



**Baraka & 4 others v Sabwa & 3 others (Environment & Land Case
125 of 2019) [2023] KEELC 17826 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 125 OF 2019**

**A NYUKURI, J
MAY 17, 2023**

BETWEEN

**MOHAMMED BARAKA 1ST PLAINTIFF
FRANCIS SABWA 2ND PLAINTIFF
ROSEMARY JAJA MBOGO, CHARLES GACHUNGU MUCHIRI, MERCY
MAKAU & WILLIAM MUCHIRI (SUING AS ADMINISTRATORS OF THE
ESTATE OF SIMON MBOGO MUCHIRI (DECEASED) 3RD PLAINTIFF
WANJIRU NDERITU 4TH PLAINTIFF
FRANCIS KIDIAVAI SABWA & ALEX M WESIGWA (SUING
AS ADMINISTRATORS OF THE ESTATE OF LUCY MWAURA
(DECEASED) 5TH PLAINTIFF**

AND

**JOHN NGAIRA SABWA 1ST DEFENDANT
NATIONAL BANK OF KENYA LIMITED 2ND DEFENDANT
IGAINYA LIMITED 3RD DEFENDANT
THE CHIEF LAND REGISTRAR, NAIROBI 4TH DEFENDANT**

JUDGMENT

Introduction

1. By a Plaint dated 3rd September 1998 and amended on 5th November 2009, the Plaintiff sought the following orders;



- a. A declaration that the certificate of Title of LR No. 7815/8 situated in Mavoko Municipality and currently registered in the name of the first Defendant was obtained fraudulently and by misrepresentation of material facts and is void for all purposes.
 - b. A further declaration that the charge between the Defendant herein is a nullity and bad in law by virtue of fraud.
 - c. An injunction restraining the second Defendant by themselves, their servants and/or agents from selling by public auction, dealing with or disposing off in any way LR No. 7815/8 situated in Mavoko Municipality, Machakos District pending hearing and final determination of High Court Civil Case No. 1402 of 1998 and the outcome of the instant suit.
 - d. An order declaring the Title Deed issued to the 3rd Defendant by the 4th Defendant a nullity.
 - e. In the alternative an order directed to all the Defendants to compensate the Plaintiffs for the loss of the land at current market value and the loss of user of the said property.
 - f. Costs of this suit plus interest.
 - g. Any other relief that the court may deem fit to grant
2. The Plaintiff averred that the Plaintiff and the 1st Defendant jointly purchased land known as LR N. 7815/8 Mavoko Municipality Machakos District measuring approximately 62.37 Acres (suit property). They stated that the 1st Defendant secretly and fraudulently misled the Registrar of Titles to register his name as the sole proprietor of the suit property without the knowledge or consent of any of his co-purchasers. They stated that upon conducting a search, they realized that the 1st Defendant had obtained a certificate of title of the suit property and charged the same to the 2nd Defendant which led them to file Civil Suit No. 1402 of 1998 against the 1st Defendant seeking cancellation of the fraudulent registration and issuance of new titles in their respective names according to their respective shares. They stated that they had already obtained interlocutory judgment in that suit against the 1st Defendant.
 3. They also stated in the alternative that the 1st Defendant held the title of the suit property in trust and on behalf of the Plaintiffs as joint purchasers. They stated that in breach of the said trust, the 1st Defendant transferred the suit property to his name and proceeded to obtain a loan. They stated further that on 6th November 2002, the 2nd Defendant secretly transferred the suit property to the 3rd Defendant without notice to the Plaintiffs and during the pendency of this suit. They complained that the transfer to the 3rd Defendant was unlawful as there was a valid order prohibiting any transactions on the suit property. That the sale has occasioned loss of the value of the suit property in the sum of Kshs. 62 Million.
 4. The 1st Defendant never entered appearance despite service.
 5. The 2nd Defendant filed statement of defence dated 21st October 1998 and amended on 2nd July 2021. The 2nd Defendant denied the Plaintiffs' claim and stated that they were strangers to the allegations made by the Plaintiffs.
 6. It was the 2nd Defendant's case that by a legal charge and a further charge dated 30th July 1997 and 29th September 1997 respectively, the 1st Defendant who was the sole registered proprietor of the suit property charged the said property to the 2nd Defendant as security for a facility of Kshs. 7,100,000/-. They stated further that none of the Plaintiffs had any legal or equitable interest reflected in the register of the property and that the legal charge was valid and binding against the 1st Defendant.



