



Maleche (As administrator of the Estate of Simon Maleche Achesa - Deceased) v Maleche (As administrator of the Estate of Jacob Sitefano Maleche - Deceased) & 2 others (Environment & Land Case 45 of 2017) [2025] KEELC 1295 (KLR) (18 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 45 OF 2017
DO OHUNGO, J
MARCH 18, 2025**

BETWEEN

SYLVIA MALECHE (AS ADMINISTRATOR OF THE ESTATE OF SIMON MALECHE ACHESA - DECEASED) PLAINTIFF

AND

WELLINGTON ACHESA MALECHE (AS ADMINISTRATOR OF THE ESTATE OF JACOB SITEFANO MALECHE - DECEASED) 1ST DEFENDANT

DAVID OMUTERE MALECHE 2ND DEFENDANT

THE LAND REGISTRAR KAKAMEGA 3RD DEFENDANT

JUDGMENT

1. Litigation in this matter commenced on 10th February 2017 when Simon Maleche Achesa (Simon) filed Plaintiff dated 10th February 2017. He averred that he purchased a portion of land parcel number Isukha/Shirere /580 from Shilinyenya Sikolia, paid the purchase price and took possession. That Jacob Sitefano Maleche who was the Plaintiff's brother transferred the portion which became known as Isukha/Shirere /2417 (the suit property) to himself and then to the Second Defendant with the aid of the Third Defendant. He averred that the transactions were fraudulent and conducted through misrepresentation.
2. Simon therefore prayed for judgment against the Defendants for the following orders:
 - a. The registration of land parcel Isukha/Shirere /2417 currently registered in the names of the 2nd defendant be ordered cancelled and 3rd defendant be directed to effect the cancellation.
 - b. The 1st Defendant be directed to transfer the suit land Isukha/Shirere /2417 into the plaintiff's names.



- c. In the alternative the Registration of the 1st defendant in entry No. 2 in the register be cancelled and the land be ordered to be registered in the names of the Plaintiff.
 - d. Costs of the suit.
 - e. Any other relief the court may deem fit to grant.
3. The First Defendant filed Statement of Defence dated 5th February 2018 through which he denied the Simon's averments and stated that through mutual agreement, he took over, completed the transaction and obtained title in his own name since Simon was unable to complete paying the purchase price. That they agreed with Simon that he would transfer to Simon a portion of his own land at home in exchange for the portion of the purchase price that Simon had paid. Consequently, the First Defendant urged the Court to dismiss the suit with costs.
 4. The Third Defendant filed Statement of Defence dated 20th January 2023 in which he denied Simon's averments and urged the Court to dismiss the case with costs.
 5. Simon passed away on 30th August 2019 and was substituted by Sylvia Maleche (hereinafter "Plaintiff"), pursuant to an order made by the Court on 30th November 2020. Subsequently, on 15th July 2021, an order was made allowing the First Defendant Jacob Sitefano Maleche who had passed away on 26th August 2018, to be substituted by Wellingtone Achesa Maleche.
 6. The Plaintiff adopted her witness statement dated 3rd February 2023 as well as Simon's witness statement dated 10th February 2017. She also produced copies of the documents listed as item numbers 1 to 4 in her list of documents dated 10th February 2017 as well as copies of the documents listed as item numbers 1 to 3 in her further list of documents dated 13th April 2017. She further produced a copy of the green card in her in further list of documents dated 29th June 2018.
 7. Simon stated in his said witness statement that he purchased a portion of parcel number Isukha/ Shirere /580 from Shilinyenya Sikolia, fully paid the purchase price, took possession and started developing the portion. That after retiring from employment in 1984, he completed the construction after which he allowed his nephew David Omutere Maleche to stay in one of the houses at the request of his brother Jacob Sitefano Maleche who was David's father. That he conducted a search on 14th April 2016 only to discover that Jacob Sitefano Maleche had registered the land in his name and later transferred it to David Omutere Maleche.
 8. The Plaintiff testified that Simon was her father and that Shilinyenya predeceased Simon. That land parcel number Isukha/Shirere /580 was transferred to the First Defendant in 1986 while Simon was alive, and that Simon did not lodge any complaint with the police concerning the transfer. The Plaintiff further testified that she was not aware of any sale of the suit property to the First Defendant or any transaction where Simon was given any land in exchange.
 9. The Plaintiff's case was thereafter closed.
 10. Wellingtone Achesa Maleche (DW1) stated that the First Defendant Jacob Sitefano Maleche was his father. He adopted his witness statement dated 5th May 2022, and the First Defendant's witness statement dated 13th February 2018. He stated that the Second Defendant is his brother and relied on the documents in the Second Defendant's list of documents dated 27th April 2022.
 11. The First Defendant stated in the said witness statement that Simon was his brother while the Second Defendant was his son. That in the year 1986, Simon showed him a parcel of land that he was buying but had not completed paying the purchase price since he did not have enough money. Simon



