



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mukwanyaga v Kathendu & another (Environment & Land Case
E011 of 2023) [2024] KEELC 4911 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E011 OF 2023**

**CK NZILI, J
JUNE 19, 2024**

BETWEEN

HILDA MUKWANYAGA PLAINTIFF

AND

FESTUS KATHENDU 1ST DEFENDANT

THE LAND REGISTRAR – MERU CENTRAL 2ND DEFENDANT

JUDGMENT

1. The plaintiff in the plaint, dated 24.5.2023, failed to attend court, and her suit was dismissed for nonattendance and non-prosecution on 18.1.2024. In the counterclaim dated 10.7.2023, the initial defendant as plaintiff in the counterclaim sued the initial plaintiff as the defendant trading as Meru Junior Academy. The plaintiff averred that he was allotted and subsequently registered as a lease of L.R No. Meru Municipality Block 1/195, on 8.5.1992 and 21.12.2022, respectively.
2. The complaint was that the defendant, without express or written authority or approvals, purported to construct part of the school on the suit land. The plaintiff averred that vide a deed of exchange dated 16.12.2022, Moreso, the defendant conceded and acknowledged that he was the bonafide allottee and the registered owner of the land. The plaintiff averred that through a deed of exchange falsely and through misrepresentation of facts failed to disclose, engage, or involve other co-administrators of the estate of her late husband, refused to disclose the contents of her late husband's will regarding the beneficiaries of L.R No. Meru Municipality Block 1/278, hence making it impossible for the deed of exchange to be implemented.
3. Additionally, the plaintiff averred that during the hearing in Meru Succession Cause No. 56 of 2015, the defendant appeared to support the will that gave the plot she had offered in exchange for the suitland to third parties. Moreover, the plaintiff averred that the defendant purported to enter into the deed of exchange contrary to Section 82 of the [Law of Succession Act](#) and used the agreement to lease out



her school premises and the suitland to Highland Group of Schools, hence unjustly enriching herself at the expense of the plaintiff to the counterclaim.

4. The plaintiff prayed for a declaration that.
 - i. He was a bona fide registered owner of L.R No. Meru Municipality Block 1 /195,
 - ii. Cancellation and nullification of the deed of exchange.
 - iii. Eviction of the defendant from the suit land with the supervision of the O.C.S. Meru Police Station.
 - iv. Demolition of all buildings being and standing on the suit land.
 - v. Permanent injunction.
 - vi. Mesne profits
5. From the paginated bundle by the plaintiff filed on 11.7.2023, it appears that the statement of defense and counterclaim was served upon Ms. Nathan Mwaura & Co. Advocates, who then were on record for the defendant on 20.7.2023, from the court record. It appears that the plaintiff in the main suit and the defendant in the counterclaim failed to file any reply to the defense and defense to the counterclaim until 17.5.2024.
6. The defendant to the counterclaim purported to file a reply to the defense and defense to counterclaim dated 16.5.2024, 17.5.2024 at 10.59. It was filed four months after the counterclaim was prosecuted, cross-examination of PW 1 and 2 was done, and the parties had closed their respective cases.
7. The defendant denied the contents of the counterclaim, terming the documents accompanying it as simulated and executed to advance a fraud. The defendant averred that the term extension should be construed in the context of the situation and circumstances in that she needed additional space for her school on the property, then owned by the defunct Municipal Council of Meru, which at the time of her application was not owned by the plaintiff in the counterclaim or any other person. She terms the deed of exchange as obtained through duress and misrepresentation out of verbal threats, taking advantage of her declining health and delusion, thinking it was a lawful exchange and coercing her to sign a document she would otherwise not have signed. The defendant denied making any false representation to the plaintiff. She termed the deed of exchange as a nullity ab initio with no legal consequences.
8. Further, the defendant denied that the plaintiff was a bona fide registered owner of L.R No. Meru Municipality Block 1 /195, which she termed as acquired in bad faith, should be nullified, vitiated, and canceled by the court.
9. Additionally, the defendant to the counterclaim failed to comply with Order 11 of the Civil Procedure Rules following directions on 19.7.2023 and 14.9.2023.
10. At the hearing, Festus Kathendu testified as PW 1 and adopted his witness statement dated 5.9.2023 as his evidence in chief. He told the court that he was allocated an unsurveyed Plot No. T- 565 as per a letter of allotment dated 8.5.1992, which offer he accepted by paying allocation fee vide receipt dated 5.6.1992 for Kshs.13,470/= to the Municipal Council of Meru (defunct) who wrote a letter dated 9.11.1992 to the Commissioner of Lands informing them of his acceptance and forwarding to them Kshs.3,420/=. Eventually, PW 1 said that he was issued with a lease on 30.8.2022 as well as a certificate of lease on 21.12.2022 for L.R No. Meru Municipality Block 1/195. He produced the allotment letter, acceptance letter, town clerks letter, receipt payment memo, property rates payment receipts, letter of



