



**Othieno v Partners & another (Environment & Land Case
353 of 2013) [2025] KEELC 303 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 353 OF 2013
OA ANGOTE, J
JANUARY 30, 2025**

BETWEEN

DELANO A ODONGO OTHIENO PLAINTIFF

AND

MUCHAI & PARTNERS 1ST DEFENDANT

LUCKY SUMMER ESTATE CO LTD 2ND DEFENDANT

JUDGMENT

Background

1. Vide an Amended Complaint dated 22nd February, 2021, the Plaintiff seeks as against the Defendants jointly and severally:
 - i. A permanent injunction restraining the Defendants, their servants, employees and agents from trespassing, transferring, constructing, leasing, dealing, wasting or otherwise interfering on the Plaintiffs' Plot being Plot No 17 situated on a portion of Land Reference No 31/18 Ruaraka Nairobi and referred to by the Defendants as Plot No 3 in Lucky Summer Estate Co.
 - ii. A declaration that the purported allocation to the 1st Defendant, of the Plaintiffs Plot number 17 and referred to by the Defendants as Plot No 3 situated on a portion of Land Reference Number 31/18 Ruaraka Nairobi is null and void for illegality and fraud and be set aside.
 - iii. In the Alternative, damages for the current value of the property as captured on paragraph 14 herein.
 - iv. General damages for loss of use of the property from date of the breach of the contract to date.
 - v. Costs of the suit and interest thereon.



2. It is the Plaintiff's case that he is the registered member of the 2nd Defendant, a land buying company, who purchased shares from it on the 2nd September, 1981 and was issued with a certificate affirming the same; that on 30th March, 1983, he was allocated a plot by the 2nd Defendant, situated on a portion of land known as L.R 31/18 Ruaraka, Nairobi and that the plot was pointed out to him by one Peter Mutua Musee, the 2nd Defendant's officials in the presence of one of his neighbors, Major (Rtd) Leonard Onyango.
3. According to the Plaintiff, upon taking possession of the suit plot, he built a foundation and left it at that level so that he could continue when he was ready to do so; that in 2013, he proceeded with the construction putting up two floors; that during a routine check in the same year, he discovered that a second foundation had been constructed alongside his and that investigations revealed that the 1st Defendant was responsible for the construction under the guise that the property was his plot 3.
4. The Plaintiff contends that the aforesaid circumstances points to a breach of contract by the 2nd Defendant, the particulars of which include purporting to sell his parcel of land to the 1st Defendant, despite having earlier allocated it to him in 1983, which allocation was valid and binding, and giving the 1st Defendant possession of the plot knowing well that he had commenced construction thereon.
5. The Plaintiff averred in the Plaint that the Defendants are jointly guilty of fraud and collusion, the particulars of which include selling and purchasing his plot number 17 while claiming the same to be plot number 3, with a view of illegally depriving him of the same; and illegally trespassing onto his plot.
6. According to the Plaintiff, despite confronting the 1st Defendant and requesting cessation of the construction, they did not do so; that he reported the matter to the Area Chief, the 2nd Defendant, OCS Ruaraka Police Station and the 1st Defendant's Directors but none intervened and that further inquiries revealed that the property has two numbers being plot number 3 and 17 but is the same property on the ground and on which his foundation has stood from 30th March, 1983 to February, 2013.
7. According to the Plaintiff, the current value of his plot together with the improvements thereon stands at Kshs 10,900,000/= as per the valuation undertaken in May, 2019 and broken down as follows:

| | |
|---------------|-----------------|
| Land | Kshs 2,000,000 |
| Improvements | Kshs 8,900,000 |
| Capital Value | Kshs 10,900,000 |

8. He posits that despite demands, the Defendants have not ceased their illegal acts.
9. Vide an Amended Statement of Defence and Counterclaim dated 22nd March, 2021, the 1st Defendant denied the assertions as set out in the Amended Plaint stating that the Plaintiff's plot is no 17 whereas its plot is number 3 and that it is the Plaintiff who has trespassed onto their plot no 3.
10. The 1st Defendant seeks vide the Counterclaim:
 - i. That the Plaintiff's suit be dismissed with costs.
 - ii. That an order of eviction do issue directing that the Plaintiff do forthwith vacate the suit property and remove all developments in default of removal, the 1st Defendant be at liberty to remove such developments on the suit property at the Plaintiffs' cost.



