



REPUBLIC OF KENYA



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

**Kubai v Ondieki (Environment and Land Appeal 1 of 2020)
[2024] KEELC 4884 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4884 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 1 OF 2020
FO NYAGAKA, J
JUNE 12, 2024**

BETWEEN

MIRIAM KUBAI APPELLANT

AND

MARGARET KERUBO ONDIEKI RESPONDENT

*(Being an appeal from the judgment and decree of Hon P. K. Mtai
(Senior Resident Magistrate) (as he then was) in Kitale Chief Magistrate's
Court EL Case No. 30 of 2019 delivered on 15th January, 2020)*

JUDGMENT

Introduction

1. The Respondent who was the plaintiff in CMC EL Case No. 30 of 2019 sued the Appellant (the Defendant therein) by way of a Plaint dated 25/04/2018 and filed on that day seeking the following reliefs:
 1. An order directing the defendant to sign the relevant transfer documents to have the portion of 25ft × 100ft out of title deed No. Kitale Municipality Block 6/304 transferred into the plaintiff's name failure which the Registrar of this Honourable Court to execute the transfer documents on behalf of the defendant.
 2. Costs of the suit.
 3. Any other relief that this court may deem fit to grant.
2. The Appellant entered appearance on 18/05/2018. She filed her Statement of Defence and Counterclaim dated 08/06/2018 on 12/06/2018. She urged the trial court to dismiss the Respondent's suit with costs and judgment be entered in her favor in the following terms:



- a. An order of eviction be issued against the plaintiff, her agents and any other person claiming under her from that plot Kitale Municipality Block 6/304;
 - b. Costs of this case;
 - c. Any other relief the Honourable Court may deem fit and grant.
3. The matter proceeded for hearing on the merits. After considering the evidence of the parties, the trial magistrate on 15/01/2020 found that the Respondent's claim was merited and allowed it as prayed. In the same vein, the learned trial magistrate found the Appellant's Counterclaim to be lacking in merit. He thus dismissed with costs to the respondent.

Memorandum of Appeal

4. The Appellant is aggrieved by those findings. She filed her Memorandum of Appeal dated 27/01/2020 on 28/01/2020 that raised nine grounds impugning the findings of the trial court. I have taken the liberty to summarize those grounds as follows: that the learned magistrate failed to analyze the evidence in totality; that the learned magistrate failed to observe that two distinguishable properties namely, plot number 9 and 11 existed and instead, made his determination on one property; that the trial court entered judgment in total disregard of the facts and evidence adduced by the Appellant; that the learned magistrate's findings misapprehended the law and issues disclosed, failed to accord to the rules of natural justice and as a result, arrived at an unjust conclusion when dismissing the appellant's counterclaim.
5. For those reasons, the appellant prayed that the appeal be allowed and the judgment dated 15/01/2020 be set aside and substituted with an order that her counterclaim is allowed with costs and the Respondent's suit dismissed with costs. She further prayed for costs of the appeal.

Hearing of the Appeal

6. The appeal was heard on the basis of the parties' respective written submissions. The appellant filed her written submissions dated 19/05/2023 on 22/05/2023 but stamped 22/05/2022 (*sic*). By them she argued that the Respondent's evidence was marred with inconsistencies hence calling for interference of the magistrate's decision by this court. She pointed out that the suit plot namely Kitale Municipality Block 6/304, was purchased by the Respondent from the Appellant's mother on 16/02/2002. During *viva voce* evidence plot No. 11 was claimed yet the Respondent was staying on plot No. 9; which was never the subject of any claim. She added that the Respondent was not entitled to the reliefs sought. Furthermore, the judgment in Kitale CMCC No. 384 of 2009 which had a bearing on the outcome of this dispute, was not taken into consideration. In her conclusion, the Respondent was on plot No. 9 whereas she bought plot No. 11. That since these were different plots, the Respondent had failed to prove her case on a balance of probabilities. Finally, that the suit was time barred since the Respondent filed suit 14 years after the purported sale agreement had been executed. For those reasons, the Appellant urged this court to allow her appeal.
7. The Respondent on her part relied on her written submissions dated 23/05/2023 and filed on the same date but stamped 23/05/2022 (*sic*). The Respondent reproduced the facts as given in evidence in the lower court to submit that the trial court rightly found that as the administrator of her mother's estate, the Appellant was bound to transfer the suit land to the Respondent. Furthermore, since the findings of the learned magistrate were properly founded on law, the appeal was one for dismissal. She thus urged this court to dismiss it with costs.



