



Makori v Barasa; Faulu Microfinance Bank Ltd (Third party) (Environment and Land Appeal E017 of 2023) [2024] KEELC 1234 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E017 OF 2023
EC CHERONO, J
MARCH 7, 2024**

BETWEEN

JANE KERUBO MAKORI APPELLANT

AND

REHEMA ADHIAMBO BARASA RESPONDENT

AND

FAULU MICROFINANCE BANK LTD THIRD PARTY

*(Being an appeal arising from the Judgment of Hon.A.ODAWO (PM)
dated 27TH February, 2023 in CM ELC Case no. E014 of 2020)*

JUDGMENT

1. This appeal arises from the ruling of the Principal Magistrate Hon. Hon. A.Odawo delivered on 27th February 2023 in Bungoma Chief Magistrate Court ELC Case No.E014 OF 2020.
2. The brief background of this case is that vide a plaint dated 24th December, 2020 the respondent sued the appellant for the following orders;
 - a. Eviction of the Defendant, her servants, agents and or any other person claiming under her from East Bukusu/ South Kanduyi/4775.
 - b. A permanent injunction restraining the Defendant, her servants, agents and or any other person once evicted from entering, occupying and or using East Bukusu/ South Kanduyi/4775 or part thereof;
 - c. Mesne profits from August 2019 till her eviction.
 - d. Costs and interest.



Brief Background

3. The case before the trial court was that the (plaintiff)respondent was the registered owner of Land parcel no. East Bukusu/ South Kanduyi/4775 which contains a main house and 7 rental houses having purchased the same through a public auction conducted on 23rd July, 2019. The respondent further averred that the suit property was sold after the appellant failed to repay a loan taken with the third party/respondent where the suit property had been used as security. She stated that the appellant had refused to vacate the suit property despite being aware of the sale which actions she stated were illegal and unlawful and have resulted to her incurring losses.
4. Upon being served with the summons to enter appearance, the (defendant) Respondent herein entered appearance and filed a defence and counter-claim in which she denied that East Bukusu/ South Kanduyi/4775 ('the suit property') was ever sold through a public auction and maintained that she has been in lawful ownership and occupation of the suit land which is valued Kshs. 12,500,000/= with full developments thereon hence the defendant having entered into an illegal transaction should not benefit the equitable remedies sought
5. The appellant(defendant) alleged that the respondent(plaintiff) acquired the suit land fraudulently and illegally. In her counter-claim the appellant(defendant) stated that she is the lawful owner of the suit property. She averred that prior to the institution of this suit, she had charged the suit property with Faulu Micro-Finance Bank LTD through Pambo Investments wherein the suit property was advertised without notice. The appellant stated that the newspaper advertisement dated 3rd July, 2019 was fraudulent since the description of the suit property did not conform to the status and description. It was her argument that the said advertisement was aimed at undervaluing the suit property to unduly advantage the respondent(plaintiff)
6. The appellant stated that there was no public auction and the sale of the suit property was a sham exercise hence an illegality. It was her argument that the suit property which is valued at Kshs. 12,500,000/= was disposed of at Kshs. 2,713,170.16. She averred that the actions of the respondent and Faulu Micro-Finance were aimed at infringing her rights to property under Article 40 of the Constitution. She prayed for orders against the respondent as follows;
 - a. Declaration that the advertisement and sale of L.R. No. East Bukusu/ South Kanduyi/4775 to the plaintiff by Faulu Micro-Finance Bank Limited through Pambo Investments is null and void.
 - b. A declaration that the defendant is the lawful owner and proprietor of L.R. No. East Bukusu/ South Kanduyi/4775.
 - c. A declaration that the transfer of L.R. No. East Bukusu/ South Kanduyi/4775 from the Defendant into the plaintiff's name was fraudulent and should thus be cancelled and order of rectification of the register do issue restoring back L.R. No. East Bukusu/ South Kanduyi/4775 into the name of the defendant.
 - d. Costs of this suit and counter-claim and interests at normal court rates.
7. Vide a third party notice dated 2nd September 2021, the appellant sought to have Faulu Micro-Finance Bank LTD joined as a third party to the proceedings. The application was allowed and the third party filed their respective documents.
8. In their response, the third party/respondent filed a statement of defence against the Appellant's defence and counterclaim dated 25th October, 2021 denying the allegations set out therein. They



averred that the respondent charged the suit property with them to secure an overdraft of Kshs. 2,400,000/= which amount was disbursed to her. They stated that due process was followed for recovery of the overdraft amount and since they had the right to recovery, they issued the relevant statutory notices and when the appellant failed to honour her obligations, they advertised the suit property and disposed it off through a public auction.