- iii. That judgment is entered as prayed in the counterclaim.
 - iv. That a permanent injunction do hereby issue restraining the Plaintiff through himself, his servants, agents or howsoever from trespassing, transferring, constructing or in any other way dealing or disposing of the 1st Defendants property being plot no 3 in Lucky Summer Estate Co Ltd.
 - v. Costs of the suit and interest.
11. The 2nd Defendant filed a statement of Defence on 26th April, 2017. It denied the assertions as set out in the Plaint stating that plot no 17 belongs to the Plaintiff whereas plot no 3 belongs to the 1st Defendant and that contrary to the Plaintiff's claim, it is him who is trespassing on the 1st Defendants plot 3.
 12. The 2nd Defendant stated that they support the 1st Defendant's Defence and rely on their documents; that no demand has ever been served on them and the Plaintiff is put to strict proof thereof and that the suit is unmerited and should be dismissed.

Hearing and Evidence

13. The matter proceeded for hearing on the 6th November, 2023. The Plaintiff, PW1, testified that he is a retired veterinary officer. He adopted his witness statements dated 13th March, 2013 and 21st March, 2021 as his evidence in chief and produced the documents dated 13th March, 2013 as PEXHB1, and the documents in the bundle dated 13th May, 2021 as PEXHB 2-5 [except the valuation report].
14. PW1 narrated that he is a registered member of the 2nd Defendant; that he owns plot no. 17, for which he received a certificate in 1984; that after identifying the property, he begun constructions thereon, and that Peter Mutua Mzee, a director of the 2nd Defendant, personally showed him the plot in the presence of a witness, his neighbor, Major Onyango.
15. PW1 stated that later on, the 1st Defendant began demolishing his building at night alleging that the plot belongs to him. The Plaintiff now seeks to reclaim and occupy the land, emphasizing his continuous presence on the property since 1981.
16. It was his evidence on cross-examination, that he purchased plot no 17 and not plot no 3; that he was not initially shown the plot; that the plot he was later on shown by the 2nd Defendant already had a building thereon; that he saw the map for the first time in Court and that no one told him that he was constructing on the wrong plot.
17. It was his further testimony on cross that he has no evidence to show that Peter Mzee was a director of the 2nd Defendant; that he did not call Mr Mzee as a witness because he would not agree to come and testify; that he cannot identify the property on the map; that the search he adduced is in respect of the entire parcel of land and that the 1st Defendants' father was the original owner of the plot.
18. In re-examination, PW1 stated that Peter Mzee showed him the plot and he immediately put up a foundation on it in 1981 and that he has never identified the plot the 2nd Defendant now claims is his.
19. PW2 was Walter Ogolla Oduor, a full member of ISK and licensed by the valuation registration board. It was his evidence that he authored a report under Professor Siage, a licensed valuer. He produced the valuation report as PEXHB7.
20. In cross-examination, PW2 admitted that he was not licensed when he conducted the valuation. He explained that although unlicensed, he was working under Professor Siage's supervision and that the



report was his own, stating that one could work under someone else and still claim ownership of the report.

21. PW2 stated that he was instructed to value plot no. 3 using a map provided by the Plaintiff, and that his valuation reflects the status of plot no. 3. He admitted that the map shows the two plots are far apart, plot no. 17 being situated in the second row.
22. According to him, the purpose of the valuation was to assess the land and its improvements. He conceded to not having obtained ownership documents of the plot he valued, noting that it was not necessary where ownership is uncontested, and that he did not verify the tenure or ownership of the land, nor did he confirm if the person on-site was the Plaintiff's representative.
23. It was his evidence on re-examination that the plot was developed up to the 2nd storey and was under construction, and that the value of the suit property was Kshs 2 million and the developments thereon were Kshs 8.9million.
24. DW1 was Francis Muchai, a businessman and partner in Muchai & partners. He adopted his witness statement dated 25th March, 2013 and produced the bundle of documents of an even date as 1DEXHB1.
25. Briefly, his statement is that on 22nd February, 1977, they were registered as members of the 2nd Defendant with a view to acquiring two plots in its property known as L.R 31 Ruaraka, one of the plots being plot number 3; that between 1977 and 1979, they made payments to the 2nd Defendant and were given possession of the suit property and that they fenced the plots and constructed a foundation,
26. According to DW1, sometime in February, 2013 after they begun constructions, the Plaintiff made a claim that they were constructing on his plot number 17; that they proceeded to the offices of the 2nd Defendant who confirmed that they were on the right plot which was far from plot 17; that they reported the matter to the provincial administration and at a meeting held on 14th March, 2013, the Plaintiff was instructed to report to the offices of the 2nd Defendant to be shown the correct location and that rather than follow up on the same, he instituted the present suit.
27. During cross-examination, he testified that Muchai & Partners is their family business, owned by his father. He stated that the payment receipts for plot no. 3 were issued either in the names of Muchai Njagwi or Muchai Gachagua & Partners. However, he could not recall the specific payment method and noted that either him or his father could have made the payments.
28. DW1 was uncertain about the registration status of the plot and observed that the receipts do not specify plot numbers. DW1 also expressed doubts as to whether the plots were officially demarcated, but recalled being shown the plots by a surveyor between 1977 and 1979, alongside several other individuals viewing the property.
29. DW1 conceded that he does not remember his father's membership number; that they would be given different sets of receipts with the same numbers; that he is aware that there is development on the suit property; that he doesn't remember when he saw the map for the first time and that they duly paid the 2nd Defendant and were issued with a certificate in 1995. According to DW1, the 2nd Defendant's surveyor showed them the plot and that they had a survey map.
30. DW2 was Nancy Mugure, a Director at the 2nd Defendant's company. She adopted her witness statement dated 12th March, 2024, a substitution of the statement of Festus Wanjohi, and produced the certificate of ownership of the entire land as 1DEXHB2.



