



REPUBLIC OF KENYA



KENYA LAW
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**Mare v Ponda & 3 others (Environment & Land Case 77 of 2015)
[2023] KEELC 18846 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18846 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 77 OF 2015**

**MAO ODENY, J
JULY 19, 2023**

BETWEEN

MOHAMED MARE PLAINTIFF

AND

JULIUS GANDI PONDA 1ST DEFENDANT

LAND SETTLEMENT OFFICER- KILIFI 2ND DEFENDANT

LAND REGISTRAR 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. By a Plaint dated May 19, 2015 the Plaintiff herein sued the defendants seeking the following orders ;
 - a. An Order that the 3rd Defendant revokes the title Plot No Kikombethele Scheme/ 798 and the 2nd and 4th defendant to conduct a fresh settlement exercise.
 - b. An Order of permanent injunction restraining the 1st defendant from cultivating, leasing, charging, constructing or dealing with the suit premises in any manner to the detriment of the Plaintiff's interest in the suit premises.
 - c. Costs of and incidentals to this suit.
 - d. Any further or other relief as the honourable court may deem necessary to grant.
2. The 1st Defendant filed a Defence and Counterclaim dated August 26, 2015 where he sought the following orders :



- a) Vacant possession
- b) Costs of this suit and interests thereon at Court rates.
- c) Any other relief that this Honourable Court may deem just to grant.

Plaintiff's case

3. PW1 Mohamed Mare adopted his witness statement dated May 19, 2015 as his evidence and stated that he was the legal owner of Plot No Kikombetele Scheme/ 798 where he has lived for 50 years which suit premises has all along been his ancestral land.
4. It was PW1's testimony the 3rd Defendant officers visited him on the suit plot and encouraged him to proceed developing the suit land and promised that he would be given priority when they will be recommending issuance of titles to people who are in possession of the land.
5. PW1 further stated that he later learnt that the plot had been allocated to the 1st Defendant without his knowledge and despite the 1st Defendant not having settled on the said land. He also stated that the title to the suit premises was issued illegally and contrary to his legitimate expectation to be considered as a long occupant of the suit premises whose occupation had been open, exclusive and uninterrupted.
6. On cross-examination, PW1 stated that he has another home at Chakama but his late father was on the suit land first. He told the court that the land was not sold and that his father did not file any complaint when the Defendant was allocated the land. He also told the court that his father bought the suit land.
7. PW2 Mumba GandI adopted his Witness Statement dated May 19, 2015 as his evidence in chief and told the court that he was given the plot by one HAJI gave along Malindi Madunguni road.
8. PW 2 stated that they were paying him a tax of Kshs. 5 per annum whereby they were cultivating till 1957 when he left and the Plaintiff remained on the suit plot as the owner. It was his testimony that the Plaintiff used to pay tax directly to the owner and after some years, they stopped, paying rent but continued to cultivate the plot without any problems.
9. On cross-examination, he stated that the Plaintiff's father left Chakama in 1956 to the suit land and that they did not buy the land as they took over as squatters. He testified that the land belonged to the Arabs who were leasing the land and at the time, they did not have title deeds but he currently has a title to plot No 511.

Defence Case

10. DW1 Julius Gandi Ponda the administrator of the Estate of Ponda Nzola Adopted his Witness Statement dated October 25, 2021 as his evidence in chief and told the court that the land in dispute Land Title No Goshi/ Kikombetele Scheme/ 798 is registered in his late father Ponda Nzola's name.
11. DW1 stated that the land was registered in his name on 8th August, 2013 and that the Plaintiff did not own the land before the adjudication exercise and that the Plaintiff's father had been allowed by his late father to stay on a portion of the land on temporary basis. DW1 produced a copy of the title as proof of ownership.
12. He testified that the Plaintiff's father got his own land at a village called Vihingoni and relocated to that land and stayed there until his death where he was buried. That the Plaintiff later sold that land and stated that the Plaintiff has never been in occupation of the suit land. Further that during the adjudication exercise, his father was rightly identified as the owner of the land and the Plaintiff's family did not raise any complaint or objection during the exercise.



