



Magotsi (Suing as the administrator and personal representative of the Estate of Stephen Likhasi (Deceased) v Makotsi & another (Environment & Land Case 72 of 2016) [2023] KEELC 20754 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20754 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 72 OF 2016
DO OHUNGO, J
OCTOBER 17, 2023

BETWEEN

ANNE BUSOLO MAGOTSI (SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN LIKHASI (DECEASED) PLAINTIFF

AND

SULUMENA INDOSHI MAKOTSI 1ST DEFENDANT
DANIEL KUBASU 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 22nd December 2015, the plaintiff averred that he was the administrator of the estate of Stephen Likhakasi (deceased) who was her father and the registered proprietor of land parcel number Kakamega/Shikulu/461 (suit property). That after her father's demise, the defendants unlawfully and fraudulently subdivided the suit property into land parcel numbers Kakamega/Shikulu/3870 and 3871 and transferred the subdivisions to themselves. The plaintiff therefore sought judgment against the defendants jointly and severally for an order for cancellation of title numbers Kakamega/Shikulu/3870 and 3871 so that the land reverts to Kakamega/Shikulu/461 in the name of Stephen Likhakasi (deceased). She further sought for costs.
2. The defendants filed a defence dated 26th November 2016 wherein they denied the plaintiff's allegations and averred that the subdivisions were lawfully done with the consent of all beneficiaries and that the second defendant lawfully purchased his portion. They therefore prayed that the suit be dismissed with costs.
3. At the hearing, the plaintiff testified as PW1 and adopted her witness statement dated 22nd December 2015 as part of her evidence. She stated that the first defendant is her mother and that her father,



Stephen Likhakasi died on 15th April 1983. That on 7th December 2013, her sisters hired one Harrison Mwalimwa to plough the suit property and that once he finished ploughing, the second defendant arrived with police officers from Malaika Police Post who arrested Harrison and that upon inquiring why Harrison had been arrested, they were informed that the second defendant had bought the suit property from the first defendant. She added that they discovered that the first defendant used Succession Cause no 133 of 2002, which was non-existent, to fraudulently change ownership of the suit property. She further testified her deceased father had two wives but one of them was deceased as of the date of her testimony and that her deceased father had nine children two of whom were deceased as of the date of her testimony. She also stated that no one was residing in the suit property as of the date of her testimony and that her sisters had planted sugarcane therein.

4. Scholasta Mucheresa testified as PW2 and adopted her witness statement dated 22nd December 2015 as her evidence in chief. She stated that she was the fourth born to Stephen Likhakasi (deceased) and that they discovered that the first defendant had registered herself as proprietor of the suit property through Succession Cause no 132 of 2002 but on perusing the said file, they discovered that it was in respect of the estate of one Mija Opilo Wanda and that the property in the said cause was parcel number East Wanga/Malaha/748. That upon making the discovery, they made a report at Kakamega Police Station and that as of the date of her testimony, they had not filed succession proceedings in respect of the estate of Stephen Likhakasi.
5. On 2nd June 2022, just before PW3 testified, counsel for the defendants told the court that the first defendant passed away in April 2020 and that the surviving defendant had no intention of having her substituted. The claim against the first defendant therefore stood abated from end of April 2021.
6. Mathias Shimanyula Mikai testified as PW3 and adopted his witness statement dated 22nd December 2015 as his evidence in chief. He added that he was the deceased's third born. When referred to an agreement dated 6th November 2003 that was in the defendants' list of documents, he conceded that his name was in the agreement. He however denied signing the said agreement and stated that he did not know whether his brothers signed an agreement to sell the suit property.
7. Gerald Mwikhali Makotsi testified as PW4 and adopted his witness statement dated 22nd December 2015 as his evidence in chief. He stated that he was the deceased's second born and that he as well as the defendants all signed the aforesaid agreement dated 6th November 2003.
8. The plaintiff's case was then closed.
9. During defence hearing, the second defendant testified as DW1 and adopted his witness statement dated 25th January 2018 as his evidence in chief. He stated that the first defendant passed away after signing a witness statement in this matter and that he was approached sometime in 2003 by the first defendant's family to purchase one acre out of the suit property since the family needed money to enable them to transport the body of one Fabiano Makotsi from Nairobi to Kakamega for burial. That the agreed purchase price was ksh 80,000 out of which ksh 30,500 was for the cost of transporting the body while the balance of ksh 49,500 was to cover for the succession cause of the purchased land. He further stated that after the agreement was signed, he neither signed a transfer nor paid stamp duty and that not all member of Stephen Likhakasi's family were involved in the agreement. That he did not attend the land control board and did not participate in the succession proceedings. That everything was handled by the first defendant and that he moved into the suit property and had been developing it since.
10. Frank Khasoha Kubasu testified as DW2 and adopted his witness statement dated 25th January 2018 as his evidence in chief. He stated that he was a witness in the aforesaid agreement and that they



