



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 339 OF 2009**

SUSAN NYOKABI NGOCI.....1<sup>ST</sup> PLAINTIFF

REBECCA NJERI KAMAU.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

KIMSON HOLDING LIMITED.....1<sup>ST</sup> DEFENDANT

FRANCIS MWAMBURI.....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

**Introduction**

1. The dispute revolves around the ownership of all that property known as Land Reference Number 13486/212 measuring approximately 0.1 hectares and situate in Embakasi Area within Nairobi County. The Plaintiffs claim the same as do the Defendants. The 2<sup>nd</sup> Defendant is in possession

**Litigation history and pleadings**

2. The suit was commenced by way of a plaint in July, 2009., prior to the substantial amendments to both the Civil Procedure Act and Civil Procedure Rules. In the plaint the Plaintiffs sought a declaration that the property LR 13486/212 ('the suit property') belonged to the Plaintiffs. The Plaintiffs also sought an order for the Defendants to vacate the suit property.
3. The Plaintiffs in the plaint stated that they discovered in January, 2009 that the 2<sup>nd</sup> Defendant had trespassed unto their parcel of land being the suit property. They averred that they are the rightful owners of the parcel of land and had never transferred the same to the Defendants or either of them. The Plaintiffs particularized alleged acts of fraud on the part of the Defendants. The Plaintiffs alleged that any agreement purportedly entered into for the sale of the suit property was fraudulent.
4. The Defendants filed a Defence statement on 16<sup>th</sup> November, 2009. The defence demurred, stating that the claim was bad in law and further that the Plaintiffs had sold the suit property the Defendants and could not consequently turn around or renege on the agreement. The Defendants

further stated that the suit property had been transferred to the 2<sup>nd</sup> Defendant.

5. On 12<sup>th</sup> February, 2010 the parties settled the issues for determination by the court. The issues numbered nine and the statement of Agreed issues jointly signed by the parties was filed in court on 12<sup>th</sup> February, 2010.
6. On 15<sup>th</sup> June, 2012 the Plaintiffs filed their list of witnesses and witnesses statements having earlier filed the list/bundle of documents on 12<sup>th</sup> March, 2010. The only two witnesses for the Plaintiffs were the Plaintiffs themselves. The bundle of documents consisted of only two documents too.
7. The Defendants filed no documents, neither did the Defendants file any witnesses statements despite opportunity as well as the courts direction to do so.

### **The trial**

8. At trial, on 24<sup>th</sup> November 2014, both Plaintiffs testified whilst the Defendant did not avail any witnesses. Neither did the Defendants testify.
9. The evidence of the 1<sup>st</sup> Plaintiff who testified through a court interpreter in the Gikuyu language was to the effect that together with the 2<sup>nd</sup> Plaintiff she owns the suit property. She stated that they bought the property from Githunguri Njiru Farm. She referred to a letter dated 6<sup>th</sup> July, 2009 from Githunguri Njiru Farm (1966) Ltd. The letter stated that title was being processed and would be issued in the joint names of the Plaintiffs. The 1<sup>st</sup> Plaintiff also testified that they had been paying land rates. She exhibited copies of land Rates payment receipts issued by the city council of Nairobi, now defunct.
10. During cross examination the 1<sup>st</sup> Plaintiff stated that she did not know the reference number of the property sold to one Mr. Kimani in Ukambani. She said she did not have any documents or papers. She did not know whether their title deeds had been eaten by rats. She did not know when she started paying for the rates. She could not remember the date of the letters by Githunguri Farm. She could not remember when she sold the Ukambani plot to one Mr. Kimani.
11. The 2<sup>nd</sup> Plaintiff (PW 2) also testified. Once again the testimony was through a court interpreter. She testified, in chief, that she was married to the 1<sup>st</sup> Plaintiff's mother under Gikuyu customary law. This was to assist in bearing children and she bore five. Even though she could not remember the year they bought the suit property, she stated that she jointly owned the suit property with the 1<sup>st</sup> Plaintiff. Under intense cross examination PW2 insisted that they had never sold the suit property to the 1<sup>st</sup> Defendant. PW2 however conceded that it was not them who had been paying land rates to the county authorities. The 1<sup>st</sup> Defendant was paying. Finally, PW2 confirmed that they had signed an agreement with the 1<sup>st</sup> Defendant and further that they had received monies from the 1<sup>st</sup> Defendant and sold land to the 1<sup>st</sup> Defendant, the land sold was not the suit property.
12. The Defendants did not call any witnesses. Neither did the 2<sup>nd</sup> Defendant testify.

