



**Kimani v Maina & 2 others (Environment & Land Case
E149 of 2022) [2024] KEELC 4370 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4370 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E149 OF 2022**

JG KEMEI, J

MAY 23, 2024

BETWEEN

ALICE NJAMBI KIMANI PLAINTIFF

AND

SIMION MWANGI MAINA 1ST DEFENDANT

EDWXARD KUBAI WAMAITHA 2ND DEFENDANT

CHIEF LAND REGISTRAR, RUIRU 3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed suit vide the Plaint dated 5/12/2022 seeking the following orders:-
 - a. A declaration that the Plaintiff is a bonafide purchaser for value of all that parcel of land known as Ruiru/ruiru East Block 2/798.
 - b. A permanent injunction stopping the 1st and 2nd Defendants, their agents, servants or persons acting on their behalf from dealing, meddling, transferring or in any way interfering with the land parcel number Ruiru/ruiru East Block 2/798 and further interfering with Plaintiff's quiet possession of the same.
 - c. A declaration that the title deed issued to the late Emma Wamaitha Gatumwa sometime in the year 2021 is fraudulent, null and void.
 - d. An order directing the 3rd Defendant to cancel the secondary title deed to the land issued to the late Emma Wamaitha Gatumwa sometime in the year 2021.
 - e. An order directing the 1st and 2nd Defendants to obtain proper legal representation of the estate of the late Emma Wamaitha Gatumwa and effect transfer of the suit land in favour of the Plaintiff.



- f. Costs of this suit, plus interest at Court rates.
 - g. Any further or better relief that the Court may deem fit to grant.
2. In brief she averred that she bought land from Bartholomew Kimana Gatumwa (Kimana), the brother of the registered owner who held a Power of Attorney.
 3. That upon purchase she took possession and subdivided the land and sold to 3rd parties who have since settled on the land. That she is a bonafide purchaser for value and that she holds the original title in her possession. That she duly settled the deposit of the purchase price and therefore entitled to specific performance of the agreement dated 27/11/2006.
 4. Under paragraph 28 of the Plaint, the Plaintiff accused the Defendants of fraud and particulars of fraud were itemized.
 5. In denying the Plaintiff's claim, the Defendants filed a Defence and Counterclaim in which they sought the following orders:-
 - a. The Plaintiffs, their beneficiaries, agents, servants, tenants, purchasers, and employees be evicted from Ruiru/ruiru East Block 2/798 and any building erected on the said land be demolished.
 - b. A permanent injunction be issued against Plaintiffs, their beneficiaries, tenants, agents, servants, purchasers, and employees from trespassing, subdividing, disposing, living on, erecting on buildings whatsoever, transacting any business and or interfere in any manner whatsoever with Ruiru/ruiru East Block 2/798.
 - c. Cost of this suit.
 - d. Interest thereon.
 - e. Any/or further relief this Honourable Court might deem fit and just to grant thereon.
 6. PW1 – Alice Njambi Kimani adopted her witness statement dated 5/12/2022 and produced documents marked as PEX No. 1 – 12 in support of her case.
 7. She stated that she bought the land from Kimana. The land is registered in the name of Emma Wamaitha (Wamaitha). Kimana held a Power of Attorney from Wamaitha who lived in America then. That the firm of J G Waweru Advocates prepared the agreement for sale. That she is in possession of the land since 2006. She stated that at the time of purchase there was a restriction on the land lodged on 31/12/2001. That Kimana handed over the original title to her. That she has not cleared the purchase price because the title has not been transferred to her. That she is holding the balance of the purchase price pending the transfer of the land to her.
 8. PW2 – James Mwangi Kabaka stated that he introduced the Plaintiff to Kimana as a land broker. He was present when the agreement was signed by the Plaintiff and Kimana. That the land was sold by Kimana who stated that he had permission from Wamaitha to so sell the land. That Kimana had both the title and a Power of Attorney.
 9. PW3 – Joseph Wainaina introduced himself as the brother of Wamaitha and Kimana. That PW2 sought him out after the death of Kimana. That she connected the Plaintiff to Emma who then lived in the United States of America. That Kimana never informed him that he had sold Emma's land. That nobody knew that he had sold land. That he did not hear the conversation that Emma had with the



