



**Niedemeier v Hamid (Environment & Land Case 20 of 2019)
[2023] KEELC 21579 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 20 OF 2019
MAO ODENY, J
NOVEMBER 16, 2023**

BETWEEN

WERNER SEBASTIAN NIEDEMEIER PLAINTIFF

AND

AMIN MOHAMED HAMID DEFENDANT

JUDGMENT

1. By an Amended Plaintiff dated March 15, 2021, the plaintiff herein sued the defendant seeking the following orders;-
 - a. The Defendant, his agents, tenants, servants and/or employees currently residing and occupying the upper floor (1st floor) of the house situated in plot, parcel (portion) number 4850 (original number 1935/590) Malindi municipality registered in the name of the plaintiff be and is hereby ordered to vacate and render vacant possession of the said suit property.
 - b. The honourable court be pleased to issue a permanent injunction order against the defendant, his agents, tenants, servants and/or employees from occupying, trespassing, undertaking any development and/or constructing, renting out, entering and/or in any manner whatsoever from interfering with the plaintiff's peaceful enjoyment of his parcel (portion) number 4850 (original number 1935/590) Malindi municipality together with the developments made therein.
 - c. A declaration that the agreement dated October 15, 2013 purported to have been executed by the defendant is fraudulent, null and void and unenforceable in the circumstances.
 - d. An order for general damages for trespass against the defendant.



- e. An order for the payment of mesne profits of Kshs 25,000/- per month being rent collected by the defendant as from March 12, 2011 till the date vacant possession is rendered by the defendant.
 - f. An order for payment of Kshs 17, 514/- being water bill paid by the plaintiff, but was utilized by the Defendant and his tenants.
 - g. The honourable court do issue an order directed to the officer in charge of station (OCS) Malindi Police Station to enforce, supervise and ensure compliance with prayer (a) and (b) above.
 - h. The honourable court be pleased to award interest at court rates on prayer (c), (d) and (e) above from March 12, 2011 till payment in full.
 - i. Costs of this suit.
2. In response to the plaintiff's claim, the defendant filed a Counterclaim seeking the following orders:
- a. The plaintiff his servants, agents and/or any person acting under him be restrained by way of an injunction from occupying, trespassing, entering, interfering in any manner whatsoever with the defendant's peaceful enjoyment of the two houses built on the 1st floor of all that building standing on parcel of Land No 4850 (original number 1935/590) within Malindi municipality.
 - b. The plaintiff/respondent, his agents, assigns, representatives or otherwise be compelled to unconditionally restore the defendants water pipes and make good any other loss that he illegally caused to be occasioned or removed from the Defendant/Applicants(sic) two houses built on the 1st floor on parcel of land No 4850 (original number 1935/590) within Malindi municipality.
 - c. A declaration that the agreement dated October 15, 2013 is a valid and enforceable contract by law and that by dint of its express provisions a declaration does hereby issue that the Defendant is the rightful owner of (two houses/top floor) the 1st floor on parcel of land No 4850 (original number 1935/590) within Malindi municipality.
 - d. Costs of the suit.
 - e. Any other relief this court may deem fit to grant.

Plaintiff's Case

3. PW1 Werner Sebastian adopted his Witness Statement s dated April 23, 2019 and March 25, 2021 respectively and also produced documents in the list of documents dated April 23, 2019, as PEXH 1-9.
4. PW1 told the court that he is the registered owner of title number 4850 (original number 1935/590) Malindi Municipality, which he purchased from Malindi Estates Limited, *vide* a sale agreement date December 21, 2005.
5. It was PW1's evidence that the suit property was subsequently registered in his name *vide* an indenture dated July 27, 2006. He also stated that he paid transfer fees, stamp duty, land rates, deed plans and clearance certificates, which he produced as exhibits.
6. PW1 testified that he then constructed a two bedroomed house on the ground floor where he resided; and another two bedroomed and one bedroomed house on the 1st floor.



