



Muthiora (Suing as the legal representative and administratrix of the Estate of Genaro Muthiora M’Mbirithi – Deceased)) v Joseph (Suing as the legal representative and administrator of the Estate of Joseph M’Ikunyua M’Iringo (Deceased)) (Environment & Land Case 241 of 2017) [2023] KEELC 334 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 241 OF 2017**

CK NZILI, J

JANUARY 25, 2023

BETWEEN

PAULINE RIGIRI MUTHIORA (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF GENARO MUTHIORA M’MBIRITHI – DECEASED) PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF GENARO MUTHIORA M’MBIRITHI – DECEASED)

AND

ZACHARY MURIKI JOSEPH (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF JOSEPH M’IKUNYUA M’IRINGO (DECEASED) DEFENDANT

SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF JOSEPH M’IKUNYUA M’IRINGO (DECEASED)

JUDGMENT

1. By an originating summons dated August 2, 2017, the plaintiff as the legal representative of the estate of the late Genaro Muthiora M’Mbirithi said to have been in occupation of $\frac{1}{4}$ of an acre out of LR No Nyaki/Mulathankari/745, on account of an aborted sale in 1999, prayed that the court finds her entitled to the land by virtue of adverse possession, and in the alternative, a refund of the consideration thereof with interest. The originating summons was supported by an affidavit sworn on August 2, 2017 attaching thereto a death certificate, the sale agreements and acknowledgement receipts, application for land control board consent, the letter of consent and a search marked as PRM 1, PRM 2, 3 (a) & (b), 4 (a) & (b, 5 (a) & (b) and 6 respectively. Additionally, the plaintiff filed a list of witnesses statements



- dated December 14, 2017, supplementary affidavit and a further list of documents dated September 28, 2020.
2. The defendant filed a replying affidavit sworn by Zachary Muriki Joseph as the legal representative and an administrator of the estate of Joseph M'Ikunyua M'Iringo on October 5, 2017 entirely denying the claim and the alleged fraud at paragraph 17 of the supporting affidavit. The defendant termed the attached sale agreement as a forgery or fraudulent as it was related to a different parcel of land; he disputed the thumb print, sale amount and lack of witnesses to the purported sale. The defendant averred that he was the sole beneficiary to the estate after his father passed on in 2003, in occupation of the suit land which to the best of his knowledge only a quarter an acre of the suit land had been purchased by someone else other than the plaintiff. The defendant averred that he lodged a succession cause in 2011 and acquired a grant with no objection from the plaintiff who later on forcefully entered therein following which he made a report to the police. Further the defendant averred that he had fenced the land round with barbed wire which the plaintiff alongside others destroyed to gain access. The defendant averred that the plaintiff had previously leased a portion of the land to plant napier grass, left the land but came back in 2001 alleging a purchaser's interest which his father refuted.
 3. The defendant denied any alleged possession of the land by the plaintiff since he was the one utilizing the land as per photos attached as ZMJ "4". The defendant attached a copy of the OB No 33/24/4/2017 after the malicious damage and photos of his house as annexures marked ZMJ 1-4 respectively. Additionally, the defendant filed a list of witness's statements dated October 5, 2017, a further list of witnesses and documents dated February 12, 2019.
 4. Following an application for temporary orders dated September 27, 2017 the court directed for a scene visit and a report thereto be filed before court. The same was filed dated October 24, 2017 and adopted as evidence before this court.
 5. The plaintiff adopted her witness statement dated December 14, 2017 as her evidence in chief and produced the death certificate as P. Exh No (1), limited letters of grant as P. Exh No (2), a sale agreement as MFI P. Exh (3) an acknowledgement receipt as P. Exh No (4), an amended agreement as P. Exh No (5), an acknowledgement receipt P. exh No (6), certificate of official search as P. Exh No (7) & applications for consent as P. Exh No (8), letter of consent as MFI P. Exh No (9) and the photographs as P. Exh No (10), chiefs letter dated 29.1.2015 as MFI P. 11 and the affidavit as P. Exh No 1 2.
 6. In cross examination, PW1 insisted that she possessed a marriage certificate with the deceased who had not stayed on the land. She acknowledged having been a signatory to the sale agreement at the advocates offices though the money was cleared in instalments and acknowledged by the seller. PW 1 said that she started using the land in 2000, erected a barbed wire which was removed in June 2017 when she was allegedly chased away from the land.
 7. The plaintiff averred that it was her late husband who undertook the transactions alongside the deceased seller including attending the land control board. PW 2 adopted her witness statement dated December 14, 2017 as her evidence in chief. As a neighbor to PW1, she confirmed that she became aware of the sale since her late husband was a signatory to it. She said that she had sued the defendant in a criminal case on threats to her as a witness and for blocking a path on land which her late husband had purchased apart from what the plaintiff was claiming. She confirmed the entry and occupation of the land by PW 1 until she was chased away by the defendant when he allegedly fenced it off in 2017.
 8. PW 2 told the court that the dispute arose in 2017 after the defendant allegedly resold the land to someone else yet the plaintiff had all along been on the land since purchasing it in 1999. PW 2 was emphatic that the defendant had never lived on the suit land.