31. It was her evidence that the owner of plot no 3 phase III is Francis Njagwi who is also Muchai and partners; that they also have plot no 17 in their records and the two are different plots; that they sent the surveyor together with the map for identification of the two plots; that the Plaintiff has never been to their offices; that the receipts by the 1st Defendant emanates from their offices and are genuine and that they issued different receipts for different payments, i.e, for membership and share capital.
32. It was her evidence in cross-examination that she doesn't know the Plaintiff and has never seen him; that the receipts he has are however genuine and make reference to plot number 17; that she doesn't have the register for the 2nd Defendant's membership; that people used to refer to themselves by different names; that Peter Mzee was a director of the 2nd Defendant and that she cannot point out where plot 17 is.

Submissions

33. The Plaintiff filed submissions on 23rd May, 2024. Counsel submitted that the Plaintiff is the legitimate owner of plot no 17 otherwise known as plot no 3, being in possession of a share certificate together with receipts for the same; that it is clear that plot number 3 allegedly belonging to the 1st Defendant is his plot 17 and that he has clearly established the root of his ownership of the suit property and is entitled thereto.
34. Reliance in this respect was placed on the cases of *Karuta vs Njeri & Another* [2024] KEELC, *Beatrice Wambui Maina vs Embakassi Ranching Company Ltd*[2022]eKLR and *Caroline Awinja Ochieng & Another vs Jane Anne Mbithier Gitau & 2 Others*[2015]eKLR.
35. It was submitted that the Plaintiff, having demonstrated his ownership of the property, is entitled to permanent injunctive orders restraining the Defendants' interference therewith and that the above notwithstanding, he is willing to give the 1st Defendant possession of the property upon being compensated for the same at its current value as per the uncontested valuation report.
36. Counsel urged that the Plaintiff is also entitled to general damages for loss of use of the property and that in *Phillip Ayaya Aluochi vs Crispinus Ngayo*[2014]eKLR and *Holster vs Green Park Development Co 986 S.W 2d 500*(No. App.1999), the Court held that the measure of damages for trespass is the difference in the value of the property immediately after the trespass and the costs of the restoration, whichever is less.
37. As regards costs, it was submitted that as the dispute has been precipitated by the 2nd Defendant's actions, it should bear the costs of the suit. Reliance in this respect was placed on the case of *Njuguna vs Kiberu & 2 Others* [2022]KEELC 15015(KLR).
38. The 1st Defendant filed submissions on 12th September, 2024. Counsel argued that the 1st Defendant has demonstrated its rightful ownership of plot number 3, a position corroborated by the 2nd Defendant; that the submitted map clearly distinguishes the two parcels, and there is no evidence to support claims that both refer to the same plot and that consequently, the Plaintiff's allegations of fraud and illegality have not been proven and his suit automatically fails.
39. Counsel referenced the cases of *Daudi Kiptugen vs Commissioner of Lands, Nairobi Lands & 4 Others* [2015] eKLR and *Muiruri vs Kamae Re-settlement Project & Another* [2023] KEELC 18240 (KLR).
40. Counsel submitted that as regards costs, Section 27(1) of the [Civil Procedure Act](#) provides that the same is subject to the court's discretion and that in the circumstances, the same are due to the 1st Defendant, the Plaintiff not having established his case.