7. PW1 further told the court that he travelled back to his home country Germany leaving the defendant to serve as his caretaker for the suit property. That sometime in the year 2013, the defendant cautioned him to never return to Kenya due to an alleged warrant of arrest issued against him.
8. It was PW1's testimony that he returned to Kenya on March 19, 2015 only to find that the defendant had rented out the said houses to third parties, collecting a total of Kshs. 25,000/- from the two houses on the 1st floor and accumulated a water bill of Kshs. 17, 514/-, which he was forced to settle to avoid disconnection.
9. According to PW1, he left the country on September 27, 2013 through Mombasa airport and therefore he could not have signed the agreement bequeathing the defendant the suit land dated October 15, 2013 as claimed by the defendant. He added that he signed a Power of Attorney dated March 9, 2011 so that the defendant could help him with court cases.
10. On cross-examination by Mr. Matini, counsel for the Defendant, PW1 told the court that the Power of Attorney he signed was not to find a buyer for the suit property on his behalf. He stated that the defendant attended court on his behalf while he was in Germany. PW1 further stated that he exited Kenya through the Tanzania –Namanga border following the defendant's advice to avoid arrest. He told the court that while he was away, he sent the Defendant a total of 1000 Euros through his lawyers, for construction of the 1st floor.
11. PW2 Moses Taifa Zadock, the plaintiff's gardener, equally adopted his Written Statement dated April 16, 2020 and testified that he first met the plaintiff in 2002 when he had visited as a tourist. That the plaintiff met the defendant only to assist him with translation when he had a misunderstanding with his then girlfriend. According to PW2, the plaintiff never sold the 1st floor of the house to the defendant.
12. PW2 told the court on cross-examination that he never witnessed the signing of the agreement but was present when the plaintiff went to report the alleged forgery to the police.

Defendant's Case

13. DW1 Morris Mwambui Kupalia-DW1, an advocate adopted his Written Statement dated September 11, 2019 and testified that he prepared a special power of attorney (DEXH-1) for the plaintiff giving the defendant authority to act on his behalf in respect of the suit property.
14. DW1 stated that he also prepared an agreement dated March 9, 2011 (DEXH-2) which was in respect of caretaker services by the Defendant. He further prepared an agreement dated October 15, 2013(DEXH-3) where the plaintiff transferred the 1st floor of the house within the suit property, to the defendant. DW1 told the court that the documents were properly executed in his presence and registered at the Mombasa Lands Registry.
15. DW2 Chief Inspector Daniel Gutu, a forensic document examiner at the DCI Forensics Department testified and produced as DEXH-4 a forensic report dated July 23, 2015, which he prepared upon examination of DEXH1-3 and sample signatures of the parties herein. He stated that the sample signatures were from the parties but he did not meet them.
16. The defendant testified as DW3 and adopted his Written Statements dated August 5, 2019, May 22, 2020, August 4, 2020 and April 13, 2021 respectively. He also produced as exhibits the documents in his lists of documents dated August 5, 2019, July 30, 2020 and further lists of documents dated April 7, 2021 and October 11, 2019.



17. It was DW3's evidence that he does not dispute the fact that the plaintiff was the owner of the suit land but his contention however was that he constructed the 1st floor to completion upon being gifted the same by the plaintiff around the year 2013. He stated that the gift was in respect to the assistance he gave the plaintiff in Malindi CMCC No. 29 of 2011, where a warrant of arrest had been issued against him.
18. DW3 told the court that each unit on the suit property initially had a separate water and electricity meter until the plaintiff destroyed his pipes and denied the allegation that the plaintiff sent him money to construct the houses on the 1st floor.
19. On cross-examination by Mr. Sumba counsel for the plaintiff, DW3 testified that he was not aware how the warrant of arrest was lifted. He added on re-examination that he had a power of attorney to sell the suit property and to assist the plaintiff in civil cases.
20. DW4 Mohamed Omar Mohamed also adopted his Written Statement dated October 11, 2019 and stated that he was contracted by the defendant in the presence of the plaintiff to make 8 doors which he did. He also installed the fittings in the house.
21. DW5 Ali Juma equally adopted his Written Statement filed October 11, 2019 and testified that he was contracted by the defendant to build the house.
22. DW6 Kadenge John also stated that he was contracted by the defendant sometime in 2014 to do plumbing works on the houses on the 1st floor, which he did and as at that time, the plaintiff was in the house on the ground floor.
23. DW7 Joseph Tesa a freelance German, English translator similarly adopted his Written Statement dated October 10, 2019 and produced as DEXH 10 the document in a list of documents dated April 7, 2021.

PLAINTIFF'S SUBMISSIONS

24. Counsel submitted that the plaintiff's title was indivisible and that the defendant could not be issued a separate title for the 1st floor. He argued that the defendant could not have any claim for putting up developments on the plaintiff's land yet he had no title over the suit property. Counsel relied on the case of *Alwi Mohamed Alwi v Swaleh Omar Awadh*, Malindi ELC Case No 44 of 2015 [2015] eKLR.

