



Busuru & Busuru Investments Limited v Waraba & another (Environment & Land Case 34 of 2018) [2023] KEELC 888 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 888 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 34 OF 2018**

BN OLAO, J

FEBRUARY 15, 2023

BETWEEN

BUSURU & BUSURU INVESTMENTS LIMITED PLAINTIFF

AND

PIUS BARASA WARABA 1ST DEFENDANT

JOY AMBICHE 2ND DEFENDANT

JUDGMENT

1. Busuru and Busuru Investments Ltd (the plaintiff herein) moved to this Court vide its plaint dated July 2, 2018 and filed on July 4, 2018 seeking against Pius Barasa Waraba and Joy Ambiche (the 1st and 2nd defendants respectively) judgment in the following terms with respect to the land parcel No East Bukusu/South Kanduyi/3444 (the suit property):
 - a. An order for the cancellation of the title deed issued to the defendants on November 12, 2003 and rectification of the register to vest the title of land parcel No East Bukusu/South Kanduyi/3444 to the defendant company (must be a typing error) Busuru and Busuru Investments Ltd.
 - b. A permanent injunction restraining the defendants, their agents, representatives, assigns and any persons claiming through them from alienating, trespassing occupation and interfering with the plaintiffs lawful use and occupation of the land parcel No East Bukusu/South Kanduyi/3444.
 - c. Costs and interest at court rates.
 - d. Any other relief this Honourable Court shall deem fit to grant.
2. The basis of the plaintiff's case is that it is a limited liability Company and has since June 2, 1995 been the absolute owner and proprietor of the suit property. That it has not at any given time leased,



- disposed, alienated or handed vacant possession of the suit property to any person including to the defendants herein or even charged it to any financial institution.
3. The plaintiff avers that the defendants herein have fraudulently and unlawfully transferred the suit property into their names without the consent of the plaintiff. The particulars of fraud and irregularity on the part of the defendants are pleaded in paragraph 10(a) to (e) of the plaint as follows:-
 - a. Causing the LR No East Bukusu/south Kanduyi/3444 to be registered in their names when fully aware that the land belonged to the plaintiff.
 - b. Fraudulently executing transfer documents in their favour without the consent and knowledge of the plaintiff company.
 - c. Presenting forged transfer forms to the Land Registrar in execution of the transfer.
 - d. Presenting falsified land transfer documents and consent to the Land Registrar Bungoma.
 - e. Obtaining title deed to the suit parcel of land unlawfully without consent from the plaintiff company.
 4. The plaintiff pleads therefore that it has been occasioned massive losses and damage as a result of the defendants' unlawful action and that the defendants have no proprietary interest in the suit property and their title thereto is null and void.
 5. Together with the plaint, the plaintiff filed the statement of its director Busuru Richard Mark and a list of documents also dated June 2, 2018.
 6. In his statement, Busuru Richard Mark repeated the contents of the plaint adding that he is a co-director of the plaintiff which was duly registered on December 19, 1991 under certificate NO 48329. That the plaintiff, as the proprietor of the suit property, has never charged, gifted, alienated, transferred gifted or handed possession thereof to any person, institution or organization. That the defendants have fraudulently and unlawfully transferred it to their names hence this suit.
 7. The plaintiff filed the following documents:
 1. Copy of identity card of Busuru Richard Mark.
 2. Copy of Green Card for the land parcel No East Bukusu/South Kanduyi/3444.
 3. Copy of certificate of official search for the land parcel No East Bukusu South Kanduyi/3444.
 4. Copy of certificate of incorporation for Busuru And Busuru Investments Ltd.
 5. Copy of title deed for the land parcel No East Bukusu/South Kanduyi/3444.
 6. Copy of mutation form for the land parcel No East Bukusu/South Kanduyi/3444.
 7. Copy of Memorandum of Association of Busuru And Busuru Investments Ltd.
 8. The defendants who are a couple filed a joint statement of defence dated August 29, 2018 in which they denied that the plaintiff is the registered proprietor of the suit property. Instead, the defendants pleaded that they are the joint registered proprietors of the suit property having acquired the same for valuable consideration and are therefore entitled to the enjoyment of all the rights and privileges apartment thereto.
 9. The defendants pleaded further that in or about the year 2000, M/S Nyaluoyo Auctioneers put up for sale by way of a Public Auction land parcel No East Bukusu/South Kanduyi/3443



in exercise of the statutory power of sale by Housing Finance Company Of Kenya as chargees. That they were interested in the said land so they attended the auction and emerged the highest bidders at Kshs 1,050,000. The said property was transferred to them.