9. PW 3 was Charles Omari advocate. His evidence was that on January 9, 1999, he prepared and witnessed the signing of a sale agreement between Joseph M'Ikunyua M'Iringo and Genaro Muthiana M'Mbirithi over ¼ an acre of LR No Nyaki/Mulathankari/132.
10. PW 3 testified that after witnessing the sale agreement, the parties later on April 10, 2000 visited his chambers for the amendment of the previous sale agreement for a ¼ acre to be hived off from LR No Nyaki/Mulathankari/745 instead of Parcel No 132 which amended sale agreement was signed in his presence. He produced MFI 3-6 as P. Exh No 3-6 respectively. In cross examination, PW 3 confirmed the entire purchase price was exchanged in his presence since he knew the parties before.
11. PW 4 was the area chief, Agnes Gakii Kithinji for Nyaki Sublocation. She confirmed that it was the plaintiff who had been utilizing the suit land together with Mary Kaigongi. Similarly, PW 4 confirmed that in 2017 a group of hoodlums allegedly destroyed the plaintiff's fence made of bougainvillea and barbed wire. PW 4 also said that after visiting the scene she advised the parties to settle the matter or in the alternative, report to the police.
12. DW 1 adopted his replying affidavit sworn on October 9, 2017 as his evidence in chief and produced OB No 33/24/6/2019 as D. Exh No (1) photographs as D. Exh No (2), (3) and (4) and a court scene visit report as D. Exh No (5).
13. His testimony was that he was never involved in the alleged sale agreements but was certain that his late father never sold the land otherwise he would have disclosed it to him. DW 1 stated that the plaintiff's late husband had only rented a portion of the suitland to plant nappier grass in 1999 until 2001 when the portion was sold to one lady by the name Mary.
14. Further, DW 1 said that in 2001 he was allegedly arrested while working on the land. DW 1 testified that his late father used to be a disabled person and one Baraka was the one assisting him. The witness was stood own after an objection.
15. DW 1 was recalled to produced D. Exh No (7) dated October 5, 2017 and denied that his father was involved in the lease. He disputed both the contents of the lease and D. Exh No 1 since according to him, the lease was not on the land as alleged. In re-examination, DW 1 said the entry to the land as a tenant occurred in 2001 but eventually through the help of the local elders and the area chief, the lessee vacated the land after the lease expired as indicated in the affidavit of Ruffus Mutua.
16. DW 2 was Mutethia Kaumbuthu. His testimony was that he was aged 16 years in 1983. Therefore, he could have known if the land was being sold. He however confirmed that he was present during the scene visit but he disputed the report to the extent it stated that the plaintiff had been in occupation up to 2017. To his recollection the plaintiff had been chased away from the land in 2003 by the defendant.
17. DW 3 as a neighbor of DW1 testified that he could attest to the fact that it was the defendant who was utilizing the land and not the plaintiff. Further, DW 3 said that there was a time the plaintiff's deceased husband had leased a portion of the land to plant napier grass and when the term expired he was ordered to vacate the land through the assistance of the area chief since the defendant's father intended to sell the land to DW 3's mother, who upon buying the land, he put up a house therein which was allegedly demolished by the plaintiff's deceased husband.
18. DW 3 however said that after Muthiani filed a caution, his mother was shown a different portion where she proceeded to build a structured DW 3 confirmed that the deceased (Zachry's father) was a cobbler in the nearby local market and that he was the one who used to run his errands.
19. At the close of defence testimony, parties were directed to file written submissions by December 20, 2022. It was only the plaintiff who beat the deadline.