Defendant's Submissions

25. Counsel for the defendant identified eight issues for determination, which he condensed into five.
26. On the first issue whether there was an agreement between the plaintiff and the defendant and whether the same was entered into freely without duress and coercion, counsel submitted that the agreement dated October 15, 2013 was entered into voluntarily by both parties hence it was valid.
27. On validity of contracts, counsel relied on the cases of *National Bank of Kenya Ltd v Pipeplastic Samkolit* 2 EA 503; and *Lalji Karsan Rabadia and 2 others v Commercial Bank of Africa Limited* [2015] eKLR.
28. The second issue as to whether the plaintiff had proved his case to warrant an order of permanent injunction, counsel argued that the plaintiff had failed to meet the requirement under section 107 of the *Evidence Act* that he who alleges must prove. That the plaintiff did not prove that his signature on the agreement was forged or that the defendant unlawfully interfered with the suit property.
29. On whether there existed a valid gift, counsel relied on the case of *Re Estate of the Late Gideon Mantbi Nzioka (Deceased)* [2015] eKLR and *In Re Estate of Godana Songoro Guyo (Deceased)* [2020] eKLR and submitted that by virtue of the agreement, there existed a valid gift *inter vivos* between the parties



herein. He argued that a gift that is proved to consist of all required elements may not be revoked except under the circumstances highlighted under section 126 of the *Transfer of Property Act*. Counsel added that the plaintiff's argument that separate titles could not be issued in the present case was legally baseless since the *Sectional Properties Act, 2020* provides a well-defined procedure for issuance of titles for units consisted in one building.

30. On the fourth issue as to whether the plaintiff was entitled to the reliefs sought, counsel submitted that having failed to establish that the agreement dated October 15, 2013 was marred with fraud, the plaintiff was not entitled to the orders sought.
31. Counsel submitted that allegations of fraud were serious issues that ought to have been strictly proved, as it was held in the case of *Mirko Blaeterman (Suing through his power of Attorney- Shabir Hatim Ali) and another v David Mwangi Muiruri and 2 others* [2015] eKLR.

Analysis And Determination

32. The issues for determination that flow from the pleadings and the evidence are as follows;-
 - a. Whether there is an enforceable agreement to transfer part of the suit property to the defendant.
 - b. Whether the plaintiff is entitled to an order of permanent injunction against the defendant.
 - c. Whether the plaintiff is entitled to general damages for trespass and mesne profits.
 - d. Whether the plaintiff is entitled to special damages as pleaded.
 - e. Whether the defendant is entitled to the orders sought in his counterclaim.
33. It is not in dispute that the suit property is registered in the name of the plaintiff. It is further not disputed that the plaintiff constructed the house on the ground floor to completion but did not complete the 1st floor.
34. The defendant however alleged that on October 15, 2013, the plaintiff agreed to transfer the 1st floor of the building to him for consideration of the defendant's effort in helping the plaintiff solve court issues in CMCC No 29 of 2011. The plaintiff on the other hand stated that the said agreement dated October 15, 2013 was fraudulent as he did not sign it and that on the alleged date that the agreement was signed, he was away in Germany as per his passport entry and exit pages produced in court.
35. In the case of *Ratilal Gordhanbhai Patel -v- Lalji Makanji* (1957) EA 314, the Court of Appeal established the threshold on the burden of proof required in civil cases founded on fraud when the court observed that;-

“There is one preliminary observation which we must make on the learned Judge's treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard required. 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...”

36. It is also a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. Section 107 of the *Evidence Act*, cap 80 provides that;-
 - (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.
37. Did the plaintiff therefore prove the allegations of fraud against the defendant? A perusal of the said agreement reveals that the agreement was made on October 15, 2013. I have also seen a copy of the plaintiff's travel documents, which reveal that the plaintiff exited Kenya from Moi International Airport on September 27, 2013. He returned sometime in 2015. It is obvious that the plaintiff was not in Kenya when the said agreement was signed.
38. DW1 implied that the agreement was signed before October 15, 2013, on a date he could not remember, but was not dated until when lodged at the lands office as was their practice. DW1's explanation was that the agreement was then lodged at the Lands registry on October 15, 2013. However, looking at the lands registry stamp on the agreement, and the KRA stamp duty receipt it is evident that the agreement was received on December 2, 2013. It is therefore safe to disregard that explanation and conclude that the agreement was signed on October 15, 2013.
39. The defendant exhibited a forensic document examination report dated July 23, 2015. According to that report, DW2 made a comparison of the plaintiff's signatures and established that the signature on a copy of the agreement and the samples taken from the plaintiff were made by the same author.
40. That notwithstanding, what remains a mystery in this case is how the plaintiff managed to sign the agreement when he was not in Kenya on the material date. No reasonable explanation was given by the defendant who wants this court to believe that the plaintiff indeed signed the agreement. The original agreement was not even availed to establish the true position. This can only mean one thing, that there was forgery surrounding the agreement.
41. The law on privity of contracts is settled that it is not the business of courts to rewrite contracts between parties as the said parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. In the present case, I am satisfied that the allegations of fraud were proved.
42. The defendant's argument was that the agreement qualified as a gift *inter vivos*. [*Black's Law Dictionary*](#) Tenth Edition defines a gift as the voluntary transfer of property to another without compensation. It further stipulates the essentials to make a gift as follows:
- The donor must have the capacity to make a gift; he must have an intention to make it; his intention must be to make it now; and not in the future; he must deliver, either actually or constructively; the thing given to the donee, releasing all dominion over the thing given and investing the donee with whatever dominion he possessed; there must be an acceptance by the donee; it must be irrevocable, unless the consent of both the donor and donee is first obtained; it must be without valuable consideration, however small, for the transaction, it is a contract and not a gift; the thing given must not be indefinite, and the entire transaction must show a valid gift as a whole and not as part."(W.W Thornton, A Treatise of the Law Relating to Gifts and Advancements 2-3 (1893)
43. From the above excerpt, it is clear that the purported gift as claimed by the defendant does not fit that explanation. There must be a voluntary transfer of property to another without compensation and the donor must have an intention to make a gift.
44. The defendant claimed that the gift was given to him on the consideration of the assistance that he gave the plaintiff in a case at the Chief Magistrates Court being CMCC No 29 of 2011. This goes against the requirement that a gift must be without consideration.



