



REPUBLIC OF KENYA



KENYA LAW
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**Abafae & 5 others v Athman (Environment & Land Case 244 of 2021)
[2023] KEELC 21922 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21922 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 244 OF 2021
NA MATHEKA, J
NOVEMBER 28, 2023**

BETWEEN

**RUKIYA OMAR ABAFAE 1ST PLAINTIFF
MANNU OMAR ABAFAE 2ND PLAINTIFF
MOHAMED OMAR ABAFAE 3RD PLAINTIFF
KHADIHA OMAR ABAFAE 4TH PLAINTIFF
FATMA OMAR ABAFAE 5TH PLAINTIFF
NEEMA OMAR ABAFAE 6TH PLAINTIFF**

AND

JELINAN OMAR ATHMAN DEFENDANT

JUDGMENT

1. The plaintiff aver that they are the children of the late Omar Athman Abafae Al-Waily and the late Saida Omar Athman while the defendant is the plaintiffs' brother. The Plaintiff late parents purchased a property at Ganjoni, Mombasa known as Plot No. Mombasa/Block XXI/361 which is comprised of a block of 14 flats and which property was registered in the name of the plaintiffs' mother Saida Omar Athman. The plaintiff aver that the said Saida Omar Athman died in September 2005 after having ailed for almost ten (10) years. The plaintiff aver that they have always known and believed that the property was still registered in the name of the late mother and have had no reason to suspect that the particulars of ownership in respect thereof had actually been changed and a transfer to that effect registered at the Land Registry. The plaintiffs aver that their father who was also ailing started putting the family assets in order and around 2019 or thereabout, he instructed lawyer Suleiman Rashid Shikely to assist him in this task. The plaintiffs aver that it is while consulting lawyer Shikely that the said Omar Athman Abafae Al-Waily learnt of the fact that the defendant had transferred the aforesaid property from Saida



Omar Athman to the following: Saida Omar Athman — 1/15th share, Jelani — 4/15th share, Mannu — 1/15th share, Neema — 1/15th share, Khadija — 1/15th share, Najia — 1/15th share, Rukiya — 1/15th share, Fathiya — 1/15th share, Amina — 1/15th share, Athman — 1/15th share, Mohamed — 1/15th share and Fatma — 1/15th share

2. The plaintiffs aver that they only became aware of the fact that the title of all that property known as Mombasa/Block XXI/361 had been transferred in the manner set out above when the same was communicated to them by their father sometimes in 2019. The plaintiffs aver that their father the late Omar Athman Abafae Al Waily upon learning of the aforesaid changes called the defendant and after openly rebuking him instructed him to re-transfer the property back to the mother and also made it clear to the defendant that all the siblings had a right to the subject property in accordance with the dictates of the Islamic law which unequivocally provides that male siblings should be entitled to 2 flats each while the female siblings would be entitled to one flat each. The plaintiff aver that the aforesaid transfer was made without the knowledge, authority, approval and involvement of the registered owner or any of the plaintiffs or the named siblings therein and that the transfer document that was presented by the defendant to effect the aforesaid transfer is a forgery. The plaintiffs pray for judgment against the defendant for;
 - a) An injunction restraining the defendant by himself, his agent, employees or anybody deny an interest from selling, disposing, charging, Leasing or in any manner whatsoever dealing with all that property known as Mombasa/Block XXI/361 without the consent of the plaintiff.
 - b) A declaration that the transfer dated 27th April 2005 being null and void by reason of forgery the resultant file derived from the said transfer be cancelled
3. The defendant denies all the allegations of fraud levelled against him by the plaintiff and the defendant prays that the plaintiffs' suit be dismissed with costs.
4. This court has considered the evidence and submissions therein. The plaintiffs called 7 witnesses who testified in support of their claim. They stated that the transfer was done when their mother was alive but they deny signing the said transfer. They are all siblings and the defendant is their older brother. They all have 1 share except the defendant who has four. The transfer is a forgery and they have reported the matter to the CID indeed they testified that some of them were in the UK where they reside at the material time and hence they could not have signed the transfer. DW1 the son of the defendant testified on his behalf through a power of attorney. He stated that the transfer was not a forgery and it was done when their mother was still alive.
5. Section 24 (a) of the [Land Registration Act](#) stipulates as follows:

“subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....”
6. In the case of [Willy Kipsongok Morogo vs Albert K. Morogo](#) (2017) eKLR the Court held as follows;

“the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under Sections 24, 25 and 26 of the [Land Registration Act](#).”



