



REPUBLIC OF KENYA



**Mwangangi v Nthiwa (Environment & Land Case E001 of 2020)
[2024] KEELC 4328 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E001 OF 2020**

TW MURIGI, J

MAY 23, 2024

BETWEEN

TABITHA MWIKALI MWANGANGI PLAINTIFF

AND

DAVID MUTHUKA NTHIWA DEFENDANT

JUDGMENT

1. By a Plaint dated 23rd September, 2020, the Plaintiff prays for judgment against the Defendants for:-
 - a. An order of permanent injunction do issue restraining the Defendant, his agents, servants or anyone acting or claiming through him from entering, trespassing, building houses, subdividing, registering and or in any other manner interfering with the Plaintiff's parcel of land being title/parcel Numbers. Mbooni/Kalawani/1855, 1856, 1857, 1858, 1859, 1860 & 1861 being subdivisions of Mbooni/Kalawani/28.
 - b. An order for cancellation of all titles, subdivisions and all entries made in land parcel Nos. Mbooni/Kalawani/1855, 1856, 1857, 1858, 1859, 1860 & 1861 being subdivisions of Mbooni/Kalawani/28 and revert back to joint ownership in respect to Mbooni/Kalawani/28.
 - c. Cost of the suit.
2. The Defendant filed a Statement of Defence and counterclaim dated 21st October 2020, denying the Plaintiff's claim. In his counterclaim, the Defendant prays for judgment against the Plaintiff for:-
 - a) An order that the caution registered by the Plaintiff over land parcel Nos. Mbooni/Kalawani/1855, Mbooni/Kalawani/1857 and Mbooni/Kalawani/1858 be removed and the Makueni Land Registrar to implement the court order.
 - b) Costs of the suit with interest.



- c) Any other relief as this Honourable court may deem fit and just to grant.
3. The Plaintiff filed a reply to the Defence and Defence to the counterclaim dated 12th October 2021 denying the Defendant's claim She urged the court to dismiss the counterclaim with costs.

The Plaintiff's Case.

4. The Plaintiff, Tabitha Mwikali Mwangangi testified as the sole witness in support of her case. She adopted her witness statement filed in court on 24th September 2020 as her evidence in chief. She also produced the documents in the list of documents dated 23/09/2020 and in the supplementary list of documents dated 7/2/2022 as PEX 1-5 respectively.
5. The Plaintiff testified that land parcel No. Mbooni/Kalawani/28 initially belonged to her father in law but upon his demise it was registered in her name and that of the Defendant as joint proprietors. She testified that prior to his demise, her father in law had subdivided the land into two portions.
6. She went on to state that the Defendant subdivided the suit property into seven unequal portions to wit, Mbooni/Kalawani/1855, 1856, 1857, 1858, 1859, 1860 and 1861 without her knowledge or consent so as to deprive her from getting her rightful share of the suit property. She testified that she was given a small portion of the suit property measuring 0.8266 hectares comprised in parcel No. Mbooni/Kalawani/1856 while the Defendant awarded himself a bigger portion of the land. She pleaded with the court to issue an order of injunction restraining the Defendant from selling the said portions of the suit property as it would be to her detriment and loss. She urged the court to grant the orders as sought in the Plaintiff.
7. On cross examination, the Plaintiff testified that they were given the land by their father in law. She testified that her mother in law's house is constructed on a portion within her land which is registered in the Defendant's name.
8. It was her testimony that she was issued with a title deed in respect of her portion of land and that her mother in law was issued with title No Mbooni/Kalawani/1855.
9. She denied the allegations that she obtained consent to subdivide the land or ever signing the mutation forms.
10. She testified that although her father in law had sold some portions of the suit property to third parties, she was not aware if he had sold parcel No 1857, 1859 and 1860.
11. She lamented that the Defendant's portion of land is bigger than hers and that she is unable to access her husband's grave because it is within the land registered in the Defendant's name. According to the Plaintiff, the boundary between the two portions of land should revert back to where it was established by her late father in law. She further stated that her mother in law's house was demolished and constructed on her portion of land after they were issued with title deeds.
12. She told the court that she lodged a caution against land parcel Nos. Mbooni/Kalawani/1855,1857 and 1858 because the ownership thereof had changed hands. She further testified that she did not register a caution against parcels Nos. Mbooni/Kalawani/1859,1860 and 1861 because they had been sold to third parties.
13. She insisted that the plots that were sold by her late father in law were separate from the land that was subdivided amongst them.