- transported the body of Fabian Makotsi from Nairobi to Kakamega as agreed. That Fabian's brothers and sisters were aware of the agreement and participated in the funeral.
11. Lastly, Tom Shiholo Makumba testified as DW3. He also adopted his witness statement and went on to state that he was a witness to the aforesaid agreement. That all of the first defendant's sons except Mathias signed the agreement.
 12. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
 13. The plaintiff submitted that the second defendant hatched a scheme to defraud the plaintiff's family of the suit property without subjecting it to succession procedures. That the alleged succession cause documents used to transmit the suit property were not genuine and that the second defendant's title ought to be cancelled and the property reverts to Kakamega/Shikulu/461.
 14. On his part, the second defendant submitted that the first defendant passed on and she was not substituted and as such any claim against her ought to fail. He further submitted that he never participated in the succession cause and subsequent transfer of the suit property and that any fraud ought to be attributed to the first defendant. That the plaintiff has not proven her case on a balance of probability against him and that the suit ought to be dismissed with costs.
 15. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the transfer of the suit property to the first defendant, its subdivision into land parcel numbers Kakamega/Shikulu/3870 and Kakamega/Shikulu/3871 and the transfer of the subdivisions in favour of the defendants was unlawful or fraudulent and whether the reliefs sought should issue.
 16. Fraud is a serious allegation and 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.
 17. From the certified copy of register in respect of the suit property, it is manifest that Stephen Likhakasi was registered as proprietor thereof on 19th May 1975 and remained proprietor until 4th September 2008 when the first defendant was registered as proprietor pursuant to entry number 2 in part B of the register following a grant said to have been issued in Succession Cause Number 133 of 2002. Pursuant to entry number 3 in part B of the register, the title was closed on 5th November 2010 upon subdivision into land parcel numbers Kakamega/Shikulu/3870 and Kakamega/Shikulu/3871. A copy of certificate of death was produced showing that Stephen Likhakasi passed away on 15th April 1983. Following his death, the provisions of Section 45 of the Law of Succession Act kicked in and expressly barred all persons from disposing of the suit property unless as provided under the said statute. The plaintiff's case is that the first defendant acquired proprietorship of the suit property through a grant issued in Succession Cause Number 133 of 2002, a cause that neither concerned the estate of Stephen Likhakasi nor the suit property. Indeed, material placed before the court shows that the said succession cause concerned the estate of Mija Opilo Wanda and not that of Stephen Likhakasi.
 18. The plaintiff has contended, and the second defendant has confirmed that upon the first defendant acquiring proprietorship and subdividing the suit property into land parcel numbers Kakamega/Shikulu/3870 and Kakamega/Shikulu/3871, the said subdivisions were registered in his name. Although no certificate of search in respect of the subdivisions was produced, the outcome does not matter in view of the facts and circumstances of this case.



19. By virtue of their registration as proprietors of the suit property and its subdivisions, the defendants would ordinarily be entitled to the rights, privileges, and benefits under Section 24 of the Land Registration Act. Additionally, Section 26 of the Act would obligate the court to accept their titles as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The import of those provisos is that the grounds on which a 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 has been acquired illegally, unprocedurally or through a corrupt scheme.
20. Acquisition of title in respect of property forming part of the estate of a deceased person without first complying with the provisions of the Law of Succession Act is certainly unlawful. Indeed, that is the exact import of Section 45 (2) (a) of the Law of Succession Act which criminalises such conduct.
21. Besides the non-compliance with the Law of Succession Act, second defendant stated that he did not sign a transfer form, did not pay any stamp duty, and did not attend the Land Control Board prior to acquiring proprietorship. No valid explanation was given for those omissions which amount to non-compliance with procedure. They lead to a conclusion that there was illegality.
22. Even though the arrangement pursuant to which the remains of Fabiano Makotsi were transported from Nairobi to Kakamega for burial may have been noble and even necessary, the aspect of the transaction that touched on the suit property could not be lawfully transacted outside the law. I note that although the second defendant had a chance to claim a refund of the purchase price even if in the alternative, he opted not to do so. To further dim any prospects of a recovery against the first defendant, he opted not to pursue substitution and revival of the suit in respect of the first defendant.
23. I find that the transfer of the suit property to the first defendant, its subdivision into land parcel numbers Kakamega/Shikulu/3870 and Kakamega/Shikulu/3871 and the transfer of the subdivisions in favour of the defendants was unlawful. It follows therefore that the plaintiff has established her case and is entitled to the reliefs sought.
24. I therefore make the following orders:
 - a. Entry numbers 2 and 3 in part B of the register in respect of land parcel number Kakamega/Shikulu/461 are hereby cancelled so that proprietorship of the said title reverts to Stephen Likhakasi.
 - b. Title numbers Kakamega/Shikulu/3870 and Kakamega/Shikulu/3871 and all entries in the register that support their creation are hereby cancelled.
 - c. In view of abatement of the claim against the first defendant and considering the relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Okali holding brief for Mr Khayumbi for the Plaintiff

Mr Mwebi for the Defendants

Court Assistant: E. Juma

