



**Kiema v Ngutu (Environment & Land Case 156 of 2017)
[2024] KEELC 4553 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 156 OF 2017**

TW MURIGI, J

JUNE 5, 2024

BETWEEN

MARGARET NTHAMBI KIEMA PLAINTIFF

AND

DAUDI MUTULE NGUTU DEFENDANT

JUDGMENT

1. By a Plaint dated 26th February, 2015 the Plaintiff prays for judgment against the Defendant for: -
 - i. A mandatory order of this Honourable court cancelling the subdivision of land parcel Kitengei B Settlement Scheme adjudication number 324.
 - ii. A declaratory order that the Plaintiff is the sole bona fide and legal owner of the parcel of land Kitengei B Settlement Scheme adjudication number 324.
 - iii. Costs of this suit.
 - iv. Any other/further relief that this court may deem fit and just to grant.
2. The Defendant filed a Statement of Defence on 25th March, 2015 denying the Plaintiff's claim. He urged the court to dismiss the suit with costs.

THE PLAINTIFF'S CASE

3. The Plaintiff, Margaret Nthambi Kiema, testified as the sole witness in support of her case. She adopted her witness statement filed in court on 3rd March, 2015 as her evidence in chief. She also produced the documents in the list of documents dated 2/3/2015 and 5/10/2022 as PEX 1 – 3.
4. The Plaintiff informed this court that her late husband used to work for Hon. Mulu Mutisya who was the initial owner of the suit property. It was her testimony that in the year 1982, her late husband



purchased the suit property from the late Hon. Mulu Mutisya for a consideration of twenty goats and immediately took possession and settled thereon. She testified that during the first demarcation exercise conducted in the year 1993, the suit property was registered as parcel No. 390 but it was later changed during the second demarcation exercise to parcel No. 324. She went on to state that in the year 2010, the Defendant in collusion with the land adjudication officers hived off a big portion from her land and recorded it in his name.

5. It was her testimony that she has been in occupation of the suit property for more than 28 years and that her late husband is buried thereon.
6. She testified that they tried to resolve the dispute herein in Kibwezi lands office but she did not agree with the findings thereof, hence the present suit. She urged the court to grant the orders as sought in the plaint.
7. On cross-examination by Ms. Kellen, she testified that she was present when her husband purchased the suit property in the year 1983 from Hon. Mulu Mutisya though they did not record any sale agreement. She went on to state that she filed a complaint against the Defendant at Kibwezi lands office after he encroached into her land without her consent. She stated that the suit property changed from Parcel No. 390 to Plot No. 324 when the survey exercise was conducted on 24/01/2003.
8. She further testified that she was not summoned by the District Land Adjudication and Settlement Officer (DLASO) Kibwezi and that she was not present when the suit property was subdivided. She stated that she did not appeal against the findings of the Kibwezi Lands Office, but instead filed the present suit.
9. In re-examination, she reiterated that she did not consent to the subdivision of the suit property. She testified that the original number for the suit property i.e P/No. 390 was recorded in her late husband's name while the current number 324 is recorded in her name.

THE DEFENDANT'S CASE

10. The Defendant Daudi Mutule Ngutu testified as the sole witness in support of his case. He adopted his witness statement dated 3rd August, 2015 as his evidence in chief. He also produced the documents in the list of documents dated 24/03/2015 and 24/3/2015 as DEX 1 – 12 respectively.
11. He informed the court that he is the owner of Plot No. 1163 having purchased the same from village elders for Kshs. 600/= in the year 1973. He testified that Plot No. 1163 was hived off from Plot No. 324. He further testified that he resided in the suit property from the year 1973 up to about 1980 when wild animals invaded his land and forced him to move to Kambu where he has another parcel of land.
12. That later on he was informed by his neighbours that his land had been invaded by someone who had purchased land that was close to his land. That he reported the matter to the village elders who advised him and Kiema, the Plaintiff's husband to settle the matter but they were unable to settle the same. He went on to state that during the demarcation exercise in the 1980s, the suit property which comprised of his land and the Plaintiff's land was allocated No. 390.
13. He further stated that during the second demarcation exercise, land parcel No. 1163 was demarcated and recorded in his name while land parcel No. 324 was demarcated and recorded in the Plaintiff's name. He asserted that he was present when the survey exercise was carried out. He further stated that they were both present when the land adjudication office heard the dispute in respect of the suit property which was resolved in his favour. He further testified that he sold Parcel No. 1163 to one Peter Muthee in the year 2014.



