



**Cronchet & another v Mwalimu (Environment & Land Case
189 of 2021) [2024] KEELC 1058 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 189 OF 2021
AE DENA, J
FEBRUARY 29, 2024**

BETWEEN

CHRISTINE CRONCHET & ANOTHER PLAINTIFF

AND

ZUMA MANGALE MWALIMU DEFENDANT

JUDGMENT

Suit in Summaray

1. The Plaintiffs filed a plaint dated 25/7/2019 praying for judgement against the Defendant for;
 - a. A prohibitory injunction restraining the Defendant either by himself, his servants, agents or otherwise from trespassing onto the property number Kwale/Diani S.S/1299 and from interfering in any manner whatsoever and howsoever with the Plaintiff's ownership, possession and quiet enjoyment thereof. An order of immediate eviction of the Defendant from property number Kwale/Diani/SS/1299
 - b. An order of immediate eviction of the Defendant from property number Kwale/Diani S.S/1299
 - c. Damages for trespass
 - d. Costs of the suit and interest
 - e. Any other relief that the court may deem fit and just to grant
2. It is the Plaintiffs' case that they are the joint registered owners of the property No. Kwale/Diani/SS/1299 (hereinafter referred to as suit property). That the suit property was purchased on 15/10/2013 from K-Rep Bank Limited in an exercise of the banks power of sale in a public auction which was conducted by Five Eleven Auctioneers for a sum of Kshs 5,500,000/- and which amount was paid in



full. It is pleaded that after purchase, the Plaintiffs were issued with a title deed over the suit property, took possession and deposited building materials thereon. That sometime in September 2014 the Defendant without any lawful justification trespassed upon the land. That the Defendant had built structures on the land and further drilled a borehole. That despite being issued with a 3 months' notice to vacate, the Defendant has been adamant and continues with the illegal occupation and use of the property. The court is urged to allow the orders as sought in the plaint as efforts to have the Defendant vacate from the property have proved futile,

3. The Defendant vide a Statement of Defence filed on 5/08/22, denies the allegations raised in the plaint. The Defendant states that he has proprietary rights over the suit property having purchased the same in 2007 and had peaceful possession until the year 2014 when the Plaintiffs started claiming ownership. The Defendant prays for dismissal of the Plaintiffs suit and costs and interest thereon.
4. The matter proceeded for hearing on 15/11/2022 and 14/6/23

Plaintiffs' Case

5. PW 1 Christina Cronchet ID No. 50XXXX an air operator based in Mombasa and residing in Diani adopted her witness statement signed and prepared on 25/7/2019 as evidence in chief. The witness further referred to her list of documents dated 25/07/2019 and produced the documents therein as her exhibits in this case as PEXB 1-20.
6. It is her testimony that the property was advertised in the dailies in October 2013 by an auctioneer. She attended the auction with some of her colleagues and was shown a copy of the title and was further informed that the property had been purchased by the bank. That the witness was given a search on the title and all documents pertaining to the sale, charge and valuation report of the property. She then bid for the property. There were no other bidders and she was thereafter linked to K-REP bank and started communicating with them directly.
7. The witness also stated that she signed a memorandum of sale, paid deposit and later paid the balance to KREP. After this she signed a transfer, obtained all the necessary consents, paid stamp duty and also cleared rates for the property. That subsequently, title was issued in her name. That she carried out a search which showed the property was in her name. After the transfer she physically went to the land found about 6 squatters who agreed to vacate the suit property except one, the Defendant. That she assisted them to move and gave them money. PW1 told the court that the Defendant was issued with one month notice to vacate and thereafter Timamy Advocates issued several notices but the Defendant had to date refused to vacate the property. The witness states that she had paid to all the land rates and an Askari who guards the property to date.
8. On cross-examination the witness indicated that prior to the eviction she didn't visit the property but knew where it was. That she has never interacted with the Defendant and was not aware of the agreement between the squatters and the original owner. The Plaintiffs case was then closed.

