



**Mvita v Muluvi & another (Land Case 117 of 2015)  
[2024] KEELC 13283 (KLR) (19 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13283 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 117 OF 2015  
FM NJOROGE, J  
NOVEMBER 19, 2024**

**BETWEEN**

**KAZUNGU POLA MVITA ..... PLAINTIFF**

**AND**

**STELLA KATWA MULUVI ..... 1<sup>ST</sup> DEFENDANT**

**HARRISON WASIWASI MUSUMIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**PLEADINGS**

**Plaint**

1. The plaintiff filed the present suit vide a plaint dated 10<sup>th</sup> July, 2024 which he amended on 28/3/2019. In the amended plaint the following orders were sought:
  1. A declaration that the transfer of extra one acre was fraudulent and not paid for hence the suit property kilifi mtondia /1109 and be subdivided to hive out the one acre to be returned to the plaintiff at their own cost(sic).
  2. In the alternative the defendants be compelled to pay for the extra one acre at the current prevailing market prices;
  3. Costs of the suit;
  - 4 Interest on (a) and (b) at court rates;
  - 5 Any other relief this court may deem fit to grant;
  - 6 That the costs of this Application be provided for.



2. The plaintiff's case is that he entered into a sale agreement in 2009 with the 2<sup>nd</sup> defendant for the sale of 1 acre of land to be carved out of the land parcel known as Kilifi/Mtondia/ 1084. the consideration was Kshs 100,000/=. The land was subdivided into portions numbered 1108,1109,1110, and 1111. The 2<sup>nd</sup> defendant was actively involved in the subdivision in that the surveyor was appointed by him. The 2<sup>nd</sup> defendant allocated himself Parcel No 1109 measuring 2 acres instead of the 1 acre sold to him. It is the plaintiff's contention that the 2<sup>nd</sup> defendant in a blatant abuse of office caused the plaintiff to sign various documents some blank only to realize that he took undue advantage of his illiteracy, obtained consent to transfer 2 acres under a process called the special land control board and eventually the suit land was transferred to the 1<sup>st</sup> defendant who was the 2<sup>nd</sup> defendant's wife. Thus the plaintiff alleges that the transaction was skewed and lacked his free consent in that the 2<sup>nd</sup> defendant exercised undue influence over him. It is thus alleged that the 2<sup>nd</sup> defendant caused the plaintiff to sign a transfer to a stranger and not for the 1 acre that was bought but for 2 acres, and the defendants were unduly enriched at his expense. The land control board consent is also alleged to have been fraudulently acquired. It is further pleaded that when the alleged fraud was discovered the plaintiff asked the 2<sup>nd</sup> defendant to pay for the one extra acre but he never did so hence the suit.

#### **Defence.**

3. The defendants filed a joint statement of defence dated 17<sup>th</sup> December 2015. In that pleading they denied the claim. It is the defendant's case that in addition to the one acre that the plaintiff speaks of, the 2<sup>nd</sup> defendant did buy and pay for 1 more acre from Rophus Furaha Kazungu who was a beneficiary of the subdivision of the plaintiff's land and that plot was lawfully transferred to the 2<sup>nd</sup> defendant with the knowledge and participation of the plaintiff. It is also averred that Kazungu was the plaintiff's agent who was actively involved in the subdivision of plot no 1084 and that the land control board consent to transfer was applied for through him. The defendants raised an issue of the long period between the transaction and the filing of the suit claiming fraud.

#### **Reply to defence.**

4. The plaintiff filed a reply to defence reiterating the contents of the plaint and denying involvement in the transaction through Kazungu in the subdivision process. he denied having applied for the consent of the LCB to transfer the disputed 1 acre or executing any agreement or transfer either through himself or Kazungu for the disputed portion and presentation of the same to the land registrar.

#### **Amended defence.**

5. The defendants amended their defence on 12/10/2018, substituting the name "Joe Kazungu Yaa Mangi" therein for "Rophus Furaha Kazungu".

#### **Amended Reply to Defence.**

6. The plaintiff replied to the amended defence vide this pleading which he filed on 24/4/19. He denied involvement of Joe Kazungu Yaa Mangi on his behalf in the processes involving the suit land.

#### **HEARING.**

7. The plaintiff testified alone in his case on 31/7/2019. The 1<sup>st</sup> defendant testified on 15/2/22 while the 2<sup>nd</sup> defendant testified on 30/5/2024.