- consent request for the processing of title, National Land Commissio. letter to the director of surveys, director of surveys and director of land administration, letters dated 18.11.2021, 19.7.2022, 20.7.2022 forwarding letter by the cabinet secretary forwarding the lease dated 4.8.2022 from the director of surveys forwarding a sealed registry index map to the director of land administration, lease data form A & B, lease and certificate of lease for L.R No's Meru Municipality/Block/1/195 as P. Exh No. (1) – (20).
11. PW 1 told the court that in 1992 or 1993, the defendant's husband approached him to exchange his land with an equivalent portion of land out of L.R. Meru Municipality Block 1/2780. Even though they were unable to finalize the negotiations, PW 1 said that he allowed the said husband to utilize his land as a playground, pending completion of the negotiations. Further, PW 1 said that he said husband died in 2015, only for the defendant to start building permanent structures therein in 2017. PW 1 said that he told the defendant to cease any construction, and in 2021, she renewed the offer for the exchange on 16.12.2022.
 12. In addition, PW 1 said that afterward, he discovered that three other co-administrators to the estate of the deceased were not involved in the negotiations; the three were not informed of the deed of exchange, the will of the deceased had bequeathed the plot to be exchanged with the two beneficiaries in equal shares which were not aware of the deed and had not accepted or been told how the hiving off of 0.1125 ha and the eventual transfers would happen. The defendant in Succession Cause No. Meru HC Succession No. 96 of 2015, had testified in support of the will, making it impossible to implement the deed of exchange; the deed of exchange was contrary to Section 82 of Law of Succession act (Cap 160), and the defendant had used the deed to lease out her land to Highland Group of Schools, with a view of unjustly enriching herself at the expense of the plaintiff.
 13. Additionally, PW 1 said that contrary to the supplementary affidavit sworn on 31.6.2023, the defendant was the owner who initiated the negotiations. She eventually signed the deed before a lawyer, and the agreement was freely and voluntarily executed while understanding its contents; hence, there was no coercion, threats, intimidation, or duress. PW 1 termed the claim as an afterthought, for he never gave any permission to the defendant to erect any buildings on any part of the land, and she was warned and agreed to cease any constructions but eventually ignored the dissent; otherwise, it was a clever way to grab the land.
 14. PW 1 termed Part Development Plan No. 167/98/17 and letters dated 6.8.1998, 12.8.1998, 13.8.1998, 31.8.1998, and 14.8.1998 in the list of documents accompanying the primary plaint as invalid and incapable of conferring any ownership rights to the defendant otherwise the allotting authority was never consulted to confirm availability of the said land because, after 8.5.1992, the suit land was never available for reallocation to another person since it had been legally and procedurally allocated to him, a fact conceded by the defendant.
 15. The plaintiff relied further on the deed of exchange dated 14.12.2022, copy of the certificate of death dated 11.5.2015, the last will and tenant of the late Johnson Mathio M'Iberi dated 17.4.2015 and proceedings in Meru H.C. Succession Cause No. 95 of 2016 as P. Exh No's. 21 – 25, respectively. PW 1 said that going by the will, it was evident that there was no land that the defendant was capable of offering in exchange and was out to defraud him for the land was not hers going by paragraph 16 of the will of the deceased and proceedings before the probate court. Moreso, PW 1 said that the defendant closed her school and leased it out to Highland Group of Schools; hence was earning income from his land.
 16. In cross-examination by Mr. Mwaura advocate on behalf of the defendant PW 1 told the court that the defendant was his neighbor on her Plot No. 52 since 1992 Plot No. T. 565 later changed to L.R No.