7. The 2nd Defendant further stated that they were never made a party to *HCC Civil Suit No. 1402 of 1998* and that the consent judgment in respect of that suit was an afterthought and a well calculated but overtaken fraudulent scheme in collusion with the Plaintiffs to unjustly and unlawfully deprive and defeat the 2nd Defendant's superior interest as chargee thereof. The 2nd Defendant maintained that the consent judgment was statute barred and unexecutable under Section 4 of the [Limitation of Actions Act](#).
8. They further stated that if any fraud had been done by the 1st Defendant against the Plaintiffs, the Plaintiffs recourse was damages as against the 1st Defendant and that no actionable wrong was attributed to the 2nd Defendant. They maintained that the 1st Defendant having defaulted in the loan payment, which was outstanding as of 31st May 1998 in the sum of Kshs. 8,819,689/40 which continued to attract interest at 35% per annum, they had the right to exercise their statutory power of sale. Further that the 1st Defendant was duly served with the requisite statutory notices which had since expired and that the suit property was lawfully sold and transferred to the 3rd Defendant following a public auction of sale thereof.
9. The 2nd Defendant further stated that the Plaintiffs were estopped from raising any claim because if the suit property was allegedly purchased in 1992, registered in 1993, and title issued in 1996, then the Plaintiffs allowed the 1st Defendant to hold himself out as the sole proprietor of the suit property and therefore their claim cannot defeat the 2nd Defendant's rights as a bonafide chargee. They maintained that as the Plaintiffs do not seek to exercise the equity of redemption and have not challenged the accrual of the 2nd Defendant's statutory powers of sale, this suit does not disclose any cause of action against the 2nd Defendant.

Plaintiffs' Evidence

10. PW1, was Francis Kidiavai. He is the 2nd Plaintiff in this suit. He testified that he was also representing the other Plaintiffs. He testified that the 1st Defendant was his colleague at work and that in 1992, they individually purchased portions of the suit property and that before they completed the purchase, the 1st Defendant got title of the suit property. The witness adopted his witness statement dated 25th March 2018 as his testimony in chief. It was his testimony that in the suit property his share was 7.5 acres. He told court that unknown to him and his co-owners, the 1st Defendant secretly and fraudulently procured registration of the suit property in his name as sole proprietor and charged the property and that this was only discovered after obtaining a search certificate. That upon that discovery, the Plaintiffs filed *HCCC No. 1402 of 1998* against the 1st Defendant. He stated that on 10th November 1998, the court issued a decree in that suit declaring that the suit property was jointly owned by the Plaintiffs and the 1st Defendant and an order issued cancelling title of the suit property. Further that the court issued an order of the discharge and subdivision of the land to be shared equitably among the Plaintiffs.
11. He testified that the 2nd Defendant had been made aware of the Plaintiffs' interest in the suit property and had been requested to allow partial discharge of the property so that half of the suit property could be released to the Plaintiffs for them to share amongst themselves. He stated that as the 2nd Defendant was aware of the Plaintiffs' claim, they ought not to have proceeded with the exercise of their statutory power of sale and that since title had been cancelled, any charge over the same became null and void. The witness also informed court that the 1st Defendant had acknowledged that the suit property had been jointly purchased by the Plaintiffs and himself. He testified that although the 2nd Defendant was aware of the decree, they proceeded to sell the suit property to the 3rd defendant. He maintained that ownership of the suit property had been settled in the said decree and that the 2nd Defendant could not pass good title to the 3rd Defendant.