## **Evidence.**

### **Plaintiff's evidence.**

8. The plaintiff's evidence resembled the contents of his amended pleadings. He also adopted his witness statement dated 2/5/2017. His evidence is that the defendants came to him and enquired as to whether he could sell them a piece of land measuring 1 acre. It is the 2<sup>nd</sup> defendant who came first and they wrote a sale agreement dated 24/1/2009 which was witnessed by Joe Kazungu and the plaintiff's son Furaha Kazungu. The plaintiff was paid Kshs 100,000/= by the 2<sup>nd</sup> defendant as he awaited the subdivision that would yield the 1 acre. At that point the title deed was still at the land registry. His land was originally 12 acres. The 2<sup>nd</sup> defendant instructed surveyors who conducted the subdivision. He also gave Joe Kazungu Mangi 2 acres as appreciation for his services which helped him to get documents for the land. He however had no sale agreement with the said Kazungu. It was only after the subdivision that the plaintiff assessed the measurements and realized that the 2<sup>nd</sup> defendant had 2 acres instead of the 1 acre contracted for. The 2<sup>nd</sup> defendant in cahoots with other also caused the plaintiff to execute so many forms without his free consent as he was illiterate thus allegedly abusing the trust the plaintiff had in him. He was never taken to the land control board with any of his family members to secure the land board's consent, and he does not know how the consent for the 2 acres was obtained. He alleged that the 2<sup>nd</sup> defendant being the person then holding the position of land registrar, took advantage of his illiteracy and age in the transaction. The 2<sup>nd</sup> defendant also refused to pay for the 1 extra acre and the caution that the plaintiff attempted to lodge against the land was rejected under suspicious circumstances which he never specified.
9. Under cross-examination by Mr Atiang the plaintiff stated that he had already given Joe Kazungu his portion by the time the 2<sup>nd</sup> defendant came along; that he had trusted Joe and he never sold him any land. He did not however know if Joe sold a part of the said land to the 2<sup>nd</sup> defendant. Another person Kingi Charo got 2 acres from the plaintiff's land. Joe was present as the plaintiff sold the 2<sup>nd</sup> defendant land. Since he is illiterate he did not know the numbers of the parcels that were sold to other parties. He is only aware that he only sold one acre to the 2<sup>nd</sup> defendant.
10. While under re-examination PW1 stated that he was to remain with 6 acres after the subdivision.

### **Defendant's evidence.**

11. Stella Katwa Muluvi, the 1<sup>st</sup> defendant testified on 15/2/2022 and adopted her two witness statements dated 3/3/2016 and 16/2/2017 respectively. She also produced documents in her list of documents dated 7/4/2016 as P.Exh. 1-7. She told the court in cross-examination that they purchased the second acre from Joe Kazungu whom she stated was the Plaintiff's grandson and who had been given 2 acres by the Plaintiff.
12. The 2<sup>nd</sup> Defendant equally adopted his written statement dated 12/10/2018 and a statutory declaration dated 9/1/2013 as part of his evidence-in-chief. He told the court that he was a registrar when the subject transaction took place and that his role then was only limited to registration of the Settlement Fund Trustee discharge. He stated that the subdivision of Kilifi/Mtondia/1084 was done by one Anthony Karani, an Assistant Registrar at the Kilifi Lands Registry. He testified that Joe offered to sell to him 1 acre even before the subdivision was done.
13. The 2<sup>nd</sup> Defendant narrated that when he was served with the demand letter dated 19/12/2012, he met the Plaintiff and the said Joe to enquire about the allegations of fraudulent acquisition of land, raised by the latter. The Plaintiff told him that he had only given Joe one acre; that Joe informed the Plaintiff



that he needed money thus sold one acre to the Defendants for Kshs. 110,000/-. He added that he never appeared before the Land Control Board, but was only given the documents by the Plaintiff.

14. He told the court on cross-examination that he had an agreement with Joe dated 4/2/2009, however the same had no witnesses and the Plaintiff was not involved. He explained that the title to Kilifi/Mtondia/1084 was first issued on 7/8/2009 and the SFT discharge registered on the same date. He added that the requisite transfer documents were all processed by the Plaintiff and Joe.

### **Plaintiff's Written Submissions**

15. In the Plaintiff's submissions dated 5/9/2024, counsel identified four issues for determination. Firstly, whether the sale of the 1 acre and additional 1 acre complies with Section 3 (3) of the *Law of Contract Act*. Relying on the case of *Stephen Ben Ngumbao Katana v Kazungu Birya & another*, Malindi Civil Appeal No. E010 of 2021, counsel for the Plaintiff submitted that the Defendants' claim to the second acre allegedly purchased from Joe was not substantiated with any written agreement as is required under Section 3 (3) of the *Law of Contract Act*, which requires that an agreement for the disposition of land must be in writing, signed by both parties and witnessed by independent witnesses. Counsel added that the said Joe was not even called as a witness to validate their claim.
16. Secondly, counsel submitted on whether the Plaintiff has proved the allegations and or particulars of fraud and undue influence. Counsel submitted that the Plaintiff successfully proved all the particulars of fraud and undue influence. He highlighted that this was demonstrated by the 2<sup>nd</sup> Defendant's admission that he registered the Plaintiff as the first allottee on 21/1/2009 only to buy the 1 acre on the subsequent day; that there was no explanation as to why the title deed for Kilifi/Mtondia/1084 was not issued; that there was no consent of the Land Control Board and that both parties admitted that they did not attend the board for the consent; that the LCB consent was not accompanied by an application form; and that by the time the alleged LCB consent was issued, the title for sub-division 1109 had already issued; that the LCB consent was neither filed not produced in court.
17. To counsel, the transfer could not even issue before the discharge of the SFT charge which was registered on 7/8/2009, hence the consent that was purportedly issued on 4/6/2009 is either fraudulent, irregular or untenable. He added that no stamp duty was even paid. Counsel submitted that the process of acquisition of title to land is crucial in determining whether the title deed issued to the defendants in respect of the suit property is valid and conferred good title thereto; that the defendants failed to demonstrate that the process used was devoid of fraud. To support this argument, counsel cited the case of *Munyu Maina v Hiram Gathiba* [2013] eKLR; *Bandi v Dzombo & 76 others CA No. 16 of 2020* (2022 KECA 584 (KLR); *Benja Properties Ltd v Syedna Mohamed Burhanudin Sahed & 4 others* (2015) eKLR; *Wambui v Mwangi & 3 others* C.A 465 OF 2019 (2021) KECA 144 (KLR).
18. The third issue was whether the defendants have offered any plausible defence. Counsel argued that the defendants are not innocent purchasers for value since the alleged sale and transfer of the second acre by Joe was marred with numerous flaws, inadequacies, fraud and irregular activities. That the said Joe did not even have any proprietary interest over the suit property.
19. Counsel was of the view that the Plaintiff had proved his case on a balance of probabilities and argued that the balance of convenience tilts in favour of the Plaintiff. He urged the court to grant the prayers sought in the Plaintiff.



