



**Osimbo v AJE Alwar & another (Environment and Land Case Civil Suit
75 of 2013) [2023] KEELC 244 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 75 OF 2013
SO OKONG'O, J
JANUARY 26, 2023**

BETWEEN

STEPHEN OKENDO OSIMBO PLAINTIFF

AND

AJE ALWAR 1ST DEFENDANT

MILLICENT ABONYO OMOLLO 2ND DEFENDANT

JUDGMENT

1. In his plaint dated April 9, 2013, the plaintiff averred that he was at all material times the registered proprietor of all that parcel of land known as Title No Kisumu/Kogony/2216(hereinafter referred to as “the suit property”). The plaintiff averred that on a date not set out in the plaint, the defendants without any reasonable cause and without the plaintiff’s authority or consent caused the suit property to be transferred into their names and thereafter trespassed and/or encroached on the property and barred the defendant from accessing or occupying the same.
2. The plaintiff averred that the actions of the defendants aforesaid amounted to an infringement of the plaintiff’s right to peaceful ownership and use of the suit property. The plaintiff averred that the transfer of the suit property to the defendants was effected fraudulently. The plaintiff claimed that the defendants among others; forged the plaintiff’s signature, forged consent to transfer the suit property and forged the plaintiff’s KRA PIN Certificate. The plaintiff averred that following the illegal transfer and encroachment, the defendants had taken possession of the suit property and were conducting various activities thereon. The plaintiff sought judgment against the defendants jointly and severally for;
 1. An order for cancellation of the title issued to the defendants in respect of the suit property and the reversion of the ownership of the property to the plaintiff.



2. A permanent injunction restraining the defendants from entering, developing, encroaching, trespassing and/or in any manner interfering with the plaintiff's quiet and peaceful enjoyment of the suit property.
3. Costs of the suit and interest.
3. The defendants filed a statement of defence on September 19, 2013 denying the plaintiff's claim in its entirety. The defendants averred that they were registered as the owners of the suit property in 1993 and that they were entitled to enter and use the suit property. The defendants denied that they acquired the suit property fraudulently. The defendant urged the court to dismiss the plaintiff's suit with costs.
4. At the trial, the plaintiff adopted his witness statement filed on December 10, 2020 as his evidence in chief and produced documents attached to his list of documents of the same date as exhibits. The plaintiff told the court that during the registration of the suit property in his name, the name used was Okendo Osimbo. He stated that the name on his identity card was Stephen Okendo Osimbo. He stated that he had not applied to the Land Registrar for a change of name in the register of the suit property from Okendo Osimbo to Stephen Okendo Osimbo. The plaintiff stated that he never sold the suit property to the defendants. The plaintiff stated that the defendants were unknown to him and that they never made any payment to him on account of the purchase price. The plaintiff stated that he did not execute any transfer in favour of the defendants nor did he appear before the Land Control Board for consent to transfer the suit property to the defendants.
5. On cross-examination, the plaintiff maintained that the defendants were unknown to him and that he never executed the instrument of transfer of the suit property in favour of the defendants. The plaintiff reiterated further that he never appeared before the Land Control Board for consent. On examination by the court, the plaintiff stated that he discovered in 1997 that the defendants had caused the suit property to be registered in their names.
6. The 1st defendant gave evidence for the defendants. The 1st defendant adopted his affidavit sworn on September 20, 2013 as his evidence in chief and produced the documents attached to the defendants' list of documents dated February 28, 2022 as exhibits. The 1st defendant told the court that the plaintiff was brought to him by one, Dalmas Oboo (hereinafter referred to only as "Oboo"). The 1st defendant stated that the plaintiff told him that he had a piece of land that he wanted to sell because he wanted to put up a residence. The 1st defendant stated that since he was traveling back to South Africa where he was working, he asked the plaintiff to wait until he comes back to the country. The 1st defendant stated that the plaintiff prevailed upon him to proceed with the transaction because he wanted to put up his residence urgently. The 1st defendant stated that he agreed to the plaintiff's proposal and they went with the plaintiff to the office of Miruka Owuor Advocate where they entered into an agreement for sale. The 1st defendant stated that after they had entered into the said agreement, the plaintiff and Oboo told him that they will complete the remaining processes. The 1st defendant stated that they agreed that he would pay the purchase price after the suit property was registered in his name and the title of the property deposited with the agency that was going to pay to the plaintiff the purchase price. The 1st defendant stated that he left the plaintiff and Oboo with some money in trust which they were to use in the processes that they were to undertake. He stated that the purchase price was to be paid to the plaintiff through Victoria Finance on condition that the title for the suit property was delivered to it. The 1st Defendant stated that the plaintiff deposited the title deed with Victoria Finance and was paid the purchase price. He stated that Victoria Finance released to him the title deed for the suit property in 2010. The 1st defendant stated that the plaintiff applied to the Land Control Board (LCB) for consent to transfer the suit property to the defendants. The 1st defendant told the court that he had no reason to defraud the plaintiff of his land.