41. The 2nd Defendant's counsel filed submissions on 13th September, 2024. He adopted the 1st Defendant's submissions and case law, further noting that the evidence adduced affirms that the 2nd Defendant, as the allocating authority, allocated to the Plaintiff, plot no 17 and not plot 3 which was allocated to Francis Njagwi of Muchai & Partners and that the two plots are far apart and not adjacent.
42. It was submitted that it is apparent that the Plaintiff does not know the precise location of his plot, and did not seek guidance from the 2nd Defendant on the same and has in fact trespassed on the 1st Defendant's plot 3. According to the 2nd Defendant's counsel, the Plaintiff has not established his case and is not entitled to any of the orders sought.

Analysis and Determination

43. By way of a brief background, the Plaintiff instituted this suit seeking inter-alia, for a permanent injunction restraining the Defendants from interfering with his plot no 17, which the Defendants refer to as plot no 3; and a declaration that the purported allocation of plot number 3 to the 1st Defendant is void for illegality and general damages. He seeks in the alternative, the current value of the suit plot.
44. It is the Plaintiff's case that he registered as a member of the 2nd Defendant pursuant to which he purchased shares and was issued with a share certificate; that in 1983, after payment of all the sums due, he was allocated a plot by the 2nd Defendant and that he immediately commenced on setting up a foundation and later on added two stories.
45. The Plaintiff contends that sometime in 2013, when he went to check on his construction, and found a foundation built besides his; that the foundation was constructed by the 1st Defendant who alleges that the plot is his; that plot number 3 as referenced by the 1st Defendant is his plot number 17 and that the alleged transfer thereof to the 1st Defendant by the 2nd Defendant constituted a breach of contract, was fraudulent and is subsequently void.
46. The Plaintiff adduced into evidence receipts no 0362 and 744 from the 2nd Defendant; certificate of postal search over L.R 31/18; approved sub-division plan for L.R 31/18 and building plan for the proposed development on plot no 17. PW2 adduced the valuation report in respect of plot number 3.
47. The 1st Defendant on his part states that he duly purchased plot number 3 from the 2nd Defendant; that he thereafter began constructions and that the Plaintiff later on entered onto his plot alleging that it is his plot number 17. He seeks to have the Plaintiff vacate the plot and remove his developments thereon, as well as a permanent injunction restraining the Plaintiff from interfering with the property.
48. The 1st Defendant adduced into evidence certificates in respect of plot number 3 issued by the 2nd Defendant; a survey map for plot number L.R 31/18 and correspondences.
49. The 2nd Defendant supports the 1st Defendant's position that there are two plots being plot numbers 3 and 17; that plot number 3 belongs to the 1st Defendant whereas plot number 17 belongs to the Plaintiff and that it is the Plaintiff who has trespassed onto the 1st Defendant's plot number 3. Through DW2, the 2nd Defendant adduced the certificate of plot ownership with respect to plot number 3 in the names of Francis Njagwa.
50. In view of the foregoing, and in consideration of the pleadings and submissions, the issues that arise for determination are:
 - i. Whether plots number 3 and 17 make reference to the same parcel of land?
 - ii. Who is the legitimate proprietor of the plots number 3 and 17?



- iii. Whether there has been trespass to plot numbers 3 or 17 and by whom?
- iv. What are the appropriate orders to issue?
51. The dispute herein revolves around ownership of land. Both the Plaintiff and the 1st Defendant have conflicting claims in this regard and the outcome will depend on which party meets the required standard of proof. This finds footing in the elementary principle that he who alleges must prove as set out in Sections 107, 108, 109, and 112 of the Evidence Act. Section 107 provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
52. As aforesaid, the first issue in contention is whether plot numbers 3 and 17 make reference to the same parcel of land. It was PW1’s testimony in this regard that his plot number 17, “when counted from the right” is plot number 3.
53. On the other hand, the 1st Defendant maintains that the two plots are distinct and the Plaintiff has mistaken his plot number 3, to be his plot number 17. This assertion is supported by the 2nd Defendant.
54. Apart from his oral claim that plot number 3 and 17 refer to the same plot on the ground, the Plaintiff did not demonstrate this assertion. The only evidence adduced at his behest, the valuation report by PW2, works against his contention. PW2 conceded that the sub-division plan that he relied on in carrying out his valuation, given to him by the Plaintiff, shows plot numbers 3 and 17 as two distinct plots.
55. The sub-division plan referenced by PW2 was adduced into evidence by both the Plaintiff and the 1st Defendant. The plan indeed shows that plot numbers 3 and 17 are two distinct plots in L.R 31/18. Further, the two plots are not adjacent to each other. Ultimately, the Plaintiff’s claim that the two properties are one has not been established.
56. Having established that the two plots are distinct, the next issue is on their proprietorship. It is not disputed that the Plaintiff is the proprietor of plot number 17 situate on L.R 31/18. The 2nd Defendant concedes that the Plaintiff’s documents in respect of his ownership thereof are legitimate. The 1st Defendant lays no claim to this plot.
57. The Plaintiff however seeks to impugn the 1st Defendant’s ownership of plot number 3. His claim in this respect being that the same is his plot number 17 and that the 1st Defendant’s acquisition thereof was actuated by fraud.
58. It is trite that allegations of fraud must be specifically pleaded and proved. This was affirmed by the Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia* [2020] eKLR, in which the court cited the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, where 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

