



**Nganga v Wambua (Environment & Land Case 89 of 2019)
[2024] KEELC 13293 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 89 OF 2019
TW MURIGI, J
NOVEMBER 20, 2024**

BETWEEN

BENARD KITUVA NGANGA PLAINTIFF

AND

JACINTA MUTIO WAMBUA DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a Complaint dated 4th December 2019 and amended on 20th August, 2020 seeking the following orders:-
 - a. An order directing the Defendant to surrender 18 acres of land Parcel No. Makueni / Kyaluma/57 to the Plaintiff and a permanent injunction do issue against the Defendant, her agents, servants or assigns barring them from entering and interfering with the said 18 acres of land.
 - b. An order directing the Land Registrar Wote (Makueni) to carve off 18 acres of land Parcel No. Makueni / Kyaluma/57 and register the same in the name of the Plaintiff.
 - c. General damages for loss of user.
 - d. General damages for trespass and/or mesne profits.
 - e. The costs of this suit.
 - f. Interest on (a), (b) and (c) at court rates.
 - g. Any other relief that this Honourable Court may deem fit and expedient to grant.
2. The Defendant filed an Amended Statement of Defence dated 8th September, 2020 in which she denied the Plaintiff's claim. She urged the court to dismiss the suit with costs.



The Plaintiff's Case

3. The Plaintiff Benard Kituva Nganga testified as the sole witness in support of his case. He testified as PW1 and adopted his witness statement filed in court on 20/8/2020 as his evidence in chief. He also produced the list of documents filed in court on 20/08/2020 as PEX 1-3 in support of his case. It was his testimony that he sold 10 acres out of land Parcel Makueni / Kyaluma/No. 57 to the Defendant for Kshs. 32,500/= per acre and confirmed that he was paid the purchase price. That when he brought a surveyor to the land, the Defendant requested him to sell two more acres to her which he agreed.
4. He went on to state that at the time of the sale, the suit property was charged to Kenya Commercial Bank. That on 13/8/2010, he visited to the Land Control Board in the company of his wife Rhoda Mueni and the Defendant's husband, Johnson Wambua to inquire on what was required of him.
5. He informed the court that he had never seen the transfer form or the application for consent both dated 15/12/2014 and denied having applied for consent or signing any transfer documents in respect of the suit property. He went on to state that he was not familiar with the sale agreement dated 6/1/2009 between himself and Johnson Wambua Muthike, drawn by the firm of Wambua Njuguna Kiriba Advocates and denied having signed the same. He further testified that he did not sign the hand-written agreement below the sale agreement dated 6/1/2009. He denied knowledge of the second sale agreement dated 11/1/2023 between himself and Johnson Wambua Muthike as well as the handwritten notes.
6. It was his testimony that the Defendant transferred the suit property measuring 30-acres to herself without his knowledge and consent. He further stated that the Defendant resides in the suit property and that the house that he had previously built for his servant on the suit property was demolished. He urged the court to grant the orders sought in the plaint.
7. On cross-examination by Mr. E.K. Njagi, he confirmed that the suit property was charged to Kenya Commercial Bank in the year 1977. He denied having signed the sale agreement with the Defendant in regards to the suit property and asserted that their agreement was oral as it was not reduced into writing. He admitted that the Defendant paid Kshs. 218,961/= to the firm of Hamilton Harrison Mathews, who were the Advocates for Kenya Commercial Bank in order to secure a discharge of charge against the title for the suit property and confirmed that the title deed was released to the Defendant.
8. He reiterated that the purchase price per acre was Kshs. 32,500/= and confirmed that he was paid over Kshs. 900,000/= by the Defendant. He stated that the price for 12 acres was Kshs. 390,000/= . He testified that the Defendant's husband agreed to purchase the remaining 18 acres but denied having executed a sale agreement for the same. He further testified that he would receive the payment of the purchase price via Mpesa or in cash at the Defendant's office upon which he would sign acknowledgement notes.
9. He admitted having authored and signed the letter dated 13/1/2010 which did not indicate that he was selling 12 acres. He asserted that his claim against the Defendant was for 18 acres and denied having sold the same to the Defendant's husband as they were yet to agree on the purchase price. He reiterated that he received over Kshs. 975,000/= from the Defendant but denied having obtained the letter of consent and insisted that it was a forgery.
10. On re-examination by Mr. Kioko, he maintained that his agreement with the Defendant's husband for the sale of the remaining 18 acres was oral in nature.