The Defendant's Case

14. The Defendant David Muthuka Nthiwa testified as DW1 and called one witness in support of his case. He adopted his witness statement filed in court on 16th November 2020 as his evidence in chief. He also produced the documents in the list of documents dated 30th October 2020 in support of his case.
15. DW1 informed the court that land parcel No. Mbooni/Kalawani/28 was initially registered in the name of his father was Ngumbi Nthiwa Mwisyo alias Muthuka. He testified that his late father had during his life time sold commercial plots within his land to several people so as to cater for his daily upkeep, medical expenses for his son Samuel Mwangangi Muthuka and to pay school fees for his children. He stated that his late father shared the remaining land and left out the portions that he had sold to third parties. It was his testimony that the parcels arising from the subdivision were registered in his name pending transfer to the respective owners.
16. He confirmed that upon the demise of his father, land parcel No. Mbooni/Kalawani/28 was registered in their joint names. He informed the court that they invited a Surveyor who proceeded to subdivide the land on 11/09/2004 according to the boundaries established by his late father. That upon subdivision, the Plaintiff was given parcel No Mbooni/Kalawani/1859 on behalf of her late husband, while his mother was given land parcel No. Mbooni/Kalawani/1855 and that he got land parcel No. Mbooni/Kalawani/1858. He further testified that his late father sold land parcel Nos. Mbooni/Kalawani/1859, 1860 and 1861 to Mathew Matheka, Benjamin K Mutuse and Harrison Kyalo Musau who have since sold the plots to other parties.
17. He further testified that his father sold land parcel No.Mbooni/Kalawani/1857 to Mutua Muia, Gideon Nzyuko, Daniel Munyao Muendo, Samuel Katiku, Joshua Muinde, Christine Kanini Wambua, Daniel Musau, Mutua Sei, Rhoda Katulu, Kimeu Muithi, John Ngundo and Jane K. John. In addition, he stated that his late father sold several plots within the lower part of land parcel No. Mbooni/Kalawani/1858 to Joseph Maingi, Elisha K. Kituma, John Ngewa (2 plots), Jeremiah K. Kioko(3 plots), Joseph Maingi, Charles Kyalo Kangulu and Munini Mule. It was his testimony that he has constructed his home on land parcel No. Mbooni/Kalawani/1858. He complained that he will be left with a smaller portion once he excises the plots because his land was taken up by the tarmacking of Tawa-Mbooni road. He asserted that he constructed a decent house for his mother on her land as her house was old and dilapidated. He urged the court to dismiss the Plaintiff's suit with costs and allow his counter claim as prayed.
18. In cross examination, he reiterated that land parcel No. Mbooni/Kalawani/28 was initially registered in the name of Ngumbi Nthiwa Muisyo and that upon his demise the land was registered in their joint names. He admitted that land parcels Nos. Mbooni/Kalawani/1855-1861 arose from the subdivision of land parcel No Mbooni/Kalawani/28. He testified that his father subdivided his land in the year 2004 between his two sons in the presence of the elders. He further testified that he attended the Land Control board together with the Plaintiff and insisted that she signed the mutation forms.
19. DW1 further testified that his mother insisted that her land should be registered in his name.
20. DW2 Mary Mutunge Ngumbi Nthiwa adopted her witness statement filed in court on 16th November, 2020 as her evidence in chief. She informed the court that the Plaintiff is her daughter in law while the Defendant is her son. She testified that land parcel No. Mbooni/Kalawani/28 was initially registered in the name of her husband but upon his demise, the land was registered in the joint names of the Plaintiff and the Defendant. She testified that her late husband sold commercial plots to several people so as to cater for the Plaintiff's late husband medical expenses and to pay school fees for his children. She further testified that prior to his demise, her husband subdivided the land on



11/9/2004 amongst the Plaintiff, Defendant and herself. She stated that her portion is registered in the name of the Defendant while the Plaintiff's portion is registered in her name. She further testified that she requested her son to construct a decent house for her since her old house was dilapidated. She went on to state that on 11/6/2020, she summoned the clan to help her resolve the problems between her and the Plaintiff. According to DW2, the clan resolved the issue and decided that everyone should continue occupying his/her portion of land. She urged the court to order the removal of the caution registered against her land and to dismiss the suit with costs.