7. The 1st defendant stated that while he was out of the country, he gave the suit property to someone to use and when he came back, he planted trees on the property until 2000 when he engaged a caretaker to look after the property. He stated the property was under the care of his caretaker until 2021. On cross-examination, the 1st defendant stated that the plaintiff was paid a sum of Kshs 190,000/- as the purchase price for the suit property by Victoria Finance. He stated that the money was given to the plaintiff after he deposited the title deed for the suit property with the said Victoria Finance. The 1st defendant stated that before he left the country, he signed all the documents that he was required to sign such as the agreement of sale and the instrument of transfer. The defendants called one witness, Michael Odhiambo Oboo (DW2) who told the court that the plaintiff and the defendants were known to him and that the plaintiff sold the suit property to the defendants.
8. After the close of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on November 2, 2022 while the defendants filed their submissions on November 25, 2022. I have considered the pleadings, the evidence tendered by the parties and the parties' respective submissions. Issues for determination in a suit arise from the pleadings. In their submissions, the parties framed several issues that were never pleaded. The parties are bound by their respective pleadings. It is not open to them to raise at the trial or at the submission stage issues that are not founded on the pleadings. On this issue, the Court of Appeal in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014]eKLR cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd v Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled "*The present Importance of Pleadings*" published in [1960] Current Legal problems, at P 174 where the author stated as follows:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....”
9. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”
10. From the plaint and the defence filed by the parties, the following in my view are the only issues arising for determination in this suit;
 1. Whether the transfer of the suit property from the plaintiff to the defendants was lawful.
 2. Whether the defendants are trespassers on the suit property.
 3. Whether the plaintiff is entitled to the reliefs sought in the plaint.



4. Who is liable for the costs of the suit?

Whether the transfer of the suit property from the plaintiff to the defendants was effected fraudulently.

11. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (RLA) (now repealed). Sections 27 and 28 of the Registered Land Act provides as follows:

“27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

12. Section 143(1) and (2) of the Registered Land Act provides as follows:

- “ (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

Section 24, 25 and 26 of the *Land Registration Act*, 2012 provides as follows:

“24. Subject to this Act—



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
25. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (1)
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
26. 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.”
13. Under the Registered Land Act and the *Land Registration Act*, 2012, the registration of a person as a proprietor of land confers upon that person the absolute ownership of the land. The Registered Land Act which is the statute under which the suit property was registered provides that a register of land may be rectified by the cancellation of any entry therein where such registration has been obtained by fraud or mistake.
14. The plaintiff has contended that the suit property was transferred to the defendants fraudulently. In *Black’s Law Dictionary* 9th Edition page 731 fraud is defined as:
- “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”



15. In *Railal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, the court held that allegations of fraud must be strictly proved to a standard which is more than a balance of probabilities but not beyond any reasonable doubt. The court stated as follows at page 317:

“Allegation 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 mere balance of probabilities is required.”

16. In *Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co Ltd* [2004] 2 E A KLR 269, the court held that:

“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

17. In *Kampala Bottlers Ltd v Damanico (UG) Ltd* [1990-1994] EA 141(SCU), the Supreme Court of Uganda held that:

“To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters.”

18. In *Kursbed Begum Mirza v Jackson Kaibunga* [2017] eKLR , the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

19. The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)

20. The burden was on the plaintiff to prove the allegations of fraud pleaded against the defendants. In his plaint, the plaintiff set out the particulars of fraud against the defendants as follows;

1. Forging the signature of the plaintiff.
2. Procuring a consent to transfer purporting that the same emanated from the plaintiff.