- Plaintiff on phone. That in 2016, Emma came to Kenya and met with the Plaintiff. That Emma said she would discuss the transaction with the Plaintiff.
10. PW3 – Joseph Waweru Chege stated that she met Wamaitha who informed him that she had sold the land to the Plaintiff and that there was an existing case at the Chief Magistrate’s Court at Thika. He stated that he bought the land from Kinuthia who acquired from the Plaintiff. That before purchasing the land he carried out a search at the Plaintiff’s office where he was shown the records at the Plaintiff’s office. That he did not carry out a search at the lands office. That the Plaintiff gave him a Share Certificate for the land as a representation of ownership in the said land.
 11. DW1 – Edward Kubai Wamaitha stated that he is the son of Wamaitha. He adopted his written statement dated 2/3/2023 and produced documents marked as DEX 1 – 10.
 12. He stated that of his knowledge he was aware that his mother never sold the land to the Plaintiff. Infact he stated that she had complained that her title was lost and procured a replacement of the same in 2021 after going through the legal procedure. That his mother never sold land nor gave Kimana the permission to sell the land. She was unhappy when she discovered that Kimana had unlawfully sold her land. That when she came to Kenya she reported a case of trespass.
 13. DW3 – Simon Mwangi stated that he is the son in law to Wamaitha. He stated that he visited the land with Emma and found 3 houses constructed thereon. That in 2016 Emma reported the loss of the title and obtained a replacement title.
 14. Parties filed their written submissions which I have read and considered.

The Plaintiff’s Submissions

15. The Plaintiff filed two sets of submissions dated 23/6/2023 and 4/8/2023 through the firm of Joe Nganga & Associates. Rehashing the summary of the case and rival evidence adduced in Court by the witnesses, the Plaintiff submitted that she duly purchased the suit land from Bartholomew Kimana Gatumwa. That Bartholomew held a power of attorney for his sister Emma Wamaitha Gatumwa, the registered owner of the suit land. That the sale agreement, proof of payment of deposit and evidence of the power of attorney, copy of title deed were produced as Pexh.1, 2, 4, 5 & 6. It was submitted that the Plaintiff took possession of the suit land after paying the deposit and being issued with the seller’s title deed but halted further transactions upon realizing that there was a pending caution in respect of the suit and vide Thika CMCC 676 OF 1993.
16. The Plaintiff stated that the completion process was halted following the demise of Kimana. The Plaintiff then managed to trace another brother named Joseph Wainaina who helped the Plaintiff to connect with the suit land owner Wamaitha. The Plaintiff would later meet with Wamaitha when she visited Kenya in 2016. That PW2 and DW2 confirmed that the Plaintiff and Wamaitha met and together visited the suit land where they met PW4.
17. Further it was pointed out that Thika CMCC NO 676 of 1993 was dismissed in 2018 for want of prosecution and no appeal was preferred. That Wamaitha died in 2021 and thereafter the 1st and 2nd Defendants reported the Plaintiff at Juja DCI offices accusing her and other purchasers for trespassing on the suit land. The Plaintiff then learnt that Wamaitha had reported that her title deed was lost, swore an Affidavit and applied for a replacement leading to issuance of another title deed in her name. It is against that background that the Plaintiff filed Ruiru CMELC No. E119 of 2022 which was terminated for want of jurisdiction hence the present suit.
18. The Plaintiff thus avers that she is a bona fide purchaser for sale and the title deed held by the 2nd Defendant was procured fraudulently. That according to the Defendants, the Plaintiff executed a sale



agreement with and paid deposit to Kimana and not the registered owner, Wamaitha. The Defendant denied existence of any power of attorney based on what the late Wamaitha allegedly told them. That the conduct of the Plaintiff and the late Wamaitha when she was alive, it is apparent that the sale was kept alive and if at all there was no Power of Attorney as claimed, then the late Emmah would have stated as much in her to Kenya in 2016. The Plaintiff submitted that she had discharged the burden of proof placed on her by dint of Section 107 of the Evidence Act whereas the Defendants have not proven their counterclaim.