45. If there was, a gift then it should have culminated in delivery of the gift actually or constructively, there was no such delivery actually or constructively. The suit property being immovable property, the final act would have been delivery of the transfer documents or registration of a transfer in favour of the defendant. No such transfer was exhibited. This was aptly explained in *Odunga's Digest on Civil Case Law and Procedure* Vol (III) Page 2417 at paragraph 5484 (d) e – 1 thus:

“...Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.”

46. If a gift is to be valid the donor, in this case the plaintiff, must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do. The conduct of the plaintiff did not at any point from 2013 imply that he had any intentions to perfect the gift; otherwise, he would not have lodged a complaint at the DCI or even filed this suit.

47. In the case of *Re Estate of the Late Gedion Manthi Nzioka (Deceased)* [2015] eKLR, the court held as follows:

“In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*). Section 31 of the *Law of Succession Act* provides as follows with respect to gifts made in contemplation of death:

...For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid.”

48. I have considered the pleadings, the evidence on record and the submissions by parties and come to the conclusion that the plaintiff has proved his case against the defendant save for the claim for mesne profits, which is a special damage, which must be specifically pleaded and proved. The plaintiff did not lead any evidence to prove the same.

49. In the case of *Monica Anyona Dongi v Richard Otieno Okumu* [2019] eKLR the court held that:

“Regarding the appellant’s prayers for mesne profits, the same must have been specifically pleaded and proved to be granted. The Court of Appeal in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR stated:

“This Court in *Peter Mwangi Mbuthia & another vs. Samow Edin Osman* [2014] eKLR expressed that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. It was stated:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us *prima facie*, that there was no evidence to support the actual figure awarded... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne



profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

“In the case of *Karanja Mbugua & another vs Marybin Holding Co. Ltd* [2014] eKLR it was correctly stated that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of order 21, rule 13 of *Civil Procedure Act*. In *Dr J K Bhakthavasala Rao -v - Industrial Engineers, Nellore* AIR 2005 AP 438 it was held that mesne profits by its very nature, involves adjudication of a pure question of fact. “The onus of proving what mesne profits might, with due diligence, have been received in any year lies upon the party claiming mesne profits.”

50. The court will therefore not award general damages for trespass, mesne profits and special damages as pleaded as the plaintiff authorized the defendant to enter the suit property as a caretaker as per the special power of attorney and agreement both dated March 9, 2011.
51. The defendant did not prove his counterclaim and therefore it is dismissed with costs to the plaintiff. The specific orders are as follows:
 - a. The defendant, his agents, tenants, servants and/or employees currently residing and occupying the upper floor (1st floor) of the house situated in plot, parcel (portion) number 4850 (original number 1935/590) Malindi municipality registered in the name of the plaintiff be and is hereby ordered give vacant possession of the suit property within 45 days.
 - b. A permanent injunction order is hereby issued against the defendant, his agents, tenants, servants and/or employees from occupying, trespassing, undertaking any development and/or constructing, renting out, entering and/or in any manner whatsoever from interfering with the plaintiff's peaceful enjoyment of his parcel (portion) number 4850 (original number 1935/590) Malindi municipality together with the developments made therein.
 - c. A declaration is hereby issued that the agreement dated October 15, 2013 purported to have been executed by the Defendant is fraudulent, null and void and unenforceable in the circumstances.
 - d. An order is hereby issued to the Officer in charge of station (OCS) Malindi Police Station to enforce, supervise and ensure compliance with the order of vacant possession after 45 days if there is no compliance.
 - e. Costs of this suit to the plaintiff.
 - f. Defendant's counterclaim is dismissed with costs

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

