



Amudavi & another v Ambani (Sued Through His Personal Representative/Administratrix Gladys Maraga Alias Maraka); Sakha & another (Interested Parties) (Environment & Land Case 23 of 2019) [2023] KEELC 21142 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21142 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 23 OF 2019
DO OHUNGO, J
OCTOBER 31, 2023**

BETWEEN

AIRIS MINYIKHA AMUDAVI 1ST CLAIMANT

ACHAYO JOSEPHINE OKECHI 2ND CLAIMANT

AND

JAIRO SAKHA AMBANI (SUED THROUGH HIS PERSONAL REPRESENTATIVE/ADMINISTRATRIX GLADYS MARAGA ALIAS MARAKA) RESPONDENT

AND

MICHAEL MUSUKU SAKHA INTERESTED PARTY

GLADYS SHANYISA W/O JOSEPH SHISAKHA INTERESTED PARTY

RULING

1. Proceedings in this matter were commenced through originating summons (OS) dated March 26, 2019 wherein the claimants/plaintiffs averred that they were entitled by adverse possession to 0.07 hectares of the parcel of land known as Tiriki/Cheptulu/805 (the suit property). They therefore prayed for the following:
 1. Determination of the question as to whether or not the Claimants herein (especially the 1st Claimant) have become entitled to a 0.07 Hectare portion of land parcel number Tiriki/Cheptulu/805 (as delineated and bordered red on the sketch map annexed to the Claimants' supporting affidavit and marked "SAL-2") by adverse possession.
 2. Issuance of a declaratory order that the 1st Claimant herein has acquired ownership of a 0.07 Hectare portion of land parcel number Tiriki/Cheptulu/805 (as delineated and bordered red



on the sketch map annexed to the Claimants' supporting affidavit and marked "SAL-2") by adverse possession and is therefore entitled to be registered as the owner thereof in place of the Respondent.

3. Issuance of an order as against the Respondent for the subdivision of land parcel number Tiriki/Cheptulu/805 in such a way as to have the aforesaid 0.07 Hectare portion hived therefrom and either:
 - i. To have the said 0.07 Hectare portion transferred direct to the 2nd Claimant herein, Achayo Josephine Okechi, to hold thereunto as the absolute registered owner in the place of the 1st Claimant; or
 - ii. In the alternative, and only if prayer 3 (i) above cannot be granted, to have the said 0.07 Hectare portion transferred to the 1st Claimant to hold thereunto as the absolute registered owner in the first instance and to thereafter transfer the said portion to the 2nd Claimant.
4. That costs of this suit be provided for.
2. The respondent filed memorandum of appearance on April 16, 2019. Thereafter, on 24th April 2019, the parties filed a written consent settling the case by entering judgment in terms of prayers 2 and 3 (i) of the OS with further order that the claimants/plaintiffs were to meet all the expenses of subdividing the suit property and transferring the 0.07 hectares portion to them. Each party was to meet own costs of the suit. The consent was adopted on May 14, 2019 and a decree issued on May 17, 2019.
3. The matter then remained dormant until May 31, 2023 when notice of motion dated May 31, 2023 was filed by the above named intended interested parties. This ruling is in respect of the said Notice of Motion.
4. The following orders are sought in the notice of motion:
 1. That this application be certified as urgent and be heard *ex parte* in the 1st instance.
 2. That in the interim there be a stay of the orders made in this matter on 14/5/2019 vide a consent dated 24/4/2019, and any execution of the aforesaid orders pending the hearing and determination of this application.
 3. That in the interim the proceedings filed at Hamisi Senior Principal Magistrates Court being Hamisi Succession Cause No. 21 of 2017 be stayed pending further orders from this Court.
 4. That upon grant of prayer 2 above the applicant herein Michael Musuku Sakha and Gladys Shanyisa w/o Joseph Shisakha be enjoined in this matters (sic) as interested parties.
 5. That for the purpose of expeditions hearing and determination of this matter, the above file i.e. Kakamega ELC No 23 of 2019, ELC No 24 of 2029 and ELC No 25 of 2019 be consolidated and file Number Kakamega ELC No 23 of 2019 be the lead file.
 6. That the consent dated 24/4/2019 and adopted by the Court on 14/5/2019 be set aside and the matter be reopened and be heard *viva voce* and *denovo* (sic).
 7. That the plaintiff and the defendant be restrained from further intermeddling with all that parcel of land known then as Tiriki/Cheptulu/805 and the resultant numbers being Tiriki/Cheptulu/1743, 1744, 1745 and 1746 belonging to the deceased estate of Jairo Sakha Ambani by transferring, taking occupation, utilizing, developing and in any way dealing with the same pending the hearing and determination of the proceedings herein.



8. That cost of the application be provided for.
5. The application is supported by an affidavit sworn by Michael Musuku Sakha, the first applicant. It is opposed through a replying affidavit sworn by Achayo Josephine Okechi, the second claimant and another replying affidavit sworn by Gladys Maraga alias Maraka, the respondent.
6. The application was canvassed through written submissions which the applicants, claimants and respondents duly filed. I have considered application, the affidavits, and submissions. The issue for determination is whether the reliefs sought should issue.
7. From the onset, it must be noted that the applicants are not parties in this suit. The suit was concluded on May 14, 2019 upon adoption of the consent. At the time the OS was filed, the respondent was the administratrix of the estate of Jairo Sakha Ambani (deceased). The applicants have deposed in the affidavit in support of the application that she remains the administratrix. the first applicant contends that he is a son of the deceased while the second applicant is a widow of the deceased's son. They claim that the consent was obtained through fraud, non-disclosure of material facts and without involving other beneficiaries within the deceased's estate.
8. As has been repeatedly held, fraud is a serious allegation that must be pleaded and proved to a standard above balance of probabilities but not 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. Beyond the allegations of fraud, the applicants have not offered any proof to the requisite standard.
9. It is manifest that the present application is an offshoot of disputes within the deceased's estate. The applicants should resolve such disputes within the succession cause in respect of the deceased's estate.
10. I find no merit in notice of motion dated May 31, 2023 and I therefore dismiss it. In view of the relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance by the First Plaintiff/Claimant

The Second Plaintiff/Claimant present

No appearance by the Defendant/Respondent

Mr Owuor holding brief for Mr Mshindi for the Applicants

