



REPUBLIC OF KENYA



KENYA LAW
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**Tanui v Kibuthi (Environment & Land Case 106 of 2017)
[2025] KEELC 575 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 106 OF 2017
JM ONYANGO, J
FEBRUARY 13, 2025**

BETWEEN

KIPYEGO JUMA TANUI PLAINTIFF

AND

CHRISPUS KABIRU KIBUTHI DEFENDANT

JUDGMENT

1. By a Plaint dated 13th March 2017, the Plaintiff filed suit against the Defendant claiming that land parcel number Kakamega/Sango/441 initially belonged to his late father Kipkorir Juma Arap Chelule. who bought it through a loan from the Settlement Fund Trustees. He averred that sometime in 1977 the Defendant had without any colour of right evicted the plaintiff's father from land parcel number Kakamega/Sango/441. He therefore prayed for an order that the Defendant be evicted from land parcel number Kakamega/Sango/441.
2. Upon being served with the Plaint and Summons to enter appearance, the Defendant filed a Defence dated 13th May 2018 in which he denied the Plaintiff's claims and stated that the suit had been filed belatedly and the plaintiff's late father had sold him the suit property in 1977 and he never made any claim against him prior to his demise in 2002. He stated that they followed all the relevant procedures.
3. He further stated that Kipkorir Arap Chelule was allocated the suit property by the Settlement Fund Trustees and at the time he sold it to the Plaintiff he had outstanding loan arrears which the Defendant cleared. He subsequently obtained a Discharge of Charge and the title was registered in his name. He urged the plaintiff to abandon the case.
4. The suit was set down for hearing and both parties testified. The Plaintiff called one witness while the defendant did not call any witness.



Plaintiff's Case

5. The Plaintiff testified as PW1. He stated that he had obtained a Limited Grant in respect of the estate of his late father Kipkorir Juma Arap Chelule. It was his testimony that his father had purchased the suit property through a loan from the Settlement Fund Trustees. He stated that when the Defendant started claiming their land he reported the matter to the chief. He later conducted an official search and discovered that the land was registered in the Defendant's name. He then lodged a caution on the title. He later reported the matter to the police. He stated the Defendant' ID number on the application for consent of the Land Control Board and the Transfer Form were different. He produced a copy of the charge by the Settlement Fund Trustees as Plaintiff's exhibit 2, the Certificate of Official Search as Plaintiff's exhibit 3, the Application for Land Control Board Consent as Plaintiff's exhibit 4, a letter from the Divisional CID as Plaintiff's exhibit 5 and Transfer Form as Plaintiff's exhibit 6.
6. Josiah Kibongei Yego testified as PW2. He told the court that sometime in 1977 the Defendant claimed that he had bought the suit property and went to evict them without any notice. He stated that at the time they were evicted, he was still very young and his father had disappeared from home. He later died in 2002.
7. Upon cross examination he said that his late father told them that he never sold his land. He stated that he was not aware that his father had applied for consent of the Land Control Board to transfer the land to him. He stated that his mother was not involved in the sale of the suit property.
8. Although the Plaintiff had indicated that he wished to call the DCIO Lugari and an officer from the Settlement Fund Trustees, he did not call them and he closed his case after the testimony of PW2.

Defendant's Case

9. The Defendant testified as DW1. He testified that he bought the suit property from the Chumo Arap Chelule – deceased.in 1977 at an agreed purchase price of Kshs. 21,000. He said that at the time he bought the suit property, the deceased only had a letter of allotment and he had to obtain the consent of the Settlement Fund Trustees. He produced copies of the letter of allotment, application for consent of the Land Control Board, Transfer Form and green card.
10. It was his further testimony that he later sub-divided the suit property and he has sold a portion of it to 32 people and remained with a small portion. He said that he cleared the loan with the settlement Fund Trustees before the land was transferred to him in 1998. He said that before his demise, the deceased never bothered him and he did not understand why the plaintiff had sued him.
11. Upon cross-examination he stated that he did not enter into a written sale agreement because the deceased still had a loan with the Settlement Fund Trustees. which he paid before the transfer was effected to his name.
12. After the defendant closed his case the parties were directed to file their written submissions and they duly complied.