59. Speaking to the standard of proof, the Court of Appeal in *Moses Parantai*(supra) observed as follows:

“..... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.”

60. The particulars of fraud as pleaded by the Plaintiff include the sale and purchase of his property, plot 17, under the guise that it is plot 3 with the intent to deprive him of the property and trespass thereon.

61. As discussed above, the Plaintiff has not demonstrated that the two plots make reference to the same parcel of land being his plot number 17. It therefore follows that his allegations of fraud, being founded on the claim that the two parcels are one, also fails. In the same vein, the claim of breach of contract being founded on the assertion that the 2nd Defendant sold to the 1st Defendant his plot number 17 fails.

62. During the 1st Defendant’s testimony on cross-examination, it was conceded that the receipts adduced do not specifically reference plot number 3. Questions also arose as to why there were discrepancies in the names receipted— “Muchai Njagwi & Partners” and “Muchai Gachagwi & Partners”—to which DW1 responded that they all referred to the same entity, the 1st Defendant.

63. Apart from this, however, the 1st Defendant’s title was not directly challenged. The certificate of ownership on record explicitly identifies plot number 3 as belonging to the 1st Defendant. Further, the payment receipts have been validated by the 2nd Defendant as legitimate. The Plaintiff has neither contested the authenticity of this certificate nor provided contrary evidence to demonstrate any irregularity in the 1st Defendant’s ownership.

64. Ultimately, the 1st Defendant’s title has not been impugned and the court finds that plot number 17 belongs to the Plaintiff whereas plot 3 belongs to the 1st Defendant.

65. The Plaintiff and the 1st Defendant each asked the court to restrain the other from interfering with their plots. Essentially, each claim trespass. According to the *Trespass Act*, trespass means:

“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”

66. Similarly, Clerk & Lindsell on Torts 18th Edition at Paragraph 18-11 denotes trespass to mean:

“any unjustifiable intrusion by one person upon land in possession of another...”

67. As aforesaid, the court has found that plot number 17 belongs to the Plaintiff whereas plot number 3 belongs to the 1st Defendant. While the Plaintiff is categorical that the 1st Defendant has trespassed onto his property, no evidence has been given in this respect.

68. On the contrary, the evidence points to a different set of circumstances being that the Plaintiff has trespassed onto the 1st Defendant’s property. This has been highlighted by his own witness, PW2, the valuer, who went to ground and identified plot number 3 as the plot on which the two storey building allegedly build by the Plaintiff stands.



69. That being so, it is the court's finding that the Plaintiff has trespassed onto the 1st Defendant's suit property.
70. In the end, the court finds that the Plaintiff has not established his case, while the 1st Defendant has established his counterclaim. Consequently, the court grants the following reliefs:
- a. The Plaintiff's suit is dismissed.
 - b. The 1st Defendant's Counter-claim is allowed as follows:
 - i. An order does hereby issue directing the Plaintiff to forthwith vacate the suit property, being plot number 3 and and remove all developments thereon within 90 days of the date of this Judgment.
 - ii. In default of (i) above, the 1st Defendant is at liberty to remove such developments on the suit property at the Plaintiff's cost.
 - iii. A permanent injunction does hereby issue restraining the Plaintiff through himself, his servants, agents or howsoever from trespassing, alienating, transferring, charging, constructing or in any other way dealing or disposing of the 1st Defendant's property being plot number 3 in Lucky Summer Estate Co Ltd.
 - iv. The Plaintiff shall bear the costs of the suit and the Counter-claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF JANUARY, 2025.

O. A. Angote

Judge

In the presence of;

Mr. Muhia for 1st Defendant

Mr. Ndurumo for 2nd Defendant

Mr. Orende for Plaintiff

Court Assistant: Tracy