9. Upon hearing the matter to conclusion, the trial court entered judgment in favour of the respondent(plaintiff) as against the appellant(defendant) on 27th February, 2023 and issued orders of eviction, permanent injunction, mesne profits of Kshs. 1,500,000/=, costs and interests of the suit.
10. Being aggrieved by the trial court's judgment, the Appellants herein preferred the present appeal vide a memorandum of appeal dated 22nd March,2023 on the following grounds;
 - i. That the Honourable Magistrate erred in law and fact when she allowed the Plaintiffs claim contrary to the provisions of Section 97 of the Land Act, 2012 and Rule 11(b)(x), Rule 16 of the Auctioneers Rules, 1997 hence occasioning a miscarriage of justice.
 - ii. That the Honourable Magistrate erred in law and fact when she failed to take cognizance of the fact that no professional valuation of the reserve price was undertaken by the third party proper to the disposal of the Appellant's L.R. No. EAST/ Kanduyi/South Kanduyi/4775 hence occasioning a serious miscarriage of justice.
 - iii. That the Honourable Magistrate erred in law and fact when she dismissed the counter-claim advanced by the Appellant despite the weight of evidence advanced by the appellant.
 - iv. The learned Trial Magistrate erred in fact and law when she failed to hold or take cognizance of the fact that the suit property was disposed off unlawfully based on wrong and misleading advertisement of the sale property.
 - v. That the Honourable Magistrate erred in law and fact when she failed to hold that the sale auction conducted by the Respondent was fraudulent since 25% of the reserve price was never paid at the fall of the hammer contrary to the Auctioneers rules.
 - vi. That the Honourable Magistrate erred in law and fact when she failed to take cognizance of the fact that the description of the property allegedly purchased by the plaintiff could not warrant her claim for any loss of user or mesne profits from the appellant hence occasioning a miscarriage of justice.
 - vii. That the Honourable Magistrate erred in law and fact when she allowed the plaintiffs claim despite the Appellants property having been purchased at an undervalued price way below the stated market value of Kshs. 12 Million hence denying the appellant her right to property.
 - viii. That the Honourable Magistrate erred in law and fact when she failed to consider the counter-claim advanced by the appellant and the evidence thereto hence occasioning a miscarriage of justice.
 - ix. That the Honourable Magistrate erred in law and fact when she failed to decree that on the basis of a wrong advert and failure to undertake a valuation of the report the intended sale of the suit property was fraudulent and null and void.
 - x. That the Honourable Magistrate erred in law and fact when she condemned the Appellant to pay Kshs. 1,500,000/= as mesne profits contrary to the evidence adduced by the Appellant and the Respondent hence passing an unlawful decision.



11. In this appeal, the appellant is seeking to have the judgment of the trial court set aside and the appeal allowed with costs of both the primary suit and the appeal.
12. When this appeal came up for directions, the parties agreed to canvass the same by filing and exchanging of submission within agreed timelines. However, neither of the party filed submissions on the appeal as directed.
13. I have considered the Memorandum of Appeal, the Record of Appeal, and the court record generally and identify the following as the issues that emerge for determination:
 - a. Whether or not the respondent satisfied the grounds for grant of an order of eviction and permanent injunction in his claim in the trial court.
 - b. Whether the respondent obtained the suit property fraudulently.
 - b. Whether or not the trial court erred in allowing the respondents claim.
 - c. What order to make on costs.
14. Being a first appeal, this court has a primary role to reconsider the evidence adduced in the lower court, re-evaluate and analyze it and come up with my own independent conclusions and therefore determine whether the trial court's findings and conclusions are consistent with the evidence adduced and the applicable law. See case of *Kenya ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212.
15. On the first issue, in order for the respondents who was the plaintiff in the primary suit to have succeeded, she needed to prove that she was the proprietor of the suit land and that the appellant was unlawfully in occupation of the same without consent. The respondent in her evidence stated that she saw in the Standard Newspaper advertisement for the sale of the suit property and since she was interested, she attended a public auction which was held on 23rd July, 2019 and was successfully declared the highest bidder with a bid of Kshs. 5,625,000/=. It was her evidence that she was thereafter issued with a certificate of sale and the title deed for the suit property. She stated that she then applied for a transfer of the suit land in her name and a certificate of title was issued to her on 28th September, 2020. She produced into evidence the Newspaper print out as PExhibit 1, Notification of Bid as PExhibit 2, a certificate of sale as PExhibit 3, a copy of title deed as PExhibit 4 among other documents.
16. I note that the attached certificate of title is in the name of the appellant. I have also looked at the appellant's list of documents and in particular a copy of the green card produced as DExhibit 4 which proves that indeed a title was issued in favour of the respondent on 8th September, 2020. The [Land Registration Act](#) is very clear on issues of ownership of land and in particular, Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, 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.”
17. Again Section 26 (1) of the same [Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
18. From the foregoing, it is clear that the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on grounds set out thereunder.
 19. While considering the repercussions of Section 26(i), the Court in *Elijah Makeri Nyangw'ra -v- Stephen Mungai Njuguna & Another* (2013) eKLR held;

