



**Nebange Limited v Mire (Environment & Land Case 45 of 2007)
[2023] KEELC 125 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 45 OF 2007
EK WABWOTO, J
JANUARY 19, 2023**

BETWEEN

NEBANGE LIMITED PLAINTIFF

AND

BIRRE HUSSEIN MIRE DEFENDANT

JUDGMENT

1. The Plaintiff vide an Amended Complaint dated 7th March 2017, sought for the following orders; -
 - a) The declaration that the Plaintiff is the lawful owner of L.R. No. 36/1/766.
 - b) A declaration that the Grant No. I.R. 90556-LR No. 36/1/766 dated plan No. 174497 are forged and fraudulent.
 - c) An order that the Defendant demolish at their own cost and restore the Parcel No. 36/1/766 to its former condition.
 - d) General damages for trespass.
 - e) Special damages to be provided.
 - f) A permanent injunction restraining the defendant, his agents, servants or any other person claiming any interest through the Defendants from entering, remaining on, constructing on or in other manner whatsoever interfering with the suit land L.R. No. 36/1/766.
2. The defendant contested the Plaintiff's claim through a defence dated 12th July 2019.



Case of the Plaintiff

3. The case of the Plaintiff is contained in the amended plaint dated 7th March 2017, the oral evidence tendered at the hearing on 27th April 2022, the exhibits produced at the hearing and written submissions dated 5th May 2022 filed by Githinji Kimamo & Co. Advocates.
4. The Plaintiff's case is that it is the registered owner of L.R. No. 36/1/766 situated in Eastleigh. It was pleaded that on 20th March 2007, the Defendant in the company of several of his workers trespassed into the suit land and unlawfully demolished the Plaintiff's old house. The matter was reported to the area chief who directed the Defendant to stop the illegal activities.
5. It was also averred that later on 22nd August 2003 the Defendant presented to the Registrar a transfer instrument which was fraudulently procured. The particulars of fraud and illegality were particularized at paragraph 6 (e) of the amended plaint.
6. During the hearing of the suit, Peter Nderitu Gethi a director of the Plaintiff's Company testified as PW1. He adopted his witness statement dated 7th March 2017 as evidence in chief. He testified that the Plaintiff purchased the suit property from Continental Credit Finance Limited through a conveyance dated 20th March 1985 and the same is still registered in the names of the Plaintiff to date.
7. It was also his testimony that the police instituted Kibera Chief Magistrate's Court Criminal Case No. 53118/2009 against John Rote Mugwanyi a director of Phelsey Enterprises Limited who purportedly sold the land to the Defendant.
8. On cross-examination, he stated that the Defendant herein was not charged with any criminal offence in relation to the alleged forgery but the seller of the property was the one charged. He also stated that the original conveyance was misplaced and further that he has not sued the Registrar of titles or Commissioner of Lands.
9. On re-examination, he stated that he is still the owner of the suit property and that this is a case of fraud and not double allocation.
10. Peter Orwa P.C. No. 77258 testified as PW2. He testified that the Investigations revealed that the Defendant's title was forged. He produced the Police File Ref CID/C/CRI/6/4/VOL. XIII/471 as PExh 8. He also produced a letter from the Chief Land's Registrar dated 9th December 2009 confirming that the Plaintiff's conveyance dated 20th March 1985 represented the true records from the Land's Office.

Case of the Defendant

11. The case of the Defendant is contained in his defence dated 17th March 2017, his witness statement dated 12th July 2019, the list and bundle of documents dated 12th July 2019, the oral evidence tendered during trial on 27th April 2022 and written submissions dated 30th September 2022 filed by Hasan N. Lakicha & Co. Advocates.
12. In his pleadings, the Defendant averred being the lawful owner of L.R. No. 36/1/766 having purchased it from Phelsey Enterprises Limited in 2005. The Defendant also denied the particulars of fraud and malice.
13. During the hearing, he testified as DW1 and adopted his witness statement as evidence in chief. He maintained that he did due diligence prior to purchase of the suit property and at no time was he made



aware that the title to the property was fraudulent and that if the same was fraudulent he would not have purchased the property.