- requested him to buy the parcel and that instead of him refunding to Simon what Simon had paid, he would transfer to Simon his parcel of land situated at Idakho. The First Defendant added that he transferred the Idakho parcel to Simon and Simon introduced him to the seller by the name Shilinyenya who he took to his advocate and the transaction was completed with him obtaining title and developing the suit property. He added that he transferred the suit property to the Second Defendant.
12. Next on the stand was David Omutere Maleche, the Second Defendant who testified as DW2 and adopted his witness statement dated 5th May 2022. He produced copies of the documents listed as item numbers 1 to 22 in his list of documents dated 27th April 2022. He stated in the statement that he was the registered proprietor of the suit property and that he obtained title from the First Defendant who was his father. That the suit property was a subdivision of Isukha/Shirere /572 as opposed to Isukha/Shirere /580 and necessary consents and approvals were given prior to the subdivision. That the sale agreement that Simon relied on was in regard to Isukha/Shirere /580 which is not the parent parcel of the suit property and that the claim in respect of the suit property was without basis.
 13. DW2 further testified that as of the date of his testimony, the Plaintiff was in use of the suit property but without his consent. That he was registered as proprietor of the suit property in 2017 and that his father processed the documents. The First and Second Defendants' case was thereafter closed.
 14. Nelson Otieno Odhiambo (DW3), the Land Registrar in charge of Kakamega Land Registry and produced a copy of the transfer that yielded the Second Defendant's title. He stated that the said transfer was properly registered and added that he could not retrieve all the documents that were used during registration of the transfer since they may have been misplaced at the registry. He added that misplacement of documents was a common occurrence at the registry and that the transaction was not fraudulent. The Third Defendant's case was thereafter closed.
 15. Directions were then given that parties file and exchange written submissions. The Plaintiff filed submissions dated 22nd October 2024, the First Defendant filed submissions dated 16th September 2024, the Second Defendant filed submissions dated 20th November 2024 and the Third Defendant filed submissions dated 28th October 2024.
 16. I have considered the pleadings, evidence, and submissions. The issues that arise for determination are whether fraud and misrepresentation have been established and whether the reliefs sought should issue.
 17. There is no dispute that the Second Defendant is the registered proprietor of the suit property and is consequently entitled to the rights, privileges, and benefits spelt out by the law, ranging from Article 40 of *the Constitution* to Section 24 of the *Land Registration Act*. Further, Section 26 of the *Land Registration Act* obligates the Court to accept the Second Defendant's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The only grounds upon which the 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 was acquired illegally, un-procedurally or through a corrupt scheme. In this case, the Plaintiff opted to challenge the title on grounds of fraud and misrepresentation.
 18. It has been stated severally by courts in our jurisdiction that fraud is a serious allegation and that the party alleging it must plead it, particularise it, and strictly prove it to standard 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 *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.



19. The Plaintiff's case is that Simon purchased a portion of land parcel number Isukha/Shirere /580 from Shilinyenya Sikolia, paid the purchase price and took possession. That Jacob Sitefano Maleche (the First Defendant) who was the Plaintiff's brother transferred the portion which became the suit property to himself and then to the Second Defendant with the aid of the Third Defendant. The Plaintiff's case is founded on the land sale agreement dated 13th March 1971, a perusal of which reveals that the land sold was a portion of plot number 580, in other words, a portion of land parcel number Isukha/Shirere /580. That position is reiterated in Simon's witness statement, the Plaintiff's testimony and Plaintiff's letter dated 23rd August 1973 to the Town Clerk Kakamega Municipal Council.
20. The evidence on record however shows that the suit property is subdivision of land parcel number Isukha/Shirere /572. I have perused the copy of the register in respect of parcel number Isukha/Shirere /572 and I note that the said register was closed on 20th January 1986 upon subdivision of the parcel into Isukha/Shirere /2415 to 2417. The copy of the register in respect of the suit property as well as certificate of search in respect of the suit property both confirm that position. Thus, the Plaintiff has not demonstrated any connection between the suit property and the parcel that she is claiming. To the extent that the Plaintiff's allegations of fraud and misrepresentation concern a different parcel from the suit property, they are unproven. Fraud, as stated in the case law above, cannot be inferred but must be strictly proven to the required standard.
21. In view of the foregoing discourse, I find no merit in the Plaintiff's case, and I therefore dismiss it. Considering the close family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 18TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

No appearance for the First Defendant

The Second Defendant present

Mr Kipkorir holding brief for Mr Juma for the Third Defendant

Court Assistant: B Kerubo

