



REPUBLIC OF KENYA



**Ahmed v Shee & 7 others (Environment & Land Case 56 of 2019)
[2023] KEELC 16411 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 56 OF 2019**

**MAO ODENY, J
MARCH 23, 2023**

BETWEEN

HASHIM SHARIF ALI AHMED PLAINTIFF

AND

ALI AHMED SHEE 1ST DEFENDANT

SALMA MOHAMED 2ND DEFENDANT

AHMED FAMAU 3RD DEFENDANT

FAIZA MOHAMED OMAR 4TH DEFENDANT

FAHMI ABDERHMAN 5TH DEFENDANT

JOHN CHILUMO MADADU 6TH DEFENDANT

CHIEF LAND REGISTRAR 7TH DEFENDANT

THE NATIONAL LAND COMMISSION 8TH DEFENDANT

JUDGMENT

1. By a Plaint dated 18th July 2019, the Plaintiff herein sued the Defendants seeking for the following orders: -
 - a) A declaration that title L.R. No. 12852/546 held jointly by the 1st to 6th Defendants was illegally issued.
 - b) An order directing the 7th and 8th Defendants to cancel title L.R. No. 12852/546 held in the joint names of the 1st to 6th Defendants.
 - c) An order compelling the 6th and 7th Defendants to allot the suit parcel to the Plaintiff pursuant to his application dated 2nd July 1997.



- d) An order compelling the 6th and 7th Defendants to survey the suit parcel and amalgamate it to form part of Lamu Island/Block V/124.
 - e) A permanent injunction barring the Defendants from dealing with the suit parcel.
 - f) In the alternative, this honourable court be pleased to issue an order declaring the portion as riparian land which is not available for alienation.
 - g) Costs of this suit.
2. The gist of the Plaintiff's case is that he was at all material times the duly registered owner of all that parcel of land known as Lamu Island/Block V/124. That in between the Plaintiff's property and the Indian Ocean is a riparian portion of land which the Plaintiff sought to acquire through an application to the then Municipal Council Plot Allocation Committee and the 7th Defendant herein and dated 2nd July 1997.
 3. It was the Plaintiff's case that his application was never considered and that he recently learnt that the portion was allocated to the 1st -6th Defendants and a title. L.R. 12852/546 jointly registered to them by the 7th and 8th Defendants which the Plaintiff claims was illegally and fraudulently allocated.
 4. The 1st-6th Defendants filed a joint statement of Defence and Counterclaim dated 20th November 2019 wherein they averred that they legally acquired the suit property and that the same is not riparian land.
 5. The 1st to 6th Defendants prayed that judgment be entered in the following terms;
 - a) A permanent injunction restraining the Plaintiff by himself and/or his agents, servants, representatives, or any other person claiming under him from laying any claim of ownership, trespassing, encroaching and/or adversely dealing in any way with the 1st to the 6th Defendants' parcel of land L.R. No. 12852/546.
 - b) A declaration that Parcel of Land L.R No. 12852/546 belongs to the 1st to the 6th Defendants herein having acquired it legally and the same is not riparian as stated by the Plaintiff.
 - c) Costs of the suit.
 - d) Any other or further order or relief that this Honourable Court may deem fit and just to grant.

Plaintiff's Case

6. PW1 Hashim Sharrif Ali Ahmed adopted his statement dated 18th July 2019 as evidence in chief and reiterated the contents of the plaint and produced his title document as PEXH-1 and a letter dated 2nd July 1997 as PEXH-2.
7. On cross examination PW1 told the court that he did not have any report from the 8th Defendant identifying the suit property as riparian land. PW1 further stated that he sued because he had earlier applied for the plot but was not allocated and that the suit property had mangrove and could not be allocated.
8. PW1 also stated on cross-examination that his property is freehold and the suit property is a leasehold. PW1 also stated that he has an alternative prayer that the land be declared riparian or it should be allocated to him as per the application letter dated 2nd July 1992.



Defendants' case

9. DW1 Ali Ahmed Shee, the 1st Defendant who had authority to plead and give evidence on behalf of the 2nd to 6th Defendants also adopted his statement dated 7th June 2021 as evidence in chief.
10. It was DW1's evidence that they have a certificate of lease issued legally to them dated 24th June 2016, a lease for 99 years from 1st July 1998 and prayed that their counterclaim be allowed and the Plaintiff's suit be dismissed with costs.
11. On cross-examination, DW1 stated that they acquired the land procedurally and that the high tide never reaches the suit property. It was his evidence that they have planted some trees thereon and built a makuti house.
12. DW1 further stated that the Plaintiff's property was not adjacent to the suit property; and that the suit property as not near the ocean.