14. On cross-examination by Mr. Makundi, he testified that the village elders who sold the land to him were Kamulae Ngui, Mbila Mututu, Ngila Ndiu and Fredrick Makau were deceased except Kamulae Ngui.
15. He further testified that Hon. Mulu Mutisya was his neighbour and that he had taken away his land and included it in his land Parcel No. 390. He further stated that he was not aware how Mulu Mutisya acquired his land and neither did he know the acreage.
16. He stated that he sold the parcel No. 1163 in the year 2014 for Kshs. 3,075,000/=. He asserted that the DLASO confirmed in his judgment that he was the owner of parcel No. 1163.
17. In re-examination, he testified that the suit property did not have a parcel number at the time when he purchased the same. He further testified that the instant suit had not been filed as at the time when he sold the suit property in the year 2014.
18. After the close of the hearing, the parties agreed to file and exchange their written submissions.

THE PLAINTIFF'S SUBMISSIONS

19. The Plaintiff's submissions were filed on 23/10/2023.
20. On her behalf, Counsel submitted that dispute herein emanates from the decision of Ali C. Hussein the DLASO dated 1st July 2011 who upheld the decision of DLASO Kibwezi which carved out Plot No. 1163 in favour of the Defendant. Counsel further submitted that the impugned decision was not pursuant to the establishment of an adjudication process to which an appeal lies to the Minister hence the issuance of DEX2. Counsel submitted that the DLASO erred in holding that the late Hon Mulu Mutisya could not have legitimately been allocated the suit property without any evidence being tendered before him. Counsel submitted that this Court ought to ensure that justice prevails and that the Plaintiff does not lose her land.
21. None of the authorities cited by Counsel were availed for the Court's perusal.

THE DEFENDANT'S SUBMISSIONS

22. The Defendant's submissions were filed on 27/11/2023.
23. On his behalf, Counsel identified the following issues for the court's determination: -
 - i. Whether the manner in which the suit was instituted by the Plaintiff is improper and whether it ought to be struck out?
 - ii. Whether the Plaintiff has locus to bring the instant suit?
 - iii. Whether the Defendant's ownership of Plot No. 1163 Kitengei "B" Settlement Scheme hived from Plot No. 324 ought to be interfered with?
 - iv. Whether the prayers sought by the Plaintiff are tenable?
24. On the first issue, Counsel submitted that the Plaintiff having failed to prefer an appeal or judicial review proceedings against the decision of the DLASO, cannot purport to have the dispute heard and determined afresh. Counsel submitted that the issues for determination presented before the DLASO on 19/01/2011 were as follows: -
 - a. Whether the subdivision of Plot Nos. 1163 and Plot No. 324 in Kitengei "B" Settlement Scheme was proper.



- b. Who between the two parties was entitled to the ownership of the two properties i.e. Plot Nos. 1163 and 324 situated in Kitengei “B” Settlement Scheme.
25. Counsel submitted that under Section 10 (1) of the *Land Adjudication Act*, the DLASO was clothed with the requisite jurisdiction to determine the land dispute herein since the suit property was within an adjudication area known as Kitengei “B” Settlement Scheme. Counsel submitted that the procedure for challenging a decision by the Land Adjudication and Settlement Officer is spelt out in Section 29 (1) of the *Land Adjudication Act*. Counsel contended that the instant suit is an attempt by the Plaintiff to open a new avenue for litigation with the hope of a favourable outcome.
26. On the second issue, Counsel submitted that the Plaintiff lacks capacity to institute this suit as she has not obtained a grant of letters of administration in respect of the estate of her deceased husband, Kiema Kitavi who purportedly owns the suit property. Counsel urged the Court to strike out the suit with costs to the Defendant.
27. On the third issue, Counsel contended that the Plaintiff has not demonstrated any plausible reason to warrant the cancellation of the subdivision resulting in Plot No. 1163 registered in favour of the Defendant. Counsel submitted that the Defendant’s claim to the suit property was upheld by the DLASO while the Plaintiff was allowed to continue utilizing Plot No. 324.
28. On the fourth issue, Counsel submitted that the Defendant’s registration as proprietor of the suit property was unassailable in law and as such the Plaintiff is not entitled to the orders sought in the Plaint. Counsel further contended that in exercise of his proprietary rights, the Defendant has already sold Parcel No. 1163 to a third party.
29. Concluding his submissions, Counsel submitted that the Plaintiff has not demonstrated a prima facie case to warrant the grant of the orders sought. To buttress his submissions, Counsel relied on the list of authorities dated 27th November, 2023.