The 1st and 2nd Defendants' Submissions

19. The firm of Nyambura Munyua & Co. Associates filed submissions dated 29/7/2023 on behalf of the 1st and 2nd Defendants. Reiterating the background of the case and rival evidence adduced in Court, the Defendants expounded on the elements of a valid contract in relation to the sale agreement dated 27/11/2006 between the Plaintiff and Kimana. It was stated that Bartholomew lacked the capacity to enter into the sale agreement as the power of attorney was not mentioned in the agreement nor produced in Court. That the consideration of Kshs. 450,000/- was not done as agreed and even the amount of Kshs. 200,000/- said to have been paid upon execution of the agreement was not proven as a receipt of Kshs. 180,000/- is annexed to the agreement. That the sale agreement lacked legality noting that the subject land had restrictions prohibiting any dealings on it and the said Kimana lacked capacity to sell land that was not his. That the totality of the forgoing coupled with the Wamaitha's reporting loss of her title deed made the sale agreement legally un-enforceable.
20. Moreover, it was submitted that that the suit land legally belonged to the late Wamaitha and the Plaintiff cannot lay any claim to it. That a title deed is prima facie evidence of ownership as enshrined in Section 26 of the Land Registration Act. That the right to own property is constitutionally protected under Article 40 of the Constitution of Kenya. On the issue of costs, the Defendants stated that costs follow the event and urged the Court to allow their counterclaim and dismiss the Plaintiff's suit with costs.
21. In a rejoinder, the Plaintiff submitted that the Defendants cannot rely on the protection of the law on sanctity of title, yet the title they hold was procured fraudulently since the whereabouts of the original title was known. That the Defendants' intention is to defeat her purchase which was sanctioned by the late Wamaitha.

Analysis and determination

22. It is not in dispute that the suit land was registered in the name of Wamaitha as at 1992. The 1st and 2nd Defendants are the son in law and son of the deceased Wamaitha who died in 2021. The 2nd Defendant has brought suit as administrators of the estate of Wamaitha pursuant to the Limited Grant of Letters of Administration ad Litem dated 12/7/2022.
23. The key issue is whether the agreement between Kimana and the Plaintiff is legally binding.
24. In answering this question the Court will firstly look into whether the Plaintiff has proven fraud on the part of the 1st and 2nd Defendants.
25. Fraud is defined as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.
26. It is trite that the standard of proving fraud is higher than a balance of probability but below the standard of beyond reasonable doubt applied in criminal cases.



27. In the case of *Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

28. In this case the Plaintiff has particularized fraud as follows:-

- a. Making false reports to the Police at Juja DCI that the suit property has been trespassed while knowing that the Plaintiff was a bonafide purchaser from Emma Wamaitha.
- b. Assisting the late Emma Wamaitha to swear a false Affidavit that the original title to the land was lost while knowing that it had been deposited with the Plaintiff's Counsel.
- c. Claiming to be legal representatives of the estate of the late Emma Wamaitha without any legal documentation to support the same.
- d. Seeking to evict innocent 3rd parties who are bonafide purchasers for value and who purchased plots from the Plaintiff.
- e. Seeking to deny the Plaintiff a transfer of the land in her favour as agreed between herself and the Defendant's relative the late Emma Wamaitha details whereof are well within their knowledge.

29. It was the Plaintiff's case that she bought the land from Kimana vide an agreement dated 27/3/2006 entered into between herself and Kimana. The Plaintiff avers that Kimana held a Power of Attorney from Wamaitha. She however failed to present any Power of Attorney before the Court. The vendor in this agreement is described as the owner of the suit land which is registered in the name of Wamaitha. To the extent that the Plaintiff purchased land registered in the name of Wamaitha from Kimana without permission of the owner shows that the transaction was illegal, null and void.

30. The Plaintiff has argued that she was given the original title and put in possession by Kimana and that when Wamaitha came to Kenya, she did not disown the transaction.

31. However the actions of Wamaitha are far different from the averments of the Plaintiff. If indeed Wamaitha had okayed the transaction nothing stopped her from executing a sale agreement with the Plaintiff. Indeed nothing stopped her from even transferring the land to her even after the case was completed.

32. The Court finds that there is no evidence to show that Wamaitha ratified the actions of Kimana. I say so because Wamaitha reported the loss of her title and obtained a replacement. Even if the Plaintiff held the original title in her custody that alone is not enough to legalise the alleged sale.

33. I have perused the pleadings and it is clear that the 2nd Defendant has sued on behalf of the estate of his mother pursuant to the grant issued to him.