## The Defendants' Submissions

20. In their submissions dated 16/9/2024, counsel identified three issues for determination: a) whether the defendant acquired the 2<sup>nd</sup> acre through a lawful process under the law of contract. b) whether the 2<sup>nd</sup> Defendant abused his office and manipulated the system as a Land Registrar to unjustly enrich himself. c) whether the Plaintiff's claim has been proven on a balance of probabilities.
21. In relation to the first issue, counsel reiterated the Defendants' evidence. He argued that the omission to sue the said Joe to explain how the Defendants acquired the second acre was a disservice to the Plaintiff's case. To him, failure to do so or even call him as a witness was detrimental to the Plaintiff's claim.
22. On the issue of abuse of office, counsel argued that the creation of plot 1109 and other subdivisions from the mother title was straight and proper; that the Plaintiff cannot only fault the transfer of the second acre and be content with the transfer of the first acre, since both are an outcome of the same process.
23. Finally, counsel argued that the Plaintiff's case was uncorroborated and had he sued or called Joe as a witness, the answers he seeks from this court would have flown effortlessly. Counsel relied on the case of *Bukenya & others v Uganda* (1972) EA 549. He urged the court to dismiss the suit for lack of merit.

## Analysis and Determination

24. The main issues for determination in this suit are whether the allegations of fraud on the defendants' part have been substantiated, and whether the Plaintiff is entitled to the reliefs sought.
25. It is common ground that the 2<sup>nd</sup> defendant purchased 1 acre directly from the plaintiff. The issue arising in this case is how the Defendants acquired the second acre of land in Kilifi/Mtondia/1084. The Plaintiff relied on the sale agreement dated 24/1/2009 to state that the 2<sup>nd</sup> Defendant only negotiated and paid for that 1 acre, and that thereafter, the Defendants connived with some other third parties to acquire an additional one acre. The Defendants' case on the other hand is that they purchased the second acre from the Plaintiff's relative one, Joe Kazungu Mangi at a consideration of Kshs. 110,000/-.
26. It is trite law that when a party alleges fraud on the part of the other party, the said fraud must be pleaded, particularized and proved. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated 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.”

27. As regards the standard of proof, the Court of Appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows; -

“...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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

28. The onus was therefore on the Plaintiff who sought to rely on fraud on the part of the Defendants and alleged forgery on the transfer documents to prove to the court that he did not willingly sign any of the said documents.
29. Section 107 of the *Evidence Act*, provides as follows: -
- (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.
30. The Plaintiff throughout his pleadings and testimony denied signing the transfer documents willingly. He alleged that the 2<sup>nd</sup> Defendant in collaboration with third parties took advantage of his old age and illiteracy and made him sign some forms. I have perused the evidence on record, I do not find anything to substantiate this allegation. In his own written statement, the Plaintiff stated that he involved Joe in the entire transaction, from paying for the SFT discharge to subdivision. He stated that he engaged him because he trusted him. That Joe was never called to testify on behalf of either the plaintiff or the defendants. The plaintiff however is categorical that he gave him 2 acres. The 2<sup>nd</sup> defendant stated that he bought land from Kazungu. It is clear that as per the plaintiff's own evidence that having given Joe Kazungu two acres of land out of plot no Kilifi/Mtondia/1084, the latter clearly had some land to sell to the defendants. In my view, the Plaintiff's evidence fell too short of establishing fraud on the part of the Defendants as far as the acreage purchased. It was the 2<sup>nd</sup> Defendant's testimony that at one time, after the demand notice had been served upon him, there was a misunderstanding as to the acreage given to Joe. It is clear to me and I find it credible that the Defendants bought the second acre from the said Joe.
31. The final outcome is that the Plaintiff's case is unmerited and it is hereby dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE  
JUDGE, ELC, MALINDI**

