



**Hatimy & another v Hatimy & another (Environment & Land Case 45 of 2014) [2023] KEELC 16520 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16520 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 45 OF 2014**

**NA MATHEKA, J  
MARCH 23, 2023**

**BETWEEN**

**RUKIYA ABDULRAI-MAN HATIMY ALIAS RUKIYA NUREN  
HATIMY ..... 1<sup>ST</sup> PLAINTIFF**

**ZULFAT ABDULRAHMAN HATIMY ALIAS ZULFAT NUREIN  
HATIMY ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOHIDEEN ABDULRAHMAN MOHAMED HATIMY ..... 1<sup>ST</sup> DEFENDANT**

**AHMED ABDULREHMAN HATIMY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1 It is the plaintiffs’ case that at all material times to this suit, the Plaintiffs and the 1<sup>st</sup> defendant were the registered as joint owners of all that Property known as Title Number Mombasa/Block IX/109 comprising Four (4) Units of Flats owned by each of the Four (4) joint owners situated at Tudor Area of Mombasa Island. The Plaintiffs own one (1) flat each on the suit premises while the 1<sup>st</sup> defendant and one Sheikh Nurein Hatimy each of the remaining two (2) flats of the suit premises in line with the wishes and directions of their late Father. The Plaintiffs aver that the defendants have for a long time after the demise of their late Father attempted to unlawfully dispossess the Plaintiffs of their share of the suit premises without any lawful cause. The Plaintiffs aver that they are lawfully registered as joint proprietors of the suit property and the defendants have no right to interfere with their property. In November 2013, the 1<sup>st</sup> defendant wrote letters to the Plaintiffs and their tenants seeking to unlawfully take over the property and the plaintiffs state that the 1<sup>st</sup> defendants’ action is illegal, null and void ab initio. Subsequently, the 1<sup>st</sup> Defendant caused to be published in the Kenya Gazette dated January 31, 2014 Notice No517 alleging that the Title to the suit Property was lost when the said original Title is held and is known to be held by the Plaintiffs. The Plaintiffs are apprehensive that the defendants intend to unlawfully and/or fraudulently dispossess them of their property aforesaid. The Plaintiffs’



claim is for an order to restrain the defendants from interfering with their ownership, possession and use of the suit Property. The plaintiffs pray for judgment to be entered against the defendants jointly and severally for;

1. A declaration that the defendants interference with the Plaintiffs' ownership and possession of their share of the Premises comprised in the piece of land known as Mombasa/Block IX/109 is illegal, null and void ab initio.
  2. An order of injunction to restrain the defendants whether by themselves, their Agents, Servants, Employees or any other person acting under the instruction or direction of the defendants from interfering with, alienating, transferring trespassing upon, selling, occupying or in any other way dealing with the plaintiff's share of the Premises comprised in Title Number Mombasa/Block IX/109
  3. Any other and/or further order or relief that this honourable court may deem fit or just to grant.
  4. Costs of and/or incidental to this suit.
- 2 The defendants deny that the Plaintiffs and one Sheik Nurein Hatimy were the registered owners as proprietor in common in equal shares or at all of all that property known as Title Number Mombasa/Block IX/109. The defendant avers that the arrangement averred by the Plaintiffs were not in accordance to the wishes of their father. The defendant aver that at no time did they attempt to unlawfully disposes the plaintiffs of the subject property and further avers that the entire family agreed on a property distribution agreement which was executed by the entire family including the plaintiffs herein. The defendants aver that the Plaintiffs fraudulently registered the suit property in their names with knowledge that they were not entitled to the same.
- 3 The defendants aver that prior to the fraudulent transfer of the suit property the plaintiffs have all along misrepresented the defendant that the title was lost. The defendants aver that the intent to regain possession is valid and not unlawful as contented by the plaintiffs.
- 4 The defendants aver that the Plaintiffs consented to the distribution of their father's estate and that pursuant to the distribution, the 2<sup>nd</sup> Plaintiff was allocated all that property known as 13/XXXV of which she willingly accepted as her entire share. The defendants aver that the plaintiffs has denied the 2<sup>nd</sup> defendant quite enjoyment of his suit property and has been collecting rent with is not due to her and which the 2<sup>nd</sup> defendant claims has accrued to the tune of Kshs 2,624,000.00. The defendants prays that the Plaintiffs' claim be dismissed with costs and in the inverse Title Number Mombasa/Block IX/109 registered in the name of 2<sup>nd</sup> Plaintiff be cancelled. Mandatory orders to issue against the Plaintiffs to transfer Title Number Mombasa/Block IX/ 109 in favour of the 2<sup>nd</sup> defendant and;
1. Permanent injunction restraining the Plaintiff from collecting rent from all that property known as Mombasa/Block IX/ 109.
  2. Mandatory orders to issue to the 2<sup>nd</sup> Plaintiff to remit the entire rent collected by herself total of Kshs 2, 624, 000.00 to the 1<sup>st</sup> defendant and in default, execution to issue.
  3. Cost of the suit.
- 5 This court has considered the evidence and the submissions therein. The Plaintiffs have produced PEx1, the Certificate of title to Mombasa/Block IX/109, to demonstate to court that Mohidin Abdulrehman Mohamed Hatimy, Sheikh Nurein Hatimy, Rukiya Nurein Hatimy and Zulfat Nurein Hatimy as registered as proprietaries in common with equal shares on April 28, 2006. It is the Plaintiffs'



