



**Haji v Kariuki & another (Environment & Land Case 914 of 2017)
[2024] KEELC 7331 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 914 OF 2017
MN GICHERU, J
NOVEMBER 7, 2024**

BETWEEN

HUSSEIN MOHAMED HAJI PLAINTIFF

AND

GEORGE NGURE KARIUKI 1ST DEFENDANT

THE LAND REGISTRAR, KAJIADO NORTH 2ND DEFENDANT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendants.
 - a. Cancellation and or revocation of the Title Deeds issued to the 1st defendant by the 2nd defendant in respect to the suit property which is L.R. Nos. Kajiado/Kisaju-Kipeto/715 and 716.
 - b. An order that the 2nd defendant to issue title deeds in respect to the suit parcels in the name of the plaintiff.
 - c. Costs of this suit.
 - d. Such further and/or other order as to this court may be just to grant.

This is as per the amended plaint dated 21/3/2019.

2. The plaintiff's case is as follows. Before the year 1993 he was the registered owner of L.R. Kajiado/Kisaju-Kipetu/528 which measured 18.0 hectares or thereabouts. In the year 1993, he offered to sell 20 acres of the suit land to the defendant. 20 acres is approximately 8.0 hectares. The purchase price for the 20 acres was Kshs. 1, 300,000/-. The sale agreement between the plaintiff and the 1st defendant was oral. Following the oral agreement, the 1st defendant paid the plaintiff a deposit of Kshs. 750,000/-.



3. Upon receipt of the deposit of Kshs. 750,000/- from the 1st defendant, the plaintiff surrendered the original title for the entire suit land to the 1st defendant. He also surrendered the application for subdivision and consent to subdivide the suit land into two portions. It was agreed by the parties that the plaintiff would transfer the 20 acres of the suit property in favour of the 1st defendant upon the 1st defendant paying the balance of the purchase price. The plaintiff did not sign the sale agreement.
4. The plaintiff asked the 1st defendant to pay the balance of Kshs. 550,000/- but he did not cooperate. The plaintiff left the country before the transaction could be completed. While he was out of the country, he followed up with the 1st defendant on the outstanding balance. Instead of paying up the balance, the 1st defendant took advantage of the plaintiff's absence to transfer the two parcels to himself without the consent, knowledge or authority of the plaintiff. The plaintiff's land was subdivided into L.R. Nos. Kajiado/Kisaju-Kipeto 715 and 716 which measure 8.09 hectares and 9.91 hectares respectively. The transfer, registration and the subsequent subdivision of the suit land was done without following the procedure because the plaintiff did not apply and obtain the consent of the Land Control Board and he did not sign any transfer form.
5. Owing to the failure of procedure required to lawfully transfer land, the plaintiff has pleaded three (3) particulars of fraud which are presenting a forged transfer document purported to have been executed by the plaintiff, transferring the suit land without the consent, permission and involvement of the plaintiff and knowingly presenting an application for the consent of the Land Control Board purporting it to have been executed by the plaintiff. The plaintiff blames the officers of the 2nd defendant for colluding with the 1st defendant and for not cooperating in availing the land records to him.
6. In support of his case, the plaintiff filed the following evidence.
 - a. His witness statement dated 19/3/2019.
 - b. Further witness statement dated 5/4/2023.
 - c. Copy of title deed for L.R. No. Kajiado/Kisaju - Kipeto/528.
 - d. Copy of application for consent of the Land Control Board.
 - e. Copy of the consent of the Land Control Board.
 - f. Copy of incomplete mutation form for L.R. No. 528.
 - g. Copy of P.I.N. certificate for the plaintiff dated 21/3/2016.

Most of the above documents are faded and the dates are not clear. They are also incomplete and were filed while seeking an application for injunction on 2/10/2017.

7. The first defendant, through counsel on record filed an amended written statement of defence dated 14/5/2019. In the said defence, the 1st defendant avers as follows. Firstly, he denies the entire claim by the defendant generally. Secondly, on 31/8/1992, the plaintiff approached the 1st defendant and offered to sell a portion of L.R. No. 528 measuring 20 acres at a price of Kshs. 25,000/- per acre. Thirdly, both parties appointed Mr. K.N. Mungai then of Mungai and Gakuru advocates to prepare the necessary sale agreement which was signed by both parties on 3/9/1992. Fourthly, the plaintiff applied for and was granted the consent of the Land Control Board on 5/10/1992 for the subdivision of L.R. No. 528 which was subdivided into L.R. No. 715 and 716 respectively. Fifthly, by 21st December 1992 a total of Kshs. 684, 500/- was paid to the plaintiff by the 1st defendant which was an overpayment by Kshs. 184, 500/-. Instead of refunding the overpayment, the plaintiff later agreed to sell the remaining parcel of



land at the same price of Kshs. 25,000/-. The total purchase price for the two parcels was Kshs. 1, 111, 950.00 which the 1st defendant paid to the plaintiff. He paid a further Kshs. 100,450.00 to the advocate for transfers of the title deed in his favour and this was done. Sixthly, it is the plaintiff who executed all the necessary conveyancing documents in favour of the 1st defendant and in the year 1992, it was not a requirement that passport size photographs be submitted and everything was done in accordance with the law of the day. Seventhly, in the year 2013, the plaintiff approached the 1st defendant and requested that the suit land be sold to him. The 1st defendant declined the request because he had his own plans for the land. Finally, the 1st defendant has been in quiet possession of the suit land since 1992 and the plaintiff's claim against him has no basis and should be dismissed with costs.