10. Then sometimes in the year 2003, one Busuru Richard Mark acting through Peter Dindi approached them indicating that included within the property which they had earlier purchased through the auction, was another property being the suit property what was also up for sale at a non-negotiable price of Kshs 550,000. Since the suit property was literally part of their compound, and on the representation of the said Peter Dindi acting as agent, they executed a sale agreement and acquired the suit property at a consideration of Kshs 550,000. That the defendants paid the consideration of Kshs 500,000 by a cheque NO 038762 dated November 8, 2003 in favour of the plaintiff and cash Kshs 50,000 collected by the said Peter Dindi as agent for Busuru Richard Mark. The defendants are therefore bona fide purchasers for value.
11. The defendants denied all the allegations of fraud and illegality as set out in paragraph 10 of the plaint and put the plaintiff to strict proof thereof. They added that as bona fide purchasers, they have been in exclusive, open and continuous possession of the suit property in good faith and denied being privy and/or accessory to any fraudulent dealings on the suit property. They therefore sought the dismissal of the plaintiff's suit adding that they would raise the following preliminary issues:
 1. The suit offends the provisions of the *Limitation of Actions Act* Cap 22 Laws Of Kenya.
 2. The suit is bad in law and does not disclose any reasonable cause of action as the defendants are not responsible for land registration neither do they issue any titles.
12. The defendants filed separate but similar statements in support of their case and which are basically a rehash of their defence.
13. In those statements filed herein on September 3, 2018, they state how on August 8, 2000 they purchased through a Public Auction conducted by Nyaluoyo Auctioneers a parcel of land known as East Bukusu/South Kanduyi/3443 which had an incomplete mansion and was being sold by the Housing Finance Company Of Kenya exercising its power of sale as chargee. They were the highest bidder and paid Kshs 1,050,000 for the said land which had a stone fence around it making it one complete compound with the suit property.
14. Then on November 4, 2003 Busuru Richard Mark approached the 2nd defendant and informed her that the suit property which was within the land which the defendants had previously purchased following the public auction was available for sale at Kshs 550,000. The defendants agreed to buy the suit property as they would be greatly inconvenienced if the same was purchased by someone else since it was in the same compound with the land parcel No East Bukusu/south Kanduyi 3443 which the defendants had purchased earlier.
15. A sale agreement was executed and the sum of Kshs 550,000 was paid through a Bankers cheque for Kshs 500,000 and the balance of Kshs 50,000 was paid in cash. Subsequently, the suit property was registered in their names in equal shares. They therefore denied the allegations of fraud and illegality adding that they are *bona fide* purchases for value and they are therefore surprised that since 2003, a period of over 15 years, the plaintiff has not raised any claim over the suit property.
16. They therefore sought the dismissal of the suit.
17. The defendants filed the following documents on September 3, 2018:



1. Copy of sale agreement dated November 4, 2003 in respect of the suit property between the defendants and richard m. busuru to which is annexed ID Card No 48***** for Busuru Richard Mark.
18. The defendants also filed a supplementary list of documents dated March 14, 2019 containing the following:
 1. Copy of Bankers cheque NO 03**** dated November 18, 2003 for Kshs.500,000 in the name of Richard Mark Busuru.
 2. Letter dated November 4, 2003 addressed to the chairman Land Control Board Kanduyi Division By Busuru R. M. I.R.O A Sale Of Land Lr No E. Bukusu/s. Kanduyi/3444.
19. The plaintiff filed a reply to the defence in which it reiterated the contents of its' plaint and added that it raises a cause of action against the defendants.
20. The plenary hearing commenced on October 2, 2019 and ended on June 30, 2022.
21. Busuru Richard Mark (PW1) a director of the plaintiff was the only witness who testified on its behalf. He adopted as his evidence the statement dated July 2, 2018 whose contents I have summarized. He also produced as the plaintiff's documentary evidence the documents filed on July 4, 2018.
22. The defendants also adopted as their evidence the contents of their statements filed on September 3, 2018. They also produced as their documentary evidence the documents filed on September 3, 2018 and the supplementary list of documents dated March 14, 2019 and filed on November 15, 2019.
23. The defendants also called during the plenary hearing Samson Otieno Odipo (DW3) a Customer Experience Executive from ABSA Bank Bungoma and who, although he did not record any statement, was allowed to testify without objection. His testimony was brief and he produced a copy of the Banker's cheque NO 03XXXX for Ksh 500,000 dated November 18, 2003. He said it was drawn in favour of Richard Mark Busuru and was paid.
24. Submissions were thereafter filed both by Mr. Otsiula instructed by the firm of JB Otsiula & Associates Advocates for the plaintiff and by Mr Makali instructed by the firm of Jo Makali & Company Advocates for the defendants.
25. I consider the following to be the issues for my determination in this dispute:
 1. Whether the defendants obtained the registration of the suit property fraudulently or illegally.
 2. Whether Peter Dindi had the actual or ostensible authority of Busuru Richard Mark to contract with the defendants over the purchase of the suit property.

It is clear from the Green Card that the suit property was registered in the name of the plaintiff on June 2, 1995. Since June 12, 2003, it has been registered in the names of the defendants who hold a title thereto issued on November 12, 2003. It is the plaintiff's case that the defendants obtained the title fraudulently and illegally particulars whereof have been pleaded in paragraph 10 (a) to (e) of the plaint.

26. Having pleaded fraud and illegality, the onus was on the plaintiff to prove those allegations. Sections 107, 108 and 109 of the *Evidence Act* provide that:

107(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.



- 108: The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
- 109: The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
27. The law on proof of fraud is now clear as in buttressed in the case of [*Vijay Morjaria v Nansingh Madhusing Darbar & Another*](#) [2000 eKLR] where Tunoi JA stated that:

“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.” Emphasis mine.

As regards the standard of proof, the Court of Appeal stated as follows in the case of [*Kinyanjui Kamau v George Kamau*](#) 2015 eKLR:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G&F) 742 where the Court said 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” Emphasis mine.

The plaintiff distinctly pleaded fraud and irregularity in the plaint. But it needed to go further and adduce evidence of those allegations of forgery and falsification of documents. No such documents were produced as part of the plaintiff’s evidence. When he was cross-examined by Mr Makali, he said:

“It is my case that the defendants procured the land in dispute fraudulently. I have cited the particulars of fraud in paragraph 10 of my plaint. The defendants are not Land Registrars. I have not sued the Land Registrar. I have not annexed any transfer documents in my plaint or a forged transfer form. I have not obtained any falsified transfer documents.”

It cannot be sufficient proof for the plaintiff to allege forgery of documents without even making the said forged documents available in evidence. As already stated in the cases cited above, forgery or fraud are serious allegations which must be proved to the required standard and cannot be left to be inferred from facts. From my assessment of the evidence herein, the plaintiff has not adduced sufficient evidence to prove that fraud or forgery.

28. The plaintiff also pleaded that the suit property was transferred to the defendants without its consent or knowledge and therefore the defendants have no proprietary interest therein. In answering this question, the court must consider whether the late Peter Dindi had the authority, ostensible or otherwise, to enter into this sale agreement dated November 4, 2003 by which the defendants acquired ownership of the suit property. It is clear from the Memorandum and Articles of Association of the plaintiff – specifically paragraph 18 thereof – that it had only two directors being Richard Mark Busuru (PW1) as his wife Salima Mdzomba Busuru who is deceased. Therefore, Busuru Richard Mark or Richard Mark Busuru remained the only director of the plaintiff and could transact business on its behalf as provided under paragraphs 11 and 12 of the Memorandum and Articles of Association. It



is the defendants' case that on or about November 4, 2003, one Peter Dindi (now deceased) acting as agent of Busuru Richard Mark offered to sell them the suit property. In paragraph 9 of his statement, the 1st defendant has stated as follows:

“9. That on or about November 4th 2003 Busuru Richard Mark through one of his agents by the name of Peter Dindi approached my wife the 2nd defendant herein and informed her that the fenced off property included LR NO E Bukusu/S KAnduyi/3444 measuring half an acre (0.2 Hectares) and that the same was up for sale and that the purchase price had been set at Kenya Shillings Five Hundred Fifty Thousand Only (Kshs 550,000) which sum though appearing inflated, my wife informed me that we consider buying it as it would be a great inconvenience if the said parcel was sold to somebody else who we would have to share the same fence compound with.”

