



REPUBLIC OF KENYA



**Muruthi v Chabari & another (Environment & Land Case E146 of 2022)  
[2023] KEELC 16306 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16306 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E146 OF 2022**

**JA MOGENI, J**

**FEBRUARY 28, 2023**

**BETWEEN**

**PRISCILLA WANJIKU MURUTHI ..... PLAINTIFF**

**AND**

**FRANCIS NYAGA CHABARI ..... 1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit against the defendants via a plaint dated 21/04/2022 seeking for the following orders;
  - i. An order of declaration that the plaintiff is the registered owner of all that parcel of land in the County of Nairobi containing by measurement Nought decimal two six nought five (0.2605) of a hectare or thereabouts that is to say LR No. 14615 (I.R No. 45706)
  - ii. An Order directed at the Chief Registrar of Lands Nairobi directing the Chief Land Registrar Nairobi to rectify the register at the lands registry to reflect the name of the suit property and issue title in the names of the plaintiff
  - iii. Costs of this suit be in the cause
2. The plaintiff pleaded that she is the registered owner of all that parcel of land in the County of Nairobi known as LR No. 14615 (I.R No. 45706) situate at Karen Nairobi. That Sometime in 2012 the plaintiff who resides in United Kingdom discovered that her parcel of land had been irregularly sold and transferred to a third party the 1<sup>st</sup> defendant herein.
3. That she reported to the Directorate of Criminal Investigation (DCIO) and the 1<sup>st</sup> defendant was arrested and charged with three counts to wit; conspiracy to defraud, making documents without



- authority and forcible detainer. The criminal case was terminated on the admission of the 1<sup>st</sup> defendant who acknowledges that he surrendered the land back to the plaintiff.
4. However, the plaintiff stated that when she undertook a search on 7/09/2021 and showed that the suit property is still registered in the name of the 1<sup>st</sup> defendant despite the surrender of the title by the 1<sup>st</sup> defendant vide the acknowledgement /undertaking dated 18/07/2012.
  5. Doing a site visit of his property, he found the defendant had trespassed on part of the suit property by erecting a structure and on inquiry the defendant informed him that she lawfully bought the property from third parties who did not have proprietary rights over the suit property.
  6. The plaintiff avers that since the 1<sup>st</sup> defendant has no claim to the suit property following the acknowledgement/undertaking dated 18/07/2012, then the Chief Land Registrar in Nairobi needs a court order to rectify the register to reflect the correct position that plaintiff is the rightful owner registered owner of the suit property.
  7. That despite repeated requests to the 2<sup>nd</sup> plaintiff to correct the register, the 2<sup>nd</sup> defendant has refused to rectify the same requiring a court order to effect the same.
  8. Despite being served with summons to enter appearance, the 1<sup>st</sup> and 2<sup>nd</sup> defendants neither filed their defence (s) nor appeared in court for the hearing.
  9. The matter was set down for hearing on 31/10/2022 with the plaintiff relying on her sole testimony. She testified via video link and adopted her witness statement dated 21/04/2022 as her evidence in chief. She stated that sometime in 2012 while her visit to the country from the UK, she found the suit property which is her parcel of land fenced off. She stated that she reported to the police and during the investigation it was discovered that the 1<sup>st</sup> defendant Francis Nyaga Chabari had started to build on the suit property which however he accepted as not belonging to him.
  10. She avers that the 1<sup>st</sup> defendant wrote an acknowledgement stating that he had no claim over the suit property. Further that whereas the 1<sup>st</sup> defendant had been arrested and charged in a court of law, after he wrote the acknowledgment stating that the suit property did not belong to him, then the charges were dropped. The plaintiff attached the court ruling dated 26/07/12 for Criminal Case No. 947 of 2012, Republic vs Francis Nyaga Chabari. The plaintiff also attached a letter from the Directorate of Criminal Investigation where the matter had been reported seeking to have the charges dropped was working in Busia County he purchased the suit property known as South Teso/Angoromo/1459 from Fabian Ikapel which was subsequently transferred into his name and he was issued with a title deed on January 26, 1984. Upon having vacant possession, he fenced the parcel of land and carried out farming activities over the years on the suit land.
  11. The plaintiff further stated that despite repeated requests to the Chief Land Registrar who is the 2<sup>nd</sup> defendant in the instant suit to correct the register they have refused to do so requiring a court order directing that the rectification be made.
  12. It is her testimony as the plaintiff that she needs an order directed at the Chief Land Registrar of Lands in Nairobi directing them to rectify the register at the lands registry to reflect the name of Priscilla Wanjiku Muruthi the plaintiff herein as the registered owner of the suit property.
  13. As already stated the suit is undefended and the plaintiff has proceeded to give both oral and documentary evidence in support of her claim. The plaintiff testified that the suit property belongs to her and what needs to be done is the rectification of the register. Someone attempted to take her suit property by constructing on it. This was thwarted the plaintiff herself by reporting to the Directorate of Criminal Investigation where the 1<sup>st</sup> defendant confessed to the wrong doing and stated that he would



