Ndungu v Chief Land Registrar Nairobi & another (Environment & Land Case 249 of 2016) [2025] KEELC 569 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 569 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 249 OF 2016

JA MOGENI, J

FEBRUARY 12, 2025

BETWEEN

DANIEL NJOGU NDUNGU ..... PLAINTIFF

AND

THE CHIEF LAND REGISTRAR NAIROBI ..... 1ST DEFENDANT

WILSON MWANGI KAMAU ..... 2ND DEFENDANT

JUDGMENT

1. Vide a Plaint dated 2/03/2016 the Plaintiff filed this suit seeking the following:-

   a. That an injunction to issue against the 1st Defendant herein preventing the 1st Defendant from registering any transfer or processing any transaction on the property known as Nairobi Block 122/505 until the hearing and determination of this suit.

   b. That the 1st Defendant be restrained from authorizing any transactions or dealing on the property known as Nairobi Block 122/505.

   c. That in the alternative if a new title deed for Nairobi Block 122/505 has been issued in the name of Wilson Mwangi Kamau the same be revoked with immediate effect and the records at the Lands Registry be maintained to reflect that the Applicant herein is the rightful owner of Nairobi Block 122/505.

   d. The prohibitory injunction is sought to restrain the 2nd Defendant from entering into, trespassing onto, making bricks, cultivating, building structures, interfering with and/or in any other manner whatsoever dealing with all that parcel of land known as Nairobi Block 122/505.

   e. That costs of this suit be paid by the Defendants herein.

   f. That the Court be please to make such other or further orders as it may deem fit and just.

2. The suit is defended vide the Statement of Defence of the 2nd Defendant dated 17/09/2018 where he denies all the averments in the Plaint. Adding that the averments by the Plaintiff at paragraph *10* are untrue and misleading and are designed to render null a legitimate conveyancing transaction. He further contends that the entire conveyancing of the suit property had both parties represented and the signatures on the transfer were witnessed by an Advocate as was the alleged signature of the lease.

3. I have perused the Court file and I have not been able to locate the Statement of Defence by the 1st Defendant and therefore I have assumed that the 1st Defendant though served several times chose not to defend the suit. In the circumstances the Court will focus on the documents filed by the 2nd Defendant for the defence case.

Plaintiff's Case

4. It was the Plaintiff's contention that he has held the suit property herein as the registered proprietor since the registration of lease in his favour on 13/04/2012. Consequently, that he has been paying the land rent and rates annually as required.

5. That on applying for the current outstanding rates at the Nairobi City County offices the Applicant was shocked to receive a copy of the Demand dated 8/01/2016 indicating that the property owner is Wilson Mwangi Kamau. That he even got a copy of the Transfer of Lease dated 2/09/2014 in the name of Wilson Mwangi Kamau despite not having executed any transfer in favour of the said Wilson Mwangi Kamau or to any other person.

6. The Plaintiff also stated that the photograph and the signature appearing in the Transfer of Lease is not his and therefore fraudulent. The Plaintiff contends that he is in possession of the original registered lease and the original certificate of lease in his favour and any other document that bears names of another person other than himself should be disregarded completely.

Evidence by the Plaintiff

7. PW1 – Eng. David Njogu Ndung'u the Plaintiff informed the Court that he is a civil Engineer and he adopted his witness statement and list of documents as his evidence in chief and exhibits. He testified that there is a transfer dated 22/08/2014 which bears someone else's photograph and signature which is purported to be his. Further that there are two law firms, Atonga Miyare and Momanyi Advocates which allege to have prepared a sale agreement as evidenced by the documents produced by the 2nd Defendant alleging that the Plaintiff received payment for the sale of the property but that he never received any funds for the suit property. That any claim for payment is fraudulent.

8. The Plaintiff produced in Court the original lease certificate and his ID card. He further stated that the land is undeveloped and that he has paid the land rates for the suit property and he produced the four receipts. That he realized there was interference although he has never sold the suit property nor has he interacted with the two law firms mentioned.

