



REPUBLIC OF KENYA



KENYA LAW
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**Ngoba v Mureithi & 5 others (Land Case 15 of 2018)
[2023] KEELC 19014 (KLR) (19 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19014 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 15 OF 2018
EK MAKORI, J
JULY 19, 2023**

BETWEEN

ALLEN PATRICK NGOBA PLAINTIFF

AND

ROBERT GITHINJI MUREITHI 1ST DEFENDANT

MOHAMED KHAMIS BALLETY 2ND DEFENDANT

LIFESPAN TOURS AND SAFARIS LTD 3RD DEFENDANT

MALINDI MUSKETEERS LTD 4TH DEFENDANT

LAND REGISTRAR KILIFI 5TH DEFENDANT

HON ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. In the Plaint dated 23rd January 2018, the Plaintiff seeks, *inter alia*, the following reliefs:
 - i. A declaration order that the Plaintiff never donated a Power of Attorney dated 20th December 1990 and all the transactions emanating from the said Power of Attorney are null and void *ab-initio*.
 - ii. An order directed to the 5th Defendant to rectify the land register by canceling the 4th Defendant's name and replacing the same with the name of the Plaintiff.
2. At the hearing that took place on 6th December 2022 the Plaintiff testified and called two witnesses.
3. The Plaintiff testified that sometime on or about 1991, he was notified verbally by the Land Registrar Kilifi County that his Title Deed was available for collection, as the lawful owner of Land Parcel No Chembe/Kibabamshe/372 however when he visited the lands office, he did not get the Land Registrar



in the office. From 1991 to 30th September 2016, the Plaintiff visited the Land Registrar in Kilifi on several occasions without being issued with the Title Deed but on 30th October 2016, the Land Registrar informed the Plaintiff that he had donated Power of Attorney to the 1st Defendant sometime on 20th December 1990. The Plaintiff said that he had not donated any Power of Attorney to anyone including the 1st Defendant who was unknown to him.

4. That on 16th October 2016, the Plaintiff was informed by the Land Registrar that the subject property had been transferred to the 2nd Defendant, through the 1st Defendant, and the same property was later transferred to the 3rd Defendant.
5. The Plaintiff testified that the 5th Defendant colluded with the 1st, 2nd, 3rd, and 4th Defendants to transfer the suit property without the Consent of the Land Control Board and or his knowledge.
6. The Plaintiff testified that the Defendants fraudulently transferred the land from him using a fraudulent Power of Attorney and applied the same to fraudulently process a duplicitous transfer.
7. Plaintiff testified and called two witnesses; Elijah Kahindi Karisa and Johnson Mutana Kalama. He also tendered exhibits in support thereof:
 - a. Exhibit 1 – Plaintiff’s National Identification Card.
 - b. Exhibit 2 – Green Card of the suit property.
 - c. Exhibit 3 – Transfer form from Mohamed Khamis Ballet to Lifespan Tours and Safaris.
 - d. Exhibit 4 – Cancelled Title Deed; Title Number Chembe/Kibabamshe/372.
 - e. Exhibit 5 – Map.
 - f. Exhibit 6 – A CR-12 of the company Lifespan Tours and Safaris.
 - g. Exhibit 7 – A letter addressed to the District Land Registrar dated 7th October 2016.
8. The 1st and 2nd Defendants did not enter appearance and consequently judgment against them was issued on 24th May 2022. The hearing was also formal proof against the 1st and 2nd Defendants, who never appeared in court to defend themselves despite sufficient knowledge of the hearing of the matter.
9. The 3rd Defendant in its Statement of Defence dated 4th April 2018, stated that the 4th Defendant is the title holder, proprietor, and registered owner of Plot No. Chembe/Kibabamshe/372 and whose title deed was issued on 8th January 2007 by the 5th Defendant.
10. The 3rd Defendant further claimed that it was a bonafide purchaser of the suit property for value having purchased it from the 2nd Defendant. The 3rd Defendant averred that the property was not in any way fraudulently transferred from the Plaintiff and objected to the Plaintiff’s claim for an order of rectification of the land register by cancellation of the 4th Defendant’s name and replacing it with the name of the Plaintiff.
11. The 4th Defendants appeared and filed a defence and together with the 3rd Defendant appointed the law firm of Gicharu Kimani & Co. to represent them but on the day of the hearing, the 3rd and 4th Defendants appeared virtually and told the court they would prefer hearing in open court and the matter was then adjourned. However, when the court resumed the session, they did not appear and thus did not cross-examine the Plaintiff and his witnesses. They also did not prosecute their defence.
12. The Attorney General appeared for the 5th and 6th Defendants. He argued that all transactions were procedural and complied with the law. They availed themselves of the opportunity to cross-examine



the Plaintiff and his witness. They applied for and got an adjournment to call the Land Registrar Kilifi to give evidence and provide records. On 26th January 2023, they failed to call their witness and they were given last a last adjournment for 8th February 2023 the day given to the AG, he stated that he needed to close his case and that there were no documents to produce.