14. On cross-examination, he stated that according to him, the title to the property was not fraudulent and he had sold it to a third party though he did not have the sale agreement in court.
15. Upon re-examination, he stated that he transferred the land on 22nd May 2009 and he was not aware of any issues in respect to the said property.

The Plaintiff's submissions

16. The Plaintiff commenced its submissions by making reference to a quote extracted from the Judgment delivered by the Court of Appeal in *Ardhi Highways Developers Limited v West End Butchery Ltd & Others* Civil Appeal No. 246 of 2013 [2015] eKLR page 18, which states as follows;

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor, indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.. .”

17. The Plaintiff gave a summary of the evidence tendered by each party at the trial. The Plaintiff submitted that it had been proved that it is the owner of the suit property which had been invaded by the Defendant and which necessitated the filing of the current suit. The seller of the property to the Defendant had been charged in a court of law but later jumped bail and was at large.
18. It was also submitted that the Defendant was warned by the then lawyer that the sale was fraudulent and all the title documents were forgeries but still proceeded with the same.
19. It was also submitted that, the Defendant being aware that he had a forged title purported to transfer the same through an instrument dated 22nd May 2009 for a sum of Kshs 8,000,000/- making a profit of Kshs 4,000,000/- from the amount he purportedly had bought the property.
20. The Plaintiff concluded its submissions by submitting that the Plaintiff had proved its case to the required standard and was entitled to the prayers sought. Reliance was also made to the case of *Park Tower v Moses Chege & others* [2014] eKLR and an amount of Kshs 5,000,000/- was submitted as adequate compensation as damages for trespass having been denied lawful possession of their property from April 2007 to date.

The submissions by the Defendant

21. The Defendant filed his submissions dated 30th September 2022. The Defendant gave a brief background of each parties' case. The Defendant then proceeded to outline the following issues for determination: -
 - i. Whether the Defendant acquired the title to the land through fraud.
 - ii. Whether the Defendant is a bonafide purchaser for a value without notice.
22. On the first issue, Counsel submitted that the Defendant has not acquired the title to the land parcel in dispute through fraud and that he has never been a party to any fraud or fraudulent process. Reliance



was made to the cases of *Eunice Grace Njambi Kamau and Another v The Hon. Attorney General & 5 others* ELC Civil Suit No. 976 of 2012, *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* [1996] eKLR, *Paul Muira & Another v Jane Kendi I Kinyua & 2 others* [2014] eKLR, *Gabriel Chepkwony & Another* [2018] eKLR and *Falcon Global Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary school* [2018] eKLR to the effect that no evidence of fraud or any misrepresentation has been tendered to link the defendant herein with any fraud or misrepresentation in regard to the acquisition of the title.

23. It was further submitted that no evidence has been put forward to suggest that the acquisition of the title was illegally procured and the Plaintiff had not discharged its burden of proving its case to the required standard.
24. On the second issue, the Defendant submitted being an innocent purchaser for value. In support of this submissions, the Defendant cited the cases of *Taraban Company Limited –Vs- Sehmi & 7 others* (Civil Appeal 463 of 2019 [2021] KECA (KLR)), *Lawrence Mukiri v A.G. & 4 others* [2013] eKLR, *Katende v Haridor & Company Limited* [2008] 2 E.A 173 and *Westorn Gitonga & 10 others v Peter Rugu Gikanya & Another* [2017] eKLR and reiterated that the Defendant is a purchaser for value without notice.
25. The Defendant also made reference to the case of *Martha Chelal & Another v Elijah Kipkemoi Boiywo & 2 others* [2019] eKLR where the court observed that Section 26 of the *Land Registration Act* provides for indefeasibility of title and protection of title holders but it also provides for impeachment of titles that have been procured fraudulently by mistake or by misrepresentation.
26. In conclusion the Defendant urged the court to make a finding that the Plaintiff had failed to prove its case that there was fraud on the part of the Defendant and have the case dismissed with costs.