ANALYSIS AND DETERMINATION

30. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination:-
- i. Whether the suit property falls within an adjudication area.
 - ii. Whether the Plaintiff has the capacity to institute this suit.
 - iii. Whether P/NO1163 was fraudulently excised from P/NO 324.
31. From a disposition of the pleadings and the evidence on record, the following facts are not in dispute: -
- i. The Plaintiff is the legal owner of Plot No. 324 Kitengei “B” Settlement Scheme.
 - ii. The Defendant was the legal owner of the Plot No. 1163 Kitengei “B” Settlement Scheme which he subsequently sold to Peter Muthee.
 - iii. The land dispute over Plot No. 324 was heard and determined by the DLASO awarding the Defendant Plot No. 1163 while the Plaintiff retained Plot No. 324.

WHETHER THE SUIT PROPERTY FALLS WITHIN AN ADJUDICATION AREA

32. The Defendant contended that the suit herein is fatally defective and it ought to be struck out for failing to comply with the provisions of Section 29 of the *Land Adjudication Act*. He argued that the



suit property falls within an adjudication area and as such the Plaintiff ought to have filed an appeal against the decision of the DLASO or judicial review proceedings.

33. The Plaintiff on the other hand submitted that the suit property does not fall within an Adjudication Area. She produced a letter dated 7th November, 2011 by the DLASO Kibwezi District to show that the suit property does not fall with an adjudication area. Section 29(1) of the [Land Adjudication Act](#) provides as follows:-

‘Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

- (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
- (b) sending a copy of the appeal to the Director of Land Adjudication,

and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.’

34. The letter dated 7/11/2011PEX 1 states as follows in part:-“.....you may proceed with filing of the appeal since you do not need consent from this office since it is not under Adjudication Section hence Cap 284 Laws of Kenya does not apply.” It is crystal clear from the above letter that the suit property is not within an adjudication section and as such, the land in dispute falls outside the framework of the [Land Adjudication Act](#).

WHETHER THE PLAINTIFF HAS CAPACITY TO INSTITUTE THIS SUIT

35. The Defendants contended that the Plaintiff lacks capacity to institute the suit herein as she has not obtained a grant of letters of administration for the estate of her late husband to permit her to institute the same.

36. The Plaintiff on the other hand argued that the suit property is recorded in her name.

37. Locus standi is defined in Black’s law dictionary 9th Edition as “the right to bring an action or to be heard in a given forum.”

38. In the case of Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, the Court defined the word Locus Standi as follows;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

39. Further in the case of Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000, the Court held that:-

“Locus Standi signifies a right to be heard, A person must have sufficiency.”

40. Section 82(a) of the [Law of Succession Act](#) confers power on personal representatives to institute a suit in regard to the estate of the deceased and provides as follows:-

“Personal representatives shall subject only to any limitation imposed by their grant have the following powers:-



- a) to enforce, by suit or otherwise all causes of action which by virtue of any law survive the deceased or arising out of his death for his personal representative.”

41. From the reading of the above provision, it is clear that the personal representative of the deceased shall subject to any limitation imposed by the grant, enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death.
42. In the matter at hand, it is not in dispute that after the second demarcation exercise was conducted, P/ NO 324 was recorded in the name of the Plaintiff. The judgment dated 1st July clearly shows that P/ NO 324 was to be recorded in the Plaintiff’s name. On the basis of the above, I find that the Plaintiff has the requisite capacity to institute this suit, as the suit property known as parcel No. 324 is recorded in her name.