- Meru Municipality Block 1/128. PW 1 said that he followed all the necessary processes, approval, and clearances by the County Government of Meru and the Commissioner of Lands until he acquired a certificate of lease on 21.12.2022. He denied knowledge of an alleged application by the defendant for an extension of a lease covering his plot to the Land Registrar Meru Central.
17. Similarly, PW 1 denied that the defendant had occupied his land for 25 years. Additionally, PW 1 said that even though he had no development duly approved for his plot, he was yet to decide on what to do with the plot. Further, in the absence of any approved development plans, PW 1 termed the construction on part of his land by the defendant as illegal. Additionally, he termed any agreements between the defendant and the Highlands Group of Schools as invalid for the property does not belong to the defendant.
 18. Regarding any part development plans for an extension of a lease to cover his plot in possession of the defendant, PW 1 denied knowledge of the same; otherwise, he gave out a notice for the defendant to vacate his land after realizing that she was fraudulent in the deed of exchange. In re-examination, PW 1 said that he only permitted the defendant to erect temporary structures on his land since the deed of exchange had not been formalized.
 19. Elias Muthomi Kabura, working as the Director of Land Administration, testified as P.W. 2. He produced certified copies of P. Exh No. (1) – (17), the whole file that contains the same as p. Exh No. (25). PW 2 confirmed that L.R No. Meru Municipality Block II/152 belonged to the defendant, and there was no approved extension of the lease to cover the neighboring plot belonging to the plaintiff.
 20. In cross-examination by Mr. Mwaura, advocate for the defendant, PW 2 said that he was an Assistant Director and Administration Nairobi. He said that the plaintiff was duly issued with an allotment letter through plans T.P./42/1/x/2219 on 22.5.1992 for Plot No. T165. He termed the application for an extension of lease by the defendant as null and void, for it would not nullify an already allocated plot to the plaintiff. PW 2 said that it was erroneous for the defunct Municipal Council of Meru to inform the defendant to make such a request for an extension of a lease is only made and allowed if an adjacent plot is tilted. In re-examination, PW 2 said that if any advice by the municipal council in 1998 had been brought to the attention of the Commissioner of Lands, it would have been rejected since there was no land available for reallocation.
 21. Following the closure of the plaintiff's case, Mr. Mwaura advocate for the defendant to the counterclaim told the court that the defendant was not calling any witnesses. He, therefore, closed the defendants' case to the counterclaim.
 22. Parties were, therefore, directed to put in written submissions by 18.2.2024. The plaintiff in the main suit, instead of filing written submissions, filed an application dated 1.2.2024 seeking to arrest the judgment due on 24.4.2024. Another application was also filed on 19.2.2024, further delaying the judgment and leading to the postponement of the judgment by an order dated 20.3.2024.
 23. The defendant relied on written submissions dated 6.2.2024. It was submitted based on K.C.B. vs James Karanja (1981) eKLR, that a counterclaim is a fresh suit, and therefore, the failure to file a defense or call evidence to oppose the suit renders the counterclaim an opposed through the defendant has to prove it.
 24. In this case, the defendant submitted that he was proved issuance of a title to the suit land as per the defendant's exhibits, namely a paper trial as per D. Exh No's (1) – (18), all confirmed as per certified copies of the documents produced as D. Exh No. (25) by DW 2. Reliance was placed on Mwangi Stephen Murithi vs. City Council of Nairobi (2015) eKLR citing with approval *Joseph Arap Ng'ok vs Justice Moiijo Ole Keiwua N.R.B. Nai Civil Application No. 60 of 1997*.



