transferred the suit land into her name without his consent and that she forged and presented transfer documents (which were fraudulent) to the 2nd Defendant. It



was the duty of the Plaintiff to lead evidence and produce such documents for the Court to prove fraud on the part of the 1st Defendant. No such evidence or documents were produced before the Court to enable the Court deduce fraud and or forgery. The Plaintiff must demonstrate that there is fraud and secondly that the 1st Defendant is a party to such fraud. It is trite law that the burden of proof lies on the person who alleges fraud.

22. I also note that the entries on the green card for land parcel no. Kakuzi/Kiririmiri /Block 8/170 of the name of the Plaintiff which was cancelled and replaced with that of the 1st Defendant were done on the same day, that is to say the 5/5/89. The share certificate of the Plaintiff only states that he bought two shares from the Sacco but it does not disclose the specific parcel numbers that were allocated to the Plaintiff. Although the Plaintiff did produce an incomplete copy of the allottees register which contains the name of the Plaintiff at No 170, it is not sufficient to prove ownership of the suit land.
23. In the case of Dr. Joseph Arap Ngok – Vs - Justice Moiyo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997 the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

24. I find that the Plaintiff has failed to discharge the standard of proof required for the alleged fraud against the 1st and 2nd Defendant to that extent the Plaintiff's claim is bound to fail and it must fail.
25. Final orders;
- a) the Plaintiff's case is dismissed with costs.
- Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JANUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Muthui HB for Chris Maina for the Plaintiff.

1st & 2nd Defendant – Absent.

Irene and Njeri, Court Assistants

