



Ikua v Kilifi Plantations (2014) Limited (Environment & Land Case 42 of 2022) [2024] KEELC 13434 (KLR) (25 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 42 OF 2022
EK MAKORI, J
NOVEMBER 25, 2024**

BETWEEN

WANJIRU IKUA PLAINTIFF

AND

KILIFI PLANTATIONS (2014) LIMITED DEFENDANT

JUDGMENT

1. The plaintiff's case against the defendant is set out in the Amended Complaint dated 14th February 2023, and her statement and affidavit dated 14th July 2022.
2. She states that sometime in 2005, she entered into a sale agreement with Forlornland Limited to purchase the piece of land referred to as plot No V323 (original No 273/10) measuring 0.3781 hectares situated within Kilifi County (the suit property). The plaintiff and Forlornland agreed that the purchase price for the suit property was Kshs 1,250,000. Forlornland required the plaintiff to pay a deposit of Kshs 850,000 upon execution of the sale agreement; after that, Forlornland would give her vacant possession of the suit property. The parties also agreed that the plaintiff would pay the balance of the purchase price in installments to be agreed upon. After executing the sale agreement, the plaintiff paid Forlornland the deposit of Kshs 850,000 on 26th October 2005, took vacant possession of the suit property, and erected a fence around it. Some years later, the plaintiff contacted Mr. Chris D. Wilson (Mr. Wilson), whom he knew as a director and shareholder of Forlornland, intending to pay the purchase price balance and complete the transaction. Over a series of correspondence, Mr. Wilson informed the plaintiff that Forlornland was wound up. To safeguard its interest in the suit property pending the plaintiff's clearance of the purchase price, Forlornland registered the suit property in the name of one Sally Ann McGuinness (Sally) on 8th August 2007. Mr. Wilson then procured a registration of a Declaration of Trust by Sally in which she declared that she held the title to the suit property to Mr. Wilson's order.



3. On 31st December 2018, the plaintiff cleared the purchase price balance, Kshs 400,000, by depositing the money into the account of Kilifi Plantations Limited as allegedly directed by Mr. Wilson.
4. What precipitated this suit are events that occurred in May 2022. The plaintiff states that around this time, some strangers came to the suit property and erected a fence around it on top of the wall she had already erected. Upon enquiring about why they were trespassing on her land, they informed her that they were acting under the instructions of Mr. Wilson. A few days later, the plaintiff spotted some guards stationed at the suit property, and the guards restrained her access to the suit property. On 4th May 2022, the plaintiff carried out a search of the suit property at the Kilifi Lands Registry and was astonished to learn that it was registered to the defendant. Upon further inquiries at the company registry, the plaintiff learned that Mr. Wilson is also a director and shareholder of the defendant.
5. Based on the facts, the plaintiff accuses the defendant of fraudulently and illegally acquiring title to the suit property. She particularized the fraudulent and illegal acts on the part of the defendant as follows:
 - a. The defendant shares a common director with Forlornland, Mr. Wilson. Since *Companies Act* through their officials, the defendant must have known or ought to have known that Forlornland had sold the suit property to the plaintiff. Therefore, the property was not available for registration in its name.
 - b. The plaintiff accuses the defendant of using its director, Mr. Wilson, to hatch a plan to dispose of her property.
 - c. The plaintiff also accuses the defendant of failing to satisfy itself that the suit property was available for registration in its name.
 - d. She also accuses the defendant of deliberately failing to inform her that it was acquiring the suit property.
 - e. Lastly, the plaintiff states that the defendant purportedly acquired the suit property without paying any consideration whatsoever.
6. The plaintiff asserts that the defendant cannot claim bona fide interests in the suit property. She, therefore, seeks the following reliefs against the defendant:
 - a. A permanent injunction restraining the defendant, whether by itself, its agents, and servants, from subdividing, leasing, selling, transferring, charging, developing, dealing with, or interfering with her ownership, use, and possession of the piece of land referred to as plot No V323 (original No 273/10) measuring 0.3781 hectares situated within Kilifi County.
 - b. An order compelling the Land Registrar, Kilifi Lands Registry, to cancel and revoke the certificate of title to plot No V323 (original No 273/10) measuring 0.3781 hectares situated within Kilifi County in the name of the defendant and to register suit property in her name.
 - c. Costs of the suit together with interest thereon at court rates.
7. The defendant avers that on 3rd July 2000, the defendant transferred the suit property to Forlonland Limited, a Special Purpose Vehicle, to aid in selling several properties, including the suit property.
8. On or around 2005, the Plaintiff was introduced to Forlonland Limited by Ms. Sally McGuinness, a mutual friend of the plaintiff, and Mr. Wilson, the company's director. Evidence was adduced at trial that Ms. Sally was also purchasing one of the properties the company was selling. The company, Forlonland Limited, entered into an Agreement to sell the suit property to the Plaintiff at a purchase price of Kenya Shillings One Million, Two Hundred and Fifty Thousand (Kshs 1,250,000). According