Analysis of the issues arising and determination

27. I have considered the pleadings, evidence adduced and the submissions filed by the Advocates for the parties. The issues arising for determination in this suit in my view are the following:
 - i. Whether the Plaintiff has proved the particulars of fraud.
 - ii. Whether the Defendant is a bonafide purchaser for value without notice.
 - iii. What are the appropriate remedies that can issue herein.
28. I will proceed to handle the issues sequentially.
29. The Court of Appeal in *Kinyanjui Kamau v George Kamau* [2015] eKLR, held as follows:

“It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged”.
30. A party alleging fraud must specifically plead the particulars of fraud and specifically lead evidence to prove the allegations of fraud. There are steps that must be taken to prove fraud. In the case of *Vijay Morjaria v Nansign Madhusihn Darbar & Another* [2000] eKLR, the court of Appeal 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”.

31. The same procedure goes for allegations of misrepresentation and illegally as outlined under order 2 rule 4 of the *Civil Procedure Rules*. As regards the standard of proof, the court of Appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows: -

“It is trite law that any allegations of fraud must be pleaded and strictly proved. (See *Ndolo v Ndolo* [2008] 2 KLR (G & F) 742 wherein the court stated that: -

“...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...”

32. The Plaintiff pleaded and particularized fraud against the Defendant in its amended plaint dated 7th March 2017. In the instant case, Counsel for the Plaintiff also submitted that the Plaintiff had proved its case and particular of fraud against the Defendant.
33. From the evidence that was tendered it was the testimony of Peter Nderito Gethi who testified as PW1 that the Plaintiff was the registered proprietor of the suit property L.R No. 36/1/766 having purchased the same on Continental Finance Limited through a Conveyance dated 20th March 1985. He also testified that the Defendant had unlawfully invaded and trespassed on the premises. He further stated that the matter had been reported to the police who conducted their investigations and found the title to be fake which led to the arraignment of one John Rote Mugwanyi on criminal charges of forgery of title contrary to Section 350 (1) of the Penal Code in Kibera Criminal Case No. 53118/2009. John Rote Mugwanyi was a director of Phelsey Enterprises who allegedly had sold the land to the Defendant.
34. Constable Peter Orwa who testified as PW2 stated that as the investigations that were carried out, the Plaintiff’s conveyance dated 20th March 1985 represented the true records from his office and that the Defendant’s grant IR 90556 was a forgery.
35. On the other hand, the Defendant denied any fraud on the acquisition of the said property. In his testimony, He maintained that he is the lawfully registered owner of the suit property together with one Dakane Abdullahi Ali which they lawfully purchased from Phelsey Enterprises Limited in 2003.
36. It was also his testimony that on 25th May 2009, the property was sold to Abdirahman Adan Mohamed and Abdullahi Abdulle trading as Marjan Brothers who took possession of the same and constructed a modern building. He also stated that they once lost the title and had petitioned the Registrar of Titles to issue them with a provisional title where the suit property was advertised vide Kenya Gazette Notice number 9986 on 16th December 2005.
37. From the testimony that was adduced it is evident that the Defendant acquired the suit property when it was already being owned by the Plaintiff. The Plaintiff was able to demonstrate how the same was acquired way back on 20th March 1985. The Defendant was unable to demonstrate how they acquired the same yet the Plaintiff had never sold nor transferred the said property to any party.



38. In the case of *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that: -

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

39. Being guided by the above authority, the Defendant has failed to adequately demonstrate how they acquired the said property and also were they sold the same to a third party in 2009 after the suit had been filed in they 2007. This may only be constructed as seeking to conceal the fraud that had been pointed out by the Plaintiff. Due to the foregoing it is the finding of this court that the Plaintiff has proved the particulars of fraud as pleaded in their plaint as against the Defendant.

40. In his defence, the Defendant also pleaded being a bonafide purchaser for value without notice. The Defendant herein filed elaborate submissions dated the 30th September 2022 and in respect of which same implored the Honourable court to find and hold that the Defendant was a bona fide purchaser for value without notice.