34. The Court finds that no fraud has been proven against the 1st and 2nd Defendants.



35. Whether the Plaintiff a bonafide purchase of title. I rely on the case of Katende Vs. Haridas & Company Ltd (2008) 2 EA 174 where the Court defined a bonafide as;

“A bona fide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bonafide doctrine he must prove the following; he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent good title and he purchased without notice of any fraud.”

36. In this case the Plaintiff purchased land from Kimana who held no Power of Attorney to sell the land. There is no evidence that Wamaitha ratified the sale at all. No evidence was led to show that the Plaintiff paid any money to Wamaitha for the sale of the land.

37. In her evidence she stated that:-

“I never carried out a search before entering into the agreement. I carried out a search after the sale.”

Further she added:

“I said that the land was not available for sale. there was a restriction on the title lodged on 31/12/2001. I bought the land in the year 2006 when the restriction was in force. I do not have a Power of Attorney in Court. ... the blame is on my part as I bought the land that belonged to Wamaitha with a restriction.”

38. The import of the above evidence is that in 2006 the suit land was not available for sale. It had an encumbrance in favour of a restriction lodged in 2001; the Plaintiff did not carry out any due diligence. Had she carried out a basic search on the title she would have discovered that Kimana had no interest in the land and further that the land was subject to a suit namely CMCC No. 676 of 1993 in which Wamaitha had been sued with others.

39. It is trite that the principle of pendente lite still applies in our jurisdiction. In the case of Madan, JA, echoing the words of Turner LJ in Bellamy vs Sabine [1857] 1 De J 566, expounded on the purpose of the doctrine thus in the case of Manwji Vs U. S International University and Another [1976-80] KLR 229:-

“It is a doctrine common to the Courts both of law and equity, and rests, as I apprehended, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant’s alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings.”

40. The Court of Appeal in Emmanuel Ngade Nyoka Vs. Kitheka Mutisya Ngata [2017] eKLR affirmed that the doctrine simply prohibits a party to a suit from transferring the suit premises to a third party while the suit, with regard to the suit premises is pending. That the purpose of the doctrine is of course to preserve the suit premises until the finalisation of the ongoing litigation.

41. The Court finds that the suit land was not available for sale in 2006 as the land was subject to active litigation before the Court. The Plaintiff walked into the transaction with her eyes wide open and



regrettably acquired no interest in the suit land because Kimana held none and transferred none to the Plaintiff.

42. PW3 who testified on behalf of the Plaintiff sated as follows:-

“Emma bought the land from Nyakinyua. Kimana did not tell me that he had sold the land. Nobody knew that Kimana had sold the land. I did not hear what the Plaintiff and Emma talked about.

... I can say that what Kimana did was wrong to sell land belonging to my sister without permission.”

43. The Court finds Kimana had no mandate from Wamaitha to dispose the land.

44. The Court finds that between Kimana and the deceased Wamaitha, the deceased had a better title.

45. On the question of eviction, in the absence of any evidence having been tendered in support of the Plaintiff's continued occupation of the land, the Court finds that the Plaintiff is a trespasser ab initio. Trespass is defined as “any unjustifiable intrusion by one person upon the land in possession.”

46. Section 24 and 25 of *Land Registration Act* provides that a land owner has a right to among others quiet enjoyment of the suit land.

47. The Plaintiff has not satisfied this Court that she has a justifiable reason to remain in occupation of the land.

48. In the end the Plaintiff's suit is dismissed and I enter Judgment in favour of the 1st and 2nd Defendants as follows:-

- a. The Plaintiffs, their beneficiaries, agents, servants, tenants, purchasers, and employees be and are hereby ordered to vacate the suit land within a period of 60 days from the date of judgement in default evicted from Ruiru/ruiru East Block 2/798 to ensue and any building erected on the said land shall be demolished.
- b. A permanent injunction be and is hereby issued against Plaintiffs, their beneficiaries, tenants, agents, servants, purchasers, and employees from trespassing, subdividing, disposing, living on, erecting on buildings whatsoever, transacting any business and or interfere in any manner whatsoever with Ruiru/ruiru East Block 2/798.
- c. The costs are in favour of the 1st and 2nd Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MAY, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Karanja for the Plaintiff

Ms. Muturi HB Mrs. Kerio for the 1st and 2nd Defendant

3rd Defendant – Absent

Court Assistants – Phyllis & Oliver