9. In cross-examination, he testified that he was a member of City Chicken & Eggs Dealers Co-operative Society Ltd who owned the property when it was consolidated. That when it was sub-divided it was his testimony that he got his title after his Advocate visited the Land's offices to process title. That he signed the Lease document in the Advocate's office. He stated that the lease document presented by the 2nd Defendant does not bear his signature at all. Upon further cross-examination by Counsel for the 2nd Defendant Mr. Muriranja, he testified that the documents bearing the signatures on pages 40-41 of the Plaintiff's bundle and pages 22-24 of the 2nd Defendant's bundle bear different signatures of the Land Registrar.

10. It was the Plaintiff's testimony that he did not transfer the suit property to anyone and whereas the ID number and the PIN number on the transfer document at pages 25 of the 2nd Defendant's bundle are his but the photograph on the transfer documents is not his and neither is the appended signature his.

11. He further testified that the property is registered by the Ministry of Lands but when one pays rates at the City Council offices the registered owner is shown as Mr. Wilson Mwangi. PW1 also produced a search dated 11/06/2012.

12. Whereas PW1 concluded testifying, the Counsel for the Plaintiff decided not to close their case since they wanted to call the Registrar as a witness for the Plaintiff and they sought two weeks to have the Registrar attend Court.

Evidence by the Defendant

13. DW1 - Wilson Mwangi Kamau the 2nd Defendant adopted his witness statement and produced his list of documents dated 30/11/2022 and a second list dated 5/12/2022 as Defendant's Exhibits 1-32.

14. Upon cross-examination he testified that the Daniel Njogu Ndung'u that he met and whose photograph appears in his bundle of documents is not the Plaintiff and also it is not the photograph that is in the Plaintiff's bundle at page 25. It was his testimony that he had never met the Plaintiff but he had met a Daniel Njogu at a restaurant at a bus-station where they transacted on the purchase of the suit property. That he was represented by a law firm of Atonga Miyare Advocates and the seller who is Daniel Njogu was represented by the law firm of O. H. Momanyi Advocates. That he bought the property in 2014 after seeing an advertisement in the Daily Nation dated 11/06/2014.

15. He told the Court that when they were concluding on the transfer he went to the law firm of Atonga Miyare Advocates but that he never visited the Advocates of the seller. That he made payments directly to the seller's Advocates.

16. On further cross-examination by Counsel for the Plaintiff, Ms Kagwe he stated that he was shown beacons and leases and that he met Daniel Njogu Ndung'u but it was not the Plaintiff and also that from the documents he had produced at pages 29, the ID copy does not resemble the Plaintiff. He testified that he met the seller twice and second time the seller met him with his wife and he was issued with a lease on 02/09/2014 as shown at pages 53 of the 2nd Defendant's bundle. He told the Court that he is in possession of the suit property but it is not developed.

17. On the issue of payment of rates he testified that in 2015 when he went to pay for the rates he realized that the names still reflected the name of the seller Daniel Njogu Ndung'u so he presented to the Council his lease and the names on record were changed. That come 2016 he was summoned by CID and that is when he realized that there was a matter filed in Court over the ownership of the suit property. He stated that he paid rates for 2014 and 2015 but he has not paid from 2016. He told the Court that when he got his title he did a search but he has not produced the same in Court.

18. When re-examined by his counsel he told the Court that he met Daniel Njogu Ndung'u who exchanged his ID with him but the Daniel Njogu he met is not the Plaintiff who is in Court. That he was issued with the rent clearance certificate as seen at page 37 and the rates clearance certificate as seen at page 36. He stated that he was given all the documents from the seller and that he did the transfer but that he did not appear at the firm of O. H. Momanyi.