Defence Case

9. DW1 Zuma Mwangali Mwalimu ID No. 54XXXX testified that he lives in Mvindeni between Diani SS and Ukunda Scheme and is a farmer. The witness referred to his statement dated 4/8/2022 and adopted the same as his evidence in chief. The Defendant also produced the documents in his list of documents dated 4/8/2022 DEX "1-3". It is his evidence that the entire land measured 3 acres and he bought 1 Acre therefrom at KShs. 550,000 on 26/4/2007 from Mwalimu Akida and that he has a sale agreement of that date. That they didn't progress to subdivision and transfer because the vendor started ailing and was hospitalized at Jocham. The witness states that the vendor informed him that the



- title was not with him but with his son. That his son had approached one Josephat and had given him the title as security in order to clear the hospital bill. That the vendor stated that the title wasn't given with his authority. That the vendor further informed him that he had been forced to sign on certain documents while unconscious in hospital by his son and Josephat which altered the information on the title.
10. The witness added that he informed Josephat that he had purchased the 1 acre from Mwangale. That he was later surprised to see people who were asking him to vacate the plot. He summarized his evidence by stating he had been residing on the suit property since 2007 and all he wanted was to be given his 1 acre.
 11. On cross examination DW1 stated that he bought the land in 2007. He conceded that other than the sale agreement he had not presented any title or letter of allotment to show Mwalimu owns the land. He further confirmed there was no subdivision. With reference to the agreement, the witness admitted to the conditions in the agreement that the deposit was to be refunded if the transfer cannot be effected. He admitted to being aware of the clause but denied that he was eligible to sue for a refund. He further admitted that the transaction was not completed within 90 days and had not produced evidence to show the said Mwalimu was sick. That he had never paid any land rates as he did not have the title deed to the suit property.
 12. On reexamination the witness stated that he had not registered any caution on the suit property because Mwalimu promised to follow up.
 13. DW2 Mwalimu Akida Mrabuis a farmer and resident of Vigurungani Kwale County. The witness adopted his statement dated 4/8/2022 as evidence in chief. He told the court that he had also lived in Ukunda for 27 years. That the Defendant was known to him as he had sold him 1 acre of the suit property at a consideration of Ksh. 600,000/=. He stated that the suit property is his land. There were witnesses during the sale including Kibamba Akida. That there was a balance of Ksh. 100,000/= which they agreed with the Defendant was to be completed upon processing of the title deed.
 14. On cross-examination the witness reiterated he was the owner of the suit property. That he however did not have any documents in proof of ownership. That he had a copy of the agreement between him and the Defendant. He confirmed that the full purchase price had not been paid and there was a balance. That he had stayed at Jocham Hospital for 1 year. That he had sold the shamba for Kshs 500,000/= leaving the balance of 100,000/=. That his son was given Kshs 300,000 and a car and that is what was used to clear the bill at the hospital.
 15. On re-examination DW2 clarified that the land was inherited in 1974 when his uncle died. That he left the shamba with his son and who gave the shamba but without his approval. That he had not authorized the sale of the land.
 16. DW3 Akida Mwalimu Akida told the court he lives in Vigurungani but works in Likoni as a driver. He stated that the Defendant entered into an agreement for sale of land with his father. That his father had land 5 acres in Maweni (beach) Kwale Diani SS/1299. That his father fell ill and sold 1 acre to the Defendant. He could not remember when his father was sick. He stated that he was not there when the land was being sold and was therefore not sure of the purchase price. He stated that Josephat Masila, a businessman was known to him. That he had met him and engaged him without his father's knowledge. That the suit property had a title deed which his father kept. That he was given the title deed by his mother.
 17. The witness further testified that his father sent him to collect Kshs. 100,000 from the Defendant. That he didn't get the money and he contacted Masila who used to buy and sell land. That the hospital bill



was paid by the said Masila. That his father inquired about the title and he informed his father that he had given the title to Josephat Masila. That his father indicated he would follow up with Masila when he recovered. That after 90 days the said Masila was to give them more money but failed to do so however he gave the witness and his siblings a car.

18. On cross examination the witness testified that his father inherited the land from his uncle though he had no evidence of this. When referred to the sale agreement he denied being present at the time the same was being drafted and stated that his name was just used. That he only knew the balance of the sale price being 100,000/= and was not aware of the final price. He conceded that his witness statement gives the balance as 50,000/=. That his father stayed in hospital about 2 months. He admitted to being the one who sold the suit property to Masila. The money was Kshs 300,000/- and was paid in hospital. That the car was later given to his father who sold it.
19. On reexamination the witness confirmed that he wasn't brought up on the land, that he was also not born on it. That he informed his father after selling. His mother gave him the KRA pin, that his father did not take part as he was paralyzed. The defence case was then marked as closed.

