



REPUBLIC OF KENYA



**Manyara (Suing as the Legal Representative of the Estate of Maurice
Martin Mwale Mbuki) v Muteti & 5 others (Environment & Land Case
E059 of 2021) [2023] KEELC 21299 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E059 OF 2021
LC KOMINGOI, J
OCTOBER 31, 2023**

BETWEEN

**MARGARET MUNJIRU MANYARA (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF MAURICE MARTIN MWALE
MBUKI) PLAINTIFF**

AND

**MATHEKA MUTETI 1ST DEFENDANT
JACINTA WANJIRU KIMWAKI 2ND DEFENDANT
FRANCIS KINGORI WANYEKI 3RD DEFENDANT
ROSEMARY MUTHONI KARANJA 4TH DEFENDANT
ZACHARIAH MUNYAMBO NYINGI 5TH DEFENDANT
THE ATTORNEY GENERAL 6TH DEFENDANT**

JUDGMENT

1. By a Plaint dated 28th July 2021 the Plaintiff as the legal representative of the Estate of the late Martin Maurice Mwale Mbuki claims that her husband who passed away on 4th February 2004 was the owner and proprietor of suit properties LR No. Kajiado/Kitengela/6278 and LR No. Kajiado/Kitengela/3185 from 1995. Upon his demise the Plaintiff conducted a search on 16th February 2004 to confirm and ascertain the status of the properties. The search confirmed that the late Maurice Martin Mwale Mbuki was the registered owner. In 2014 she undertook another search with the intention of filing a Succession suit for the Estate of the deceased only to find the suit properties registered in the names of the 1st to the 5th Defendants as follows:LR No. Kajiado/Kitengela/6278 had been transferred to the 1st Defendant on 5th June 2004 for a consideration of Kshs. 500,000 and later transferred to



the 3rd and 4th Defendants on 4th June 2015. LR No. Kajiado/Kitengela/3185 was transferred to the 4th Defendant on 5th June 2004 for a consideration of Kshs. 1,000,000 and on 16th September 2014 it was subdivided into LR No. Kajiado/Kitengela/75033 and LR No. Kajiado/Kitengela/75032. LR No. Kajiado/Kitengela/75032 was subsequently transferred to the 5th Defendant.

2. The 1st to the 5th Defendants are not only unknown to her but she is still in physical possession of the suit properties. She reported the matter to the Director of Criminal Investigations. She claimed that these transfers were illegally and fraudulently done because they were transferred without a court order, with falsified documents and without consent from the Land Consent Board with intention to defraud the Estate of the deceased Martin Maurice Mwale Mbuki. She therefore prayed for:
 - a. Entries number 5,6,7,8,9 and 10 on the register of the land parcel LR No. Kajiado/Kitengela/6278 be cancelled.
 - b. Entries number 5,6,7,8 and 9 on the register of the land parcel LR No. Kajiado/Kitengela/3185 be cancelled.
 - c. That the registers to land parcel LR No. Kajiado/Kitengela/6278 and Kajiado/Kitengela/3185 do vest in the estate of Maurice Martin Mwale Mbuki.
 - d. That the Defendants do pay costs of the suit.
 - e. Such other and further relief as the court may deem fit and just to grant.
3. The 6th Defendant filed a Statement of Defence dated 27th September 2022.
4. The 1st to the 5th Defendant's did not enter appearance. Since they are unknown to the Plaintiff, they were served vide substituted service through a Notice in the Standard Newspaper.

Evidence of the Plaintiff

5. PW1, Margaret Munjiru Manyara adopted her witness statement as her evidence in chief and produced 11 documents which were marked as P. Exhibit 1-11. She stated that she did not know any of the Defendants, she was in physical possession of the suit properties and no subdivisions had taken place.
6. On cross examination she stated that the original title to the suit property got lost and a report to that effect had been made. She had copies of the Title which were given to her by her late husband before his demise. She confirmed that her husband had not sold the suit properties and a search conducted after his demise in 2004 confirmed that position. She also stated that the suit properties had not been subdivided and they were still in her possession. She confirmed that she registered the restriction on the properties to inhibit any transactions. She indicated that after discovering the transfer, she reported the matter to the Director of Criminal Investigations but she had not received any information on the status of the investigations.