19. At this point the Counsel for the Plaintiff made an application for summons to issue for the firm of Atonga Miyare Advocates to be summoned which application was granted since there was no objection

raised. At the same time the counsel for the 2nd Defendant applied for a reissuance of the summons for the Chief Land Registrar.

20. On 27/02/2024, the Chief Land Registrar – Venecensia Juma testified and stated that according to their records, the suit property was first allocated to one Daniel Njogu Ndung'u and a Certificate of Lease issued on 13/04/2012 and thereafter the property was sold to one Wilson Mwangi Kamau via a transfer instrument dated 12/08/2014 registered on 2/09/2014 which was accompanied with a spousal consent dated 13/08/2014.

21. She further testified that in her records there was summons dated 21/03/2016 and that there was a complaint lodged and the Plaintiff and 2nd Defendant were summoned. Thereafter on 26/04/2016 a restriction was placed by the Order of the Chief Land Registrar on the suit property pursuant to a letter dated 15/04/2016. From the records the owner of the suit property is Wilson Mwangi Kamau

22. Upon being cross-examined by Counsel for the Plaintiff she stated that the transfer dated 10/04/2012 is not produced since it is not in their record. That Daniel Njogu acquired a lease but the transfer document that conveyed the property to Daniel is not in the Chief Land Registrar's records. She testified that Daniel acquired the property from government of Kenya and the lease has to be registered. That the property still has a restriction and there is a new title to Wilson Mwangi Kamau.

23. She further stated that the document she had produced in Court does not show the photograph of Daniel Njogu. She added that when she did the scanning, the photograph of Daniel was left out but she did not know why. At which point the Counsel for the Plaintiff asked that a complete lease document should be produced in Court to show the lease that was issued to Daniel Njogu Ndung'u.

24. On cross-examination by Counsel for the 2nd Defendant Ms Muriranja, the Registrar stated that the current registered proprietor is the 2nd Defendant and that the title issued to Daniel is cancelled. That since this is under the Registered *Land Act*, when a title is cancelled it is surrendered then the office issues a new one. Once one is issued with a new lease it has to be commissioned then it is registered. Thus the transfer at page 25-27 was booked and there is a valuation which was duly registered in the 2nd Defendant's documents.

25. On re-examination by Counsel Fatma, she stated that transfer from the Plaintiff to the 2nd Defendant complied with requirements since there is a deed file. That both the Plaintiff and the 2nd Defendant were summoned but there is no record that they honored the summons.

26. Whereas the Plaintiff had sought for summons to have the Director Land Administration produce the Original Lease for Parcel Nairobi Block 122/505 and CF 34956/122/505 she was unable to get the witness and she therefore closed her case.

27. The parties were directed to file their submissions which they did. The Plaintiff's submissions are dated 1/08/2024 while the Defendant's submissions are dated 28/08/2024. I have considered those submissions in this judgment.

Analysis and Determination

28. The Court has carefully considered the pleadings, evidence and submissions filed. The only issue that arise for determination is whether the registration of the suit property in the 2nd Defendant's name was based on any or all of the following vitiating factors; illegality, want of procedure or fraud.

29. Section 26 of the *Land Registration Act* provides for conclusiveness of title and states as follows;

> " 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
>
> 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

30. Therefore, registration to title vests in the proprietor absolute and indefeasible ownership of the land, unless it is proved that the proprietor obtained registration by fraud, or misrepresentation, or illegality, or want of procedure or corruption. In the case of Elijah Makeri Nyangwara Vs. Stephen Mungai Njuguna & Another [2013] eKLR, the Court held as follows;

> " The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate has been acquired through a corrupt scheme."

31. Similarly, in the case of *Munyu Maina Vs. Hiram Githiha Civil Appeal No. 239 of 2009*, the Court of Appeal held as follows;

> " We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

32. Fraud should not only be pleaded but the same should be strictly proved on a standard that is above the standard of proof in ordinary civil cases of the balance of probabilities, but less than the standard required in criminal cases of beyond reasonable doubt.