case that their late father gifted the suit property to them before his demise. The defendants dispute the Plaintiff's claim to the suit property and maintain that the suit property forms part of their late father's estate. They further pleaded that it was agreed by the family pursuant to the distribution agreement dated April 12, 2002 (DEx1) that the suit property would be held by the Mohidin Abdulrehman Mohamed Hatimy, the 1<sup>st</sup> defendant. The Defendants claimed that the suit property is part of the estate of their father and is subject to Mombasa High Court Succession Cause No 124 of 1999. In their submissions, counsel for the Defendants contended that the High Court in the said case, delivered a ruling on October 25, 2022 where the court ordered the public trustee to be the administrator of the estate, nonetheless, no such evidence was produced in court by the Defendants. The only document seen is the distribution agreement dated April 12, 2002 (DEx1) which the Plaintiffs have disowned and it is noted that some signatures are missing. It is the view of this court that it can only make a determination on the ownership of the suit property based on the title documents and the supporting documents thereto.

- 6 Though the certificate of title was issued under the repealed Registered of [Land Act](#) Cap 300 on April 28, 2006, Section 26 of the [Land Registration Act](#), No 3 of 2012 applies herein. Section 26 of the [Land Registration Act](#), stipulate that;

“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—

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

- 7 In their counterclaim, the defendants sought the cancellation of the title registered in the name of the 2<sup>nd</sup> Plaintiff and orders to compel the 2<sup>nd</sup> Plaintiff to transfer title in favor of the 2<sup>nd</sup> defendant. The title that has been produced by the plaintiffs is registered in the names of both the Plaintiffs and defendants therefore there is no title that has been produced bearing only the name of the 2<sup>nd</sup> Plaintiff. Again, section 26 of the [Land Registration Act](#) guarantees the doctrine of indefeasibility of title, which establishes that the certificate of title produced by the Plaintiffs remains indefeasible. The defendants have failed to demonstrate to court, through evidence that the said title was obtained through fraud or misrepresentation to which the title holders, themselves included, are proven to be party to. Section 107 of the [Evidence Act](#) puts strict proof upon the person to prove the existence of any fact. In [Alice Chemutai Too v Nickson Kipkurui Korir & 2 others](#) (2015) eKLR the court held that:

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.”



- 8 However, in the instant matter, the defendants have failed to establish the alleged fraud or illegality to the requisite standard against the Plaintiffs who, the court finds have absolute and indefeasible title to the suit property.
- 9 The plaintiffs on the other hand, averred that the defendants have intended to unlawfully and fraudulently disposes them of their interest in the suit property. The Plaintiffs urged the court to restrain the defendants from interfering with their ownership, possession and use of the suit property. The Plaintiffs maintained that the defendants obtained a certificate of title for the Mombasa/Block IX/109 (PEX12) registered in the name of Mohidin Abdulrehman Mohamed and Sheikh Nurein Abdulrehman Mohamed on November 30, 2005. During her examination in chief, PW1 stated that she reported the actions of her brothers to relevant authorities in an attempt to halt their acts of dispossessing her and her sister of the suit property.
- 10 On March 3, 2006, Mary Kai, the then Mombasa District Land Registrar wrote to the 1<sup>st</sup> defendant (PEX2). In the letter, the registrar demanded that the 1<sup>st</sup> defendant surrenders the title deed dated November 30, 2005, which was obtained pursuant to a transfer executed on the same day (PEX4). The purpose of the surrender was to cancel the title deed on the ground that the 1<sup>st</sup> Plaintiff did not recall executing the transfer in favour of the 1<sup>st</sup> defendant nor appear before the advocate who oversaw the said execution. Further, the 1<sup>st</sup> defendant was required to forward the title within 30 days from the date of the letter, failure to which the said title would be cancelled through a Kenya Gazette Notice. The fraud allegations are also reinforced by a letter dated June 27, 2006 (PEX3), which seemed to supported the earlier letter from the Land Registrar. The Divisional CID Urban Mombasa Benson Mwatene wrote to Swaleh & Company Advocates, the defendants' counsel to inform them that the 1<sup>st</sup> Defendant was under investigations for forgery of signatures after a report was made to them from the Land Registrar. This was after Land Registrar cancelled the title issued on November 30, 2006 and issued new titles.
- 11 It is trite law that any allegations of fraud must be pleaded and strictly proved, and in this case, the Plaintiffs have advanced a case for fraud and forgery on part of the defendants. They have discharged their burden of proof of the allegations they have advanced on a higher standard than the ordinary civil cases. The Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* (2015) eKLR held that;
- “In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No 106 of 2000) 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.”
- 12 On November 20, 2013, the Defendants purported to exchange the suit property among themselves together with one Abubakar Abdulrehman Mohamed Hatimy (PEX5) and even presented the deed of exchange to the Land Registrar for registration on the same day (PEX6). Since the title issued to all the four parties herein dated April 28, 2006 was held in common, the acts of the Defendants of seeming