On her part, the 2nd defendant has stated in paragraph 11 of her statement:

“11: That in the year 2003, Busuru Richard Mark through one of his agents by the name of Peter Fifi Dindi, approached me with the information that the fenced off property included L.R NO E. Bukusu/s. Kanduyi/3444 also measuring half an acre (0.2 Hectares) and was up for sale at a non-negotiable price of Kenya Shillings Five Hundred fifty Thousand kshs.550,000.00 inclusive of 10% commission fees.”

When he was cross-examined by Mr Makali, Busuru Richard Mark denied having authorized Peter Dindi to transact any business on his behalf. He also denied having received the Kshs 500,000 which the defendants claim to have paid him through the cheque NO 03XXXX being part of the purchase price for the suit property. He however admitted that Peter Dindi did some land transactions for him in 2003. This is what he said in cross-examination:

“I know Peter Dindi. He passed away. He hailed from a neighbouring village to my village. It is true that in 2003, I was using him to do land transactions on my behalf. I can see in agreement dated November 4, 2003 the said Peter Dindi signed as a witness. The stamp of the plaintiff Company is not genuine. This is the seal of the company (shows).”

Clearly, Busuru Richard Mark wants to distance himself as much as possible from Peter Dindi in on far as the sale of the suit property to the defendants is concerned.

29. In him submissions, Mr Otsiula has stated as follows at page 4:

“It is the plaintiff's position that he did not execute any transfer in favour of the defendants nor attend the Land Control Board. He also stated that he did not provide any documents to the said Peter Dindi who is allegedly acting as an agent of the plaintiff. The 1st defendant has admitted that the search he carried out showed that the plaintiff was the owner of the land and yet he went ahead to purchase land from a Peter Dindi who had no title to the suit land. It is trite and settled law that a person cannot convey that which he holds not.”

Counsel then goes on to cite the case of *Munyu Maina v Hiram Gathiba Maina* CA Civil Appeal No 239 of 2009 [2013 eKLR] where it was held as follows:

“We state that when a registered proprietor's 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.”

Counsel for the plaintiff has also submitted that:

“You Lordship, the fact that even DW1, on cross-examination stated before Court that the said Peter Dindi is the one who signed the sale agreement on behalf of Richard Mark Busuru and the fact that he did not indicate that the same was being signed on behalf of the said Richard Mark Busuru.

Secondly, the 2nd Director ought to have been a witness in the said agreement. There is no evidence to that effect. This confirms the plaintiff’s testimony that he never signed any documents giving ownership to the defendants neither was it witnessed by the 2nd Director hence the entire transaction being fraudulent in nature. Let us not forget the fact that the National Identification Card produced by the Defendants claiming to belong to the plaintiff was no longer being used by the defendant (sic) being an old generation national identification card.”

30. It is on record from the evidence of Busuru Richard Mark (PW1) that his wife Salima Mdzomba Busuru and who was the only the other director of the plaintiff passed away in June 2012. She therefore could not have been available to witness the sale agreement executed between Peter Dindi and the defendants on November 4, 2013. And with regard to the identity card number appearing on the sale agreement, Busuru Richard Mark (PW1) said the following when led in his evidence in chief by his counsel Mr Otsiula:

“The I.D Card NO 4881***7 indicated there was not my ID in 2003. My ID in 2003 was No 48***4 It did not have the digit 67. I also did not sign the agreement dated November 4, 2013. It is not even signed. It only the name as M BUSURU. I am not aware of any transfer of the suit land by plaintiff to the defendant.”