12. The witness produced documents attached to the list of documents dated 29th March 2018 as P-Exhibit 1 to 11. He produced a copy of the certificate of title, a letter by the Plaintiffs to the Water National Conservation & Pipeline Corporation; an undertaking by the 1st Defendant dated 24th October 1997; copy of the charge dated 30th July 1997; a further charge dated 29th September 1997, decree in *HCCC No. 1402 of 1998*; letter by the 1st Defendant to National Bank of Kenya; letter from the Plaintiffs' counsel to the 2nd Defendant dated 31st March 1998; letter dated 15th April 1998 from 2nd Defendant's counsel to the Plaintiffs' counsel; agreement of sale dated 6th November 2002 between the 2nd and 3rd Defendants and a copy of transfer between 2nd and 3rd Defendants.
13. In cross-examination, PW1 testified that although they bought the property jointly, they did not sign any joint agreement and had not produced any sale agreement to show that the Plaintiffs had purchased the suit property. He said that after discovering fraud by the 1st Defendant, the Plaintiffs did not report to the police. He admitted that prior to August 1998, a search would not show that the suit property was registered by fraud.
14. He stated that a caveat on the title was entered on 20th August 1998. He stated that when they filed HCCC No. 1402 of 1998, they knew that the 2nd Defendant had charged the suit property but they did not sue them. He testified that the consent recorded in *HCC 1402 of 1998* did not involve the 2nd Defendant and that there was no court order stopping the sale. He stated that the 2nd Defendant was not involved in the fraud. He stated that the never offered to pay the bank loan. That marked the close of the Plaintiffs' case.
15. DW1 was Paul Chelaya, the recoveries manager of the 2nd Defendant. He adopted his witness statement dated 27th August 2019. It was his testimony that on 22nd July 1997 and 29th September 1997, the 2nd Defendant granted the 1st Defendant credit facilities in the sum of Kshs. 7.1 Million as the 1st Defendant was trading in supply of imported maize from Commonwealth Countries. That a legal charge and further charge were created in respect of the suit property. He testified that before availing credit facilities to the 1st Defendant, the 2nd Defendant conducted due diligence and the results thereof were satisfactory that the 1st Defendant was the absolute registered owner of the suit property for a leasehold term of 999 years from 1st August 1948. He stated that therefore the 2nd Defendant was a bonafide holder of a legal charge from the 1st Defendant for value without notice of any defect in the title of the 1st Defendant and that the Plaintiffs' claim was not capable of being noticed from an official search or perusal of documents at the Land Office. He stated that the 2nd Defendant had no mechanisms of knowing the Plaintiffs' claim.
16. It was the testimony of DW1 that the 1st Defendant having been registered as proprietor of the suit property in 1992, the Plaintiffs took inordinately long until 1998 to belatedly claim ownership of the suit property. He stated that the 2nd Defendant had not wronged the Plaintiffs and if they had a genuine claim they ought to seek for damages against the 1st Defendant.
17. DW1 informed court that the Plaintiffs and 1st Defendant obtained a consent judgment with intention to defraud the 2nd Defendant when they failed to join the latter to that suit and when the 2nd Defendant has a superior interest in the suit property. He stated that the said consent judgment was fraudulently stale and irrelevant as it did not concern the 2nd Defendant. He stated that the sale of the suit property by the 2nd Defendant to the 3rd Defendant was not done secretly but lawfully as they were exercising their statutory power of sale. He stated that it was only the 1st Defendant who could have a cause of action to challenge the 2nd Defendant's power of sale.