1st Defendant's Submissions

13. Counsel submitted that the only issue for determination is whether the registration of the 1st Defendant's late father as owner of the suit property and the issuance of the title deed to him was obtained illegally as claimed by the Plaintiff.
14. Counsel relied on the provisions of Section 26 (1) of the Land Registration Act submitting that the Plaintiff has challenged the title on the ground that was allegedly acquired illegally but the Plaintiff has not set out the particulars of illegality in the Plaint.
15. It was counsel's submission that the Plaint ought to have contained precise allegations of the illegal acts alleged to have been committed by the deceased and that mere allegations that the title was issued illegally was not enough. Counsel relied on the case of Demutilla Nanyama Pururmu vs Salim Mohamed Salim Civil Appeal No 138 of 2018.
16. Mr. Shujaa submitted that the Plaintiff made generalized allegations of illegality without specific acts of fraud and relied on Sections 107, 108 and 109 of the Evidence Act that places the evidential burden on the Plaintiff to prove that the title deed issued in the name of the 1st Defendant's late father was acquired illegally.
17. Counsel further submitted that the evidence adduced by the Plaintiff has not shown that the allocation and registration of the parcel of land in the name of the deceased was done illegally. That no evidence has been tendered showing that the deceased or the 2nd and 3rd Defendants committed any illegal acts in the allocation. Counsel urged the court to dismiss the Plaintiff's suit with costs and enter judgment in the counterclaim for the 1st Defendant with costs.

Analysis And Determination.

18. The court directed that parties file submissions but on counsel for the 1st Defendant complied. The issue for determination is whether the 1st Defendant's father was registered fraudulently as an owner of the suit land.
19. The Plaintiff in this case averred that that he has been in occupation of the Plot No Kikombethele Scheme/ 798 for over 50 years and has planted permanent crops and made developments thereon.
20. The Plaintiff has alleged illegality and fraud of the title that was acquired by the 1st Defendant in his testimony but the same was not pleaded in his pleadings. The 1st Defendant on the other hand averred that he is the registered owner entitled to possession of the suit property known as Title No Goshi / Kikombethele Scheme / 798 and that he has been the beneficial owner of the suit property long before the same was registered in his name.
21. The 1st Defendant stated in his evidence that during the demarcation and adjudication exercise he was duly identified as the settler on the suit property and was allocated the same. That the Plaintiff did not raise any objection to the allotment and eventually the same was registered in his name on 8th August, 2013.
22. The 1st Defendant produced in evidence a copy of a title deed in the name of his late father Ponda Nzola which was duly issued to him on 8th August, 2013. The Plaintiff on the other hand asserted that the title to the suit premises was issued illegally and contrary to his legitimate expectation to be considered as a long occupant of the suit premises whose occupation had been open, exclusive and uninterrupted.



23. On the issue of specifically pleading fraud in the plaint, the Plaintiff never pleaded fraud specifically, he only adduced evidence that the 1st Defendant's title was procured fraudulently without proof. Even if he had proof, the Plaintiff had failed the first test of specifically pleading fraud in the plaint.
24. When a party alleges fraud, then they should follow the procedures that require that the acts of fraud or illegality must be specifically pleaded and specifically proved as was held in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, where 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
25. The Plaintiff failed this test as he just gave evidence that the 1st Defendant had been fraudulently registered as an owner without proof. When a Plaintiff alleges fraud then the burden of such proof rests with the Plaintiff.
26. In the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR where the Court of Appeal stated that:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs 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.”
27. The plaintiff further stated that they were on the suit land for over 50 years uninterrupted and during adjudication they were on the ground. If they were on the ground, why they were not recognized and allotted land. There is an elaborate process for land adjudication and is a party is not satisfied has a right to file an objection which must be heard before the adjudication process is complete.
28. Section 26 referred to above provides that;
- “Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
- The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection’.



29. There was no evidence that there was such objection filed, heard and determined Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, 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.”

30. Section 26 (1) of the *Land Registration Act* states as follows: -

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

31. It is trite law that a Certificate of Title issued by the Registrar upon registration 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 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.

32. Consequently, I find that the Plaintiff has not proved his case on a balance of probabilities and is therefore dismissed with costs. The 1st Defendant has proved his counterclaim on a balance of probabilities and is allowed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JULY 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.