20. In his submissions, the plaintiff took the view that her pleadings, testimony and documents had established the ingredients of adverse possession of $\frac{1}{4}$ an acre of the suit land whose entry was out of a sale agreement in 1999, the clearance of the full purchase price and the taking of vacant possession. Reliance was placed on *Public Trustee vs Wanduru Ndegwa* (1984) eKLR, *Hosea vs Njiru & others* (1974) E.A 526 and *Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau* ELC No 7 of 2021 (OS)
21. As to whether there was fraud in registering the defendant as a proprietor of the suit land, the plaintiff submitted that the defendant secretly filed a succession cause without informing him yet he was in occupation in an open manner.
22. The issues calling for the court's determination are:
 - a. Whether or not the plaintiff bought the suit parcel land from the registered owner.
 - b. If the plaintiff has proved her claim based on adverse possession.
 - c. If the plaintiff is entitled to the prayers sought and lastly what is the order as to costs.
23. It is trite law that parties are bound by their pleadings and issues flow from pleadings. The architecture of Kenya's environment and land litigation is governed *inter alia* by the *Civil Procedure Act* and the *Civil Procedure Rules*, the *Environment and Land Court Act*, its Practice Directions and the *Evidence Act*. Parties approaching court are required under Order 2 Rule 2 of the *Civil Procedure Rules* to plead material facts and not evidence except facts presumed by law or where the burden of disproving it lies on the other party. Order 2 Rule 3 thereof provides for the mandatory items to be specifically pleaded such as on part payment, fraud, inevitable accident, limitations and illegality.
24. Regarding a claim for the recovery of land, a defendant is mandatorily required to plead every ground of defence on which he relies and that a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
25. Order 2 Rule 10 of the *Civil Procedure Rules* requires that the particulars of any misrepresentation, fraud or undue influence or a condition of mind, disorder or disability of mind be pleaded.
26. The primary pleadings before the court are the originating summons dated August 2, 2017 and the replying affidavit sworn on December 5, 2017. In the originating summons the plaintiff based her claim on adverse possession out of an aborted sale agreement entered into on 9.1.1999 and later on amended on April 10, 2002 to reflect the correct parcel number from which the $\frac{1}{4}$ of an acre was to be excised.
27. The plaintiff produced the sale agreements, acknowledgement receipts, the application for land control board, the letter of consent and a copy of an official search as exhibits. In the supporting affidavit accompanying the originating summons, the plaintiff clearly indicated vacant possession was handed over on 9.1.1999, that she paid full purchase price, survey works to excise the land was finalized in 2000, survey fees, stamp duty were duly paid and the boundaries on the ground fixed by the District land surveyor in the presence of the parties. While aware of all these, the plaintiff pleaded that the defendant committed acts of fraud which were itemized at paragraph 17 of the supporting affidavit by purporting to re-sale the land to third parties and for forcefully seeking to enter the land, damaging the fence and for failing to transfer the land. The plaintiff also raised an alternative claim of a refund of Kshs.30,000/= with interest.
28. In response, the defendant swore an affidavit on October 5, 2017 terming the claim as a mere sham, vexatious, frivolous, an abuse of court process, lacking merits in law, time barred and offensive of the *Land Control Act*.



29. On fraud as per the reply to the supporting affidavit the defendant alleged fraud on the part of the plaintiff's supporting documents, being falsified, forgeries, based on non-payment of the purchase price and based on an agreement which was never witnessed by third parties.
30. Prior to the amendment of Section 3 (3) of the [Law of Contract Act](#) in 2003, all what was required to dispose an in interest in land was evidence of an acknowledgment note, or memorandum in writing and duly signed by the party to be charged or by some person authorized by him. There was however a proviso that a suit shall not be defeated if there was nothing in writing so long as there was part performance or willingness to perform the terms by one party, including the taking of possession of the property or being already in possession or having done some act in furtherance of the contract.
31. In the case of [Peter Mbiru Michuki vs Samuel Mugo Michuki](#) (2014) eKLR, what was before the court was an oral agreement and part performance by way of taking possession. The respondent had alleged that he had been in physical, open, actual and uninterrupted occupation of the suit property with full knowledge of the appellant till the filing of the suit. The respondent denied any adverse possession and raised the issue of lack of a consent from the land control board. The trial court held the sale agreement was valid and allowed the claim of adverse possession.
32. The Court of Appeal confirmed the judgment of the High court and cited with approval [Public Trustee vs Wanduru](#) (*supra*) on the proposition that the provisions of the [Land Control Act](#) had no application where the claim to agricultural land was by operation of the law such as by way of adverse possession.
33. As to the validity of the sale agreement, the court held that Section 3 (7) of the [Law of Contract Act](#) excluded the application of Section 3 (3) of the said [Act](#) to contracts made before the amendments date of June 1, 2003 since there was already the taking of vacant possession and the continued part performance of the oral contract.
34. On the issue of adverse possession, the appellant had submitted that if it ever existed, the same had terminated in 2011 when the appellant re-entered the property after the death of the plaintiff. The court cited with approval [Kimani Ruchire vs Swift Rutherford & Co. Ltd](#) (1980) KLR where it was held that a party must prove that they had used the land as of right, with no force, no secrecy or persuasion with the knowledge of the registered owner in a continuous unbroken manner.
35. The court further stated that the possession of land needed not be actual and physical but could also be constructive including the occasional visits and possession through a licensee. As to when time started running the court was of the view four alternative timelines could be used to compute time including the year of the sale agreement, when the buyer took legal position, the year of construction of the house, the year parties went to the land's office to affect the transfer and the year the seller wrote to state that he had changed his mode on the transaction.
36. Further, the court held that adverse possession continued through the purchaser's dependents and personal representatives until the successor in title allegedly demolished the house which had been constructed in the property. The court stated that a purchaser in possession of the land purchased after having paid the purchase price was a person in whose favour the period of limitation could run and a demand letter from the seller terminated any permission or license given by the seller.
37. Further, the court cited with approval [Mwangi & another vs Mwangi](#) (1986) KLR 328 that the rights of a person in possession or occupation were equitable binding on the land and which were not defeated by death of the registered owner and bound the successor in title or the legal administrator who becomes as holding the land in trust. As to re-entry upon the death of the registered owner, the court held equity suffers no wrong without a remedy and that he who comes to equity must follow the law.