3. Forging the PIN Certificate of the Plaintiff.
 4. Failing to disclose to the plaintiff their intention.
21. From the evidence before the court, I am satisfied that the plaintiff signed the transfer of land dated August 12, 1993 through which the suit property was transferred to the defendants. As correctly submitted by the defendants, the signature in the said transfer said to be that of the plaintiff is similar to the signature of the plaintiff in the plaint, verifying affidavit and witness statement filed herein even to the naked eye. Since the plaintiff claimed that the signature in the said transfer was not his, the burden was on him in the circumstances to prove the same. Apart from the mere allegation made in his oral testimony, the plaintiff did not produce any other evidence showing that the signature in the transfer said to be his was by someone else. Although the plaintiff claimed that he did not appear before J M Miruka Owuor advocate who is said to have witnessed his signature in the transfer, he did not tell the court where he was at the material time. The plaintiff did not also challenge the evidence of the 1st defendant to the effect that it was the plaintiff who had approached him with Oboo and offered to sell to him the suit property and that the process of transfer was undertaken by the plaintiff and Oboo. From the totality of the evidence tendered, the plaintiff did not convince me that the defendants were strangers to him as he claimed. The evidence by the 1st defendant and DW2 to the effect that the plaintiff and the 1st defendant had interacted on several occasions was not challenged by the plaintiff in any material respect. It is my finding therefore that the plaintiff's signature in the transfer of land dated August 12, 1993 is not a forgery as claimed by the plaintiff.
22. The Letter of Consent dated July 29, 1993 is addressed to the plaintiff. The application for consent of the Land Control Board (LCB) a copy of which was produced in evidence by both parties shows that the same is supposed to be made and signed by both parties. The 1st defendant told the court that he did not sign the same and that the same may have been signed on his behalf by Oboo. For the plaintiff, the document bears the signature said to be his. The signature resembles the signature in the transfer of land that I have held to belong to him. The signature is similar to the signatures used by the plaintiff when signing the plaint, the verifying affidavit and the witness statement. In the absence of any evidence to the contrary, I am satisfied that the plaintiff signed the application for consent of the Land Control Board. Since the application for consent was made by the plaintiff and the defendant, I find nothing unusual, fraudulent or illegal in the Consent of the LCB being addressed to the plaintiff who was the vendor.
23. The other alleged act of fraud was the forgery of the plaintiff's PIN Certificate. The allegation is rather strange. This allegation leaves no doubt that the plaintiff's claim is not genuine. The requirement for the vendor's and the purchaser's passport photographs and KRA PIN to be included in the transfer of land came in 2005 and 2012 respectively or thereabouts. None of the parties herein put their KRA PIN details on the instrument of transfer of the suit property that was executed on August 12, 1993. It is therefore not clear as to what was actually forged. The alleged forgery of the plaintiff's PIN Certificate has therefore not been proved.
24. The last act of fraud alleged against the defendants is the failure to disclose to the plaintiff their intentions. The plaintiff did not come out clearly on this issue. The allegation implies some sort of misrepresentation or non-disclosure of facts. There is no clarity as to what the defendants were required to disclose to the plaintiff that they failed to disclose or what they misrepresented that amounted to fraud on the plaintiff. In any event, I wonder how the defendants who are alleged to be complete strangers to the plaintiff would have made representations to him. The alleged fraud has not been established.



25. For the foregoing reasons, I find the fraud allegations made against the defendants in the acquisition of the suit property not proved. It is my finding that the plaintiff sold the suit property to the defendants, executed a transfer in their favour and obtained the consent of the LCB in respect of the transaction. It is instructive to note that the suit property was registered in the name of the defendants on August 20, 1993 and that it was 20 years later on April 17, 2013 that the plaintiff brought this suit claiming that he had been defrauded of his land. The plaintiff did not refute the evidence tendered by the defendants of the activities that they have undertaken on the suit property. The plaintiff did not plead as to when he discovered the alleged fraud. In his witness statement, he stated that he learned of the alleged fraud in 2012. However, in answer to a question that was posed by the court, he stated that he discovered that the suit property was registered in the name of the defendants in 1997. If the defendants were fraudsters as the plaintiff wants this court to believe, I wonder why it took the plaintiff 16 years to assert his claim over the suit property against them. It is my finding that the defendants acquired the suit property lawfully.

Whether the defendants are trespassers on the suit property.

26. The plaintiff claimed that after the defendants fraudulently caused the suit property to be registered in their names, they trespassed on the same and started carrying out various activities thereon. Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya provides as follows:
- (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
 - (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
27. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page 923, paragraph, 18-01. In *Gitwany Investments Limited v Tajmal Limited & 3 others* [2006] eKLR, the court stated 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.
28. To prove trespass, the plaintiff had to establish that he was the owner of the suit property and that the defendants entered and occupied the same without any justifiable cause. I have already held that the defendants acquired the suit property lawfully and not fraudulently as claimed by the plaintiff. This means that the defendants are the lawful registered owners of the suit property. As the owners of the suit property, the defendants had a right to enter and use the suit property. The plaintiff’s trespass claim has no basis in the circumstances.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

29. From the above findings, it is clear that the plaintiff has not proved his case against the defendants. The plaintiff is therefore not entitled to the reliefs sought in his plaint.

Who is liable for the costs of the suit?

30. Under Section 27 of the *Civil Procedure Act*, the cost is at the discretion of the court. As a general rule, costs follow the event unless for good reason, the court orders otherwise. In this case, the plaintiff has failed in his claim against the defendants. In the absence of any valid reason to warrant denying the defendants the costs of the suit, costs shall be awarded to the defendants.



Conclusion:

In conclusion, the plaintiff's suit is dismissed with costs to the defendants.

DELIVERED AND DATED AT KISUMU ON THIS 26TH DAY OF JANUARY, 2023.

S OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform:

Mr Anyul for the Plaintiff

Mr Omino for the Defendants

Ms J Omondi-Court Assistant