not pursue any complaint against the plaintiff once the charges of fraud against him were dropped in exchange of his freedom.

### **Analysis and Determination**

14. The plaintiff's case is anchored on fraud. She has accused the 1<sup>st</sup> defendant under paragraphs 5 and 6 of her plaint and pleaded the particulars of fraud *inter alia*; conspiracy to defraud, making documents without authority and forcible detainer.
15. The plaintiff led evidence that the registration of the suit property to the 1<sup>st</sup> defendant was done fraudulently and accuses the 1<sup>st</sup> defendant and further that the 1<sup>st</sup> defendant cannot be allowed to benefit from the fraudulent action which he was charged with and acknowledged and sought to have the charges against him dropped without making any claim against the plaintiff. Meaning that the 1<sup>st</sup> defendant is not an innocent purchaser.
16. Section 27 and 28 of the [Registered Land Act](#) – impeachment of title on ground of fraud.
17. 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.
18. From the provisions of sections 27 and 28 above it is trite that 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. 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.
19. Section 26 of the [Land Registration Act](#) provides two ways in which a title of a registered proprietor may be challenged; one is on the ground of fraud or misrepresentation to which the person is proved to be a party; secondly, where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme. In the first ground the Court must be satisfied subject to evidence adduced that the person was privy or a party to the fraud while in the second instance it is not necessary that the title holder be a party to the factors vitiating the title. It therefore means that the title of an innocent purchaser may be impeached as long as it is proved that the title was procured illegally procedurally or through a corrupt scheme. See the case of [Elijah Makwari Nyangw'ra v Stephen Mungai Njuguna & anor](#) ELC 609B of 2012.
20. It is now settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in [Bullen](#)



Leake & Jacobs, Precedent of Pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune v Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence v Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy v Garrett (1878) 7 ch.D. 473 at 489 it is stated that:-

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

21. In the case of Arthi Highway Developers Limited v West End Butchery Limited and others CA No. 246 of 2013 the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The court specifically referred to the law as stated in the case of Dr. Joseph Arap Ngok v Justice Moiwo ole Keiwua & 5 others, Civil Appeal No Nai 60 of 1997 where the court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

22. As regards standard of proof of fraud, the law is quite clear. In RG Patel v Lalji Makanji(1957)EA314 the former Court of Appeal for Eastern Africa stated thus:

“Allegations 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.”

23. In the case of Vijay Morjaria v Nansingh Madbusingh Darbar & another [2000] eKLR, Tunoi, JA. (as he then was) 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

24. It is on record that the plaintiff has pleaded and particularized the instances of fraud against the 1<sup>st</sup> defendant. The issue for the Court is to determine whether he has successfully proved it. It is also not in dispute that a competent court of law whose record I have scrutinized and the



information was produced by the plaintiff in evidence has recorded that the 1<sup>st</sup> defendant provided an acknowledgment /undertaking dated 20/7/2012 acknowledging that he will not interfere with the subject property which was stated to I.R 45706.

25. In the proceedings in Criminal Case No. 947 of 2012 it on record that the plaintiff applied to court to allow her withdraw the criminal case against the accused who was the 1<sup>st</sup> defendant because he had surrendered the suit property to her. He application was allowed by the trial magistrate T. Murigi SPM (as she then was).
26. This evidence led by the plaintiff led evidence was uncontroverted since the 1<sup>st</sup> defendant did not attend court and it remains unchallenged.
27. The Directorate of Criminal Investigation in its letter dated 25/07/2012 provides the same invitation where the Director of Criminal Investigation states that the plaintiff herein expressed her intention to voluntarily withdraw her criminal complaint against the accused person stating that the accused person has surrendered back her parcel of land to her and she no longer desires to pursue the case.
28. With the confession made by the 1<sup>st</sup> defendant it is therefore correct to hold that the suit property was therefore transferred fraudulently to the 1<sup>st</sup> defendant? ‘Fraud’ has been defined in Blacks Law Dictionary as;  