The Defendant's Case

11. The Defendant called two witnesses in support of her case.
12. DW1, Emmanuel Karisa Kenga, testified that he is a forensic document examiner with more than 30-years of experience.
13. He informed the court that on 19/1/2021, he received the following documents from E.K Njagi Advocate with instructions to examine the signatures and give his opinion: -
 - i. An agreement dated 1/5/2010
 - ii. An agreement dated 6/1/2009
 - iii. An agreement dated 11/1/2013
 - iv. An agreement dated 15/12/2014
 - v. Transfer form dated 15/12/2014
 - vi. Document of Bernard Kituva Ngungu dated 13/1/2010 with his specimen signature
14. That he examined the known and questioned signatures and concluded that the disputed documents were written and signed by the same hand. He produced his report dated 22/1/2021 as DEX 1.
15. On cross-examination by the Plaintiff, he testified that he only examined the signatures on the sale agreements and not the hand-written notes.
16. In re-examination, he testified that the Plaintiff admitted having authored and signed a letter marked as A1. He stated that he examined the signature which the Plaintiff had admitted and compared it with the signatures on the disputed sale agreements and came to the conclusion that the documents were signed by the Plaintiff.
17. The Defendant Jacinta Mutio Wambua testified as DW2 and adopted her witness statement dated 17/1/2020 as her evidence in chief. She also produced the list of documents dated 17/1/2020 as DEX 1-16 in support of her case. It was her testimony that the sale agreements dated 6/1/2009, 1/5/2010 and 11/1/2013 were executed between the Plaintiff and her husband, Johnson Wambua Mutheke. She further testified that the Plaintiff's signature on the disputed documents was verified by the forensic document examiner.
18. The Defendant testified that they purchased 30 acres from the Plaintiff for Kshs. 32,500/= per acre and paid a total of Kshs. 975,000/= to the Plaintiff. That she paid Kshs. 218,961/= out of Kshs. 975,000/= to the Plaintiff's account in Kenya Commercial Bank. She further testified that the suit property was not subdivided as at the time when they were purchasing the same. She further testified that the Plaintiff requested them to bail him out of a loan that he had secured from Kenya Commercial Bank.
19. She further testified that the Plaintiff applied and obtained consent to transfer the suit property. She urged the court to dismiss the Plaintiff's suit with costs.
20. In cross-examination, she testified that the Plaintiff obtained consent from Land Control Board in its meeting held on 27/11/2014. She stated that it was agreed between her husband and the Plaintiff that the title would be registered in her name. She further testified that after the Plaintiff agreed to sell the suit property, he instructed her to represent him in Machakos Case No. 248 of 2010, where he had sought for an order to have the caution placed by Nzioka Mulinge removed.



21. In re-examination, she testified that the Plaintiff filed Machakos Case No. 248 of 2010 to have the caution removed so that he could sell the suit property to them.
22. After the close of the hearing, the parties agreed to file and exchange their written submissions.

The Plaintiff's Submissions

23. The Plaintiff filed his submissions on 20th November, 2023.
24. The Plaintiff submitted that he was the registered proprietor of the suit property before it was fraudulently transferred to the Defendant without his knowledge and without following the due process. He narrated the chronology of events from the year 2008 when he was approached by the Defendant to sell his land until the year 2017 when Machakos ELC Case No. 248 of 2010 (OS) was marked as closed by Justice O.A. Angote.
25. The Plaintiff submitted that the court has a duty to dispense justice in accordance with the evidence that has been adduced by the parties without relying on procedural technicalities. He asserted that he was not aware of the transfer of the suit property to the Defendant and urged the court to grant the orders sought in the Plaintiff.