18. In cross-examination, the witness stated that although the Plaintiff sought to stop the sale of the suit property by the 2nd Defendant, their application was dismissed. He stated that none of the Plaintiffs had offered to pay the bank loan. According to the witness, before the sale of the suit property, a valuation was done on 24th July 1997 which placed a value of Kshs. 14 million on the property. He stated that although the bank could vary the security for the credit facility, there was no alternative security. Further that the letter done by the Plaintiffs' counsel dated 31st March 1998 was to inform the bank that the Plaintiffs had an interest in the suit property.
19. He testified that after dismissal of the Plaintiffs' application for injunction, the property was transferred to the 3rd Defendant. He stated that he complied with statutory notices and that the sale to the 3rd Defendant was by private treaty. That marked the close of the 2nd Defendant's case.
20. DW2 was Isaac Gathungu Wanjohi a director of the 3rd Defendant. He adopted his witness statement dated 26th June 2018 as his evidence in chief. It was his testimony that he learnt through advertisement in the local press that the suit property was up for sale by public auction. He testified that the land was not sold by public auction, the same was sold to the 3rd Defendant for Kshs. 5.5 million and registered in the name of the 3rd Defendant on 19th December 2002. He stated that the 3rd Defendant was a stranger to the Plaintiffs complaints.
21. He produced documents attached to his list of documents dated 23rd July 2013 as D-Exhibits 1 to 10.
22. On cross-examination, he testified that when he bought the suit property, it had been registered in the 1st Defendant's name. He stated that he did not do any valuation and that the property was 65 acres. He stated that the land was compulsorily acquired by the Government and he was compensated Kshs. 64 million, but that the matter is still in court. That marked the close of the 3rd Defendant's case.
23. Subsequently, parties were directed to file written submissions. On record are the 2nd Defendant's submission dated 20th December 2022.

Submissions

24. Counsel for the 2nd Defendant submitted that it was not in dispute that the 1st Defendant was the registered proprietor of the suit property as at the time of creation of the first and further charge. Counsel argued that none of the Plaintiffs had any legal or equitable interest in the property. Counsel referred to Section 24 of the *Land Registration Act* No. 3 of 2012 to contend that registration of a person as proprietor of land vests in that person the absolute ownership of the land together with all rights and privileges appurtenant thereto. Counsel contended that no document was produced by the Plaintiffs to show that as at the time of the charge and further charge, any other person other than the 1st Defendant was the registered proprietor of the suit property.
25. Reliance was placed on the case of *Margaret Njeri Wachira v. Eliud Waweru Njenga* [2018] eKLR, for the proposition that a title document is a prima facie evidence of land ownership and a conclusive evidence of proprietorship.
26. On whether the charges created on the title of the suit property by the 1st Defendant in favour of the 2nd Defendant were valid, counsel argued that the two charges were valid and that the 2nd Defendant had superior interest in law which ranked in priority to the Plaintiffs' unregistered interest. Counsel argued that the 2nd Defendant had not wronged the Plaintiffs, neither were they party to an alleged fraud of the 1st Defendant.



27. It was further argued for the 2nd Defendant that the consent judgment in HCC No. 1402 of 1998 was stale as the same had been rendered 21 years ago and that the same was statute barred and contrary to Section 4 of the *Limitation of Actions Act*. Reliance was placed on the case of *Mwangi s/o Kirungu v. Solomon Njuguna T. Mbutia* [2014] eKLR, for the proposition that a judgment that has been pending for over 12 years cannot be executed as the same is statute barred.
28. On whether the Plaintiffs had proved their case on a balance of probability against the 2nd Defendant, counsel argued that the Plaintiff failed to prove fraud as against the 2nd Defendant. Counsel cited the cases of *Quest Recourses Limited* [2015] eKLR and *Raila Odinga v. IEBC & 3 Others* [2013] eKLR, for the proposition that the legal burden of proof in any suit rests on the Plaintiff. Counsel argued that as the suit property was registered in the 1st Defendant's name in 1992, then the Plaintiffs are to blame for their misfortunes as they took too long to claim ownership when the property had already been charged and that the evidence of DW1 demonstrated that there was no order barring the 2nd Defendant from exercising its statutory power of sale and therefore the Plaintiffs are not entitled to any relief.