21. On cross examination, she testified that the elders were present when her late husband subdivided his land.
22. After the close of the hearing, the parties agreed to file and exchange written submissions.

The Plaintiff's Submissions

23. The Plaintiff's submissions were filed on 15th March 2023. On her behalf, Counsel submitted that the Plaintiff together with the Defendant jointly hold undivided shares in land parcel No. Mbooni/Kalawani/28 and that neither party can transfer or dispose of their interest without the other party's consent.
24. Counsel submitted that the subdivisions in respect of land parcel No. Mbooni/Kalawani/28 were illegally carried out and that the titles arising therefrom were issued unprocedurally. It was submitted that the Defendant committed acts of fraud in carrying out the subdivisions as he did not produce the application for consent to subdivide the property, consent or the mutation forms. It was submitted that the Defendant did not adduce any evidence to show that the Plaintiff gave her consent to effect the subdivisions and the subsequent transfer.
25. Counsel further submitted that the sale agreements were contested as they were executed before the family meeting was held in the year 2004 when the suit property was divided. It was submitted that during the meeting, there was no mention of any plots having being sold.
26. Counsel submitted that the plot numbers contained in the sale agreements were not in existence during the time of the sale. It was further submitted that the Defendants did not call the purported purchasers to testify on the veracity of the sale agreements.
27. Concluding his submissions Counsel submitted that the subdivisions are unprocedural as they are marred with irregularities.
28. To buttress his submissions Counsel relied on the case of *Siriekisi Morris Wanjala v Boniface Bruno Wanjala* (2021) eKLR

The Defendant's Submissions

29. The Defendant's submissions were filed on 11th May 2023
30. On his behalf, Counsel submitted that the Plaintiff did not list the particulars of fraud in the Plaint. Counsel further submitted that Order 2 Rule 10(a) of the *Civil Procedure Rules* provides that particulars of misrepresentation, fraud, breach of trust, wilful default or undue influence must be listed in the plaint. According to Counsel, the Plaintiff did not adduce any evidence to show that the subdivision of parcel No. Makueni/Kalawani/28 was carried out fraudulently.
31. Counsel further submitted that the Plaintiff maliciously registered cautions on land parcels Nos. Makueni/Mbooni/1855, 1857 and 1858 without any basis and urged the court to order the removal of the same. According to Counsel, the Plaintiff did not register cautions on land parcels Nos. Makueni/



Kalawani/1859, 1860 and 1861 because she was aware that her father in law had prior to his demise sold the same to several people.

32. To buttress his submissions Counsel relied on the following authorities:-

- a) *Vijay Morjaria v Nansing Madhusing Darbar & Another* (2000) eKLR
- b) *Moses Parantai & Peris Wanjiku Mukuru (suing as the legal representatives of the estate of Sospeter Mukuru Mbeere deceased) v Stephen Njoroge Macharia* (2020) eKLR

Analysis and Determination

33. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination:-

- i. Whether the Plaintiff is entitled to the orders sought.
- ii. Whether the Defendant is entitled to the orders sought.

34. From the pleadings and the evidence on record, the following facts are not in dispute:-

- i. The Plaintiff is a sister in law to the Defendant.
- ii. Land Parcel No. Mbooni/Kalwani/28 was jointly held by the Plaintiff and the Defendant prior to its subdivision.

Whether the Plaintiff is Entitled to the Orders Sought

35. The Plaintiff is claiming ownership over parcels of land arising from the subdivision of land parcel No. Mbooni/Kalawani/28.

36. The Plaintiff alleged that the Defendant caused land parcel No. Mbooni/Kalawani/28 to be subdivided into seven unequal portions without her knowledge or consent. She lamented that after land parcel No. Makueni/Mbooni/28 was subdivided, she was given a small portion of the land measuring 0.8266 Ha comprised in title No. Mbooni/Kalawani/1856 while the Defendant awarded himself a bigger portion of the property.

37. According to the Plaintiff, the subdivisions were carried out fraudulently as she did not obtain consent from the Land Control Board nor sign the mutation forms.

38. At this juncture, this court is called upon to determine whether the subdivision of land parcel No. Mbooni/Kalawani/28 was carried out fraudulently.

39. Black's law dictionary defines fraud as:- "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

40. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) held 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."