25. The defendant submitted that once the plot was allocated to him, leading to a certificate of lease, the land was not available for reallocation. Again, defendant submitted that, as per the paper trail, he followed the process of a good title; the purported application or an extension of a lease by the defendant to the counterclaim was impossible without the amalgamation of the two plots. Reliance was placed on Horticultural Crops Development Authority vs Zakir Properties Ltd & others (2020) eKLR. Regarding the prayer for invalidation of the deed of exchange dated 16.12.2022, the defendant submitted that courts do not rewrite contracts for parties, but an agreement could be invalidated on account of fraud, mistake, and illegality. Given that the defendant could not offer the same in view of the will and the probate decree, which the defendant failed to disclose or incorporate in the deed of exchange.
26. The plaintiff submitted that given the will and the proceedings in the probate cause, the defendant to the counterclaim had no capacity under Section 82 of the Law of Succession Act to dispose of an immovable property of a deceased until a grant is confirmed. Reliance was placed on in Re-estate of Isaac Kaburu Marete (deceased) (2017) eKLR on eviction of the defendant to the counterclaim the plaintiff submitted that he is entitled to use, occupation, enjoyment, and the development of the suit land under Section 25 & 26 of the Land Registration Act as otherwise, the defendant is a trespass to land without the express authority of the owner. Reliance was placed on Azina Said Chepkemboi vs Noah Martin Too & others (2015) eKLR.
27. As to demolition, the plaintiff, in the counterclaim, submitted that he never allowed the defendant to build on his property, nor had she produced any County Government of Meru-sanctioned approvals or permits for the alleged construction; otherwise, any illegal developments therein should not remain. Reliance was placed on Ombori Migiro vs Denis Basweets (2010) eKLR.
28. On mesne profits, the plaintiff relying on Section 2 of the Civil Procedure Act and Order 21 Rule 13 of the Civil Procedure Rules submitted that a court may grant a decree for mesne profits until the property is relinquished back to the decree-holder. It was submitted that the defendant was renting out the property to a school earning rental income going by an admission in the defendant's supplementary affidavit sworn on 31.6.2023. reliance was placed on Christine Nganchan Oanda vs. Catholic Diocese of Homabay Registered Trustees (2020) eKLR. The plaintiff urged the court to grant Kshs.2 million for the illegal trespass.
29. The issues calling for determination are:
- i. Whether the plaintiff to the counterclaim has proved ownership of the suit land.
 - ii. If the plaintiff has pleaded and proved trespass to the suit land.
 - iii. If the defendant had the capacity to enter into the deed of exchange.
 - iv. Whether the plaintiff is entitled to the reliefs sought.
30. In Gatirau Peter Munya vs Dickson Mwenda Kithinji & others (2014) eKLR, the court observed that a person who makes an allegation must lead evidence to prove the fact, for he has an initial legal burden of proof. In this case, even though the defendant had not filed a defense to the counterclaim before the hearing commenced, the onus was on the plaintiff to prove the contents of the counterclaim to the required standards. Similarly, the defendant was duty-bound to call evidence to support her defense; otherwise, the contents would remain mere statements. See Deacons (E.A) P.L.C. Ltd vs Modern Techno Fitness Gym Ltd & another (2021) eKLR and Mark Macavley vs Rob De Boer & Fiona De Boer (2002) eKLR.



31. The plaintiff has alleged that he is a bonafide owner of the suit land, now trespassed into and developed by the defendant without his consent or approval. In her belated defense to the counterclaim, the defendant has challenged the allocation, letter of allotment, and the certificate of a lease held by the plaintiff as a belated, simulated, and fraudulent scheme. PW1 produced P. Exh No's. 1 – 18, as well as certified copies of the exhibits as P. Exh No. 25. A title deed held by a party is to be taken by a court as prima facie proof of ownership unless it has been challenged on account of illegality, irregularity and or as acquired through corrupt scheme. See *Mwangi Stephen Murithi vs City Council of N.R.B. (supra) H.C.D.A vs Sakir Properties Ltd & 2 others (supra)*.
32. Even though the defendant, in the belated statement of defense dated 16.5.1994, termed the certificate of a lease held by the plaintiff as illegal or fraudulent, no particulars of fraud, illegality, corrupt scheme, or unprocedural means in acquisition have been pleaded or proved against the process, manner, and procedure that the plaintiff used to acquire the title. The cross-examination of PW1 and PW2 by the defendant's counsel on record did not yield any adverse material or evidence to impeach the title held by the plaintiff to the suit land.
33. No specific questions were put to the said witnesses by Mr. Mwaura advocate, to demonstrate any irregularity in the paper trail produced as P Exh No's 1-25. The defendant failed to produce any single complaint letter to the issuing authority that she was first in time to apply and or be allocated the land. P W 1 admitted that the entry into the land was consensual and temporary in 1992 to be used as a playground.
34. The defendant has pleaded that the extension which she made to the defunct Municipal Council of Meru has to be understood in the context. Unfortunately, the defendant was unable to lay such context and its justification before the court and specifically challenge the evidence of PW2 that the alleged application for an extension of her plot to cover the suitland was irregular, invalid, since the land already had been allocated to the plaintiff. Given the preceding, my finding is that the plaintiff holds a good title to the suit land.
35. The next issue is how the defendant gained entry to the suitland. The plaintiff testified that the defendant's late husband was temporarily allowed to use the plot as a playground with no permanent developments. The defendant has not pleaded a contrary view on the terms of entry and use that the defendant was allowed to undertake significant developments on the suit land and on what terms. PW1 said that after the deed of exchange, the defendant purported to erect permanent structures and was warned to stop. The defendant failed to produce any sanctioned approvals or permission from the plaintiff or the relevant government agencies authorizing her to undertake any permanent developments on the suit land.
36. Both parties have, in their pleadings, admitted that the deed of exchange was null and void. The plaintiff blames the defendant for failing to disclose vital information and involve the co-administrators. He attacked the capacity of the defendant to sign the document before the grant of letters of administration was confirmed contrary to Section 82 of the *Law of Succession Act*. On the other hand, the defendant pleaded coercion, delusion and undue influence while signing the deed of exchange. It is not the business of the court to rewrite contracts.
37. In *Macfoy vs United Africa Co. Ltd (1961) 3 ALL E.R 1109*, a nullity was termed a nullity. In this suit, the plaintiff has explained the circumstances under which the deed of exchange was executed on 14.12.2022. The defendant has not denied the fact that what she was offering to exchange was not within her power to do so. In *Registered Trustees of Gospel of God Church vs. Mborothi and others E.L.C. Case No. 114 of 2011 (2023) KEELC 216 of 2016 (K.L.R.) (15th November 2023) (Judgment)*,