Submissions

Plaintiffs' Submissions

20. According to the Plaintiffs, the following issues ought to be determined by court in determining this matter;
 - i. Whether the Plaintiffs are the legal and rightful owners of the property number Kwale/Diani Settlement Scheme/1299
 - ii. Whether the Defendant has proved to have interest in the property number Kwale/Diani Settlement Scheme/1299
 - iii. Whether the Defendant has trespassed the property number Kwale/Diani Settlement Scheme/1299
 - iv. Whether the Plaintiff is entitled to the prayers sought in the plaint.
21. Reiterating the root of the Plaintiffs title, it is submitted that upon registration of the suit property in their names, the chargors interest passed on to them as per the provisions of section 98[4] of the *Land Act*. That they are further protected as per section 99[2] of the said Act having bought the sale pursuant to the exercise statutory power of sale. The Plaintiffs maintain that the title deed is prima facie evidence of their ownership of the land as per section 26 of the *Land Registration Act* and the holding in **Propwa Company Limited V Justus Nyamo Gatondo & Another [2020] eKLR**. That the title and copy of official search have not been challenged under section 26, fraud has not been pleaded and particularized as a result the Plaintiffs are the absolute and indefeasible owners of the suit property.
22. On whether the Defendant has proved to have any interest in the suit property, it is submitted that no evidence has been produced by the Defendant to show that he purchased the suit property and has been in occupation of the same. The Defendant admitted to not having any title document or paying rates. The Plaintiffs further refer to the agreement relied upon by the Defendant and point out that certain clauses in the same were defaulted and as such the agreement is void. With regards to the transaction between Mwalimu Akida and Josphat Masila, it is submitted that the evidence by DW2 and DW3 confirmed that the suit property was sold to Josphat Masila at a consideration of Kshs 300,000/- and Motor Vehicle Reg No KBM 429C which they acknowledged receiving. That based on this, the Defendant has no proprietary rights to the suit property.



23. On trespass it is urged that having established the Plaintiffs have a good title, the Defendants actions then amount to trespass as was deliberated upon in *Nyangeri Obiye Thomas V Yunuke Sakagwa Nyoiza ELC Case No 227 of 2018* cited with approval in *John Monyancha Ngege V Marcela Kerubo Kebabe [2019] eKLR*.
24. The Plaintiffs seek that the orders as sought in the plaint be granted. On eviction reliance is placed in the holding in *Anthony Ndungu Maina v Faith Wanjiku Maina [2020] eKLR* and in *Phylis Wangui Ktavi & Another V Stephen Parasho Kaito [2021] eKLR*. The plaintiffs further seek for damages for trespass and place reliance on *Duncan Nderitu Ndegwa v KP& LC Limited & Another [2013] eKLR*. It is posited that the Defendant has recourse against the person he purchased the suit property from and to also seek damages in the event that it is established that the Defendant was prejudiced by the statutory power of sale exercised by the bank.

Defendant's Submissions

25. The Defendants submissions were filed before court on 6/10/2023. The following issues for determination were highlighted;
 1. Whether the charge registered in favour of Josphat Mwanja Masila by K-Rep bank was legal, lawful and regular
 2. Whether subsequent transfer to Plaintiffs was legal
 3. Whether the Plaintiffs title should be impeached
 4. Whether the Defendant has trespassed the suit property
 5. Whether Plaintiffs are entitled to reliefs sought.
26. On the first issue for determination it is submitted that the suit property initially belonged to Mwalimu Akida Mrabu who sold 1 acre of the same to the Defendant. That the Defendant was thereafter granted possession. However, before transfer was effected the Defendant learnt that Mwalimu Akida was critically ill and in a coma and could not proceed with the transfer. That Mwalimu's son informed the Defendant that he was using the title deed to the suit property to secure a loan from one Josphat Mwanja which he did. That the contract between the said Josphat Mwanja and Akida Mwalimu Auda is void as the same does not meet the requirements of the law of contract. The Defendant pleads illiteracy on the part of Akida Mwalimu Auda and states that the title was to secure funds to clear the hospital bill and not to sale the suit property.
27. On whether the subsequent transfer to the Plaintiff was legal, it is submitted that the Defendant is an innocent proprietor who is entitled to protection of his rights to use and ownership of property as envisaged under Article 40 of *the Constitution* of Kenya 2010. The Defendant states that the transfer of land to Josphat Mwanja and to the Plaintiff was fraudulent and the court should not be used to sanitize the process.
28. On whether the Plaintiffs title should be impeached, it is the Defendants submission that in so far as title registered under Josphat Mwanja is concerned, the same was procured by fraud and misrepresentation of facts. That the title held by the Plaintiff should therefore be impeached by dint of Section 26 of the *Land Registration Act*. That any subsequent transactions entered into by Josphat Mwanja were entered into by a party who had no capacity and should not have a title in the first place. The court is referred to the holding in *Elijah Makeri Nyangwara V Stephen Mungai Njuguna & Another [2013] eKLR* and in *Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others [2015] eKLR*.