to the said Agreement for sale, the Plaintiff paid a deposit of Kenya Shillings Eight Hundred and Thirty Thousand (Kshs 830,000), leaving a balance of Kenya Shillings Four Hundred and Twenty Thousand (Kshs 420,000). Attempts by Defendant to reach her to complete the transaction after that were futile. Mr. Christopher Wilson further contacted a mutual friend of the Respondent, Ms. Sally Ann McGuinness, who had introduced her to the applicant for purposes of the sale. Still, the respondent remained unreachable for four years. The company, Forlonland Limited, then wrote to the Registrar of Companies on 17th March 2009 requesting that Forlonland Limited be struck out of the Companies Registry since its purpose had run out. The same was approved and subsequently gazetted on 21st July 2009. After Forlonland Limited was deregistered, Mr. Christopher Wilson registered the suit property in the name of Ms. Sally Ann McGuinness to safeguard the plaintiff's interest in the suit property, pending the final payment of the purchase price by the plaintiff. Six years later, on 25th April 2015, to enable the finalization of the transaction with the defendant, Mr. Christopher Wilson procured the registration of a Declaration of Trust by Sally McGuinness, who was the only known link to Plaintiff.

9. On 18th February 2018, Mr. Wilson instructed his erstwhile advocates to issue a completion notice to the plaintiff's transaction advocates, Bowyer Mahihu Advocates, allowing her 21 days to complete the transaction. The plaintiff contended at trial that she did not receive the notice since the firm no longer had instructions to represent her in the transaction. That the said firm drafted the Agreement for Sale as her advocate in the transaction and no evidence of any communication as to change of advocates was sent to the defendant's director, Mr. Wilson, nor did the said firm respond and deny having instructions to receive the notice on behalf of the plaintiff. Following the respondent's failure to complete the transaction within the 21-day notice period, the Agreement for Sale was rescinded. Mr. Christopher Wilson wrote two bank cheques for the refund of the entire purchase price already paid by the respondent and forwarded the same to her advocates via a letter dated 10th May 2019, but the cheques were returned to him. Consequently, Ms. Sally McGuinness transferred the property to the defendant on 6th May 2021 (16 years from the Agreement of Sale to the plaintiff), thereby extinguishing her role as a trustee.
10. The plaintiff reported the matter to the Directorate of Criminal Investigations, which investigated whether there was any fraud or illegality from the defendant and its directors. No charges were preferred against them. From the facts presented in the trial, the defendant believes that there was no illegality or fraudulent act committed by the defendant herein or any of its directors in obtaining the Title to the said suit property. If anything, too much unnecessary accommodation was accorded to the plaintiff herein to complete her obligations under the Agreement for Sale before the suit property was transferred to the defendant herein on 6th May 2021.
11. Before I frame the issues for the determination of this suit, a Preliminary Objection had been raised that the suit herein was time-barred; its ruling was delivered on 1st day of February 2023, and this Court observed as follows:

“The law requires that if one wishes to plead fraud, one must do so specifically and prove it at the hearing. In this case, the Plaintiff has pleaded fraud and illegalities against the Defendant without going into detail. It is unclear how the Plaintiff was defrauded by the Defendant in the acquisition of the title to the disputed land. If the case goes to trial, such allegations without specifics will be challenged. The Defence will be ambushed with details about which it is unaware. As previously stated, the only common denominator is the Director of the Defendant, Mr. Chris D. Wilson, who is not a Defendant in this matter. That in itself does not infer fraud on the part of the Defendant.



47. The Plaintiff's claim of fraud can only be resolved at a full hearing. It is not something I can simply wish away.

48. Order 2 Rule 10(2) of the *Civil Procedure Rules*, states: -

“The court may order a party to serve on any other party particulars of any claim, defence, or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.”