### **Analysis**

13. The Plaintiffs pleaded and alleged fraud against the Defendants. The law is trite and clear. Fraud ought to be pleaded with meticulous particularity and proved strictly: per Rawal JA (as she then was) in **Okere –v- Kinyukia & others [2007] 1 EA 304** and also **Ratilal –v- Lalji [1954] EA 314**. Have the Plaintiffs proved their case to the required standards?
14. The Plaintiffs testified explicitly that they sold land to the 2<sup>nd</sup> Defendant. They were however not

clear which land they sold to the said 2<sup>nd</sup> Defendant. All they could say was that the land sold “is far off”. They confirmed having signed a Sale Agreement. They also testified that the suit property had been transferred to the Defendants. First to the 1<sup>st</sup> Defendant and then subsequently to the 2<sup>nd</sup> Defendant. It would certainly appear from the evidence before the court that the Plaintiffs were familiar with the 2<sup>nd</sup> Defendant. It is also evident that the parties transacted. On the Plaintiffs’ own admission they entered into a Sale Agreement with the 1<sup>st</sup> Defendant. The Agreement they admitted was witnessed by the 1<sup>st</sup> Plaintiff’s son one James Gitari. The said James Gitari also used to receive monies from the Defendants. It was for the Plaintiffs to prove and show to the court that the property they sold to the 1<sup>st</sup> Defendant was not the suit property. They failed to do so. What started off as allegations against the Defendants continue to remain so in the absence of proof.

15. Secondly, the Plaintiffs have not tendered sufficient evidence to show that they are the registered proprietors of the suit property. It is to be noted that the suit property is a registered parcel of land. For the court to interfere through persuasion and issue a declaratory order on ownership, records of the register ought to have been availed by the Plaintiff. To prove its case on a balance of probabilities the Plaintiff needed to avail to the court the registration records of the suit property. In my view, it is not enough to avail a letter from a person who is not a custodian of the registration records to confirm who is the true owner of a registered parcel of land. An abstract of the register or a certified copy of the title document is what proves, prima facie, who the registered owner and, *a fortiori*, true proprietor of a registered property is: see **Section 26(2)** of the **Land Registration Act**.

16. Thirdly, the burden was always on the Plaintiffs to prove fraud on the part of the Defendants. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity: see **Hornal –v- Neubeger Production Ltd [1957] 1 QB 247**. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome: see also the cases of **Mpungu & Sons Transporters Ltd –v- Attorney General & another [2006] 1EA 212**. In the instant case the Plaintiffs alleged that the Defendants made an agreement of sale and purported the same to have been signed by the Plaintiffs. The Plaintiffs however did not provide a copy of the said fraudulently drafted and executed Agreement. That left the court as well as the Plaintiffs’ case in limbo. The Plaintiffs, in short, have failed to prove any of the allegations of fraud.

### **Conclusion**

17. I am not convinced by the Plaintiff’s evidence or by the Plaintiff’s submissions that the Plaintiffs have proved their case even on a basic balance of probabilities. The gaps in the Plaintiffs’ case which required production of documentary evidence can only mean that the Plaintiffs’ story as it is cannot be relied upon to lead to a grant of the orders prayed for. The Plaintiffs’ suit must fail and it does. I dismiss the same with costs to the Defendants.

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of March, 2015.**

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent