



Kinyanjui & 3 others (Suing as the officials of the Kianjata Welfare Association) v Mwangi & 4 others (Environment & Land Case E352 of 2021) [2024] KEELC 4383 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E352 OF 2021**

**JA MOGENI, J
MAY 30, 2024**

BETWEEN

**PETER KINYANJUI 1ST PLAINTIFF
GIBSON MEMIA KARUMBA 2ND PLAINTIFF
PAUL GATHUKIA NJOGU 3RD PLAINTIFF
RAHAB MUGURE 4TH PLAINTIFF
SUING AS THE OFFICIALS OF THE KIANJATA WELFARE ASSOCIATION**

AND

**JOHN MWERU MWANGI 1ST DEFENDANT
GITHURAI TINGANGA CO LTD 2ND DEFENDANT
COOPERATIVE BANK OF KENYA LIMITED 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT
HON ATTORNEY GENERAL 5TH DEFENDANT**

JUDGMENT

1. By a plaint dated 15/10/2021 the Plaintiff sued the Defendants for the following orders:
 - a. A declaration that the plaintiff is the legal and bonafide owner of land parcel No LR Nairobi/Block 119/2977.
 - b. A declaration that the loan facility advanced to the 1st defendant by the 3rd defendant is not binding to the plaintiff



- c. A declaration that the loan and interest advanced to the 1st defendant vide a charge registered on land parcel No LR Nairobi/Block 119/2977 should be settled by the 1st defendant
 - d. Cancellation of the charge registered on LR Nairobi/Block 119/2977
 - e. An order for the cancellation of the lease and the certificate of lease issued to the 1st defendant and dated 28th August 2015
 - f. An order against the 4th defendant to issue a new lease to the plaintiff in respect of LR Nairobi/Block 119/2977
 - g. General damages
 - h. Costs of this suit.
2. The plaintiff avers that they are the legal owners of the land parcel number LR Nairobi/Block 119/2977 having purchased it from Edward Mugi a shareholder of the 2nd defendant in July 1979.
 3. That it is his case that the 2nd defendant was a custodian of the documents relating to the parcel of the suit property including the processing of titles.
 4. That the 1st and 2nd defendant conspired to have the suit property registered in the 1st defendant's name who subsequently obtained credit facilities from the 3rd defendant who charged the title deed without doing any due diligence.
 5. By an application dated 29/11/2021 by the 3rd defendant seeking joinder of an Interested Party was granted leave to have the party joined to the suit but my perusal of the court documents show that the said party never filed any pleadings.
 6. The 1st and 2nd defendants never entered appearance leading to the plaintiff applying for an interlocutory judgment, the 23rd defendant filed a statement of defence dated 29/09/2022.
 7. The 3rd defendant denied all the averments by the plaintiff and averred that having advanced a loan to one Jesse Otieno Aboge (who is not a party to the suit) she provided security as suit parcel number LR No Nairobi/Block 119/2977 which belong to the 1st defendant.
 8. That the 3rd defendant wrote a letter to the 1st defendant seeking permission to allow the 3rd defendant to advance a loan to the said Jane Otieno Aboge to which the 1st defendant responded in the affirmative vide the letter dated 25/10/2016. This led to preparation and registration of a charge to the suit property.
 9. Further that when there was default, notices were issued to Jesse and the 1st defendant who according to the 3rd defendant are the owners of the suit property
 10. The 3rd defendant avers that the suit is frivolous, fraudulent, hopeless and vexatious and should be dismissed.
 11. The 4th and 5th defendants filed a joint statement of defence dated 08/03/2022. They denied fraud and illegality on the part of the Land Registrar and averred that if any charge was registered against the suit property, the same was done procedurally and legally based on the documents presented before the 4th defendants offices who exercised due diligence and the said documents being believed to be genuine were registered.



12. They faulted the plaintiff for suing the 2nd defendant because the said company was long wound up and no suit can be instituted against it. They deny that the plaintiffs were ever the legal owners of suit parcel number Nairobi/Block 119/ 2977. They reiterated the contents of various paragraphs of their statement of defence and averred that the plaintiff's claim is speculative, unmeritorious and should be dismissed for it raises no cause of action against the 4th and 5th defendants.
13. At the hearing, the plaintiff testified as PW1. He adopted his witness statement dated 10/06/2017 as part of his sworn evidence-in-chief. He produced the 15 documents contained in his bundle dated 15/10/2021. Among the documents produced was receipt issued by 2nd defendant to plaintiff dated 21/07/1979 transferring ownership of suit property to plaintiff, Certificate of Ownership, the allotment letter dated 16/05/1994, and letter from 2nd defendant recognizing plaintiff as the owner of the suit property.
14. It was his testimony that the plaintiff being a welfare association after buying the land one Edward Mugi for a consideration of Kshs 8,700 they started construction in 1984 and built it from members contributions for 11 years to its current state which is a four (4) storey building with 11-13 units per floor from which members collect rent and pay KRA taxes.
15. That the current leadership which took over in 2019 learnt that the suit property was allocated to the 1st defendant in 2018 and they immediately reported to the police. They awaited the police action before filing the current suit. The police action led to the arrest of the 1st defendant who was charged and is currently in remand in prison custody.
16. Plaintiff testified that they are still in control of the suit property since 1979. He added that the 3rd defendant acted negligently by granting a loan facility without undertaking due diligence and never commissioned a valuation to be done. That the witness of the 3rd defendant deposed that the suit property is undeveloped and yet the suit property is developed and the plaintiff collects rent. That the 1st defendant is not known to him and he only got to hear about him in 2018 and that he has never set foot on the suit property. He reiterated that they have never used the suit property as a loan security. Further that the suit property is located along Jack Road in Githurai 44 area. He further testified that he did not know the person who took the loan from the 3rd defendant and charged the suit property.
17. In his evidence during cross-examination, he reiterated that he had papers that show how plot 1428 moved to become the suit property. It was his testimony that the letter at page 22 was written by the Association showing that the plaintiff's plots were 1428 and 1217 and in the letter they were being asked to collect title deeds.
18. The 3rd defendant had one witness – Lilian Omanji who works for the 3rd defendant as a Recoveries Officer and she adopted her witness statement dated 6/06/2023 and her bundle of documents. It was her testimony that the 1st defendant had issued a letter of consent giving the 3rd defendant the suit property as security for a loan and that the bank conducted due diligence including a valuation.
19. In her evidence in cross-examination she testified that they had not produced a valuation report in court. She referred the court to annexure 1 paragraph number 2 which states that the suit property is undeveloped and the bank did not rebut the testimony of the plaintiff who categorically states that the suit property is developed.
20. She further testified that it is when the bank wanted to realize its security that it realized from a valuation report done in 2016 that the property is developed. 1st defendant did not lead evidence. Similarly, she testified that the 1st defendant was a guarantor and that paragraph 2 of annexure 1 speaks about the property being on Ngumba road and not on Jack road and she avers that this may be as a



result of the team that undertook valuation not using GPS technology thus missing out on the location of the suit property.

21. That the bank realized between three years later between 2019 to 2021 that the suit property was developed. She further testified that she was not aware that the plaintiff was in possession of the suit property and that the guarantor is not an in charge.
22. Upon being cross-examined she testified that at the time of lending the bank never interrogated to establish the relationship between the borrower and the guarantor. On re-examination she stated that the bank can never charge a property without conducting a valuation. With this the 3rd defendant closed its case.
23. DW4- George Gichere Gitonga testified that he was the Land Registrar in charge of the Court Section. He testified that the records they had including the copy of the Lease and charge show that the land is registered in the name of the 1st defendant who is the 1st registered owner. That the plaintiff was never issued with a lease. He also stated that there is a restriction placed on the suit property by DCI Kasarani on 18/04/2019. Upon cross-examination he stated that the charge in favour of Cooperative Bank was duly registered. With this the 4th defendant closed its case.
24. The plaintiff filed written submissions dated 22/03/2024, through the firm of M/s Karanja Kang'iri & Co Advocates. By the time of writing this ruling neither the 3rd defendant nor the 4th defendant had filed their submissions.

Analysis and Determination

25. I have considered the pleadings, written submissions of the plaintiff and the annexures submitted in evidence and I have identified the following as the three issues falling for determination in the suit:
 - i. Whether the charge was unlawfully and fraudulently registered
 - ii. Whether the plaintiff is entitled to the reliefs sought; and
 - iii. Who is to bear the costs of this suit.
26. On whether the charge was unlawfully and fraudulently registered, counsel submitted that the 3rd defendant had testified that they charged a property that was undeveloped. Infact the bank's letter of 27/10/2016 attests to the property being undeveloped. DW3 testified that they only came to the realization that the property was developed when the loan was non-performing and they wanted to recover their security.
27. It is therefore clear that the process leading to the charging of the suit property was fraught with unlawfulness and illegalities. The 3rd defendant did not at all contact due diligence because if they had then they would have known the location and what was on the property that they were charging.
28. A Charge over a suit property is done with the presence of the owner of the suit property which is being charged. In the absence of the owner then there must be a legal instrument that would allow a party to act in their stead. In the circumstances at hand the said Jesse Otieno Aboge neither attended court nor the 1st defendant. The 3rd defendant apart from adducing in evidence a letter did not produce the original copy of the said letter but they also never produced a power of attorney.
29. Say for instance that indeed the 1st defendant who allegedly owns the suit property wanted his property charged, what was so difficult in having him execute a power of attorney to allow Jesse Otieno Aboge



to act for him. I will not comment on the pending criminal case but I would like to point out that this is a red herring already.

30. Counsel for the plaintiff blamed the 3rd defendant for failing to carry out due diligence to ascertain ownership of the land before accepting the documents presented to it as security.
31. On their part though DW4 alleges to have a copy of lease document in the name of the 1st defendant, he was unable to testify as to how the title was issued to the 1st defendant only choosing to state that the Director Land Administration would be best placed to show the process of registration. Despite hearing about the Director Land Administration none of the parties sought to have the Director summoned.
32. On whether there was fraud on part of the 4th defendant, DW4 testified that, in registering the charge, the Land Registrar relied on documents presented by the parties and was satisfied that they met the legal requirements relating to the requisite documentation. He further stated that it was not possible for the Land Registrar to tell whether or not the documents presented to their office were authentic.
33. As stated earlier, the Plaintiff claimed that the defendants colluded to fraudulently deny them of their suit property and title which was issued to the 1st defendant irregularly for a parcel that was already allocated to them. The Registrar on his part testified that he used records presented to him to register the suit property.
34. Whoever alleges fraud must prove. Section 107, 108, 109 of the *Evidence Act* provides that: -

“ 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that 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.

108. 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.

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

35. In the case of *Githinga Kibutha v Caroline Nduku* ELCA No 16 of 2007 the court stated thus: -

“The *Land Registration Act* does not define fraud. Recourse must therefore be had to other sources of law. The *Black’s Law Dictionary* defines fraud thus: -

“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. Fraud, as applied to contracts, 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’.

Fraud would, therefore consist of deceitful actions which may be made through either positive assertions or concealment of facts. It is settled law 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.”

36. Similarly, in the case of *Denis Noel Mukbulo Ochwada & another v Elizabeth Murungari Njoroge & another* [2018] eKLR. The court stated that: -

“As regards standard of proof of fraud, the law is quite clear. In *R. G. Patel v Lalji Makanji* (supra), the former Court of Appeal for Eastern Africa stated thus: -

“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.”

37. Also in the case of *Urmilla w/o Mahendra Shab v Barclays Bank International Limited & another* [1979] KLR 76; [1976-80] 1KLR 116B it was held that:

“allegations of fraud must be strictly proven and that 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. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned”.

38. It is the Plaintiff’s case that the charge and/or transfer of the suit property to the 1st defendant was fraudulent, illegal and unlawful. That it was due to a conspiracy by the defendants because this occurred when they had already been allotted the suit property and had already constructed on the suit property. Further that the 3rd defendant charged a property that they alleged to be undeveloped yet the suit property was developed with a four storey building occupied with tenants.

39. The plaintiffs went ahead and reported the matter to CID where the 1st defendant was arrested and charged with two counts as follows:

- i. Conspiracy to defraud, contrary to section 317 of the *Penal Code*;
- ii. Obtaining registration by false pretences contrary to section 320 of the Penal Code The particulars of each well captured in the plaintiff’s pleadings.

40. The defendants have not denied or rebutted this fact of fraud and arrest of the 1st defendant whose matter is still pending before the criminal court.

41. I have gone through the evidence tendered by the Plaintiff and I find that he has proved on a balance of probability that there is indeed actions that would clearly pass for having been illegally and fraudulently done.

42. The actions point to irregularities that led to an allotted plot being allotted a second time to someone who had not paid for it. No evidence was led to show how the 1st defendant came into the said Certificate of Lease. The root of title cannot be seen it is as if the title “just happened”

43. The 3rd defendant should have done due diligence and get the history of the land not just from the lands registry (which it infact did not do) but also from the neighbours (if only it had visited the suit property). The plaintiff’s testimony indicated that they have been on the suit property since 1979 they



have constructed a four storey building information that was "discovered" by the 3rd defendant only after the 1st defendant defaulted in loan repayment and after they now undertook a valuation since they never did one before issuance of the loan, at least none that the court was informed of. All the parties who engaged in this fraudulent activity must have been the often spoken about land cartels that has been fleecing people of their hard earned money or property. The 3rd defendant should therefore be held vicariously liable for the wrongful acts of its agents.

44. In this era of Artificial Intelligence and advanced digital age, where people are developing software day in day out, banks should be ahead in innovative ways to curb any unforeseen and foreseeable compromise to their securities where they have to charge properties. The GIS systems can be used to allocate parcels of land with precisions. Banks must be extra diligent when dealing with properties to be charged or mortgaged.
45. On whether the plaintiff was entitled to the reliefs sought. Now the 1st and 2nd defendants were given an opportunity to defend themselves but they did not appear in court. The plaintiff's evidence against them is uncontroverted. The 4th defendant's averred that the 2nd defendant is no longer in existence but never presented any evidence to support this claim besides, what interest did the Counsel have to speak for this party yet they had not been instructed.
46. On the issue general damages PW1 did not present any evidence in respect of the damages the Plaintiff had suffered in relation to the Defendants' actions. The burden of proof was upon the Plaintiff to prove the damages he had suffered. It was PW1's evidence that they had developed the land. Therefore, the claim for general damages must fail as it has not been proved by the plaintiff. It is against the foregoing that I find that the Plaintiff is indeed not entitled to General Damages.
47. It is against the foregoing that I come to the conclusion that the plaintiff has proved his case on a balance of probabilities. I therefore enter judgement in favour of the plaintiff against the defendants in the following terms:
 - a. A declaration is hereby issued that the plaintiff is the legal and bonafide owner of land parcel No LR Nairobi/Block 119/2977.
 - b. A declaration is hereby issued that the loan facility advanced to the 1st defendant by the 3rd defendant is not binding on the plaintiff
 - c. A declaration is hereby issued that that the loan and interest advanced to the 1st defendant vide a charge registered on land parcel No LR Nairobi/Block 119/2977 should be settled by the 1st defendant
 - d. An order is hereby issued for cancellation of the charge registered on LR Nairobi/Block 119/2977
 - e. An order is hereby issued for the cancellation of the lease and the certificate of lease issued to the 1st defendant and dated 28th August 2015
 - f. An order is directed to the 4th defendant to issue a new lease to the plaintiff in respect of LR Nairobi/Block 119/2977
 - g. Costs of this suit are awarded to the plaintiff to be paid by the defendants jointly and severally

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY MAY 2024.

.....



MOGENI J

JUDGE

In the Virtual presence of: -

Mr. Kang'iri for Plaintiff

No appearance for 1st, 2nd, 4th & 5th Defendants

Mr. Muhoro holding brief for Ochieng for the 3rd Defendant

Ms. Caroline Sagina - Court Assistant

.....

MOGENI J

JUDGE

