



Maleche (Suing as the Legal Representative of the Estate of Simon Maleche Achesa) v Kutekha & 4 others (Environment and Land Appeal E028 of 2021) [2023] KEELC 20745 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E028 OF 2021
DO OHUNGO, J
OCTOBER 17, 2023**

BETWEEN

SYLVIA MALECHE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SIMON MALECHE ACHESA) APPELLANT

AND

**JOSIAH KUTEKHA 1ST RESPONDENT
EUGENE LILECHI 2ND RESPONDENT
ZABLON LUKWIRI SHIOSO 3RD RESPONDENT
FLORA SHIOSO 4TH RESPONDENT
SYPHROSA LUKHWIRI 5TH RESPONDENT**

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon. B. Ochieng Chief Magistrate) delivered on 12th May 2021 in Kakamega MCELC No. 921 of 2018)

JUDGMENT

1. The background of this appeal is that through plaint dated 6th June 2018, Simon Maleche Achesa averred that he was the registered proprietor of land parcel number Idakho/Shikulu/2800 measuring approximately 3.42 hectares (suit property) and that the first and the second respondent were grandchildren to one Esther Khutekha. He further averred that Esther Khutekha passed away on 30th May 2018 and that the respondents intended to bury her remains on the suit property. He therefore prayed for an injunction to restrain the respondents, their servants, and agents from burying the remains of Esther Khutekha on the suit property. He further sought for costs of the suit and interest thereon.



2. The respondents filed defence and counterclaim dated 7th February 2019 and averred that Simon Maleche Achesa fraudulently and illegally acquired the suit property through misrepresentation of facts. They further averred that the first to third respondents had stayed on the suit property for more than 12 years. They therefore prayed that Simon Maleche Achesa's suit be dismissed with costs, and that judgment be entered in their favour for a declaration that the acquisition of the suit property by Simon Maleche Achesa was unlawful and should be cancelled. They also sought a declaration that the first to third respondents had acquired title to the suit property by adverse possession.
3. Simon Maleche Achesa passed away on 30th August 2019 and was substituted by the appellant herein pursuant to orders made by the Subordinate Court on 27th July 2020.
4. Upon hearing the matter, the subordinate court (Hon. B. Ochieng, Chief Magistrate) delivered judgment on 12th May 2021 dismissing the appellant's suit and allowing the respondents' counterclaim by issuing a declaration that the acquisition of the suit property by the appellant was "illegal and unlawful and should be cancelled" and ordering that the respondents were at liberty to inter the remains of Esther Khutekha on the suit property. He further granted the respondents costs of the suit.
5. Aggrieved by the judgment, the appellant filed this appeal on 7th July 2021. Considering that the appeal was filed out of time, she later filed ELC Misc. Application number E002 of 2022, wherein an order was made on 29th June 2023, by consent, extending time for appealing against the judgment and deeming this appeal as having been filed within time.
6. The following grounds of appeal are listed on the face of the Memorandum of Appeal dated 5th July 2021:
 1. That the learned trial Magistrate erred in both law and fact in making a declaration that the acquisition of title No. Idakho/Shikulu/2800 by the appellant as a proprietor was illegal and unlawful and should be cancelled when there was no proof of such illegality.
 2. That the learned trial magistrate erred in law and fact in relying on a purported written agreement dated 6.10.1997 signed by Jeremiah Maleche and members of Peter Kutekha's family which agreement does not specify the number of the parcel of land being given and when the said Jeremiah Maleche had no capacity to do so.
 3. That the learned magistrate failed to appreciate that by the time the alleged agreement dated 6.10.1997 was being entered into, the suit land had long been transferred into the names of the appellant herein having been (sic) registered on 29.7.1996 and the said Jeremiah Maleche was not the registered proprietor to purport to give land which he was not a registered proprietor.
 4. That the learned trial magistrate erred in law and fact by ordering the interment of the remains of the late Esther Khutekha on land parcel Idakho/Shikulu/2800 belonging to the estate of Simon Maleche.
 5. That the learned trial magistrate failed to appreciate that the alleged particulars of fraud were never proved by the respondents nor were such particulars of fraud pleaded as required by law and hence made an erroneous conclusion.
7. Based on those grounds, the appellant prayed that the judgment and all consequential orders be set aside, and judgment be entered in favour of the appellant as prayed in the plaint.
8. The appeal was canvassed through written submissions. The appellant argued that she demonstrated that the learned trial magistrate's findings on fraud and illegality were erroneous. That the title documents show that the Simon Maleche Achesa was registered as the proprietor on 29th July 1996



as per entry number 2 and that entry number 3 on the title concerns the date when the title deed was issued. She added that the confusion on date of issuance of title between the date in the title deed and that in the certificate of search could be due to a clerical error. She further submitted that the respondents failed to particularise and prove their allegations of fraud against Simon Maleche Achesa. The appellant therefore urged this court to allow this appeal and make such orders as it may deem appropriate since the remains of Esther Khuteka had already been interred on the suit property.