41. The Plaintiff pleaded and testified that the Defendant illegally subdivided land parcel No. Mbooni/Makueni/28 without her knowledge or consent. She stated that her late father in law had subdivided the land between her and the Defendant. It is trite law that fraud must be specifically pleaded and proved. The Plaintiff did not set out the particulars of fraud in her plaint. It is not in dispute that the Plaintiff and the Defendant jointly held No. Mbooni/Kalawani/28 as joint proprietors. The subdivisions and subsequent transfer could not have been effected without the Plaintiff obtaining consent from the Land Control Board. The Plaintiff did not adduce evidence to show that her signature was forged to effect the subdivisions and subsequent transfer. Although the Plaintiff pleaded particulars of illegality on the part of the Defendant, she did not adduce any evidence in support of the same. I find that the Plaintiff has not demonstrated that the subdivisions were carried out fraudulently as she would wish this court to believe.
42. The Plaintiff sought for an order of cancellation of titles, subdivisions and all entries made in land parcel No. Mbooni/Kalawani/28.
43. Section 80 of the [Land Registration Act](#) provides as follows:-
- “Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”.
44. The court is satisfied the subdivisions and subsequent transfer were done procedurally and as such the titles arising thereof cannot be cancelled. Having found that the subdivisions were carried out procedurally I find that the Plaintiff is not entitled to the orders sought.

Whether the Defendant is Entitled to the Orders Sought

45. The Defendant is seeking for an order directing the Land Registrar Makueni to remove the caution registered by the Plaintiff on land Parcel Nos. Mbooni/Kalawani/1855, 1857 and 1858.
46. The parameters on who should register a caution are provided for under Section 71 of the [Land Registration Act](#). Section 71(1) provides as follows: -
- A person who-
- a. claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act,
 - b. is entitled to a licence, or
 - c. has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land, lease or charge.
47. Section 73 of the [Land Registration Act](#) makes provisions on the removal of a caution. Section 73(1) stipulates that;
1. A caution may be withdrawn by the cautioner or removed by the order of the court or subject to sub section (2) by order of the registrar.



48. The Plaintiff informed the court that she registered the caution against land parcels Nos. Mbooni/Kalawani/1855, 1857 and 1858 because the ownership thereof had changed hands. She produced the certificates of official search in respect of land parcels Nos. Mbooni/Kalawani 1855-1861 (Pex 2). The certificates of official search for land parcel Nos. 1855, 1857 and 1858, show that the Plaintiff registered the caution on 17/8/2020 while claiming proprietary interest. She testified that the Defendant intends to sell the portions arising from the subdivision to her detriment.
49. From the evidence on record, it is not in dispute that Muthuka Lula deceased sold plot Nos. 1859, 1860 and 1861 during his life time. The Plaintiff did not register any caution over the said parcels. The Defendant testified that his late father also sold Plot No. 1857 and several plots on the lower part of plot No. 1858 where he has constructed his home. In this regard, the Defendant produced sale agreements in respect of Plot Nos. 1857, 1858, 1859, 1860 and 1861. According to the Defendant, the plots are registered in his name pending transfer to the respective owners. The Plaintiff did not adduce any evidence to show that the sale agreements were forged or that her late father in law did not execute the same.
50. DW2 confirmed that she was given plot No. 1855 and that the same is registered in the name of the Defendant. It is crystal clear from the sale agreements that the late Muthuka Lulu sold land parcel No. Mbooni/Kalawani/1857 to several purchasers during his life time. The Plaintiff cannot therefore claim proprietary interest on land parcels Nos. Mbooni/Kalawani/1855 and 1858 as they are legally registered in the names of the DW1 and DW2 respectively. On the basis of the foregoing, I find that the Defendant is entitled to prayer (a) in the counterclaim.
51. In the end, I find that the Plaintiff has not proved her case against the Defendant on a balance of probabilities as required. I also find that the Defendant has proved his counterclaim against the Plaintiff on a balance of probabilities as required.
52. The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed. Accordingly, I enter judgment for the Defendant against the Plaintiff as follows:-
- i. An order is hereby issued for the removal of the cautions registered by the Plaintiff over land parcel Nos. Mbooni/Kalawani/1855, Mbooni/Kalawani/1858 and the Makueni Land Registrar to implement the court orders.
53. Since the parties herein are closely related, I hereby order that each party bears its own costs.

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

.....
HON. T. MURIGI

JUDGE

In the presence of:

Court Assistant - Alfred.

Hassan for the Plaintiff

Sila for the Defendant

