



Mwachi & another v M'nairobi & 2 others (Environment & Land Case 587 of 2007) [2024] KEELC 880 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 587 OF 2007**

**MD MWANGI, J
FEBRUARY 22, 2024**

BETWEEN

CHRISTOPHER M. MWACHI 1ST PLAINTIFF

REGINA L. MWACHI 2ND PLAINTIFF

AND

MUTUGI D.G. M'NAIROBI 1ST DEFENDANT

CITY COUNCIL OF NAIROBI 2ND DEFENDANT

LAND REGISTRAR, NAIROBI 3RD DEFENDANT

JUDGMENT

1. This is a suit filed in Court way back in the year 2002. The Plaintiffs in their Amended Further Amended Plaint filed in court on 31st July, 2006 claim that they bought the suit property for value from one Solomon Kisali Liona. Solomon Kisali Liona had been allocated the property (then referred to as plot number 42 measuring 0.02 hectares) by the defunct City of Nairobi, the 2nd Defendant herein sometimes in the year 1992.
2. The 2nd Defendant approved and accepted the sale of the suit property to the Plaintiffs and accordingly issued them a fresh letter of allotment (Ref. No. CP & ARCH 005694) dated 20th November, 2000. The Plaintiffs who became the beneficial owners of the suit property took actual possession and embarked on developing it on the basis of building plans duly submitted to the 2nd Defendant.
3. In addition to the letter of allotment, the 2nd Defendant too issued the Plaintiffs a beacon certificate dated 3rd October 2001 showing the extent of the suit property, delineating its boundaries and showing its precise location. Subsequently, the 2nd Defendant demanded payment of survey fees of Kshs.13,160/- as a precondition for issuance of a formal lease. The Plaintiffs duly complied but the 2nd Defendant did not issue the lease in favour of the Plaintiffs.



4. The Plaintiffs later on discovered that the suit property formerly known as plot No. 342 Jamhuri II Estate had however been registered as Nairobi/Block 63/461 on 30th October, 2001 in the name of the 1st Defendant as Lessee, either by fraud perpetrated by employees of the 2nd Defendant or by mistake of the 2nd Defendant and the participation of the 1st Defendant. The particulars thereof are enumerated at paragraph 13 of the Amended Further Amended Plaintiff.
5. The Plaintiffs aver that the purported lease issued to the 1st Defendant by the 2nd Defendant was null, void and of no effect having been vitiated by the doctrine *nemo dat qui non habet* and the acts of fraud/forgery.
6. The Plaintiffs further pleaded that upon issuing them the letter of allotment, the beacon certificate and requiring payment of survey fees, the 2nd Defendant became a trustee of the Plaintiffs as the beneficial owners of the suit property and could only deal with it as a fiduciary of and for the benefit of the Plaintiffs.
7. The Plaintiffs prayed for judgment against the Defendants for:
 - a. A Declaration That upon the 2nd Defendant allocating the Suit Property to Solomon Kisali Liona and subsequently to the Plaintiffs, the 2nd Defendant's right, interest and title in the Suit Property was extinguished and became subject and subordinate to the rights of the Plaintiffs as beneficial owners as represented in The Letters of Allotment and by dint of the operation of the doctrine *nemo dat qui non habet* the 2nd Defendant had no capacity to alienate the Suit Property to any other party except the Plaintiffs.
 - b. A Declaration That the Letter of Allotment dated 20th November, 2000 and other acts by and between the Plaintiffs and the 2nd Defendant conferred beneficial ownership to the Plaintiff and created a trust between the 2nd Defendant as a trustee and the Plaintiffs as beneficial owners.
 - c. A Declaration That the undated lease between the 2nd Defendant as lessor and the 1st Defendant as lessee registered on 30th October 2001 was procured by means of forgery and is therefore fraudulent, null and void and of no effect and in breach of the 2nd Defendant's fiduciary duties to the Plaintiffs.
 - d. An Order That the 2nd Defendant executes a lease in favour of the Plaintiffs in terms of the Letter of Allotment Reference No. CP & ARCH 005694 dated 20th November 2000.
 - e. An Order That the Land Registrar, Nairobi do forthwith cancel that Entry No. 1 and 2 in the Register of LR. No. Nairobi/Block 63/461 and insert therefor the names of the Plaintiffs as lessees.
 - f. The costs of the suit.