9. In response, the respondents argued that there was a valid sale agreement dated 6th October 1997 between Peter Khutekha (deceased) and Jeremiah Maleche (deceased) and that as the rightful beneficiaries of Peter Khutekha's estate, they were entitled to the suit property. They further submitted that Simon Maleche Achesa failed to show how the suit property descended from his late father to himself through transmission and further that Simon Maleche Achesa's title is suspicious since the title deed is dated 3rd January 2018 while entry number 3 at Part B states that the title deed was issued on 3rd January 2017. They therefore urged this court to dismiss the appeal with costs.
10. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*](#) [2013] eKLR.
11. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether misrepresentation, illegality and fraud were established, whether adverse possession was established and whether the reliefs sought by the parties ought to have issued.
12. There is no dispute that Simon Maleche Achesa remains the registered proprietor of the suit property. His proprietorship is confirmed both by the copy of the title deed as well as certificate of official search which were tendered in evidence. He became the registered proprietor on 29th July 1996.
13. By virtue of his registration, the estate of Simon Maleche Achesa is entitled to the rights, privileges, and benefits under Section 24 of the [*Land Registration Act*](#). Additionally, Section 26 of the [*Act*](#) obligates the court to accept the certificate of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) are established. Simply put, 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.
14. The respondents sought to attack the appellant's title on allegations of misrepresentation, illegality, and fraud. Pursuant to Order 2 rules 4 and 10 of the [*Civil Procedure Rules*](#) 2010, it is mandatory that particulars of misrepresentation, illegality and fraud be specifically pleaded. To the extent that no particulars were pleaded, the respondents did not comply with those provisions. Having chosen to attack the appellant's title on allegations of misrepresentation, illegality and fraud, the respondents were bound to not only prove fraud and misrepresentation but to additionally show that the appellant was party to such fraud and misrepresentation.
15. 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.

16. As noted earlier, there is no dispute on the fact that the estate of Simon Maleche Achesa is the registered proprietor or even the date that he became the proprietor. The only point of departure is that the title document is dated 3rd January 2018 and that it was issued to him on 3rd January 2017. The certificate of search also states that title deed was issued on 3rd January 2018. To the extent that there is no dispute on the date of registration, I do not think anything much turns on the date of issuance of the title. The respondents did not prove that Simon Maleche Achesa was party to or caused the mix-up in the date of issuance of the title deed. It is a known fact that title documents are typed and issued by the land registry as opposed to registered proprietors of land. I am persuaded that the learned magistrate erred to the extent that he relied on the mix-up on date of issuance of the title deed as a basis for invalidating Simon Maleche Achesa's title. I find that misrepresentation, illegality, and fraud were not established.
17. The next issue for determination is whether adverse possession was established. The law on adverse possession is settled. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
18. It bears repeating that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor and the reckoning of time for purposes of establishing the requisite 12 years of quiet possession must start with a wrongful dispossession of the registered proprietor. It is plain enough that a party who enters and occupies another's land pursuant to a sale agreement does so by permission of the proprietor. Such occupation does not amount to adverse possession. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the property ceases to be by permission of the seller and time for purposes of adverse possession starts to run in his favour from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR. Thus, such a claimant must demonstrate full payment of the purchase price as well as the date of that payment.
19. The respondents' case is that Peter Khutekha who was their grandfather was the initial owner of the suit property and that he sold it to the plaintiff's brother, one Jeremiah Maleche. That Peter Khutekha and family later returned to reclaim the land in 1996 and that an agreement was reached pursuant to which Jeremiah would be paid two cows and KShs 9,000 in exchange for the land. Simply put, the respondents contended that they purchased the land back. They relied on an agreement dated 6th October 1997 as proof of the alleged "repurchase" as well as payment of the two cows and KShs 9,000.
20. A perusal of the agreement as against the title deed in respect of the suit property shows that Simon Maleche Achesa was registered proprietor of the suit property as from 29th July 1996, well before the date of the agreement. Yet, Simon Maleche Achesa was neither party to nor signatory to the agreement. Further, the agreement neither stated the parcel of land in respect of which it was made nor the date when the two cows that were said to be part of the purchase price were paid. To the extent that the respondents relied on the agreement as a basis of their claim for adverse possession, they did not



demonstrate compliance with its terms so as to form a basis for asserting a hostile title in denial of the title of the registered proprietor or even to allow for reckoning of time for purposes of establishing the requisite 12 years of quiet possession. I find that adverse possession was not established.

21. In view of the foregoing, Simon Maleche Achesa was entitled to the injunction that he sought. On the other hand, the respondents failed both to impeach Simon Maleche Achesa's title and to establish adverse possession. Their counterclaim was for dismissal.
22. In the result, I find merit in this appeal, and I therefore make the following orders:
 - a. The judgment of the Subordinate Court is set aside.
 - b. Considering that the remains of Esther Khutekha have since been interred on the suit property, the prayer for injunction is overtaken by events.
 - c. The respondents' counterclaim is dismissed.
 - d. The appellant shall have costs of both the suit in the Subordinate Court and of this appeal.

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 Getanda for the Appellant

Mr Nyikuli holding brief for Mr Khayumbi for the Respondents

Court Assistant: E. Juma