Plaintiff's Submissions

13. Counsel for the Plaintiff identified two issues for determination, that is, whether the suit property is riparian land and whether the title held jointly by the Defendants was legally acquired.
14. On the first issue, whether the suit land is riparian land, counsel submitted that since the Defendants did not adduce any evidence to the contrary, the suit property was then admittedly riparian land.
15. On the second issue whether the land was acquired legally, counsel submitted that it was undisputed that the suit property bore the characteristics of a public land stipulated under Article 62(1) (1) therefore the Defendants failed to demonstrate whether the procedure for acquiring the same, as stipulated under section 12 (1) of the *Government Lands Act*, was followed.
16. Counsel further submitted that DW1 failed to show how he applied and was allocated the land, that he neither demonstrated any value that he paid for the acquisition of the land nor any application, any payment receipts to substantiate his allegations.
17. Counsel relied on the case of the case of *Mako Abdi Dolai v Ali Duare & 2 Others* [2019] eKLR. and submitted that under the repealed Act, power to dispose of public land was vested in two entities, namely the President and the Commissioner of Lands as per Sections 3 and 9 respectively of the said Act.
18. Counsel relied on the case of *Kiluwa Limited and another v Business Liaison Company Limited and 3 others* (Petition 14 of 2017) [2021] KESC 37 KLR, and submitted that a title is only as good as the process preceding its issuance, thus the unexplained process of acquisition of the suit property cannot confer good title to the 1st -6th Defendants.

1st 6th Defendants' Submissions

19. Counsel for the Defendants identified four issues for determination. Firstly, whether the 1st -6th Defendants are the legally registered owners of the suit property and submitted that the Plaintiff's claim was founded on his belief that the suit property was riparian land.
20. It was counsel's submission that the Defendants having produced the title documents to the suit property, have a right to the suit property and relied on the cases of *Serab Mubu v Commissioner of Lands and 2 others* [2014] eKLR; and *Margaret Njeri Wachira v Eliud Waweru Njenga* [2018] eKLR.



21. On the second issue as to whether the suit property was acquired procedurally, counsel submitted that the 7th Defendant issued to the 1st to 6th Defendants a lease to the suit property pursuant to Section 160 and 161 of the *Land Act*, Section 108 of the *Land Registration Act* and that the Plaintiff's allegations of fraud were mere speculations.
22. On the third issue as to whether the suit property was riparian land, counsel submitted that the burden of proof was on the Plaintiff to prove this claim but failed to do so and relied on the case of *Francis Mutito Mwangi v MM* [2016] eKLR where the court held that 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.
23. The final issue on whether the Plaintiff's claim was substantiated, counsel submitted that since the Plaintiff failed to demonstrate that the suit property was riparian land, and that the Defendants having demonstrated that they acquired the same procedurally, the Plaintiff's claim is therefore founded on false presumptions and should be dismissed with costs.

Analysis and Determination

24. The issues for determination are whether the Plaintiff has proved that the suit land is riparian land, whether the Plaintiff is entitled to the orders sought and whether the Defendants acquired the title fraudulently and whether the Defendants' counterclaim has merit.
25. It is undisputed that the suit property is registered in favour of the 1st -6th Defendants, the Plaintiff's claim against the Defendants is that their acquisition was tainted with fraud.
26. It is trite law that he who alleges must prove. Section 107 of the *Evidence Act* provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
27. It was incumbent upon the Plaintiff to prove the allegation of fraudulent acquisition of the suit land by the Defendants. The Plaintiff wants to shift the burden of proof to the Defendant to prove how they acquired the suit land to prove his allegation of fraud. This is the opposite of the law.
28. It is also noted that the Plaintiff alleged that the suit property is riparian land and wants the Defendant to prove that it is riparian land. It is strange that the Plaintiff alleges that the suit land is riparian, urges the court to declare it so and in the alternative allocate to him as per his application dated 2nd July 1997. This kind of argument does not hold any water; it follows that if the land is riparian then it cannot be allocated to any one including the Plaintiff himself.
29. Under Section 26 of the *Land Registration Act*, 2012, a Certificate of title is held as conclusive evidence of proprietorship. The Section provides as follows;
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

30. Section 24(a) of the [Land Registration Act](#), 2012 also provides as follows; -

- (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;

31. It is also trite that allegations of fraud must be specifically pleaded and strictly proved further that the burden is on the party alleging fraud. In the Court of Appeal case of [Kuria Kiarie & 2 Others v Sammy Magera](#) [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states 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.”

32. As regards the standard of proof, the court in the case of [Kinyanjui Kamau v George Kamau](#) [2015] eKLR expressed itself as follows; -

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See [Ndolo v Ndolo](#) [2008] 1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”
In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

33. While the Plaintiff pleaded and particularized the allegations of fraud, he failed to tender any evidence to prove fraud on the part of the Defendants as he shifted this burden on the Defendants to prove how they acquired the suit land.

34. Further the Plaintiff put a burden on himself to prove that the land is riparian but did not lead any evidence to ascertain the same. There are ways of proving that land is riparian, either by it being declared as such or a report indicating that it has been declared as such. This was lacking, no government agency gave evidence to that effect.

35. It seems that it is the Plaintiff's case that if I cannot be allocated the land as per my application dated 2nd July 1997, then no one should and therefore it should be declared riparian land. I find this kind of argument strange.



36. The Defendants produced a copy of the title which has not been impeached for having been acquired fraudulently hence the court holds that the Defendants are the absolute owners of the suit land having been allocated as such.
37. The Plaintiff's suit is therefore dismissed with costs and judgment entered in favour of the 1st to 6th Defendants in the Counterclaim as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF MARCH, 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.