Response by the Defendants:

8. Both the 1st and 2nd Defendants responded to the Plaintiffs' claim by filing statements of Defence essentially denying the Plaintiffs' claim and putting them to strict proof. The 1st Defendant particularly insisted that the title to the suit property was properly, validly and regularly issued to him.
9. On 30th July, 2010, the Plaintiffs and the 1st Defendant entered into a consent signed on their behalf by their respective Advocates on the following terms:



- a. That the City Council of Nairobi do execute in favour of Christopher Muhande Mwachi and Regina Lihabi Mwachi a lease in respect of Nairobi/Block63/461 (Plot No. 342 Jamhuri II Estate).
 - b. The Land Register concerning L.R No. Nairobi/Block63/461 be rectified and Entry Nos. 1 and 2 dated 30th October 2001 be cancelled.
 - c. That the Land Register concerning L.R No. Nairobi/Block63/461 be rectified and Christopher Muhande Mwachi and Regina Lihabi Mwachi be registered as Joint Proprietors.
 - d. That each party do bear its own costs of the suit.
 - e. That the suit be marked as settled.
10. The consent referred to above was however not adopted as a judgement of the court then. At the time, the matter was in the High Court. The court file seems to have gotten lost at one point in time. It was reconstructed and subsequently transferred to this court.

Evidence adduced

11. This case proceeded to hearing with both Plaintiffs testifying as witnesses in their case. During plenary hearing, Christopher Mwachi (the 1st Plaintiff herein) testified as PW1 and shall be referred to as much for purposes of this matter. He confirmed his witness statement dated 11th November, 2022 which was adopted by the court as his evidence in chief.
12. It was PW1's testimony that his claim was premised on his further Amended Further Amended Plaintiff dated 31st May, 2006 together with a list of documents dated 3rd February, 2003 with 17 documents which he produced as exhibits in court.
13. PW1 sought for the prayers contained in his Further Amended plaintiff amended on 31st July, 2006. He too confirmed the terms of the consent dated 30th July, 2010 between himself and the 1st Defendant and urged the court to adopt the terms of the said consent as judgment of the court.
14. Upon Cross-examination by Mr. Odoyo, learned counsel for the 2nd Defendant, PW1 confirmed having signed an agreement with Mr. Solomon Kisali Liona which is contained in his bundle of documents at page 61.
15. He stated that the purchase price then was Kshs. 770,000/- and they paid Kshs 30,000 in cash. He averred that the balance was to be paid by a banker's cheque and produced a copy of the banker's cheque evidencing payment of the balance of the purchase price although he admitted it was not in his bundle of documents produced in court.
16. PW1 produced the letter of allotment issued by the City Council of Nairobi and stated that he fulfilled the conditions contained in the letter of allotment by payment of Kshs 10,800/= although he did not have a receipt evidencing payment of the sum of Kshs 10,800/=.
17. He averred that all payments were made in the name of Kisali Solomon.
18. PW1 also stated that he had read the conditions in the letter of offer (allotment letter) and that he accepted the offer within 30 days although he did not have the letter of acceptance of the offer.
19. PW1 contended that the 1st time he had heard about the 1st Defendant was after the City Council had declined and or delayed granting him approvals for building and upon enquiries, he learned that the City Council had purportedly issued the same plot to the 1st Defendant.



20. PW1 stated further that the allotment letter at page 64 of his bundles relates to plot No. 342 whilst the one at page 75 relates to plot No. 124. He admitted that the City Council had issued two allotment letters for 2 different plots although he did not make any complaint against the employees of the City Council of Nairobi.
21. PW1 upon re-examination stated that the allotment letters on page 64 of his bundle is addressed to him and his wife. He asserted that according to the letter, they were required to pay Kshs 10,800/= which they complied with. He confirmed having submitted his building plans for approval by the City Council of Nairobi on 20th April, 2001 as contained in his bundle at page 49.
22. PW2 was Regina Mwachi, the 2nd Plaintiff herein. She testified as the 2nd witness for the Plaintiff and shall be referred to as PW2 in this matter.
23. PW2 confirmed her witness statement dated 11th November, 2022 which was adopted by the court as her evidence in chief.
24. PW2's testimony confirmed that their claim was based on the Amended Further Amended plaint amended on 31st July, 2006. She confirmed the documents in the 1st Plaintiff's list of documents.
25. She stated that she only learned from the Ministry of Lands that the 1st Defendant had been allocated their land. She did not know him personally.
26. Upon Cross-examination by Mr. Odoyo, learned counsel for the 2nd Defendant, PW2 reiterated her testimony that she had been told at the Ministry of Lands that their plot had been allocated to the 1st Defendant.
27. PW2 averred that she got this information around 2002 but she only saw the 1st Defendant in court and that she has never had any discussion with the 1st Defendant about returning the land to them.
28. She stated that she had been informed by their Advocate that the 1st Defendant herein had surrendered the documents in his possession to him and consented to the plot being handed over to them.
29. PW2 averred that the 1st Defendant was in court when she first testified and that he must have known that she was a truthful witness.
30. PW2 stated further that they largely depend on their Advocate and that she doesn't remember making any payments to the 1st Defendant as a condition to surrender the plot to them.
31. Upon re-examination, PW2 stated that the only reason she had visited the Ministry of Lands was because they failed to get approvals necessitating her to make enquiries.
32. At the hearing of the case, the Plaintiffs also called as a witness, Mr. Muciimi Mbaka, the then Advocate for the 1st Defendant who confirmed the consent between the Plaintiffs and the 1st Defendant.
33. The 2nd Defendant did not call a witness in this case.
34. At the close of the hearing, the court directed parties to file written submissions. The Plaintiffs and the 2nd Defendant filed their respective submissions which the court has had an opportunity to read and consider.