38. The facts in the *Peter Mbiri Michuki* (*supra*) are in Pari material with the instant suit. The defendant made pleadings that their plaintiffs claim was based on forged and or fraudulent documents since the thumb prints appearing in the sale agreement and acknowledgement notes were fraudulent and or forged. It is trite law that fraud and illegality must not only be pleaded but must also be proved on a balance higher than the ordinary balance of probabilities but below reasonable doubts level. See *Arithi Highway Developers Ltd vs West End Butchery Ltd & 6 others* (2015) eKLR, *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* (2000) eKLR.
39. In this suit, other than pleading the alleged fraud, forgery or illegality, the defendant failed to bring forward any tangible or cogent evidence to sustain his defence on fraud, illegality or forgery. The sale agreements, acknowledgement notes and the application for land control board and the consent were all served upon the defendant alongside the originating summons.
40. The defendant did not see it fit to subject the said documents to forensic examination if at all he believed the thumb prints appearing therein did not belong to his late father. There was no documents examiners report submitted before court to substantiate the alleged fraud or forgery. The defendant did not call the land control board committee members and its chairman if at all he doubted the authenticity of the documents. The land registrar was not called to testify that the said documents were not official public documents arising out of their offices. Above all the advocate who prepared the sale agreements and acknowledgement notes attended court and clarified that the seller appeared twice before him and appended his thumb prints and took the consideration.
41. It is trite law that parole evidence may not be used to challenge a written agreement unless on account of illegality, fraud or misrepresentation. See *Twiga Chemicals Industries Limited vs Allan Stephen Reynolds* (2014) eKLR.
42. In this suit, the defendant failed to discharge the burden to prove the alleged fraud, illegality and misrepresentation. The court is therefore satisfied that the deceased sold the suit parcel in 1999 and clarified it in the amended sale agreement in 2000. He also willingly attended the land control board for the issuance of the letter of consent and eventually put the plaintiff into vacant possession after obtaining the full purchase price. The land surveyor also attended the ground to fix the boundaries after the subdivisions were affected.
43. So, between 1.11.2000 when the letter of consent was issued to August 3, 2017 when this suit was filed, the plaintiff was on the land not as a licensee but an adverse possessor. She had legally and constructively become an adverse possessor.
44. The demand letter, a report to the police chief and attempts by elders to evict the plaintiff did not amount to an assertion of ownership or re-entry. The defendant since the passing on of his father in 2003 made no attempts to evict the plaintiff. An attempt to re-sale the land to third parties did little or nothing to defeat the already accrued rights of adverse possession by the plaintiff.
45. The evidence tendered by the plaintiff shows that she has occupied the land with the animus possidendi to own it. She is therefore entitled to ¼ of an acre of LR No Nyaki/Mulathankari/745.
46. The defendant shall execute the transfer documents in favour of the plaintiff within 2 months from the date hereof in default the Deputy Registrar of the court to sign the transfer documents.
47. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25TH DAY OF JANUARY, 2023



In presence of:

C/A: Kananu

Masamba for Kiogora Arithi for plaintiff

HON. C.K. NZILI

ELC JUDGE