Analysis and Determination

8. As a first appellate court, an appeal is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions although it should always bear in mind that it had neither seen nor heard the witnesses and should therefore make due allowances in this respect. [See the Court of Appeal case of *Gitobu Imanyara & 2 others vs. Attorney General* [2016] eKLR].
9. I have considered the appeal, examined the parties' rival written submissions, and analyzed carefully the record of appeal, the relevant law and the impugned decision. I will now summarize the brief facts of the parties as captured in the record.
10. According to the Respondent, on 16/02/2004, the Appellant's deceased mother sold plot No. 11 (and not plot No. 9) Kipsongo Market measuring approximately 25ft x 100ft to her. Upon completion of the sale, a title deed to that parcel of land namely Kitale Municipality Block 6/304 was obtained. She relied on the Sale Agreement marked P.Exhibit 1. According to the Respondent, she paid a sum of Kshs. 100,00.00 and Kshs. 80,000.00 being the purchase price of the suit property. The Respondent asserted that the sale agreement was attested to by the Appellant herein. That in CMCC No. 384 of 2009, the Appellant recognized the Respondent as the lawful purchaser but denied the transaction that took place.
11. Upon the death of the Appellant's mother, the Appellant endeavored to complete the transfer process in the name of the Respondent as the administrator of the estate. For this assertion, she produced a written undertaking dated 28/02/2012.
12. In it, the Appellant acknowledged receipt of the sum of Kshs. 6,000.00 as part payment of subdivision of Certificate of Lease on title No. 304 (initially plot No. 11 Kipsongo) in position 9 as per the Part Development Plan (PDP). She also acknowledged that the Respondent had purchased the plot from her late mother. The Appellant undertook to transfer the said portion of land. Lastly, she admitted that she witnessed the Sale Agreement dated 28/02/2012.
13. The Respondent maintained that in spite of the undertaking, the Appellant had failed to fulfill her obligations to date. That the Respondent instead obtained title to the suit land in her name. The Title Deed was produced and marked P.Exhibit 2.
14. The Respondent lamented that the Appellant had since threatened to sell that portion of land to third parties. She was apprehensive that she would lose the suit land which she had extensively developed from the moment she obtained vacant possession of it. She thus filed suit by way of a plaint dated 25/04/2018 to compel the Appellant to transfer the said documents in favor of her.
15. When inquired as to a tenancy agreement dated 16/02/2004, the Respondent observed that it was not executed. That her husband Jeremy Obare was not a tenant in plot No. 9. That her husband was to buy a subsequent property; and that she did not forge the letter of undertaking and that the Identity Card (ID) of the defendant namely 24321723 appeared in the agreement.
16. The Respondent also called PW2 Peter Siringi Ongori as her witness. His evidence was that on 16/02/2004, he accompanied his friend Jeremy Obare and his wife to purchase a plot in Kipsongo. He was a witness of the sale agreement dated 16/02/2004 entered between the Respondent and the Appellant's mother.
17. The Appellant, on her part, denied the averments set out in the Respondent's claim. She filed a Statement of Defence and Counterclaim dated 08/06/2018. She urged that the suit was barred



by limitation of time, was scandalous, vexatious and an abuse of the process of the court and the Respondent failed to demand before filing suit.