Issues for determination

35. Having considered the pleadings filed in this matter, the consent signed between the Plaintiffs and the 1st Defendant and the evidence adduced at the hearing, as well as the submissions by the Plaintiffs on one part and the submissions by the 2nd Defendant on the other part, the issues for determination are:
- a. Whether the consent between the Plaintiffs and the 1st Defendant should be adopted as a judgment of this Court.
 - b. Whether, upon adoption of the consent, in (a) above, the Plaintiffs have any further claim against the 2nd Defendant.
 - c. What orders should issue in regard to costs of the suit.

Analysis and determination:

A. Whether the consent between the Plaintiffs and the 1st Defendant should be adopted as a judgment of this Court.

36. As discussed earlier, the Plaintiffs and the 1st Defendant entered into a consent dated 30th July, 2010 in the terms described in paragraph (9) above. The consent however was not adopted as a judgment of the court as between the Plaintiffs and the 1st Defendant. The Plaintiffs at the hearing of the case prayed for its adoption.
37. Having heard from the Advocate for the 1st Defendant, Mr. Muciimi Mbaka, who executed the consent on behalf of his client, it is clear that the consent was entered into freely by the parties with the intention that it be adopted as a judgement of the court. It is therefore binding on the parties. The court therefore adopts it as a judgment of the court. The consent settles the case between the Plaintiffs and the 1st Defendant, with no orders as to costs.
38. In accordance with the consent, the court directs the Land Registrar, Nairobi to rectify the register in respect to L.R. No. Nairobi/Block 63/461 by cancelling entries No. 1 and 2 of 30th October, 2001 and to register Christopher Muhande Mwachi and Regina Lihabi Mwachi as joint proprietors of the parcel of land known as L.R. No. Nairobi/Block 63/461.

B. Whether the Plaintiffs have any further claim against the 2nd Defendant; and if they do whether they have proved it against the 2nd Defendant.

39. In their case, the Plaintiffs pleaded mistake and or fraud against the 2nd Defendant. The alleged fraud, as pleaded in the Amended Further Amended Plaintiff, was perpetrated by unknown employees or agents of the 2nd Defendant. The particulars of fraud were pleaded at paragraph 13 of the Amended Further Amended plaintiff filed on 31st July, 2006.
40. It is trite Law that any allegations of fraud must not only be specifically pleaded but strictly proved. The Court of Appeal in the case of Kuria Kiarie and 2 others v Sammy Magera [2018] eKLR, held that,

“The next and only other issue is fraud. The Law is clear and we take it from the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR where Tunoi JA (as he then was) states 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,



off 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.”

41. As regards the standard of proof of fraud, the Court of Appeal in *Kinyanjui Kamau vs. George Kamau* [2015] eKLR stated that:

“It is trite Law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs. Ndolo* [2008], 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”.

42. In this case, after a careful analysis of the evidence presented before this Court by the Plaintiffs, I am not least persuaded that the Plaintiffs have established the alleged fraud/forgery against the 2nd Defendant.

43. Consequently, it is the Court’s finding that the Plaintiffs have not established a case against the 2nd Defendant.

C. What orders should issue on costs.

44. The consent between the Plaintiffs and the 1st Defendant settled their case with no orders as to costs. As between the Plaintiffs and the 2nd Defendants, the Court’s finding is that considering the overall circumstances of this case, each party should bear its own costs.

Conclusion:

45. The Conclusion therefore is that judgment is granted in favour of the Plaintiffs in the following terms:

- a. The Court directs the land Registrar, Nairobi to rectify the register in respect to L.R. No. Nairobi/Block 63/461 by cancelling entries No. 1 & 2 of 30th October, 2001 and to register Christopher Muhande Mwachi and Regina Lihabi Mwachi as joint proprietors of the parcel of land known as L.R. No. Nairobi/Block 63/461.

SUBPARA b.

Each party shall bear its own costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2024.

M. D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Amolo for the Plaintiffs

N/A for the Defendants



Court Assistant: Yvette

M. D. MWANGI

JUDGE.