- the court cited *Beach Bay Holdings Ltd vs Ratin Relations Ltd & another* (2014) eKLR, that making of a contract with a non-existent entity rendered the same as a nullity.
38. The exchange deed had to comply with the Law of the Contract Act and section 38 of the *Land Act*. The grant had not been confirmed by the time the deed was issued. A grant of probate relates to the date of death, unlike a grant of letters of administration. The defendant was not a co-administrator as of the date of the deed of exchange. She could only become a personal representative upon being appointed by the court.
 39. The property the defendant was offering in exchange had not vested in her. Any transaction before confirmation of grant was a nullity. Such acts are outlawed by Section 45 of the *Law of Succession Act*. The powers and duties of the defendant had not matured as per Sections 79, 52 (b) (II) & 83 of the *Law of Succession Act*. See Re-estate of Barasa Kanenje Many (deceased) Succession Case No. 263 of (2002) (2020) KEHC 1 (K.L.R.) 30th July 2020 ruling) and Re-estate of Kivindyo Isaiah (deceased) (2019) eKLR. My finding is that the deed of exchange was null and void and is, as a result of this, declared unenforceable by either of the parties against the other.
 40. The next issue is whether the plaintiff is entitled to vacant possession. Trespass is defined as unjustified entry into occupation and commission of acts therein without the consent, approval, or authority of the bona fide owner. According to the plaintiff, the defendant was and remained a licensee, which could be terminated at will and with a notice.
 41. It was upon the defendant to show justification why she should remain on the land. Her suit was not prosecuted. There was no evidence called to sustain the belated defense filed against the counterclaim. The defendant has no superior title to that held by the plaintiff. My finding is that the plaintiff is entitled to the enjoyment of his rights under Article 40 of *the constitution* as read together with Sections 24, 25, and 26 of the *Land Registration Act*.
 42. The plaintiff has prayed for mesne profits. Mesne profits refer to damage or profits compensation recoverable for wrongful possession according to Section 2 of the *Civil Procedure Act* and Order 21 Rule 13 Civil Procedure Rules. In *AG vs Halal Meat Products Ltd* (2016) eKLR, the court defined mesne profits as losses suffered due to wrongful possession. They are the pecuniary benefits deemed to be lost to the person entitled to possession of land. In *Peter Mwangi Mbuthia & another vs Samow Edin Osman* (2014) eKLR, the court stated that there must be a demonstration of how the amount is arrived at.
 43. In this suit, the plaintiff is seeking for Kshs.2 million. The same is demonstrated or substantiated through an admission in the defendant's supplementary affidavit of renting out the premises to a third party. In *Karanja Mbugua and another vs Marybin Holding Co. Ltd* (2014) eKLR, the court said the basis of claiming mesne profits has to be led.
 44. In my view, the plaintiff failed to provide evidence of the value of the portion occupied by the defendant and the nature of the illegal developments therein. I find the relief unproved.
 45. The upshot is that I find the counterclaim proved to the required standards. The same is allowed in terms of prayers, no. (a), (b) and (c) plus costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19TH DAY OF JUNE, 2024

HON. C K NZILI

JUDGE



In presence of

C.A Kananu

Nyakundi for the plaintiff

Kaburu for 1st defendant