Plaintiff's Submissions

13. In her submissions dated 10th December 2024 counsel for the Plaintiff submitted that the Plaintiff's father is the absolute registered proprietor of the suit property and the title is free from any encumbrances. Consequently, and pursuant to section 25 of the [Land Registration Act](#), his rights are not liable to be defeated. She submitted that the Defendant acquired his title by way of fraud. It was further submitted that the Defendant did not produce any sale agreement to show that he bought the



suit property from the Plaintiff's late father nor did he produce any proof of payment. Additionally, he failed to prove spousal consent. It was therefore counsel's submission that the Defendant had failed to discharge the burden of proof in accordance with section 107 and 108 of the *Evidence Act*.

14. Counsel urged the court to uphold the property rights of the Plaintiff in accordance with Article 40 of *the Constitution* of Kenya.

Defendant's Submissions

15. On his part the Defendant submitted that he bought the suit property from the Plaintiff's father at a consideration of Kshs. 21,000. He subsequently obtained the consent of the Land Control Board on 19.5.1977. He submitted that after he sold the suit property, the deceased gave him vacant possession and relocated his family to Songhor in February 1978.

Analysis And Determination

16. I have considered the pleadings, oral and documentary evidence on record as well as the parties' submissions and in my view the issues for determination are as follows:
 - i. Whether the Defendant obtained the title to land parcel No. Kakamega/Sango441 by way of fraud.
 - ii. Whether the Plaintiff is entitled to the reliefs sought.
17. The Plaintiff's case is that the Plaintiff obtained the title to the suit property by way of fraud after which he evicted the plaintiff and other members of his family from the suit property. He based his assertion on the fact that the Plaintiff did not produce any sale agreement to prove that he bought the land from the plaintiff's late father. Whereas there is no dispute that the plaintiff failed to produce a sale agreement and proof of payment, the onus was on the Plaintiff to prove fraud on the part of the Plaintiff.
18. It is trite law that fraud is a serious allegation that must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. In the case of *Koinange & 13 Others V. Charles Karuga Koinange* 1986 KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji (1957) EA 314* observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required.”
19. Furthermore 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) 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
20. This decision was upheld by the Court of Appeal in Nairobi in the case of *Kinyanjui Kamau .v. George Kamau Njoroge* [2015] eKLR(Civil Appeal No 132 of 2005) where it was stated that to succeed in the



claim for fraud, the appellant needed to not only plead and particularize fraud, but also lay a basis by way of evidence, upon which the court would make a finding.

21. The Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR in considering the issue of fraud observed as follows:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs*, *Precedent of pleadings* 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

see *Insurance Company of East Africa vs. The Attorney General &3 Others* Hccc135/1998.

At paragraph 7 of the *Plaint*, the *Plaintiff* has pleaded as follows:

7. “The Defendant fraudulently obtained and/or changed the title deed of the suit land in 1975 before the eviction but the land parcel No. Kakamega/Sango/411(sic) belongs to the father of the administrator Kipkorir Chuma arap Chelilei now deceased”.
22. No particulars of fraud have been provided as required by the provisions of Order 2 Rule 10 of the Civil Procedure Rules. It was not enough for the *Plaintiff* to merely allege that the *Plaintiff*’s title was obtained fraudulently. He needed to set out the particulars of each act of fraud committed by the *Plaintiff* and then prove the same by way of evidence. Given the serious nature of fraud, the failure to plead the particulars of fraud cannot be ignored. It is therefore the finding of this court that the *Plaintiff* failed to plead and prove the allegation of fraud against the Defendant.

(ii) Whether the Plaintiff is entitled to the reliefs sought.

23. The *Plaintiff* seeks an order of eviction, cost and interest against the defendant. There is no prayer for cancellation of the *Plaintiff*’s title. Even if the court had come to the conclusion that the *Plaintiff*’s title was obtained by way of fraud. It would have been necessary to cancel the *Plaintiff*’s title before issuing an eviction order.



24. Before I pen off I must point out that although the question of limitation was mentioned by the Defendant in passing in his Defence, it is clear that the Plaintiff's suit is statute barred as it contravenes the provisions of section 7 of the Limitation of Actions Act. The said section provides as follows;

“S. 7 An action may not be brought by any person to recover land after the end of twelve years from the date on which the right accrued to him or if it accrued to some person through whom he claims to that person.”

25. The upshot is that the Plaintiff's suit lacks merit and it is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF FEBRUARY 2025.

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J. M ONYANGO

JUDGE

In the presence of:

Miss Ndombi for the Plaintiff

Crispus Kabiru Kibuthi Defendant present

Court Assistant: Hinga