Evidence of the Defendants

7. DW1, Rosemary Wamuyu Mwangi testifying on behalf of the 6th Defendant stated that she was a Land Registrar at Kajiado Land Registry. She relied and adopted the Witness Statement of one Bernard Laitch the Land Registrar Kajiado as part of her evidence in chief and produced four documents as exhibits which were marked as D. Exhibit 1-4. She indicated that she was using copies of the Green card because the originals had been taken by the Director of Criminal Investigations. She was however not aware of the outcome of the investigations.



8. On Cross examination she stated that she could not trace the parcel file in respect to the suit properties which should contain documents used to transfer the suit properties. She stated that, the documents would include consent from the Land Control board, payment of stamp duty among others. She went on to confirm that for a deceased person's property to be transferred there should be a Confirmation of Grant of Letters of Administration although she could not confirm whether this document was in the file because she did not have the parcel file.
9. On re-examination she stated that tracing a parcel file was a tedious job as it is done manually.
10. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

11. Counsel submitted that it was evident that the suit properties were transferred to the 1st to the 5th Defendants after the demise of Martin Maurice which was an offence and contrary to Sections 45, 55 and 71 of the *Law of Succession Act* citing Bahola Mkalindi vs Michael Seth Kseme & 2 others [2012] eKLR. As such the transfer was an act of intermeddling and thus void. Counsel also submitted that DW1 did not adduce evidence showing how the transfers were undertaken or documents used for the same and neither did the Defendants defend the claim against them. Therefore it was evident that the transfers had been procured fraudulently and judgement should be entered in favour of the Plaintiff as prayed.

The 6th Defendant's submissions

12. Counsel for the Defendant outlined the two issues for determination as: who the bona fide owner of the suit property was and whether the allegation of fraud against the 6th Defendant had been proved.
13. Counsel rehashed the Land Registrar Kajiado testimony which showed that according to the records LR No. Kajiado/Kitengela/6278 and 3185 had green cards opened on 23rd August 1995 and 10th June 1991 respectively. LR No. Kajiado/Kitengela/6278 was first registered in Rapahel Risi Omiri's name and later transferred to Martin Maurice Mwale Mbuki on 27th October 1995, a title issued on the same day and a restriction registered citing no transfer until valuation for stamp duty was done. On 5th June 2004, the restriction was removed, property transferred and Title issued to Matheka Muteti on the same day. On 4th June 2015, it was transferred to Jacinta Wanjiru Kimwaki and Francis Kingori Wanyeki and title issued.
14. LR No. Kajiado/Kitengela/3185 it was also registered in Raphael Risi Omiri's name on 10th June 1991 and on 27th October 1995 it was transferred to Martin Maurice Mwale Mbuki and similarly a restriction registered against it. On 5th June 2004, the restriction was removed, property transferred and Title issued to Rosemary Muthoni Karanja on the same day. On 17th September 2014 the Title was closed for subdivision and new Titles No. 75032 and 75033 were issued. LR No. Kajiado/Kitengela/75032 was transferred to Zachariah Munyambo Nyingi on 30th October 2014 and Title issued on the same day. This Title was also closed upon subdivision and issuance of new titles 90979-91018. LR No. Kajiado/Kitengela/75033 was also closed on 25th November 2015 upon subdivision and issuance of title numbers 88387 and 88388.
15. He submitted that once the ownership was challenged, the Defendants ought to have shown that they acquired the suit properties legally as was held in Munyu Maina vs Hiram Gathiha Maina which they failed to do. "The registration of the 1st – 5th Defendants as owners of the suit property was carried out illegally, unprocedurally and through a corrupt scheme. The 6th Defendant submits that the Plaintiff is the legitimate owner of the suit property and we humbly seek that the court declares as such."



16. However, despite Counsel submitting and acknowledging that the transfer was carried out illegally, unprocedurally and through a corrupt scheme she submitted that the Plaintiff did not prove that allegation towards the 6th Defendant. Counsel went on to contradict her submissions by stating that “Contrary to the allegations by the Plaintiff, the suit property was legally and procedurally allocated to the Defendants... The 6th Defendant submits that from the documents and testimony adduced by the Plaintiff, none offered any evidence that the Defendants in any way acted fraudulently...” Thus the allegation of fraud had not been proved as per *Kinyanjui Kamau vs George Kamau Njoroge* [2015] eKLR.