41. The definition of a bona fide purchaser is one who genuinely intends to purchase the property offered for sale and does not intend to acquire it wrongly. A bona fide purchaser may successfully rely on the bona fide doctrine if he proves that:

- a) He holds a certificate of Title.
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;
- f) He was not party to any fraud.

42. The Court of Appeal in *Munyu Maina v Hiram Gatbiba Maina* [2013] eKLR emphasized the duty of the holder of an impugned title in a claim such as the present one in the following words:

“We state that when a registered proprietors’ root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register”

43. Section 24 of the *Land Registration Act* No 3 of 2012 states that 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. Section 25 of the said Act provides that 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 to encumbrances charges or leases shown on the register and the overriding interests as stated in Section 28 of the Act.

44. Section 26 of the *Land Registration Act*, 2012 provides;

“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.

45. The Courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case the documents produced by the Defendant were challenged by the Plaintiff who was able to demonstrate and prove that the same were not obtained procedurally.

46. From the evidence that was adduced, the Plaintiff became the owner on 20th March 1985 way before the Defendant. It was also evident from the evidence that was tendered that the Plaintiff never transferred nor sold the said property to any third party. Hence therefore the said property could not be available for sale to any other person without the consent of the Plaintiff.

47. The Defendant relied extensively on the provisions of Section 26 of the *Land Registration Act*, No. 3 of 2012 which embodied the principle and doctrine of indefeasibility of title as established under the Torrens System of Registration. The doctrine is to the effect that the title of a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation to which the title holder is proved to have been a party to. It was submitted that the Defendant being an innocent purchaser the penalties attached to the guilt of the vendors should not be visited upon him and that in Kenya once a party produces a title it is prima facie proof they are owners of the said property.

48. In the instant case, having established that the Plaintiff had proved the particulars of fraud as against the Defendant, it therefore follows that the Defendant’s reliance on Section 26 of the *Land Registration Act* cannot be his saving grace. In view of the foregoing this court finds that the Defendant did not acquire the suit property lawfully on the pretext of being a bonafide purchaser for value. Further having considered the evidence adduced herein, the defendant was notified not to proceed with the purchase of the suit property but chose to ignore the same. It is the courts finding that the Defendant did not lawfully acquire the suit property and cannot have been its lawful proprietor.

49. The Plaintiff sought for several reliefs as pleaded in its amended plaint dated 7th March 2017. In its submissions, the Plaintiff submitted that it had proved its case to the required standard and urged the court to grant the prayers sought. The Plaintiff also demonstrated how they are desperate to have the property back. No court in this land will allow a person to keep an advantage which he has obtained illegally and un-procedurally. In view of the foregoing, it is the finding of this court that the Plaintiff having proved its case to the required standard, is entitled to the orders sought.



50. On the general damages for trespass, the Plaintiff urged the court to award a sum of Ksh 5,000,000/- owing to the trespass that had occurred from the year 2007 and reliance was made to the case of *Park Tower v Moses Chege & Others* [2014] eKLR.
51. Taking into consideration and noting the duration of the trespass and being guided by the above authority, I will proceed to award a sum of Kshs.5,000,000/= as general damages for trespass.
52. On the issue of costs, the general rule is that costs follow the event in accordance with the provision to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason directs otherwise. I find no reason to hold otherwise. The Plaintiff who is a successful party to the suit shall be entitled to costs within which shall be paid by the Defendant.

Final orders

53. In conclusion, I find that the Plaintiff has proved its to the required standard. I enter judgement in favour of the Plaintiff against the Defendant in the following terms: -
- a) A declaration that the Plaintiff is the lawful owner of L.R No. 36/1/766.
 - b) General damages for trespass for Ksh 5,000,000/-
 - c) A permanent injunction restraining the defendant, his agents, servants or any other person claiming any interest through the Defendant from entering, remaining on, constructing on or in other manner whatsoever interfering with the suit land L.R. No. 36/1/766.
 - d) Costs of the suit.

Judgement accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY 2023.

E.K.WABWOTO

JUDGE

In the virtual presence of: -

Mr. Githinji for the Plaintiff.

Mr. Lakicha for the Defendant.

Court Assistant; Caroline Nafuna.