18. In her counterclaim, the Appellant stated that she was the legal administrator of the estate of Noel Lijina, allottee of all that parcel of land namely Kitale Municipality Block 6/304. She produced the Grant of Letters of Administration dated 20/02/2012 marked D.Exhibit 1. She also produced the Confirmation of Grant dated 22/05/2018 that listed the suit land as an asset belonging to the deceased's estate marked D.Exhibit 2.
19. The Appellant denied that her mother sold the suit land to the Respondent. She denied witnessing any sale agreement and the inclusion of her name in the sale agreement dated 16/02/2004 amounted to acts of forgery. The strength of that allegation emanated from the fact that her ID Number 1029xxxx was not included in the agreement. Particulars of fraud were captured in paragraph 11 of her pleading. She averred that the Respondent had no legitimate claim and ought to have sued the Appellant's mother during her lifetime in the year 2010.
20. Instead, the Appellant testified that her mother, owner of plot No. 9 set up semi-permanent structures and rented them to her tenants. She relied on a tenancy agreement dated 16/02/2004 [D.Exhibit 3] for this presupposition. She recalled that Jeremy Obare was a caretaker and agent, and has since passed on. He also paid rent as one of the occupiers of the plot No. 9.
21. Sometime in 2009, the Appellant got wind of the fact that the Respondent was colluding with another person in a cyber to type and print a sale agreement in favor of the Respondent and from the Appellant's mother. She also discovered that there was a sale agreement dated 16/02/2004. She denied having executed that agreement. She produced and marked D.Exhibit 6 her ID whose number was 1029xxxx.
22. The Appellant recalled that in 2009, the Respondent sued one Philip Ejakara, a claim similar to the present one but opted not to enjoin her mother in that suit. That Civil Suit No. 384 of 2009 declared that the Respondent was a trespasser and was ordered to vacate the suit land. That plot No. 11 and not plot No. 9 had been sold. Since the Respondent had refused to leave the suit land, the Respondent maintained that in the circumstances, she was a trespasser. She produced the order, judgement and proceedings of this matter marked D.Exhibit 7(a), D.Exhibit 8(a) and D.Exhibit 8(b) respectively.
23. In fact, she added, that there was in place, an enforcement notice dated 25/05/2018 compelling the Respondent to demolish illegal structures from the suit land but had failed to do so. For these reasons, the Appellant urged the trial court to evict the Respondent. She further sought costs of the suit.
24. When cross examined, she clarified that although plot No. 11 had been sold, she could not identify who the purchaser was as she was young at the material time. That she was told to refund the buyer his money. She confirmed that in Civil Suit No. 384 of 2009, her mother sold the plot land to the Respondent. In her view, the Respondent was a tenant in plot No. 9.
25. After hearing the parties, the learned magistrate stated that the issue in dispute was best resolved by an analysis of the testimony in Civil Suit No. 384 of 2009. The trial court noted that the Respondent and another were declared as trespassers as plot No. 11 was wrongly positioned on the ground. He reproduced the evidence of the appellant who stated in evidence that she came to know of the Respondent when she was buying a plot No. 11 Kipsongo from her mother. She also confirmed that the balance of the purchase price was paid to her directly. The court pronounced itself as follows:

“This evidence settles almost all the issues in question. First, there is admission by the defendant that there was agreement dated 16/02/2004. Secondly, her mother sold plot



number 11 Kipsongo centre to the plaintiff in this case and whole consideration price was paid.

I need not look at the other evidence in view of the above admission. Accusations and counter accusations being laid against each other is not useful. It is instructive to note that the defendant herself produced these proceedings.

I have no difficulties now arriving at the decision that indeed Defendant's mother sold at Kipsonga market. The defendant being the administrator is duty bound to transfer the said portion 25ft x 100ft to the plaintiff. and I hereby direct that the plot now forming part of Kitale Municipality Block 6/304 be transferred within the next 60 days and in default, executive officer of this court is authorized to execute transfer documents on behalf of the defendant. The counterclaim is dismiss (*sic*) in its entirety and the plaintiff is awarded costs of the suit."