13. After considering the material placed before me the issues that fall for the determination of the court are as follows:
 - a. Whether the transfers of the suit property by the Defendants were legal?
 - b. Whether the 5th Defendant had the mandate to interfere with the Titles of registered land owners?
14. The Plaintiff submitted that the legality of the transfers that took place can be questioned on two fronts - The transfers done for the suit property were based on illegalities that contravene Section 26 (1) of the [Land Registration Act](#) and, the transfer of the suit property to the 3rd Defendant was in contravention of Section 9 (1) (c) of the [Land Control Act](#), which in turn voids the transfer done to the 4th Defendant.
15. In the first issue, it is not under any dispute that Land Parcel No. Chembe/Kibabamshe/372 was initially registered under the Plaintiff's name in 1978. A fact that is supported by Kenya Gazette No 97 Vol CXIX dated 17th July 2017. However, despite being notified sometime in 1991 that the Title for said property was ready for collection at the Kilifi Land Registrar, the 5th Defendant failed to issue such a Title to the Plaintiff despite several attempts by the Plaintiff to follow up on the Title.
16. The Plaintiff averred that this was an illegal scheme coordinated by the 1st and 2nd Defendants, in collusion with the 3rd, 4th, and 5th Defendants, on 30th October 2016, the Land Registrar informed the Plaintiff that he had donated Power of Attorney to the 1st Defendant sometime on 20th December 1990. Proceeding from such actions, the suit property was subsequently transferred to the 2nd Defendant and later to the 3rd Defendant. The Plaintiff had never been issued with a Title since 1978 and had never conferred Power of Attorney onto the 1st Defendant in the first place. The 1st and 2nd Defendant forged the conferment of Power of Attorney by the Plaintiff and with the endorsement of the 5th Defendant, proceeded to carry out the aforementioned transfers of the suit property.
17. The Plaintiff cited the case of [Mary Ngunyo Kiume v Charles Muisyo David & 2 others; Exams Housing Co-operative Society Limited \(Interested Party\)](#) [2022] eKLR where the court held:

“The Kenya’s land system operates under the Torrens System, where the certificate of title is prima facie conclusive and indefeasible proof of ownership of land. This principle is set out in Section 26 of the [Land Registration Act](#). Subsection 1 (a) and (b) of Section 26 however provide exemptions to this rule, which is that a title can be challenged on grounds 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 under a corrupt scheme”.
18. The Plaintiff further averred that Proceeding from the above sentiment, Section 26 (1) of the [Land Registration Act](#) provides that:
 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.

19. Plaintiff submitted that In *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015], eKLR Munyao J. considered the operation of Section 26(1)(b) of the *Land Registration Act* with respect to an innocent purchaser as follows:

“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 titleholder 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. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another*, Eldoret ELC Case No. 609 B of 2012 where I stated as follows:-

“...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 titleholder. 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 titleholder 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.” I stand by the above words and I am unable to put it better than I did in the said dictum.”

20. The Plaintiff stated that the position that a title fraudulently obtained cannot be allowed to stand has been affirmed in several other cases. The point was made in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others*, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 [2015] eKLR, where the Court of Appeal upheld the decision of the Environment and Land Court to cancel the titles of land to which felons had fraudulently acquired titles and later sold the same to other parties.

21. The Plaintiff further cited the case of *Samuel Kamere v Land Registrar* [2015] eKLR the Court of Appeal held that:

“to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.



22. The Plaintiff further quoted the case of, *Esther Ndegi Njiru & another v Leonard Gatei* [2014] eKLR, where the Court held that:

“The rampant cases of fraudulent transactions involving title to land have rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility on purchasers of titled properties to ascertain the status of a property beyond carrying out an official search”.

23. The Plaintiff concluded in submissions that proceeding from the above it becomes clear that any transfers done originating from a fraudulent Power of Attorney can only be considered as ‘fruit from the poisonous tree’ regardless of any claims that the 3rd and 4th Defendants try to make about being bonafide purchasers of the suit property. Regardless of their claims of not being parties to any fraudulent activities, any Titles premised on the said transfers of the suit property originate from unprocedural activities arranged by the 1st and 2nd Defendants.