WHETHER THE P/NO. 1163 WAS FRAUDULENTLY EXCISED FROM P/NO. 324

43. It was the Plaintiff’s testimony that during the first demarcation exercise, the suit property was demarcated and registered in the name of her late husband as P/NO 390. That during the second demarcation exercise, the suit property was demarcated as P/NO 324. The Plaintiff alleged that the Defendant in collusion with the land adjudication officers fraudulently excised P/NO 1163 from P/ NO 324. The Plaintiff urged the court to cancel the subdivision of P/NO. 324.
44. 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.” .
45. 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.”

46. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the Court of Appeal held that;-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (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 that 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...”

47. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities



48. Section 107 of the *Evidence Act* leaves no doubt on the question of the burden of proof. It provides as follows;

“S 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.”

49. To prove that the Defendant acquired the land by fraudulent means, the Plaintiffs relied on the pleadings in support of her evidence. The Plaintiffs pleaded fraud in paragraph 5 of the Plaintiff but did not list the particulars of fraud thereof.

50. The Defendant explained that he purchased the land from village elders at Kshs. 600/= in the year 1973. He stated that he settled on the land long before the Plaintiff entered the suit property and that due to wildlife disturbances, he relocated from the suit property in the 1978.

51. On her part, the Plaintiff claims that together with her husband, they purchased the suit property in the year 1983 from the late Hon Mulu Mutisya. The Plaintiff produced an acknowledgement from Mulu Mutisya’s family(PEX2) to show that they sold the suit property to the Plaintiff. However, no sale agreement was produced to ascertain the Plaintiff’s evidence.

52. Both parties confirmed that during the demarcation exercise conducted in the year 2003, they were each recorded as the proprietor of their respective parcels of land. The Plaintiff testified that she lodged a complaint against the Defendant to the DLASO Kibwezi alleging that the parcel in dispute belongs to her. That upon hearing both parties, the DLASO found in favour of the Defendant.

53. That being dissatisfied with the decision of the DLASO, she filed the present suit. Both parties produced the proceedings and decision by Ali C. Hussein, the DLASO. I have read the proceedings and judgment in respect of the land dispute regarding P/NO. 324 Kitigengei Settlement Scheme. In his findings dated 1/7/2011, the DLASO stated as follows in part:-

“It is imperative to note that Kitengei Squatter Settlement Scheme is government land meant to settle squatters. From the evidence adduced in this court the plaintiff and the respondent are squatters. Also it is clear that the land initially had been allocated to Mutule in 1973 only to be re-allocated to Mulu Mutisya in 1978 by the same allocation committee.....Given the power Mulu Mutisya had then it is proper for this office to correct historical injustices done to the respondent Mr. Mutule by the land allocation committee Kitengéi”.

54. The DLASO upheld the decision of the DLASO, Kibwezi that the new number P/No1163 be issued to Mutule as Margaret Nthambi retains the old number after the subdivisions is ordered by the DLASO Kibwezi.

55. It is clear that the P/NO 1163 was hived from Parcel No. 324 during the demarcation exercise pursuant to the decision of the DLASO. No evidence was tendered to show that the Defendant colluded with the land adjudication officers to hive off P/NO 1163 from P/NO324.

56. The Plaintiff has not demonstrated to this court that the Defendant fraudulently hived off P/NO 1163 from P/NO 324.



57. On costs, the general rule is outlined in Section 27 (1) of the Civil Procedure Act which provides as follows: -

‘(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.’

58. In the end, I find that the Plaintiff has not proved her case against the Defendant on a balance of probabilities as required.

59. The upshot of the foregoing is that the Plaintiff’s suit is hereby dismissed. In view of the nature of this suit, I hereby order that each party bears its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELVIERED VIA MICROSOFT TEAMS THIS 5TH DAY OF JUNE, 2024.

IN THE PRESENCE OF:

Kiluva for the Plaintiff

Kithuka holding brief for Ms. Kellen for the Defendant

Court assistant Alfred.

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