Analysis and Determination

29. I have carefully considered the pleadings, evidence and submissions. In my considered view the following issues arise for determination;
- a. Whether the registration of the 1st Defendant as proprietor of the suit property was by fraud.
 - b. Whether the consent judgment in HCCC No. 1402 of 1998 could oust the 2nd Defendant's right to exercise their statutory power of sale.
 - c. Whether the Plaintiffs have proved their claim.
 - d. Who should pay costs of the suit.
30. A claim based on fraud ought to be specifically pleaded and strictly proven. The Plaintiffs relied on the undertaking dated 27th October 1997 drawn by counsel for the Plaintiffs, in which the 1st Defendant stated that the suit property was jointly purchased by him and the Plaintiffs and that although the same was registered in his name, it also belonged to the Plaintiffs. The Plaintiffs also relied on the consent judgment in HCCC No. 1402 of 1998 which ordered for cancellation of the title of the suit property and declared that the suit property belongs to both the Plaintiffs and the 1st Defendant.
31. Having considered the said undertaking and consent judgment and noting the admission of PW1 that when they filed HCCC No. 1402 of 1998, they were aware that the suit property was charged by the 2nd Defendant, but failed to sue the 2nd Defendant, it is clear that the consent judgment was meant to defeat the rights of the 2nd Defendant created by the charge on the suit property. As the said consent judgment was a contract between the Plaintiffs and the 1st Defendant, the same is not binding on the 2nd Defendant as equity cannot allow two parties to agree to take away the rights of a third party who is not privy to their contract. In the 1st Defendant's undertaking, the 1st Defendant allegedly gave the Plaintiffs a go ahead in seeking cancellation of title if he fails to discharge the charge. In essence, the filing of the suit filed vide HCCC No. 1402 of 1998 was by consent between the Plaintiffs and the 1st Defendants to achieve one purpose; namely to defeat the rights of the 2nd Defendant created under the charge.
32. Having said so, I have not seen any evidence that the suit property was jointly purchased by the Plaintiffs and the 1st Defendant. No agreement for purchase was produced by the Plaintiffs and although the 1st Defendant was registered as proprietor of the suit property in 1992, the Plaintiffs did



not raise any issue until the property was advertised for sale. In the premises, I find and hold that the Plaintiffs have failed to prove that they have any legal or equitable interest in the suit property. I also find that for failure to include the 2nd Defendant in both the undertaking by the 1st Defendant and the consent judgment in HCCC No. 1402 of 1998, means that those two documents have no legal effect on the 2nd Defendant's rights of a chargee. In addition, the two documents could not vest any proprietary or ownership rights on the Plaintiffs, as their purpose was to fraudulently defeat the rights of the 2nd Defendant as chargee. In the premises, I find and hold that the 1st Defendant's registration of the suit property was not done fraudulently as no evidence was presented in that regard. What was done fraudulently was to exclude the 2nd Defendant in HCCC No. 1402 of 1998 and that at the same time purport to record a consent to curtail the 2nd Defendant's right to exercise their statutory power of sale. That contract cannot be enforced against the 2nd Defendant as they were not privy to it.

33. Having found that the filing of HCCC No. 1402 of 1998 and the consent judgment entered into was done to defeat the 2nd Defendant's rights, it is my position that the Plaintiffs and 1st Defendant had no legal or equitable right to agree to cancel the title of the suit property when the 1st Defendant had not paid the loan granted to him by the 2nd Defendant. The 2nd Defendant's right of statutory power of sale ranks higher than any other right including the purported rights created by consents of persons not party to the charge.
34. Section 96 (1) of the *Land Act* No. 6 of 2012 provides that where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time for the rectification of the default, a chargee may exercise the power to sell the charged land. In this case, the chargor who is the 1st Defendant did not deny having defaulted on his obligations under the charge. He also did not fault the process taken by the 2nd Defendant in the exercise of their statutory power of sale. I therefore find that the Plaintiffs having not had any interest in the suit property, had no capacity to challenge the sale of the suit property in the exercise of the 2nd Defendant's statutory power of sale and therefore the sale of the suit property by the 2nd Defendant to the 3rd Defendant was lawful and unchallenged.
35. In the premises, I find and hold that the Plaintiffs have failed to prove their case against the 2nd, 3rd and 4th Defendants and their case is dismissed with costs to the 2nd and 3rd Defendants. As the orders sought by the Plaintiffs were meant to unjustly benefit both the Plaintiffs and the 1st Defendant who failed to participate in these proceedings, I also dismiss the Plaintiffs' suit as against the 1st Defendant.
36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Njueini for Plaintiffs

Mr. Mindo for 3rd Defendant

Mr. Nyamweya for 2nd Defendant

Ms Josephine – Court Assistant