A suit filed by a Plaintiff pleading fraud cannot succeed unless the Plaintiff specifically pleads the facts on which the Plaintiff relies on the alleged fraud or illegalities as stated in the plaint. This will also avoid an ambush on the Defendant and, of course, have an orderly business of the court proceedings and determination of the real issues at hand. It will also maintain equality of arms.

49. As a result, rather than dismissing the Plaintiff's suit summarily, I will grant the Preliminary Objection partially and then place the following orders: -

- a. The Preliminary Objection succeeds to the extent that there is no privity of contract between the Plaintiff and the Defendant.
- b. The issues and allegations of fraud with the specificity to proceed to full trial.
- c. Within 14 days hereof and under Order 2 Rule 10 (2), the Plaintiff is hereby directed by this court to amend her Plaint and set out the specific particulars of fraud and illegalities against the Defendant to be relied on at the hearing hereof.
- d. The Defendant, within 14 days thereafter to amend Defence to reckon the particulars of fraud and illegalities, if any.
- e. Upon fulfillment of the above, the matter be set down for pre-trials.
- f. Failure to comply with orders (C) above and in line with Active Case Management, the PO to stand upheld in its entirety for lack of particulars of fraud and or illegalities.
- g. Costs to the Defendant.”

12. What then remains, which I frame for the decision of this Court, is whether the plaintiff has proved fraud on the part of the defendant in the acquisition of the suit property, well aware that if the plaintiff had purchased the same and had paid all the purchase monies, whether the orders sought by the plaintiff are sustainable. The next question would be who will bear the costs of this suit.

13. Parties filed written submissions on the issues that I have framed.

14. The plaintiff submits that for the court to resolve this dispute, it has to follow the steps through which the defendant acquired title to the suit property. This is in line with the judgment of the Supreme Court of Kenya in *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) where the court held that where



the registered proprietor's title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge. Therefore, the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal, and free from any encumbrance, including interests that would not be noted in the register.

15. Conversely, the defendant presents a defense, contending that the plaintiff has not demonstrated any evidence of fraud or commission of any illegal acts. This Court's ruling of 1st February 2023 already established that the mere fact that Mr. Christopher Wilson is a common denominator between the defendant and Forlornland Limited is not evidence of fraud on the defendant's part. No evidence of any misrepresentation by the defendant has been tendered, nor is there any evidence of illegal conduct. Black's Law Dictionary, 9th Edition, page 131, 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.”

16. The defendant further asserts that fraud must be pleaded and proved on a higher standard than a balance of probabilities. In that regard, the defendant has cited several authorities on how to reckon fraud, including Charles Mutua Mutemi v Republic [2022] eKLR, Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR and R.G Patel v Lalji Makanji [1957] EA 314.
17. The defendant further asserts that he who pleads must prove in accordance with Section 109 of the Evidence Act and as restated in Ndolo v Ndolo [2008] 1KLR (G &F) 742, Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR and Kenya Limited v Trust Bank Limited & 4 others [1996] eKLR
18. I agree with the defendant's submissions that allegations of fraud must not only be pleaded but proven at a hearing and that fraud, being criminal in nature, has to be proved beyond the usual standard of civil matters of a balance of probabilities.
19. From the record and what was tendered in evidence show that Forlornland sold the suit property to the plaintiff in 2005. The plaintiff paid a deposit of Kshs 850,000 per the sale agreement between Forlornland and the plaintiff. Forlornland was wound up in 2009. By this time, the suit property had yet to be transferred to the plaintiff, and the plaintiff had yet to finish paying the purchase price balance. The sale agreement did not show when the last installment was to be paid, and from the parties' conduct, they acquiesced to their right to terminate the agreement due to a lapse of time. On 2nd July 2014, E. K Owiny & Co. Advocates wrote to Mr. Wilson under the plaintiff's instructions, communicating his intention to pay the purchase price balance and have title to the suit property in her name. The plaintiff sought out Mr. Wilson because after Forlornland was wound up, he, as the surviving link with the company, was the only one who could facilitate the property transfer. Mr. Wilson responded to E.K Owiny on 7th July 2014, asking them to address their concerns to Mr. Saleem Ghalia. E. K Owiny followed up with another letter dated 27th August 2014, still expressing the plaintiff's willingness to bring the matter to an end. Amidst this correspondence, Mr. Wilson and Sally registered a Declaration of Trust. Sally declared that she held the suit property to Mr. Wilson's order - Trust document dated 25th April 2015. The plaintiff was not a party to that Trust document. Mr. Wilson and Sally dealt with the suit property to the exclusion of the plaintiff. On 17th August 2015, Bryant & Associates Advocates wrote to the plaintiff directing that payment of the balance of the purchase price together with other charges incurred by Sally totalling Kshs 696,250 be paid to Mr. Wilson, after which Mr. Wilson would direct Sally to execute the transfer documents to the plaintiff's name. The plaintiff indicated that she received that letter on 22nd February 2016. On 13th July 2017, E.K Owiny wrote to Mr. Wilson again, expressing the plaintiff's desire to pay the amount of Kshs 696,250