26. The above summary then sets stage for the determination of the instant appeal.
27. Article 40 of our Constitution guarantees the protection of a person's right to acquire property save if it is demonstrated that the property was obtained by means of fraud or any other illegal means. In this case, the Respondent persuaded the trial court to hold that she was the rightful owner of the suit property. According to the evidence on record, by sale agreement dated 16/02/2004, the Appellant's mother Noel Lijina sold the suit property (formerly plot No. 11) to the Respondent. That agreement was attested to by *inter alia* PW2.
28. It is not in dispute that the property the subject of these proceedings is plot No. 11 and not plot No. 9. The Appellant put up a spirited fight in the hearing of the dispute. She denied that neither her mother sold the suit property nor did she attest to the sale agreement. She vehemently opposed those allegations accusing the Respondent of committing acts of fraud. It is instructive to note that while those allegations were pleaded, they were not set out in further and clearer terms as the law requires. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & Another* [2000] eKLR held that:

"It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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."
29. In *Kinyanjui Kamau vs. George Kamau* [2015] eKLR the court held as follows regarding the standard of proof in allegations of fraud:

"It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs 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.
30. According to the Appellant, the Respondent forged the sale agreement including wrongly recording her ID number, further forged the signatures of various persons as parties and witnesses, colluded with



court registry clerks to alter the proceedings and judgment of the court and entered and took possession of the land not the subject matter of the sale. Other than mentioning about her ID, the Appellant did not particularize further the allegations of fraud. She failed to establish with specificity how the Respondent was the one who entered the ID number and did so wrongly. Thus, the Appellant failed to prove allegations of fraud towards the required standard. For those reasons, the allegations of fraud must fail.

31. While the Appellant opposed the aspect of sale purchase, as rightly pointed out by the trial magistrate, it was this party who testified in Civil Suit No. 384 of 2009 where she confirmed in the affirmative that she was PW2. In those proceedings, the Appellant testified on 16/11/2010 that her mother sold this plot of land to the Respondent by way of an agreement dated 16/02/2004. That the Respondent paid a deposit of Kshs. 100,000.00 and the balance of Kshs. 80,000.00 was paid to the appellant in March, 2004.
32. In those proceedings, the Appellant confirmed that the Defendant in Civil Suit No. 384 of 2009 demolished the buildings that had been sold to the Respondent. In its judgment decreed on 06/12/2011, the court found that the position on the ground was the wrong position according to the report from the District Surveyor. It is for those reasons that the Respondent's suit was found to be without merit as against the defendant therein. Otherwise, the court found that the defendant had illegally occupied the respondent's position.
33. In my view, the sentiments of the trial court regurgitate further that indeed the Respondent is the bona fide proprietor of the suit land. The Appellant had no right to disenfranchise her yet she fulfilled the terms of the sale agreement. Furthermore, it was the Appellant's own evidence and testimony an admission of those facts. She cannot now come to approbate and reprobate. To allow her appeal would in essence to allow her benefit from the proceeds of a sale agreement but without discharging her obligations to surrender the said parcel of land to the owner. That would amount to unjust enrichment.
34. Section 26 of the [Land Registration Act](#) provides that the certificate of title issued 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 the ground of 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.
35. The evidence adduced before the trial court points to the direction and finding, and indeed this court finds as such in agreement with the learned trial magistrate, that the title deed, registered in the name of the Appellant, was obtained by misrepresentation of material facts. She cannot thus be held to be actual and indefeasible owner of the suit land. It is for these reasons that I find that the appeal lacks merit. It is hereby dismissed with costs to the respondent.
36. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY ON THIS 12TH DAY OF JUNE, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE

In the presence of:

1. Barongo holding brief for Kaosa for the Respondent
2. Karani for the Appellant