It is not really in dispute that the identity card NO 48***7 produced by the defendants belongs to Busuru Richard Mark although he says it was not in use in 2003 when the sale agreement was executed. However, he does not explain how that identity card was in the possession of Peter Dindi on November 4, 2003 when the sale agreement was executed in respect of the suit property with the defendants. It must also be remembered that Peter Dindi was selling the suit property not as his own but as is clear from the sale agreement, the seller is indicated as Richard M. Busuru. He then goes on to add that the seal of the plaintiff affixed to the sale agreement is not genuine. He does not however say if he ever reported this matter to the Police for their action. There is also the evidence from Samson Otieno Odipo (DW3) and who is an employee of ABSA BANK that the cheque NO 0xxxxxx for Kshs 500,000 drawn in favour of Richard Mark Busuru was paid. That means that Peter Dindi did not pocket the Kshs 500,000 which must have been taken by Richard Mark Busuru the beneficiary. He (Peter Dindi) only pocketed the Ksh 50,000 most probably as this commission as he had informed Joy Ambiche (PW2) when he approached her saying the suit property was for sale at the “non-negotiable price of Kenya Shillings Five Hundred and Fifty Thousand only (Kshs 550,000.00 inclusive of 10% commission fees.” All the above taken together with the fact that Busuru Richard Mark (PW1) admitted that Peter Dindi used to carry out land transactions on his behalf in 2003, and further, that the defendants



have remained in occupation and possession of the suit property since 2003, it can only be a monumental travesty of justice for this Court to arrive at any other conclusion than that at all material times, Peter Dindi was acting as the agent of Busuru Richard Mark (PW1) and was authorized to sell the suit property.

31. Even though Busuru Richard Mark (PW1) has denied authorizing Peter Dindi to transact on his behalf with respect to the suit property, the circumstances obtaining in this case and which I have already referred to above clearly demonstrate that Peter Dindi had apparent authority to execute the sale agreement transferring the suit property to the defendant on behalf of the plaintiff. Apparent authority also known as ostensible authority is defined *BLack's Law Dictionary* 10Th Edition as:

“Authority that a third party reasonably believes an agent has based on the third party’s dealings with the principle even though the principal did not confer or intend to confer the authority. Apparent authority can be created by law even when no actual authority has been confirmed.”

Therefore, in as much as Busuru Richard Mark (PW1) may wish to deny that Peter Dindi was not his agent (notwithstanding his own admission that infect Peter Dindi carried out land transactions on his behalf in 2003), there is sufficient evidence upon which this Court can infer that the said Peter Dindi had apparent/ostensible authority to execute the sale agreement dated November 4, 2003. The plaintiff was therefore bound by the conduct of Peter Dindi with regard to the sale of the suit property to the defendants.

32. Busuru Richard Mark also denied having authorized any person to appear before the Land Control Board on behalf of the plaintiff to seek the consent for transfer. The sale agreement does not state that it was subject to the provisions of the Land Control Board. The Court cannot therefore presume that it was subject to provisions of the *Land Control Act*. And even if it was, this Court would be guided by the decision of the Court of Appeal in the case of *Kiplagat Kotut v Rose Jebor Kipngok* 2019 eKLR where it said:

“We hasten to state that the *Land Control Act*, Cap 302 of the Laws of Kenya was never intended to be an instrument or statue for unjust enrichment. It was never meant to exempt a mala fide vendor from his contractual obligations. The statute comes to the aid of persons who act in good faith without taking undue advantage of the other party. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust come into play to restore property to the rightful owner and to prevent unjust enrichment.”

This court has already confirmed, based on the evidence of Samson Atieno Odipo (DW3) that the cheque for Ksh.500,000 was drawn in favour of Richard Mark Busuru and that it was paid. It would be an unconscionable act of unjust enrichment to allow him to keep the Ksh 500,000 and at the sometime, cancel the registration of the defendants as proprietors of the suit property. That would clearly be inequitable. And even though it was not pleaded, the doctrine of proprietary estoppel comes into the aid of the defendants, rather than the plaintiff, in this case.

33. The upshot and all the above is that having considered all the evidence herein, this Court makes the following disposal orders:
1. The plaintiff’s suit is dismissed.
 2. The plaintiff shall meet the defendant’s costs.



JUDGMENT DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 15TH DAY OF FEBRUARY 2023 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO PARTIES. RIGHT OF APPEAL.

BOAZ N. OLAO

JUDGE