24. On the legality of the title holding with regard to the second issue concerning the transfers in question, the Plaintiff contended that the 3rd Defendant (Lifespan Tours and Safaris Limited) is a limited liability company duly incorporated under the *Companies Act* Cap 486 (repealed) which conducts its business in Malindi. However, a Confirmation Letter dated 22nd March 2018 from the Registrar of Companies revealed that the only two directors of the company are both Italians and are also the only shareholders of the company, the suit property is Agricultural Land as described under Section 2 of the *Land Control Act* and as such is subject to the provisions of Section 9 of the Act in relation to the granting or refusal of consent with respect to the transferring of any such land. To which Section 9 (1) (c) of the Act provides that:

- (1) In deciding whether to grant or refuse consent in respect of a controlled the transaction, a land control board shall—
- (c) refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange, or partition to a person who is not—
 - i. a citizen of Kenya; or
 - ii. private company or cooperative society all of whose members are citizens of Kenya; or
 - iii. group representatives incorporated under the Land (Group Representatives) Act, 1968 (Cap. 287); or
 - iv. a state corporation within the meaning of the State Corporation Act, 1986 (Cap. 446).

25. The Plaintiff averred that by the above provision, the 3rd Defendant, being a private company whose members are not citizens of Kenya, cannot legally become owners of the suit property and any such transfer is immediately null and void in the eyes of the law.

26. The Plaintiff submitted that the 5th Defendant’s collusion with the 1st and 2nd Defendants’ scheme to illegally acquire the Title of the suit property amount to ultra vires, as such interference goes beyond the mandate conferred on the 5th Defendant through Section 79 of the *Land Registration Act*, which provides that:

79.



- (1) The Registrar may rectify the register or instrument presented for registration in the following cases –
 - a. in formal matters and in the case of errors, mistakes, or omissions not materially affecting the interests of any proprietor.
 - b. In any case and at any time with the consent of all affected parties; or
 - c. If upon resurvey, a dimension or area shown in the register is found to be incorrect; in such case, the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
 - d. For purposes of updating the register;
 - e. For purposes of correcting the name, address, or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.
- 2) No alteration affecting the title of a proprietor may be made pursuant to subsection (1) without the proprietor's consent unless-
 - a. the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake, or omission; or
 - b. it would for any other reason be unjust for the alteration not to be made.

Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.

27. Plaintiff further stated that while commenting on the above provision the Court in *Republic v Chief Land Registrar & another Ex-parte Yosabia Kerubo Manyura* [2018] eKLR, stated that:

“It is evident from the provisions of Section 79 (above) that the Land Registrar's powers of rectification are limited to rectifying errors, mistakes, or omissions that do not materially affect the interests of any proprietor”.

28. The Plaintiff contended that in the present case, it is clear that the 5th Defendant acted without regard to the interests of the Plaintiff and purposefully undermined the Plaintiff's interests in its actions which go beyond that which is justifiable under Section 79 of the Act. Furthermore, taking into consideration the holding of the Court in *Esther Ndegi Njiru & another v Leornard Gatei* [2014] eKLR, in relation to the rampant cases of fraudulent transactions in land titles, the 5th Defendant should have held itself to a higher standard when dealing with the suit property as a protected land under the provisions of the *Land Control Act*.
29. This matter proceeded in almost a manner as a formal proof with all the parties served but failing to tender evidence to controvert the allegations as offered by the Plaintiff, as leveled against the Defendants jointly and severally. Particularly on the twin, issues raised by the Plaintiff that he never donated the powers of Attorney to any individual whose powers were used to transfer his land title to other parties including the current title holders. The Defendants too failed to approach the court and defend the allegations of fraud levelled against them jointly and severally, and that the record needs to be rectified to remedy the fraud as alleged.
30. The Plaintiff has proven his case on a balance of probability – that the 3rd and 4th Defendant failed to give evidence refuting that the Title obtained by the 3rd Defendant and subsequently transferred to the 4th Defendant was obtained fraudulently and unprocedurally. Furthermore, the 3rd and 4th Defendant



did not challenge the claims that the Plaintiff made against the 1st and 2nd Defendant in the Plaintiff dated 23rd January 2018, nor did they give any evidence that refuted the said claims. The 5th and 6th Defendant also did not challenge the testimony on oath in court made by the Plaintiff and his witnesses. Moreover, they failed to provide any evidence that supported the claims that they made in their defence. As such, the Plaintiff has ultimately proved his claims against all the Defendants and that he is entitled to the reliefs sought in the plaintiff.

31. The evidence and materials placed before this court and the authorities cited were quite relevant and germane in this matter and this court will proceed to give these final orders:
- a. A declaration be and is hereby issued that the Plaintiff never donated Power of Attorney dated 20/12/1990 and all the transactions emanating from the said Power of Attorney are null and void ab-initio.
 - b. A cancellation of all the entries against the Title Chembe/Kibabamshe/372.
 - c. An order directed to the 5th Defendant to rectify the Land Register by canceling the 4th Defendant's name and replacing the same with the name of the Plaintiff.
 - d. Costs to the Plaintiff.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 19TH DAY OF JULY 2023

E.K. MAKORI

JUDGE

In the presence of:

Mr. Kibunja for the Plaintiffs

In the absence of:

Mr. Gicharu for 1st and 2nd Defendants

Mr. The AG for the 5th and 6th Defendants

Clerk: Happy