The Defendant's Submissions

26. The Defendant's submissions were filed on 22/1/2024. On her behalf, Counsel submitted that the Plaintiff did not prove the allegations of misrepresentation and forgery on the part of the Defendant. Counsel further submitted that the Plaintiff did not challenge the evidence and the report by the document examiner. Counsel contended that the Plaintiff's evidence was incomprehensible and full of contradictions.
27. Counsel submitted that the Plaintiff admitted in his evidence that he sold each acre for Kshs. 32,500/= and admitted having received a total of Kshs. 975,000/= being the purchase price for the suit property. Counsel submitted that, it is clear from the evidence on record that the Plaintiff's claim is an abuse of the court process and urged the court to dismiss the suit with costs.

The Plaintiff's Supplementary Submissions

28. The Plaintiff filed supplementary submissions dated 20th February, 2024. In his submissions, the Plaintiff reiterated that the Defendant's acts of transferring the entire suit property to herself were fraudulent and unprocedural.

Analysis And Determination

29. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination: -
 - i. Whether the Plaintiff is entitled to the orders sought in the amended Plaintiff.
 - ii. Who is to bear the costs of the suit.
30. It is not in dispute that: -
 - i. The suit property, Parcel No. Makueni / Kyaluma/57 is registered in the name of the Defendant.
 - ii. The Plaintiff executed an agreement dated 6th January, 2009 for the sale of 10 acres of the suit property.



- iii. The purchase price per acre of the suit property was Kshs. 32,500/=.
 - iv. The Plaintiff received over Kshs. 900,000/= from the Defendant being the purchase price for the suit property.
31. The Plaintiff is seeking for an order directing the Defendant to surrender 18 acres out of the suit property. It is the Plaintiff's case that he was the registered proprietor of the suit property before it was fraudulently transferred to the Defendant.
32. To prove fraud, the Plaintiff relied on the particulars of fraud set out in paragraph 10 of the amended Plaintiff as follows:-
- a) Causing registration of the 30 acres of land parcel Makueni / Kyaluma/57 into herself without the consent from the Land Control Board.
 - b) Duping the Plaintiff to surrender the original title of land parcel Makueni / Kyaluma/57 in the belief that the Defendant was to present them to the District Ln Registrar Makueni for the registration and curving off 12 acres to be registered in her name.
 - c) Disregarding the agreement of sale of 12 acres as it had been agreed.
 - d) Presenting documents for registration i.e application for registration and transfer of the 30 acres without the express knowledge of the Plaintiff.
33. It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)* Tunoi JA 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.”
34. 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...*”
35. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.
36. The Plaintiff insisted that he sold 12 acres out of the suit property to the Defendant's husband for Kshs. 32,500/= per acre. He further testified that the Defendant's husband approached him to sell the remaining 18 acres but they did not record an agreement to that effect. He insisted that their agreement



was oral and denied having executed any sale agreement with the Defendant's husband in regards to the sale of the suit property.

37. The Defendant on the other hand testified that the Plaintiff sold the entire suit property to them. In this regard she produced the sale agreements dated 6th January 2009, 1st May 2010 and 11th January 2013 (DEX 5)) which were executed by the Plaintiff and her husband, Johnson Wambua Mutheke. She also produced the application for consent of Land Control Board(DEX 13), Letter of Consent dated 27/11/2014(DEX 15) and duly Transfer forms(DEX 16). The Plaintiff denied having executed the sale agreements, application for consent and asserted that they were forgeries.

38. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the Evidence Act provides that:-

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- (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 exists.
- (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.

39. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.

40. It is not in dispute that the suit property was charged with the Kenya Commercial Bank. It is also not in dispute that the Defendant paid Kshs 218,961/= to secure the discharge of charge on the suit property. The Plaintiff admitted that he authored and signed the letter dated 13th January 2010. In the said letter, he authorised the Defendant to pay Kshs 203,616/= to the firm of Harrison Hamilton and Mathews Advocate who were the Advocates for Kenya Commercial Bank for purposes of securing the discharge of charge. The Defendant called DW1 Emmanuel Karisa Kenga, a forensic Document Examiner who examined the disputed signatures with the known signature of the Plaintiff contained in the letter dated 13/01/2010 and concluded that the Plaintiff signed the sale agreements and the transfer form dated 15/12/2014. The Plaintiff did not call any evidence to challenge the evidence and the report by DW1.