7. While in the case of *Joseph N.K. Arap Ng'ok vs Moiwo Ole Keiwua & 4 Others* (1997) eKLR, where the Court of Appeal held that;

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”

8. Further, in Civil Appeal No. 246 of 2013 *Arthi Highway Developers Limited vs West End Butchery Limited and Others*, the Court of Appeal expressly stated thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

9. Be that as it may, Section 26 of the *Land Registration Act*, No.3 of 2012 provides that;

“26.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

10. In the case of *Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another* (2013) eKLR the court held that;

“the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme.”

11. Hon. Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows;

“...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person



must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

For the first limb, it appears to me that the title of the 1st defendant was obtained by fraud or misrepresentation. However, there is no evidence that the 1st defendant was a party to the fraud or misrepresentation. Indeed, to me the 1st defendant was an innocent purchaser for value. He was probably conned of his money by the 2nd Defendant and that is why he is the complainant in the first count of the criminal charges facing the 2nd Defendant. I am not of the view that he was a party to the fraud or misrepresentation that conveyed the land to him. He was a victim of the scheme employed by the 2nd defendant. I cannot therefore impeach the title by virtue of the provisions of section 26 (1) (a).

Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

12. From the pleadings and annexures, it is clear that the parcel of land known as Plot No. Mombasa/Block/XXI/361 which is comprised of a block of 14 flats and which property was registered in the name of the Plaintiff' mother Saida Omar Athman. On the 27th April 2005 the said property was transferred to other parties with the defendant retaining 4 shares. The plaintiffs state this is a forgery and they never signed the said transfer form. The plaintiffs have established that at the time and date indicated in the transfer document, some of the people named in the said document and who are alleged to have signed the document before Advocate Grace Okumu in Mombasa were residing in United Kingdom. I find that the lawyer Advocate Grace Okumu PW6, who allegedly attested the execution of the said transfer has expressly denied signing the document or dealing with any of the persons named therein as indicated in the said transfer document and has since recorded a statement with the police to that effect. The plaintiffs testified that the aforesaid forgery has been reported to the police and the plaintiff have recorded statements with the police regarding the facts herein stated. The defendant submitted that the plaintiff have no locus standi to litigate on behalf of their deceased mother as they do not have letters of administration. I find that the plaintiffs are litigating as beneficiaries of the suit land as they are the children of the said Saida Omar Athman and hence have an interest in the said property. It has also come out in evidence that their mother had been ailing for over 10 years before her demise on 14th September 2005. I have perused the said transfer documents and the names of the transferees are not indicated and it is only a series of signatures. I find that these cannot stand as the same cannot be matched with any names and hence the signatures cannot be identified. Secondly, PW6 who purportedly certified the same has denied doing so and hence the said document is invalid.
13. I find that plaintiffs are the lawful beneficiaries of the suit property namely, parcel of land known as Plot No. Mombasa/Block/XXI/361 which is comprised of a block of 14 flats and which property was registered in the name of the Plaintiff' mother Saida Omar Athman and the said was fraudulently transferred giving the defendant the lions share. I find that the plaintiffs have proved their case on a balance of probabilities and I grant the following orders;



1. An injunction restraining the defendant by himself, his agent, employees or anybody deny an interest from selling, disposing, charging, Leasing or in any manner whatsoever dealing with all that property known as Mombasa/Block XXI/361 without the consent of the Plaintiff.
 2. A declaration that the transfer dated 27th April 2005 being null and void by reason of forgery the resultant file derived from the said transfer be cancelled.
 3. Costs of this suit to the Plaintiffs.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