29. The fourth issue for determination was whether the Defendant has trespassed the suit property, the Defendant submits that the evidence he has tendered has demonstrated that he purchased the suit property from the initial registered owner sometime in the year 2007 and has been enjoying occupation of the same since then. He maintains that he has not trespassed in anyone's parcel of land. Counsel for the Defendant lastly submits that the court should find that the Defendant is the lawful proprietor of 1 acre of the suit property and to allow the said portion to be transferred and registered in his names.

Analysis and Determination

30. Having considered the pleadings herein, the evidence as tendered by both parties, the submissions for and against the suit herein, the court hereby identifies the following issues for determination;
1. Whether there exists a valid contract between the parties herein
 2. Whether the suit was proved as required by law
 3. Who bears the costs of this suit?
31. The court will render itself on the first issue for determination in two phases. The first phase will be with regards to the validity of the contract between the Plaintiff and K-Rep Bank and secondly the contract between the Defendant herein and one Mwalimu Akida Mrabu [DW2]. On the first contract, it is not in dispute that the Plaintiffs herein purchased the suit property from K-Rep Bank through a public auction. PW1 produced a copy of the advertisement for Auction of parcel No. Kwale/Diani/SS/1299 by Five Eleven Traders & Auctioneers placed in Daily Nation newspaper of 7/10/2013 (PEXB 4). The auction did take place on 15/10/2013 evidenced by the Memorandum of Sale dated 15/10/2013 (PEXB 6). The Plaintiffs also produced copies of banker's cheques and an RTGS dated 14/11/2014 all totalling up to the purchase price of Kshs 5,500,000/-.
32. Was the above transaction valid. This question leads to the interrogation of the title and how its ownership found its way to the Bank. The evidence on record is that one Josphat Mwanja Masila procured a loan from the bank using the title to the suit property Kwale/Diani SS/1299. PW1 produced a copy of the Charge between Josphat Mwanja Masila and K-Rep Bank Limited registered under Part C of the title herein on 11/04/2011. I also saw the title deed in the name of Josphat Mwanja Masila issued on 11/03/2011 (PEXB 1). PW1 testified that the said chargor defaulted in repayment of the loan leading to the bank exercising its statutory power of sale. It is trite that if a property has been given as security for a loan, the same is eligible for sale in case of default in loan repayment in the event that the Chargee decides to exercise its statutory power of sale pursuant to the provisions of section 90 and 96 of the Land Act, 2012.
33. The above position has been reiterated in a number of authorities see Thomas Nyakamba Okong'o vs Co-operative Bank of Kenya Limited (2012) eKLR and Maithya –vs- Housing Finance Co. of Kenya & Another (2003) 1 EA 133.
34. Section 90(1) – (3) of the Land Act states as follows; -
- (1) “If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
 - (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—