8. In support of his case, the 1st defendant filed the following evidence.
 - a. His own witness statement dated 20/2/2018.
 - b. Copy of sale agreement dated 3/9/1992.
 - c. Copy of application for consent of the Land Control Board dated 5/10/1992.
 - d. Copy of mutation form dated 7/10/1992.
 - e. Copy of consent for subdivision of L.R. No. 528 dated 5/10/1992.
 - f. Copies of title deeds for L.R. No. 715 and 716 dated 13/7/1993 in the name of the 1st defendant.
 - g. Copy of witness statement by Kenneth Ng'an'ga Mungai advocate dated 1/3/2021.
 - h. Copy of letter dated 4/9/1992.
 - i. Copies of payment vouchers from 21/9/1992.
 - j. Statement of accounts.
9. The 2nd defendant, in a written statement of defence dated 5/3/2018 generally denies the plaintiff's claim. Secondly, there is denial of any privity of contract between the 2nd defendant and the other parties. Thirdly, if there was any transfer effected by the 2nd defendant, then it was done procedurally, in good faith and with the representation of both the plaintiff and the 1st defendant. Fourthly, if there was any transfer, it was initiated by the other parties. Fifthly, the plaintiff does not disclose any cause of action against the 2nd defendant. Sixthly, the suit is time barred as it offends mandatory provisions of the Limitations of Actions Act. Finally and for the above stated reasons, the suit ought to be dismissed with costs to the defendants.
10. At the trial on 17/4/2023 and 24/4/2024 the plaintiff, the 1st defendant, K.N. Mungai advocate and Rahab Njoroge, a Land Registrar testified. The plaintiff was the sole witness on his side. He was cross-examined at length but he stuck to his script as per his pleadings and his witness statement. The first defendant and his witness said that the purchase price was paid as per the sale agreement dated 31/8/1992. They said that the plaintiff executed all the requisite documents and instruments as per the law and procedure. The Land Registrar said that the parcel files for L.R. No. 715 and 716 do not have the records for the transfer of the land from the plaintiff to the 1st defendant. They looked for them in the registry without success. However, she said that they have the original green cards, which show that the two parcels were transferred by the plaintiff to the 1st defendant on 12/7/1993.



11. Counsel for the plaintiff filed written submissions dated 31/5/2024 in which no clear-cut issues for determination were identified. Trying the best that I can to discern the issues from the said submissions, I identify the following issues.
- i. Whether the 1st defendant acquired the title deed to the suit parcels procedurally.
 - ii. Whether the consent of the land control Board was obtained by the plaintiff to transfer the suit parcels to the 1st defendant.

I did not see any written submissions by any of the defendants.

12. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and the testimony at the trial. I have also considered the written submissions by the plaintiff's counsel. In addition to the issues raised by the plaintiff's counsel, I find that these other issues arise.
- iii. Whether the plaintiff has discharged the burden of proof placed on him by the law.
 - iv. Whether the court should go by the oral or the written agreement.

13. On the issue of the burden of proof, I find that the plaintiff has not discharged the heavy burden placed upon him by Sections 107 and 108 of the *Evidence Act*. It is the plaintiff who has made allegations of non payment of the purchase price and fraud on the part of the defendants. It is him who would fail if no evidence was adduced on either side. The burden on him is not the normal burden in civil cases which is on a balance of probabilities. The burden on him is the one set in the case of Elizabeth Kamene Ndolo –versus- George Matata Ndolo Civil Appeal No. 128 of 1995 (1996) eKLR where it was held as follows.

“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”.

In paragraph 15 of the amended plaint dated 21/3/2019, the plaintiff has pleaded three (3) particulars of fraud all of which he has failed to prove to the required standard.

14. When the plaintiff was confronted with evidence to show that he received at least Kshs. 932, 000/- from Mungai advocate and he appended his signatures to the vouchers, he should have asked to have the signatures alleged to be his to be subjected to forensic examination to rebut the prima facie evidence that the signatures were his. Even in his further witness statement of 5/4/2023 he was not categorical that the signatures on the vouchers are not his. Instead, he said that he was a refugee in Netherlands between 1992 and 1998 without offering any proof.
15. When it comes to the evidence which should prevail between the oral and the documentary evidence, I find that under Sections 97 and 98 of the *Evidence Act*, it is the written agreement that prevails over the oral agreement. The court will go by the written word and not by the plaintiff's evidence that the agreement between him and the 1st defendant was oral and not written. The written agreement has the purported signature of the plaintiff, which he did not bother to subject to any forensic examination to dispel any presumption that it was indeed his.



16. Finally, on the two issues that the plaintiff raised in the written submissions, it was upon him to prove both to the high standard in the case of Ndolo –versus-Ndolo (supra) and he failed to do this.
17. In conclusion and for the reasons already given, I find no merit in the plaintiff’s suit and I dismiss it with costs to the defendants.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY 7TH DAY OF NOVEMBER 2024.

M.N. GICHERU

JUDGE

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