33. In the case of Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another [2000] eKLR, it was held 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 stated 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 be 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 reasonable doubt as in criminal cases ..."

35. In the instant case, the Plaintiff pleaded particulars of fraud being that the 2nd Defendant had alleged to have bought the suit property from the Plaintiff and that the documents that the 2nd Defendant presented did not bear his photograph or his signature. On his part, the 2nd Defendant admitted not having met the Plaintiff and also that the ID card he submitted on the transfer documents did not belong to the Plaintiff. This I find was the fraud committed in this case. Thus the land does belong to the Plaintiff herein.

36. In the Ugandan Case of Katende Vs. Haridar & Company Ltd (2008) 2EA 173 it was held that:-

> " For a purchaser to successfully rely on the bonafide doctrine, (he) must prove that; he holds a certificate of title, he purchased the property in good faith; he had no knowledge of the fraud, he purchased the title for value consideration; the vendors had apparent valid title, he purchased without notice of any fraud and he was not party to any fraud."
>
> In this instance, the second Defendant ought to have called a witness who helped him in identifying the person who sold him the land or expert witness to authenticate his transfer documents. Secondly, as held in the Alice Chemutai Too Vs. Nickson Kipkurui Korir & 2 Others [2015] eKLR, the Defendant need not be a party to the fraud for his title to be cancelled. If the person who sold him land had no good title to pass then his title cannot stand under the provisions of Section 26(1) (b) of *Land Registration Act* as enunciated above. The Plaintiff has demonstrated that the identity of the person who sold and transferred the land to the 2nd Defendant was questionable and that he did not sell nor transfer the suit property to the 2nd Defendant.

37. In the current case, the Plaintiff has shown indeed that there was fraud in the transfer and registration of the 2nd Defendant as the owner of the suit land. It was incumbent upon the 2nd Defendant to demonstrate that he was not a party to the fraud nor was he aware of the fraud. Although two different people can share bear similar names, but I have never seen two different people bearing the same Identity card nor same face even identical twins have their departing feature. In this case it was not even a case of identity the photograph was of a different person completely. As already stated above, the 2nd Defendant's evidence presented clearly brought out the fraudulent scheme to defraud the Plaintiff of the suit property.

38. It is unthinkable that someone can claim to buy land from a person they have never met and worse still present documents in Court that purport to allege that the person who sold the land to them is the one in the photo yet the passport size photos and ID card bear the name of a different person. The world seems to have gone rogue in the quest for people to get a piece of the earth before they exist this world. It is a desperate and despicable behavior. If the 2nd Defendant was convinced that he really bought the

suit property he would have easily called the person who sold him the land to exclude him from the accusation of being party to the fraud. Section 112 of the *Evidence Act* stipulates that:-

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
>
> The 2nd Defendant can therefore not benefit from innocent title holder without discharging the burden of proof of his innocence.

39. In light of the evidence adduced, I am satisfied that the Plaintiff has proved his claim against the 2nd Defendant therefore he is entitled to the orders sought. Accordingly, I enter judgement in his favour as follows;

    a. The 1st Defendant is directed to ensure that the records at the Land Registry reflect that the Plaintiff herein as the rightful owner of Nairobi Block 122/505.

    b. A prohibitory injunction is hereby issued to restraining the 2nd Defendant from entering into, trespassing onto, making bricks, cultivating, building structures, interfering with and/or in any other manner whatsoever dealing with all that parcel of land known as NAIROBI BLOCK 122/505.

    c. The costs of this suit are awarded to the Plaintiff to be paid by the 2nd Defendant.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS ON THIS 12TH DAY OF FEBRUARY 2025.

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MOGENI J

JUDGE

In the presence of:-

Ms. Kagwe for Plaintiff

No appearance for the 1st Defendant

Ms. Muriranja for 2nd Defendant

Melita - Court Assistant

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MOGENI J

JUDGE