41. In her evidence, the Defendant gave an elaborate account of how the purchase price was paid to the Plaintiff. She averred that since the suit property was charged to Kenya Commercial Bank, Kshs. 218,961/= was paid to bank through their lawyers Hamilton Harrison & Mathews Advocates. It is then that the title of the suit property was discharged. It was her evidence that the Plaintiff would acknowledge payments which were made to him and which he signed against the face of the sale agreements he had executed.

42. Although the Plaintiff denied having signed the sale agreements and the transfer form, he admitted severally during the course of the hearing that he had received over Kshs. 900,000/= from the Defendant. The Plaintiff did not call any evidence to corroborate his evidence that he had only sold 12 acres out of the suit property to the Defendant. The Plaintiff did not call the Surveyor whom he allegedly went to the suit property to demarcate 12 acres sold to the Defendant. In addition, he did not call any evidence to rebut evidence of DW1. The Defendant has demonstrated to the satisfaction of this court that the Plaintiff sold the entire suit property to the Defendant's husband and received the purchase price for the same. The Plaintiff testified that he was selling each acre for Kshs. 32,500/= . He did not offer any explanation as to why he received Kshs. 975,000/= from the Defendant if at all he had only sold 12 acres out of the suit property. It is crystal clear that the Plaintiff applied and obtained



consent to transfer the suit property to the Defendant. It is also clear that the Plaintiff executed the transfer forms between him and the Defendant.

43. From the foregoing it is clear that the Plaintiff has failed to demonstrate any fraud on the part of the Defendant.
44. The Plaintiff also sought for an order for the Land Registrar to carve out 18 acres out of the suit property. Having failed to establish that the suit property was fraudulently transferred to the Defendant and having found that he sold the entire suit property, I find that he is not entitled to the orders sought.
45. The Plaintiff also sought for general damages for loss of user. The Plaintiff did not demonstrate that he has any right or claim over the suit property and is therefore not entitled to the order sought.
46. The Plaintiff sought for general damages for trespass and/or mesne profits. Black's Law Dictionary 10th Edition defines trespass to land as follows;

“ A person's unlawful entry on another's land that is visibly enclosed.”

47. In the case of *Municipal Council of Eldoret Vs Titus Gatitu Njau* (2020) eKLR the Court of Appeal cited the case of *M'Mukanya Vs M'Mbijiwe* (1984) KLR 761 where the ingredients of tort of trespass were stated as follows;

“ trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership see *Thomson Vs Ward* (1953) 2 QB 153.”

48. To establish trespass, the Plaintiff had to prove that he was either lawfully in possession of the properties or was the owner thereof and that the Defendant entered the properties without any justifiable cause.
49. In the case of *Gitwany Investments Limited Vs Tajmal Limited & 3 Others* [2006] eKLR, the Court held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass.
50. The Plaintiff did not adduce any evidence to show that he is the registered proprietor of the suit property or was in possession thereof. The Plaintiff sought for an award of mesne profits. Mesne profits are in the nature of special damages; they must be specifically pleaded and proved. The Plaintiff did not lead any evidence in this regard and is therefore not entitled to the orders sought.
51. From the foregoing, I find that the Plaintiff has failed to prove his case against the Defendant on a balance of probabilities as is required by the law.

Who Should Bear The Costs Of The Suit

52. The general rule under Section 27 of the *Civil Procedure Act* is that costs follow the event unless the court has good reason to order otherwise.
53. Having failed to prove his case on a balance of probabilities I find that the Defendant is entitled to costs of defending the suit.
54. The upshot of the foregoing is that I find that the Plaintiff's suit is devoid of merit and the same is hereby dismissed with costs to the Defendant

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF NOVEMBER, 2024.

IN THE PRESENCE OF:

The Plaintiff in person

E.K Njagi for the Defendant

C/A Alfred

