



Osagi alias Khalwale v Ambani (Sued through his personal representative/administratrix Gladys Maraga alias Maraka); Sakha & another (Interested Parties) (Environment & Land Case 25 of 2019) [2023] KEELC 21162 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 25 OF 2019
DO OHUNGO, J
OCTOBER 31, 2023**

BETWEEN

JOSEPHINE OSAGI ALIAS KHALWALE 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 claimant/plaintiff averred that she was entitled by adverse possession to 0.15 hectares of the parcel of land known as Tiriki/Cheptulu/805 (the suit property). She therefore prayed for the following:
 1. Determination of the question as to whether or not the claimant herein, Josephine Osagi alias Khalwale, has become entitled to a 0.15 hectare portion of land parcel number Tiriki/Cheptulu/805 (as delineated and bordered red on the sketch map annexed to the claimant's Supporting Affidavit and marked "JK-2") by adverse possession.
 2. Issuance of a declaratory order that the claimant herein has acquired ownership of a 0.15 hectare portion of land parcel number Tiriki/



Cheptulu/805 (as delineated and bordered red on the sketch map annexed to the claimant's supporting affidavit and marked "JK-2") by adverse possession and should accordingly be registered as the owners 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 0.15 hectare portion hived therefrom and be transferred to the Claimant.
 4. That the costs of this suit be provided for.
2. The respondent filed Memorandum of Appearance on April 16, 2019. Thereafter, on April 24, 2019, the parties filed a written consent settling the case by entering judgment in terms of prayers 2 and 3 of the OS with further order that the claimant/plaintiff was to meet all the expenses of subdividing the suit property and transferring the 0.15 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 31st May 2023 when Notice of Motion dated 31st May 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 May 14, 2019 *vide* a consent dated April 2, 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 April 24, 2019 and adopted by the Court on May 14, 2019 be set aside and the matter be reopened and be heard *viva voce* and *denovo*.
 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 Josephine Osagi alias Khalwale, the claimant and another Replying Affidavit sworn by Gladys Maraga alias Maraka, the respondent.
6. The Application was canvassed through Written Submissions which the applicants, claimant 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 Plaintiff/Claimant

No appearance by the Defendant/Respondent

Mr Owuor holding brief for Mr Mshindi for the Applicants

Court Assistant: E. Juma

