



Mabruki & another v Nicholas & 2 others (Environment & Land Case 221 of 2021) [2023] KEELC 19005 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 221 OF 2021
NA MATHEKA, J
JULY 27, 2023**

BETWEEN

MWANAMAKA AMANI MABRUKI 1ST PLAINTIFF

MEULIDI KITONGO MABRUKI ISEME 2ND PLAINTIFF

AND

ISAIAH MASABA NICHOLAS 1ST DEFENDANT

ABUBAKAR NOOR HABIB 2ND DEFENDANT

LAND REGISTRAR MOMBASA 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs state that the parcels of land known as Mombasa/Block X11/104, Kwale/Dian1/377, Kilif1/Mtwapa/92 and Plot No 11/36 have at all material times been owned by Hannah John Werikhe (Deceased). The Plaintiffs state that they are daughters of Hannah John Werikhe (Deceased). The Plaintiffs state that on or about 2007 they instituted Mombasa High Court Succession Cause No 257 of 2007 seeking the Grant of representation to the Estate of Hannah John Werikhe (Deceased). The Plaintiff state that on or about August 20, 2009 they were issued with the Certificate of Confirmation of a Grant wherein they were not only confirmed as administrators of the Estate of Hannah John Werikhe (Deceased) but they were also confirmed as the sole heirs and beneficiaries of the Estate in equal shares. The Plaintiffs state that they have been shocked to learn that the 1st Defendant, who is the grandson of Hannah John Werikhe (Deceased) has fraudulently obtained Letters of Administration to the Estate in Mombasa Chief Magistrates Probate and Administration Cause No 452 "B" of 2019. This was fraudulent, illegal and a nullity. The 1st Defendant had also fraudulently sold and transferred the suit property to the 2nd Defendant. The Plaintiffs pray for the following orders;
 - a. A declaration that the transfer of the parcel of land known as Mombasa/Block X11/104 to the 2nd Defendant was fraudulent, illegal and a nullity.



- b. A declaration that the letters of Administration obtained by the 1st Defendant in Mombasa Chief Magistrates Probate and Administration Cause No 452 "B" of 2019 was fraudulent, illegal and a nullity.
 - c. A permanent injunction restraining the Defendants from selling, charging, leasing, transferring or in any way whatsoever and howsoever dealing with the parcel of land known as Mombasa/Block X11/104 or any other properties of the Estate of Hannah John Werikhe (deceased).
 - d. An order directed at the Lands Registrar, Mombasa for a rectification of the register in respect of Mombasa/Block X11/104 by canceling all the entries including the transfer in favour of the 2nd Defendant and reinstating Hannah John Werikhe (deceased) as the only registered owner.
 - e. General Damages.
 - f. Costs and Interest.
2. The 2nd Defendant states that he is the registered owner of all that parcel of land known as Land Reference No Mombasa/Block /104 having duly acquired the same from the 1st Defendant for valuable consideration sometime in 2020. The 2nd Defendant states that he is aware of the Probate and Administration cause referred to therein that being Mombasa Chief Magistrates P& A Cause No 452 "B" of 2019. The 2nd Defendant is however a stranger to the allegations that the Letters of Administration procured through the said cause were obtained fraudulently. The 2nd Defendant states that he was made aware of the said suit by the 1st Defendant who sold him the subject property and that this was only done as part of the Defendant's due diligence in the process of purchasing the property, where he sought to confirm that the 1st Defendant had authority to sell the property.
 3. The 2nd Defendant states that it was only after his advocates in the purchase had confirmed that the 1st Defendant was legally empowered and had the requisite authority to deal with the land in question, that he proceeded with the sale and purchased the property. The 2nd Defendant further states that he was not involved in the acquisition of the Grant in Mombasa Chief Magistrates P& A Cause No 452 B of 2019 or any other illegality with regard to the purchase and transfer of the property know as Land Reference No Mombasa/Block X11/104. The 2nd Defendant states that while it is true Mombasa/Block/XXI 104 is registered in his name, the property was duly, legally, and procedurally acquired and a title has already been issued to him, devoid of any fraud. Further, the 2nd Defendant states that he has paid valuable consideration for the property to the 2nd Defendant to a tune of Kshs 16.200.00 and if the transfer were to be nullified, he will be the one to suffer grave and irreparable loss. The 2nd Defendant states that having paid the complete purchase price and having had the property transferred to him, the issues raised by the Plaintiffs in this suit can be solved in the succession cause where they can demand for proceeds of the sale and ask for the purchase price to be distributed to them. The 3rd Defendant states that if there was any transaction registered the same was done after proper documents were officially presented at the lands office for registration including the Grant from the Chief Magistrate Probate and Administration Cause No 452 "B" of 2019. The 3rd Defendant states that the Plaint does not raise any cause of action against him hence the same should be dismissed.
 4. The 3rd Defendant stated that the Plaint does not raise any cause of action against them. That the said transaction was done after the proper documents were officially presented at the lands office for registration including the Grant from the Chief Magistrate Probate and Administration Cause No 452 "B" of 2019.