for the suit property to be registered in her name. Following this exchange of correspondence, on 31st December 2018, the plaintiff deposited the sum of Kshs 400,000/- in the account of Kilifi Plantations Limited.

20. From the record, it will seem after Forlornland was wound up, Mr. Wilson, who, as admitted, was a common denominator as the director of the former and latter company, was ready to complete the transaction and have the land, which was in the registration of Sally registered in the plaintiff's name. To achieve that, the plaintiff was requested to cater for Sally's expenses, which amounted to Kshs 276,250 for payment of rates on the property since the plaintiff had taken too long to pay the purchase price balance since 2005.
21. It will seem from the succeeding letters by E.K Owiny dated 13th July 2017 that the plaintiff agreed to pay Kshs 696,250/- which included the balance of the purchase price of Kshs, 420,000/-
22. Later, on 31 December 2018, she deposited Kshs 400,000 into the defendant Company's account, contrary to her admission of paying Sally's expenses. When the plaintiff paid this money, the agreement was already revoked (sic) on 18th February 2018. Mr. Wilson instructed his erstwhile advocates to issue a completion notice to the Plaintiff's transaction advocates, Bowyer Mahihu Advocates, allowing her 21 days to complete the transaction. The Plaintiff contended at trial that she did not receive the notice since the said firm no longer had instructions to represent her in the transaction. The said firm drafted the Agreement for Sale as her advocate for the transaction. No evidence of any communication as to the change of advocates was sent to the defendant's director, Mr. Wilson, nor did the said firm respond and deny having instructions to receive the notice on behalf of the plaintiff. Following the respondent's failure to complete the transaction within the 21-day notice period, the Agreement for Sale was rescinded. Mr. Christopher Wilson wrote two bank cheques for the refund of the entire purchase price already paid by the respondent and forwarded the same to her advocates via a letter dated 10th May 2019, but the cheques were returned to him. Consequently, Ms. Sally McGuinness transferred the property to the defendant on 6th May 2021 (16 years from the date of the Agreement of Sale to the plaintiff), thereby extinguishing her role as a trustee.
23. I had reserved fraud as the central issue in this trial. This 2005 sale of the land agreement remained unfinished until the 31st of December 2018, when the last installment was allegedly paid. In my ruling on the Preliminary Objection, I observed as follows:

“On the front of privity of contract – the court has found that none exists between the Plaintiff and the Defendant. On limitation of actions, based on breach of contract or recovery of land, the 2005 agreement runs afoul of the Statute of Limitations Act. The claim was extinguished against Forlornland Limited in 2019 after 10 years of the company's deregistration, which happened in 2009 via a Gazette Notice dated 31st July 2009. The publication of that notice was not idle – it guaranteed a 3rd party a window to ventilate their grievances and enforce their rights and obligations owed by the Company to be deregistered. As in this case, the Plaintiff had a right to have Forlornland Limited retained in the Companies register for purpose of enforcing her rights emanating from the 2005 agreement. The company was wound up, and the Plaintiff came to know of it but did nothing until 4th May 2022. This Plaintiff was not even vigilant enough to pay the outstanding balance owed from 2005 to 2018. Forlornland Limited was dissolved in 2009, so it is unclear to whom she paid the outstanding balance in 2018. This is not one of those reasonable Kenyans in a Matatu standpoint who ought to “stay on the radar” or “kaa rada” – as the situation could demand - in the purchase of land transactions in this country. What was it that the Plaintiff was waiting for from 2005 to 2022 to conclude a sale of land transaction?