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”
29. Further [Black’s Law Dictionary](#) Ninth Edition at Page 731 also defines ‘fraud’ as:-  

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
30. With the definition of fraud in mind it then follows that the registration of the suit property to the 1<sup>st</sup> Defendant is not genuine and if there was any doubt then the Ruling of the Hon. T. Murigi (as she then was) in Criminal Case No. 947 OF 2012 puts the whole case into perspective and zeros in on the actions of fraud.
31. In the absence of any evidence from the defendants to challenge the plaintiff’s testimony and the evidence presented, and having carefully analyzed the available evidence, the court finds and holds that the plaintiff herein is the lawful owner of the suit property having satisfactorily explained the root of the title.
32. The plaintiff has sought for the cancellation of the proprietorship of the 1<sup>st</sup> defendant and reversion of the registration and proprietorship to her. The court has already held and found that the plaintiff is the lawful owner of the suit property, the registration of the 1<sup>st</sup> defendant having been procured fraudulently and is therefore null and void ab initio.
33. As already highlighted elsewhere in this judgment, it is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached under certain circumstances as provided under section 26 (1) of the [Land Registration Act](#).
34. This court having held and found that the transfer of the suit property to the 1<sup>st</sup> defendant was done through fraud as the root of his title was fraudulent and he even surrendered it himself, the court further finds that the title held by the 1<sup>st</sup> defendant fall under the category of titles that must be



impeached. Despite the fact that when the plaintiff carried out an official search she found that the 1<sup>st</sup> defendant whilst having surrendered the title to the suit property is still the registered proprietor on paper, the protection that was provided to the 1<sup>st</sup> defendant by law must Now and Forthwith be lifted once the court holds that there was fraud and misrepresentation of facts. See the case of [Alice Chemutai Too v Nickson Kipkurui Korir & 2 others](#) [2015] eKLR, where the court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

35. The court having found and held that the Certificate of title held by the 1<sup>st</sup> defendant was procured by fraud and therefore null and void must then determine whether the said title can be cancelled.

36. Section 80(1) of the [Land Registration Act](#) provides: -

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

37. This court is satisfied that the Certificate of title held by the 1<sup>st</sup> defendant was procured by fraud and as such it is impeachable and ought to be cancelled. Further this court has already held and found that the Plaintiff is the legal owner of the suit property and it is only fair that the register be rectified to cure the fraud perpetrated by the 1<sup>st</sup> defendant and return the suit property to its rightful owner who has demonstrated their ownership over the suit property.

38. The plaintiffs prayers are for a declaration that the plaintiff is the registered owner of all that parcel of Land in the County of Nairobi LR Number 14615 (I.R. 45706). Also, they pray for an order directing the 2<sup>nd</sup> defendant the Chief Land Registrar Nairobi to rectify the register at the lands registry to reflect the name of the plaintiff Priscilla Wanjiku Muruthi as the registered owner of the suit property and issue title in the names of the plaintiff. And costs to the suit.

39. It is the court’s considered view that the plaintiff is entitled to the orders sought.

40. Consequently, the court finds that the plaintiff has proved her case on the required standard of balance of probability and is entitled to the prayers as sought in the Plaint dated 21/04/2022.

41. Having found that the plaintiff has proved her case on the required standard, I hereby enter judgment for the plaintiff against the defendants herein as follows:

- a. I declare that the plaintiff is the registered owner of all that parcel of land in the County of Nairobi containing by measurement Naught decimal two six naught five (0.2605) of a hectare or thereabouts that is LR No. 14615 (IR 45706)
- b. I direct the Chief Land Registrar of Lands, Nairobi County to rectify the register at the Lands Registry to reflect the name of the plaintiff herein Priscilla Wanjiku Muruthi as the registered owner of the suit property and issue title in the names of the plaintiff and in any case not later than 90 days from the date of this judgment.
- c. I ward the costs of this suit to the plaintiff.



It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**MOGENI J**

**JUDGE**

Judgement read through Microsoft Teams in the presence of:

Mr Nyangoro for Plaintiff

No appearance for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Caroline Sagina: Court Assistant.

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**MOGENI J**

**JUDGE**