- (a) the nature and extent of the default by the chargor;
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
 - (e) the right of the chargor in respect of certain remedies to apply to the Court for relief against those remedies.
- (3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—
- (a) sue the chargor for any money due and owing under the charge;
 - (b) appoint a receiver of the income of the charged land;
 - (c) lease the charged land, or if the charge is of a lease, sublease the land;
 - (d) enter into possession of the charged land; or
 - (e) sell the charged land;
35. From the foregoing, I am satisfied that the bank was right in exercising its statutory power of sale. But how did the suit property get registered in the names of Josphat Mwanja Masila. The evidence of DW1, DW2 and DW3 is that at one point, DW2 and who allegedly sold the suit property to the Defendant was unwell and admitted at Jocham Hospital. It is notable that the evidence of this hospitalisation has not been presented before court. Nevertheless, it is during this period that the hospital bill accrued to a level which DW2 and his family could not pay. DW3 the son to DW2 states that he then contacted Josphat Mwanja Masila who used to buy and sell land. PW1 evidence is that the said Josphat purchased the suit property from DW2 and his family by paying the purchase price of Kshs 300,000 and also giving DW2 and his family M/V Reg No KBM 429C. These facts are not challenged by the Defendant. If anything, it is his witnesses who acknowledged receiving this money and the motor vehicle. DW3 in fact stated in his testimony that the vehicle was taken by DW2 who later sold it.
36. The questions that crossed my mind was in what capacity was DW2 selling the motor vehicle if he did not own it? And further, if it is denied that the money was not for sale of the suit property so as to offset the bill, then why was the same not refunded as soon as DW2 got well. These are the issues that the Defence did not address or seek to clarify despite the same being obvious and glaring. The Defendant states that no contract existed between DW2 and Josphat Mwanja Masila. I'm aware while section 3[3] of the Contract Act require contracts for the disposition of land to be in writing in some instances, the conduct of the parties surmise a contract being present between them. I'm emboldened by the Court of Appeal in *Ali Abid Mohammed versus Kenya Shell & Company Limited* (2017) eKLR, which stated



that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court had this to say;-

"It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King V King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time."

37 It is my finding therefore based on the evidence adduced there existed a valid sale of the suit property from the family of DW2 to one Josphat Mwanja Masila. Having made a finding on how the Plaintiff came to be registered as the proprietor of the suit property, I will therefore answer in the affirmative that yes, there existed a valid contract between K- Rep Bank and the Plaintiffs herein. The Plaintiffs therefore lawfully purchased the suit property and the same was lawfully transferred and registered in their names. Indeed a transfer registered on 30/4/2014 from K-Rep Bank to the Plaintiffs was produced as part of the Plaintiffs bundle of documents. Also produced is a letter of consent dated 26/3/2014 by the Msambweni Land Control for the said transfer and post transfer certificate of official search confirming the proprietorship of the Plaintiffs as at 30/04/2014.

38 On whether there existed a valid contract between the Defendant and DW2 Mwalimu Akida Mrabu. It is alleged that the Defendant purchased the suit property from DW2. The// Black's Law Dictionary defines a contract as follows: -

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

39 My attention has been drawn to the agreement produced before court by the Defendant as being the one entered into at the time of purchase of the suit property. The agreement indicates that the suit property is sold at a consideration of Kshs 550,000/-. That a deposit of Kshs 50,000/- had been made with a further deposit of Kshs 150,000/- to be paid on 30/4/2007. The balance of Kshs 350,000/- was to be paid ninety (90) days from the date of agreement being 26/4/2007. I must admit it has been abit tricky to comprehend the contents of the agreement as dates have been thrown about and so have the figures all been jumbled up all over the agreement. I am however able to make out that the seller received Kshs 250,000/- at one point and Kshs 118,000 and also Kshs 47,000/-. Be that as it may, the Defendant and DW2 have all alluded to there being a balance of Kshs 100,000/- that was never cleared.

40 I have further noticed that under the conditions of the said agreement, it is stipulated that the deposit and all the other monies were refundable in the event that transfer in favour of the buyer cannot be registered. It has further been stipulated that the balance of the purchase price was to be availed on 31/7/2007. So, were these conditions perfected? The answer is in the negative. This position vitiates the validity of the contract. Further, DW3 in his testimony stated that he did not take part in the agreement, that his name was simply used and he was not present at that time. To me the import of a witness denying taking part in a contract is that the same is a forgery. It cannot stand the test of being a valid document in the eyes of the law. It is my finding that the contract therefore is null and void. I have also noted the contradiction in the evidence of the Defendant and his witness in terms of the purchase price, DW2 indicates that he sold the suit property at Kshs 600,000/- while the Defendant states that the same was Kshs 550,000/- it might not be a glaring omission, but it is proper that the court points the same out.