Analysis and Determination

17. I have considered the pleadings, the evidence on record, the submissions and the authorities cited. The issues for determination are:
- i. Whether the Plaintiff had proved that the late Martin Maurice Mwale Mbuki was Bonafide owner of the suit properties LR No. Kajiado/Kitengela/6278 and LR No. Kajiado/Kitengela/3185.
 - ii. Whether the Plaintiff had proved the allegation of fraud against the Defendants.
 - iii. Who should bear costs of this suit?
18. The court has been told that the late Martin Maurice Mwale Mbuki passed away on 4th February 2004 but the suit properties were transferred to the 1st and 4th Defendants on 5th June 2004, four months after his demise. By this time, the Plaintiff stated she had neither been confirmed as an administrator of his Estate, nor had she filed a probate and succession cause. Could the deceased have effected these transfers?
19. It is irrefutable fact that a dead person cannot transfer property. Which is similar to the old adage that “A dead man tells no tale!” This assertion underpins the legal procedures and mechanisms through which property is passed from one generation to the next, preserving the sanctity of Title. Section 45 of the *Law of Succession Act* embeds this principle and makes any dealings with a deceased person’s property without legal authority a punishable offence:
- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall-
 - (a) be guilty of an offence.”
20. Despite Section 26 of the *Land Registration Act* protecting the sanctity of Title, it is worth noting that Section 55 and 71 of the *Law of Succession Act* provide that distribution of assets of a deceased person cannot be undertaken before a grant is confirmed. Further, Section 26 of the *Land Registration Act* provides that the sanctity of title cannot be protected if it was acquired illegally, un-procedurally or through a corrupt scheme. In the celebrated case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR (also cited by the 6th Defendant) the Court of Appeal held that: “...We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the



acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”

21. In light of the irrefutable fact that the deceased lacked the legal capacity to transfer his properties posthumously, the mysterious transfer of said properties to the Defendants, months following his demise, presents a baffling conundrum. Unfortunately, this transfer shall remain an unresolved enigma with a troubling void of explanation due to the non-appearance of the 1st to the 5th Defendants. DW2 was also unable to explain how the transfers were effected because the parcel file which held the key to unravelling this paradox, was conspicuously absent from their possession. The only explanation therefore is, the transfers were done illegally, un-procedurally and/or through a corrupt scheme and thus invalid. This was also unequivocally submitted by the 6th Defendant.
22. On the issue of whether fraud against the 6th Defendant was proved, it is trite that fraud being a serious allegation should not only be pleaded but strictly proved. The Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR echoed this in the following words:

“... in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis own.)

...

Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.
23. While the burden of proof regarding fraud remains unmet, the apparent irregularity and subterfuge exhibited in these transactions cannot escape notice. The court fails to comprehend how entries in Title documents in the lawful custody of the Land Registrar Kajiado were made. These entries subsequently facilitated the transfer and subdivision of properties belonging to a deceased individual to the 1st, 2nd, 3rd, 4th and 5th Defendants without confirmed letters of administration. The court wishes to underscore the need for the Land Registrar Kajiado to safeguard the rights and properties of innocent individuals from such questionable practices. It is well within its purview to ensure the integrity and sanctity of property titles, not only protecting but actively upholding the rights of property owners, in alignment with its inherent mandate.
24. I am satisfied that the transfer, registration and subsequent subdivisions of LR No. Kajiado/Kitengela/6278 and Kajiado/Kitengela/3185 to the 1st, 2nd, 3rd, 4th and 5th Defendants was irregularly and un-procedurally done.
25. I find that the Plaintiff has proved her case as against the Defendants on a balance of probabilities. I enter Judgement in her favour as follows:



- a. That the Land Registrar Kajiado is hereby directed to forthwith cancel and expunge all entries in the register for LR No. Kajiado/Kitengela/6278 and Kajiado/Kitengela/3185 in the names of the 1st, 2nd, 3rd, 4th and 5th Defendants and that the registers be rectified to reflect the Estate of the late Martin Maurice Mwale Mbuki as the bona fide proprietor.
- b. That an order of Permanent injunction is hereby issued restraining the defendants or any of them whether by themselves, their servants, agents and/or assigns from taking possession of or trespassing on or registering or in any manner whatsoever dealing with the suit properties.
- c. Costs of the suit to the Plaintiff to be borne by 1st – 5th Defendants.

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

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

N/A for the Plaintiff.

N/A for the 1st – 5th Defendants.

Ms. Njuguna for the 6th Defendant.

