



**Kunyobo v Olubwa & another (Environment & Land Case
216 of 2014) [2023] KEELC 16823 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 216 OF 2014**

**DO OHUNGO, J
APRIL 18, 2023**

BETWEEN

JAMES SHIKUBA KUNYOBO PLAINTIFF

AND

CLYDE TIEMA OLUBWA 1ST DEFENDANT

**HON. ATTORNEY GENERAL (SUED ON BEHALF OF THE DISTRICT LAND
REGISTRAR – KAKAMEGA) 2ND DEFENDANT**

JUDGMENT

1. The plaintiff moved the court through plaint dated 24th June 2014 wherein he averred that he was the registered proprietor of the parcel of land known as Butso/Butso/Shikoti/14303 (suit property) and that on or about 17th January 2012, the defendants colluded and fraudulently caused the suit property to be registered in the first defendant's name as a result of which the first defendant constructed buildings on the suit property and started cultivating on it.
2. The plaintiff therefore sought judgment against the defendants for cancellation of the first defendant's title, a declaration that the plaintiff is the lawful proprietor of the suit property, eviction of the first defendant as well as his agents, servants or anybody claiming through him from the suit property, demolition of the structures, a permanent injunction restraining the first defendant and as his agents, servants or anybody claiming through him from trespassing upon the suit property and *mesne profits* against the first defendant from the time he trespassed upon the suit property.
3. The first defendant filed a defence dated 9th November 2018 in which he denied the plaintiff's allegations and averred that he purchased the suit property from the plaintiff and that upon complying with all legal and procedural requirements, he was duly registered and issued with a title deed. That after purchase, he took possession of the suit property since 2009 and remained in occupation up to



- the date his said defence. He denied the plaintiff's allegations of fraud and collusion and urged the court to dismiss the suit with costs.
4. The second defendant filed a defence dated 15th March 2017. He denied the plaintiff's allegations and averred that the office of the Land Registrar Kakamega received duly executed land transfer documents with respect to the suit property and further denied that there was any fraud on the part of the Land Registrar. The second defendant therefore prayed that the suit be dismissed with costs.
 5. At the hearing, the plaintiff testified as the sole witness in respect of the plaintiff's case and adopted his statement dated 24th June 2014 as his evidence in chief. He stated that he never sold the suit property to the first defendant and that he had the original of the title deed. That sometime in 2012, the first defendant trespassed on the suit property, constructed houses thereon and even started cultivating. That following the events, he conducted a search at Kakamega Lands Registry on 3rd July 2012 and discovered that the first defendant had been registered as the owner of the suit property on 17th January 2012.
 6. The plaintiff further stated that he never attended the Land Control Board with the first defendant and that the first defendant was staying on the suit property and cultivating it. That the first defendant's father purchased from the plaintiff a portion of land parcel number 7136 sometime in the year 2001 upon which the plaintiff subdivided land parcel number 7136 into 3 portions and signed the transfer. He added that the first defendant's father and his family took possession in the year 2002.
 7. The plaintiff's case was then closed.
 8. During defence hearing, the first defendant testified as DW1 and adopted his witness statement dated 9th November 2018 as his evidence in chief. He stated that he purchased a portion of land parcel number Butsotso/Shikoti/7136 at KShs 150,000 and that the plaintiff caused subdivision of the said parcel into parcel numbers 14303 and 14302. That on 27th February 2009, they entered into another agreement and he added the plaintiff a further Kshs 100,000. He went on to state that he purchased the suit property from the plaintiff and paid the whole of the agreed purchase price with the last instalment being paid in the presence of the plaintiff's mother. That the plaintiff thereafter prepared and signed the application for consent form as well as transfer and they appeared before the Land Control Board and consent to transfer was given. That the plaintiff availed his passport photo and copies of his identity card and PIN for registration. He further stated that the plaintiff gave him vacant possession and he has been in peaceful occupation and use of the suit property since 2009 and was issued with title deed in January 2012.
 9. Stanley Sammy Amabera Mangala testified as DW2 and adopted his witness statement dated 9th November 2018 as his evidence in chief. He stated that he was present as a witness when the plaintiff sold a portion of land parcel number Butsotso/Shikoti/7136 to the first defendant sometime in 2001 and 2009, which parcel was later subdivided to create the suit property. That the plaintiff appeared before the Land Control Board where DW2 was a member and consent was granted.
 10. Henry Okiya Tiema testified as DW3 and adopted his witness statement dated 9th November 2018 as his evidence in chief. He stated that he was present when the first defendant bought land from the plaintiff.
 11. John Karanja Njenga testified as DW4. He stated that he is employed by the Kenya National Archives as the Regional Archivist for the Western Region. He retrieved from the records at the archives and produced minutes dated 6th June 2002 pursuant to which consent to subdivide land parcel number Butsotso/Shikoti/7136 was granted to the plaintiff, a letter of consent dated 2nd April 2009 in respect



- of the transfer of the suit property from the plaintiff to the first defendant and minutes dated 2nd April 2009 pursuant to which the consent to transfer was granted.
12. Defence case was then closed. Parties thereafter filed and exchanged written submissions. I have noted the respective submissions. The issues that emerge for determination are whether the plaintiff has established fraud and whether the reliefs sought should issue.
 13. There is no dispute that the first defendant is the registered proprietor of the suit property. Indeed, the plaintiff produced a certificate of search that shows that the first defendant was registered as proprietor on 17th January 2012. The first defendant also produced a copy of a title deed that verifies the plaintiff's claims as to ownership.
 14. As the registered proprietor of the suit property, the first defendant is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the *Act* obligates the court to accept the first defendant's certificate of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) are established. The said sections provide as follows:
 24. Interest conferred by registration
Subject to this *Act*—
 - (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;
 26. Certificate of title to be held as conclusive evidence of proprietorship
 - (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. ...
 15. Consequently, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme
 16. The plaintiff has built his case on the allegation that the title document held by the first defendant was fraudulently obtained in collusion with the second defendant. Fraud is a serious allegation. The party alleging it must plead it, particularise it, and strictly prove it. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. A party alleging fraud cannot simply expect the court to infer fraud from the facts.
 17. Although the plaintiff listed at paragraphs 5 (a) to (f) of his plaint, what he headed as "Particulars of illegality, fraud, collusion on the part of the defendants", a perusal of paragraphs 5 (a) to (c) as well



as (e) and (f) shows that they merely repeat the allegations of illegality, fraud and collusion without offering any particulars. Even the allegation of forgery at paragraphs 5 (e) remains a mere allegation. The plaintiff did not prove fraud or illegality. On the other hand, the first defendant has demonstrated how he acquired the suit property. In those circumstances, there is no valid basis upon which to impeach the first defendant's certificate of title.

18. In view of the foregoing, the plaintiff has failed to establish his claims of illegality, fraud, and collusion. That being so, he is not entitled to the reliefs sought.

19. In the result, I dismiss the plaintiff's case with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF APRIL 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance by the plaintiff

No appearance by the first defendant

No appearance by the second defendant

Court Assistant: E. Juma