41 I have concluded on the first issue for determination and will now embark on whether the Plaintiffs claim was proved to the required standard. The onus of proof in civil cases is on the plaintiff or any



other Claimant to prove the position he or she claims on a balance of probabilities. This position is stated in the *Evidence Act* under sections 107,108 and 109 which provide as follows: -

"Section 107: Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108: Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109: Proof of particular fact

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person."

- 42 The Plaintiffs have produced a copy of title of the suit property in evidence of ownership of the same. They have further given a history of its possession which the court has discussed above. A title deed is conclusive proof and evidence of ownership of land. Section 24 of the *Land Registration Act* No 3 of 2012 states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act.

Section 26 of the *Land Registration Act*, 2012 provides;

- (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

- 43 The question therefore is whether the title held by the Plaintiffs has been successfully challenged as provided for by law. The court have also on several occasions treated the issue of titles as proof of ownership of land with caution in view of the fact that at times the titles are forged or fraudulently procured. See the Court of Appeal decision of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, where it was held as follows:

"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that



is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

44 It is trite that fraud must not only be particularised with precision but also proved to a standard that is slightly higher than that of reasonable doubt. In *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* (2000) eKLR Tunoi JA (as he then was) pronounced himself 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

45 The Defendant has made allegations of fraud in the manner Josphat Mwanja Masila procured the title. However, this aspect has not been proved. The court has made a finding that the said Josphat purchased the land and this has been confirmed by DW2 and DW3. It is not enough to make allegations without evidence in support. The court cannot be left to do guesswork on whether an allegation amounts to a fact or remains a mere allegation. See *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* (1996) eKLR where the Court expressed itself as follows: -

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.

In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”

46 I am convinced that fraud has not been proved. I have reasons, which I have stated above, to believe that the Plaintiffs have proved their case to warrant grant of the orders sought. I have noted from the Plaintiffs pleadings that the Defendant had at one point sued DW2 and his family together with the Plaintiffs herein. The suit was designated as Kwale Principal Magistrate Court Civil Suit No 56 of 2014 but which suit was struck out. The Defendant also sued only the Plaintiffs herein in Kwale PMs Land suit No. 58 of 2014 which was also struck out. I have noted Defence Counsels invitation to make an order in favour of the Defendant retaining part of the portion he claims and which I note is not raised by way of counterclaim. Perhaps the Defendant can pursue other avenues to recover his money if at all the same was given to DW2 and his family. But presently, he has not convinced the court that he is warranted to be on the suit property.

47 Are the Plaintiffs entitled to the prayers sought? The reliefs sought have already been outlined elsewhere in this judgement. Having made a finding that the Plaintiffs are the lawfully registered owners of the suit property, it follows therefore that the Defendant is a trespasser on the suit property. I see no hindrance to declare them as such.

48 As to general damages for trespass, I’m persuaded and guided by E. Obaga J dictum in the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR where it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the



costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

49 Arising from the above, the court notes that PW1 has not presented any evidence on the nature and extend of the damage to guide the court in quantifying the same. Moreover with the impending eviction, I believe it will be proper not to make any orders under this head.

50 On costs of the suit, ordinarily the same follow an event. The event herein is the Plaintiffs have successfully prosecuted their suit. They are therefore entitled to the costs of the suit. In Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014 the court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

51 The upshot of the foregoing is that this court finds that Plaintiffs have proved their case on a balance of probability. I therefore enter judgement for the Plaintiffs against the Defendant as follows: -

- i. A prohibitory injunction be and is hereby issued restraining the Defendant either by himself, his servants, agents or otherwise from trespassing onto the property number Kwale/Diani S.S/1299 and from interfering in any manner whatsoever and howsoever with the Plaintiffs’ ownership, possession and quiet enjoyment thereof.
- ii. The Defendant is hereby ordered to give vacant possession of the suit property Kwale/Diani S.S/1299 to the Plaintiffs within the next 90 days failure to which eviction to ensue by the Plaintiffs at the Defendant’s own costs.
- iii. The Plaintiffs will have the costs of the suit and interest

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 29TH DAY OF FEBRUARY 2024.

.....

A.E DENA

JUDGE

Mr. Mohamed for the Plaintiffs

No appearance for the Defendant

Mr. D. Disii- Court Assistant.