This court will then purely proceed on the basis that the claim is directed at the 3rd party herein - the Defendant based on a fraudulent acquisition of title, which was reckoned on 4th May 2022. And time will start running for purposes of the *Limitation of Actions Act*. This can be traced from the plaint in paragraph 10 as follows: -

“On 4th May 2022, the Plaintiff carried out a search of the suit property at the land registry and was astonished to learn that it was now registered to the Defendant. Mr. Chris D. Wilson is the Director/Shareholder of this company.”

Paragraph 11 of the Plaint: -

“The Plaintiff will aver that the Defendant fraudulently and illegally acquired title to the suit property.”

Paragraph 12: -

“The Plaintiff will also aver that Defendant cannot claim bona fide interests to the suit property because it did not make proper inquiries to satisfy itself that it could acquire clean title to the suit property.”

Paragraph 13: -

“The Plaintiff’s case against the Defendant is for Cancellation of title illegally issued to it and issuance of a title to her.”

The Plaintiff’s claim is based on fraud and illegalities, as stated in the four paragraphs of the plaint, which I have reproduced above in their entirety. When fraud is leveled against a party in any proceeding, it imputes a criminal mind, which necessitates sanctions. For one to answer to fraud, the specifics of the fraud must be pleaded and specifically proved at the hearing. In the Court of Appeal in the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR it was held: “The next and only other issue is fraud. The law is clear, and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, where Tunoi, JA (as he then was) states 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.”

Order 2 Rule 10 of the *Civil Procedure Rules* also provides those particulars of fraud have to be specifically pleaded in the plaint: -

- “(1) Subject to sub-rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
- a. particulars of any misrepresentation, fraud, breach of trust, wilful default, or undue influence on which the party pleading relies; and
 - b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any



malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”

In *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another* [2020] eKLR, Mutungi J. held as follows on fraud: -

“The foregoing notwithstanding the provisions of section 26 of the Limitations of Actions Act vide which the plaintiff seeks refuge cannot have any application in the circumstances of this matter. No fraud was pleaded and/or any concealment of any material facts relevant to the action. Besides, the 2nd defendant and the 3rd defendants were bonafide purchasers of the suit property for value without any notice of any defect in the title they purchased. They could not have known about and were not a party to any fraud affecting the suit property. The 2nd and 3rd defendants under provision (i) and (ii) of section 26 of the *Limitation of Actions Act* would be absolved of any wrongdoing, they having not been a party to any fraudulent dealing affecting the property.”

24. I have tried to check the fraud associated with the defendant in these proceedings- to no avail; what emerges is that from 2005 through 2009, when Forlornland was wound up, the plaintiff neglected to pay the balance of the purchase price – the correspondences between the parties say it all. The trustee was ready to transfer the title to her, but the plaintiff failed to pay the expenses incurred in paying rates to retain the land. The common director of the two companies, Mr. Wilson, was ready to accommodate the plaintiff in finalizing the sale transaction; if the correspondences on record were anything to go by, she failed in her part of the bargain – in repaying the purchase price balance. A refund was forwarded to her, which she declined. After that, the suit property was registered in the defendant’s name. I do not see the applicability of the *Dina Management Case* here. Since the agreement did not disclose the completion date, the LSK Rules set in. 21 days rescission notice was issued. The remaining balance was allegedly deposited in the defendant's account well after the termination of the agreement. A refund was forwarded to the plaintiff. She declined. Equity should have come to the aid of the plaintiff. The Court could have pierced the corporate veil and discovered that Mr. Wilson was acting fraudulently and hiding behind the corporate veil. Still, in this case, the plaintiff is the author of her misfortune - by blatantly failing to pay the purchase price balance in good time.
25. After failing to prove fraud, the plaintiff’s suit is caught up with larches and delays. As my ruling on the Preliminary Objection highlights, the current suit is statute-barred on both land recoveries and contract enforcement. It is dismissed with costs.
26. The Court sincerely apologizes to the parties for the late delivery of this judgment, which was occasioned by work pressure and increased workload.

DATED, SIGNED, AND DELIVERED AT MALINDI VIA EMAIL AND DOWNLOADED ON THE ONLINE PLATFORM ON THIS 25TH DAY OF NOVEMBER 2024 SINCE THE COURT IS AWAY ATTENDING THE ELC CONFERENCE AND COUNSELS FOR THE PARTIES MR. MUGAMBI FOR THE PLAINTIFF AND MR. MWAI FOR THE DEFENDANT DULY NOTIFIED VIRTUALLY BY HAPPY THE COURT ASSISTANT

E. K. MAKORI
JUDGE