exchanging their shares to the exclusion of the Plaintiffs was in contravention of section 91 (6) of the *Land Registration Act*, which states that;

“No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”

- 13 The parties herein held interest in the suit property as tenants in common, which meant that they held the suit property in an equal undivided shares. Each of them has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together.
- 14 In an effort to protect their interest, the Plaintiffs through their advocate Godfrey Mutubia wrote to the Land Registrar on November 25, 2013 (PEx7), January 14, 2014 (PEx8), February 12, 2014 (PEx9) and June 11, 2014 (PEx10) respectively. The constant theme in all the said letters were the actions of the defendants in purporting to register a fraudulent deed of transfer in an attempt to deny the Plaintiffs interest in the suit property and calling on the Registrar to cancel the said exchange and commence criminal investigations against the perpetrators. In particular, the letter dated February 12, 2014, brought to the attention of the Registrar of a Gazette Notice Vol CXVI No 12 dated January 31, 2014 Notice No 517 (PEx11), where the Land Registrar stated that the 1<sup>st</sup> defendant was the registered owner of the suit property, which title was lost and issuance of a new title would take place at the expiry of 60 days unless the same is objected to within the said period.
- 15 From the evidence adduced by the Plaintiffs, it is clear to the court that despite being holding title to the suit property as tenants in common, the defendants are out to oust the Plaintiffs from the suit property. The registration of Mohidin and Sheikh Nurein and issuance of certificate of title on November 30, 2006 was procured by fraud and the Land Registrar recalled the said title and cancelled it together with issuing a new title on April 28, 2006. Fraud has been proven and has been seen to be persistently pursued by the 1<sup>st</sup> defendant, even going to the extent of securing a gazette notice to purport that the certificate of title is lost and be issued with a new one.
- 16 It is the view of this court that the actions of the defendants, especially the 1<sup>st</sup> defendant are geared towards defrauding the plaintiffs, who are his younger sisters of their rights in the suit property. The parties herein are siblings, and in order to live in harmony, the law allows them to partition their interest where they hold title as tenants in common. section 94 of the *Land Registration Act*, provides that;
- “Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of title or certificate of lease, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.”
- 17 Unless and until the parties herein are able to apply to the Land Registrar for the partition the suit property, no party is allowed as stated in Section 91 (6) to deal with their undivided interest in the suit property at the exclusion of the other tenants in common.
- 18 Consequently, I find the defendants have failed to prove their counterclaim dated September 24, 2015 on a balance of probabilities and the same is dismissed with costs to the Plaintiffs. I find that the Plaintiffs have proved their case on a balance of probabilities and I grant the following orders;



1. A declaration that the defendants interference with the Plaintiffs' ownership and possession of their share of the Premises comprised in the piece of land known as Mombasa/Block IX/109 is illegal, null and void ab initio.
2. An order of injunction to restrain the defendants whether by themselves, their agents, servants, employees or any other person acting under the instruction or direction of the defendants from interfering with, alienating, transferring trespassing upon, selling, occupying or in any other way dealing with the plaintiff's share of the Premises comprised in Title Number Mombasa/Block IX/109.
3. Costs of this suit to the Plaintiffs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF MARCH 2023.**

**N.A. MATHEKA**

**JUDGE**

TABLE

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