...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.... the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme...
 20. Since the respondent (plaintiff) produced a certificate of title issued by the Land Registrar as proof of ownership before the trial court, it was incumbent upon the appellant to prove that the title was obtained by fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 21. This now brings me to the second issue for determination. The appellant in her counter claim pleaded that the respondent fraudulently and unlawfully obtained the suit property. It was her evidence that the manner in which the transaction between the respondent and the bank was carried out was questionable. She alleged that the newspaper advertisement was irregular, the property was undervalued and that no public auction took place. However, apart from pointing out the alleged irregularities, no evidence was let to prove the pleaded particulars of fraud. She did not produce the newspaper advertisement she impugned; she did not prove the allegation that no auction took place. I find that her allegations were unsupported by evidence and this court cannot infer the tort of fraud.
 22. The law requires that fraud must not only be specifically pleaded but also strictly proved. And although the standard of proof of fraud is not beyond a reasonable doubt, it is higher than proof on a balance of probabilities required in civil claims.
 23. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated as follows:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo v Ndolo* (2008)1KLR (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 the 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 case where fraud is alleged it is not enough to simply infer fraud from the facts.



24. The appellant in this appeal alleged that she was not served with the relevant statutory notices prior to the sale of the suit property. In my view, the respondent was under no legal obligation to endure that due process was followed prior to the public auction. In my humble view, the respondent having acquire the suit property in a public auction which is shown to have been duly advertised cannot be said to have engaged in fraudulent activities or in a corrupt scheme. The Court of Appeal has held in numerous decisions that there is no duty placed on such a purchaser where he participates in an auction that has been duly advertised. In the case of *Abdi Adan Hussein & 2 others v Attorney General & 2 others* [2017] eKLR the court held as follows: -

“The plaintiff argues that he was an innocent purchaser for value and was not party to any fraud. This brings me to the question; what is the extent of due diligence to be exercised by a purchaser? In *Captain Patrick Kanyagia and Another v Damaris Wangeji and others*, NBI civil appeal no 150 of 1993 (unreported) the Court of Appeal held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by the court of appeal in *David Katana Ngomba v Shafi Grewal Kaka* [2014] eKLR.

25. From the extract of the record of appeal, the respondent had also sought for orders of permanent injunction against the appellant from entering the suit property or part thereof. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in the case of *East African Industries v. Trufoods* [1972] EA 420 and *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

26. Having found that the respondent is the legal owner of the suit property and that her interest as proprietor ought to be protected under the law, I find that it is necessary for the order of a permanent injunction to be issued.

27. The trial court also awarded Kshs. 1,500,000/= being mesne profits. The same was awarded on the basis that the respondent has not been able to enjoy the suit property since she purchased the same in 2019. The suit property is said to contain one main house and residential houses which are said to be unoccupied. The estimated rent for the main house is said to be Kshs. 15,000/= per month while the rentals for the residential houses go for Kshs. 7,000/= per month. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received



therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

28. The Court of Appeal in the case of *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows:-

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

29. The Learned Nyamweya J in the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*.”

30. From the foregoing, it is my humble view that the respondent indeed pleaded the claim for *mesne* profit and quoted figures that were said to be the rent for the houses on the suit property. However, it is unclear how these figures were arrived at. The respondent did not as part of her evidence produce a valuation report from an expert substantiating the said figures. The court can therefore not infer the rental estimates by the description of the developments therein. As such, I find that the prayer for mesne profits was not sufficiently proved.

31. The upshot of my finding is that this appeal is partially allowed by setting aside the orders issued for mesne profits but uphold the orders for eviction and permanent injunction issued against the appellant. Since the appeal has succeeded partially, the appellant shall pay the respondent 80% of the costs.

32. It is so ordered.

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 7TH DAY OF MARCH, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Anwar for 1st Respondent
2. Mr. Otundo H/B Maganga for 2nd Respondent
3. Mr. Wamalwa R. H/B for Otsiula for Appellant
4. Bett C/A