5. This court has considered the evidence and the submissions therein. From the pleadings the issues for determination in this suit are; whether the 1st Defendant was the sole beneficiary of the suit property, whether the 2nd Defendant was a bonafide purchaser and whether the Plaintiffs are entitled to the reliefs sought in their plaint. The suit property was registered under the Registered Land Act, Chapter 300, Laws of Kenya (now repealed) (RLA). It was registered in the names of the Nicholas Andrew Warikhe and Hannah John Werikhe both deceased as proprietors in common in equal share. Registration of land in the names of more than one person was provided for in sections 101, 102 and 103 of the RLA the relevant provisions of which state as follows:

“ 101.

- (1) An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-
 - (a) whether those persons are joint proprietors or proprietors in common; and
 - (b) where they are proprietors in common, the share of each proprietor.

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- (1). Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –
 - (a) dispositions may be made only by all the joint proprietors; and
 - (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly...

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- (1). Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate. ...”

6. Section 118 of the RLA provides that:

“If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.”

7. The RLA was repealed by the Land Registration Act, 2012 which has similar provisions in sections 91, which states as follows in subsection (4):

“If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently –

- (a) a dispositions may be made only by all the joint tenants;
- (b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or



- (c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”

8. The distinction between joint tenancy and tenancy in common was made in *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (2012) eKLR, as follows:

“At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts, Megary & Wade, *The Law of Real Property* 6th Edition and Cheshire & Burn’s, *Modern Law of Real Property*, 16th Edition. According to Burn, at P242

“...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...” Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

- (i) The unity of possession.
- (ii) The unity of interest.
- (iii) The unity of title.
- (iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. (P477) One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant 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. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant



is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.”

9. In the instant case the 1st Defendant states that he is the grandson of Hannah John Werikhe and the son of Nicholas Andrew Werikhe who owned the suit property as proprietors in common in equal shares. He followed procedure in obtaining letters of administration to the estate of Hannah John Werikhe in Mombasa Chief Magistrates Probate and Administration Cause No 452 “B” of 2019 and later sold the property to the 2nd Defendant Abubakar Noor Habib. That his grandmother died in 1995 and his father in 2000. From the law and the authorities cited above I find that this was a tenancy in common. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, Hannah John Werikhe, devolves not to the other co-owner Nicholas Andrew Werikhe, but to the estate of the deceased co-owner. The Plaintiffs are his father’s (Nicholas Andrew Werikhe) sisters and they were not involved as beneficiaries. I find that the 1st Defendant had no capacity to transfer title to any third party to his sole benefit. I find that the title herein was obtained and/or acquired unprocedurally and illegally.
10. DW2 the 2nd Defendant testified that he purchased the suit property from the 1st Defendant after due diligence. that it was only after his advocates in the purchase had confirmed that the 1st Defendant was legally empowered and had the requisite authority to deal with the land in question, that he proceeded with the sale and purchased the property.
11. Be that as it may, and owing to the illegality and/or unprocedurality, that informed the transaction in favor of 1st Defendant, the ultimate transfer to and in favor of the 2nd Defendant herein cannot therefore be clothed with indefeasibility, either in the manner pleaded by the Defendants or at all. Section 26(1) of the [Land Registration Act, 2012](#), which provides that;

“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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



12. Where the title in favor of the vendor is proven to have been obtained and/or acquired unprocedurally, illegally or by corrupt practice, the second and subsequent purchaser of the suit property do not acquire any valid title, irrespective of whether they knew of the illegality or otherwise.
13. The provisions of Section 26 1(b) of the [Land Registration Act, 2012](#), does not require the Plaintiffs to prove that the title holder was privy or party to the illegality, and/or corrupt practice. For clarity, all that a Plaintiff must prove is that the process of the acquisition of the title was replete with impropriety, illegality or corrupt practice. In the case of [Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others](#) (2015) eKLR, the court held that;

“... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme.

The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme.

The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

The assertion of the Defendants that they were innocent purchasers who were not aware of the fraudulent transaction does not hold the water in this case as the purpose of section 26 is to protect real title holders from the unscrupulous persons.”

14. In conclusion, it is my finding and holding that the 2nd Defendant’s title is vitiated and the same is defeasible. Consequently, the Defendant’s title is amenable to revocation and/or cancellation. The prayer for general damages was not proved and the same will not be awarded. I find that the Plaintiffs have proved the case on a balance of probabilities and I grant the following orders;
 1. A declaration that the transfer of the parcel of land known as Mombasa/Block X11/104 to the 2nd Defendant was fraudulent, illegal and a nullity.
 2. A declaration that the letters of Administration obtained by the 1st Defendant in Mombasa Chief Magistrates Probate and Administration Cause No 452 "B" of 2019 are fraudulent, illegal and a nullity.
 3. A permanent injunction restraining the Defendants from selling, charging, leasing, transferring or in any way whatsoever and howsoever dealing with the parcel of land known as Mombasa/Block X11/104.
 4. An order directed to the Lands Registrar, Mombasa for a rectification of the register in respect of Mombasa/Block X11/104 by cancelling all the entries including the transfer in favour of the 2nd Defendant and reinstating Nicholas Andrew Werikhe (Deceased) and Hannah John Werikhe (Deceased) as the registered owners and thereafter the same to be subjected to succession proceedings.
 5. Costs of this suit to the Plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH JULY 2023.



N.A. MATHEKA
JUDGE

