



**Malidzo & 2 others v Mwavuma & another (Environment & Land Case
192 of 2016) [2023] KEELC 21747 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21747 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 192 OF 2016
MAO ODENY, J
NOVEMBER 20, 2023**

BETWEEN

**PATRICK MWARUA MALIDZO 1ST PLAINTIFF
STEPHEN OGONY ASANYO 2ND PLAINTIFF
HELLEN JUMWA KARISA 3RD PLAINTIFF**

AND

**NYENYO TEMBO MWAVUMA 1ST DEFENDANT
CHARLES NDERITU THEURI 2ND DEFENDANT**

JUDGMENT

1. By a Plaint dated 26th July 2016, the Plaintiffs herein sued the Defendants seeking for the following orders;-
 - a. Cancellation of the title issued to the 2nd Defendant and that the sale and transfer thereof of plot no. Kilifi/Kijipwa/1326 and Kilifi/Kijipwa/1324, Kilifi/Kijipwa/1328 and Kilifi/Kijipwa/1327 be declared null and void.
 - b. Declaration that the Plaintiffs are the owners Kilifi/Kijipwa/1324, Kilifi/Kijipwa/1328 and Kilifi/Kijipwa/1327 and are entitled exclusively to the ownership and have an unimpeded right of possession, occupation and quiet enjoyment of their property without interruption.
 - c. Eviction and a permanent injunction restraining the defendants by themselves, servants and/or employees or agents or any other person acting through them selling, leasing, cultivating, developing, putting any building materials or interfering with the plaintiffs property known as Kilifi/Kijipwa/1328, Kilifi/Kijipwa/1324 and Kilifi/Kijipwa/1327 and give them quiet enjoyment of their property.



- d. The Registrar of Lands be caused to issue fresh titles and register the plaintiffs as the registered owners of the suit property.

In the alternative

- e. The 1st Defendant be compelled to compensate the plaintiffs the value of the said plot at the current market value.
 - f. General damages.
 - g. Costs and interests on c above at the court rate.
 - h. Any other relief that this Honourable court may deem fit and just to grant.
2. The 2nd Defendant filed a counterclaim dated 19th October 2021 against the Plaintiff seeking the following orders:
 - a. A declaration that the Plaintiff in the counter-claim is a purchaser for value without notice.
 - b. Removal of all cautions and orders lodged by the defendants in the counterclaim against land titles Kilifi/Kijipwa/1324, 1326, 1327 and 1328.
 - c. An order for eviction of the Defendants in the counter-claim and a permanent injunction restraining the defendants in the counter-claim by themselves, servants and/or employees and agents or any other person acting through them from selling, leasing, cultivating, developing, putting any building materials or in any way interfering with the Plaintiff's in the counter-claim property being those pieces of land known as Kilifi/kijipwa/1324, 1326, 1327 and 1328.
 - d. Costs plus interests of the suit.

Plaintiff's Case

2. PW1 adopted his Witness Statement dated 6th July 2016 as evidence and produced the documents attached to the list of documents dated 26th July 2016 as PEXH1-14. It was PW1's case that the 1st Defendant (now deceased) was the original owner of all that parcel of land known as Kilifi/Kijipwa/298 that was later subdivided and new titles issued namely; Kilifi/Kijipwa/1324, Kilifi/Kijipwa/1326, Kilifi/Kijipwa/1327 and Kilifi/Kijipwa/1328.
3. PW1 stated that on diverse dates between September 2009 and April 2010, they entered into sale agreements with the 1st Defendant where they each purchased a quarter of an acre to be carved out of Kilifi/Kijipwa/298 at a consideration of Kshs. 150,000/- per plot.
4. PW1 further stated that out of the agreed consideration, he had paid Kshs. 100,000/- and was to complete the balance later. He told the court that he took possession of the portion he was shown by a surveyor, erected a fence thereon and planted some trees.
5. On cross-examination by Mr. Nyongesa, PW1 stated that he paid the 1st Defendant in the presence of his wife and children and was to complete the balance upon transfer. He conceded that the deceased offered him a refund of the money but he refused.
6. The case against the 1st Defendant was marked as abated on 7th March 2022, as the court was informed that he passed on in 2018. The suit proceeded against the 2nd Defendant who filed an amended defence and counter-claim.



2nd Defendant's Case

7. DW1 Charles Nderitu Theuri , the 2nd Defendant equally adopted his Witness Statement dated 9th May 2018 as his evidence in chief and produced the list of document as DEXH 1-5. He told the court that he was introduced to the 1st Defendant by a colleague who informed him of the 1st Defendant's intention to sell the suit properties. Consequently, he visited the suit properties, which he found vacant and proceeded to enter into an agreement with the 1st Defendant.
8. DW1 further stated that after carrying out due diligence and following due process, he purchased the suit properties from the 1st Defendant vide a sale agreement dated 31st October 2011.
9. It was DW1's testimony that the 1st Defendant told him that the Plaintiffs had defaulted on the sale agreements by failing to pay the balance of the purchase price for more than one year and consequently the 1st Defendant notified them and offered to refund the deposits before rescinding the agreements.
10. On cross-examination by Mr. Origi, counsel for the Plaintiffs, he testified that he was neither aware nor involved in any other court case at Kilifi courts. He stated that at the time of purchase, he was not aware that the Plaintiffs had bought the suit properties. He was also not aware that the Plaintiff had financed the subdivision.
11. On re-examination, the 2nd Defendant told the court that the 1st Defendant informed him that there were some people who had paid deposits for the suit properties but had never come back. He added that he was the one who fenced the suit properties.

2nd Defendant's Submissions

12. Mr. Nyongesa counsel for the 2nd Defendant identified two issues for determination namely, who is the owner of the suit properties; and what orders should be issued.
13. On the first issue, Counsel submitted that the suit having abated against the 1st Defendant the Plaintiffs had no claim against the 1st Defendant and in turn they failed to prove the alleged breach of agreement and fraud against the 1st Defendant.
14. According to Mr. Nyongesa, the logical consequence of this was that there was nothing wrong with the 1st Defendant selling the suit properties to the 2nd Defendant and relied on the case of [*Lawrence Muriithi M'thika and 3 others v Munyi Murwatbika and another*](#) [2021] eKLR.
15. Counsel further submitted that the Plaintiffs failed to prove their case against the 2nd Defendant as they failed to particularize the fraudulent acts complained of against the 2nd Defendant contrary to order 2 rule 4 of the [*Civil Procedure Rules*](#).
16. Counsel stated that fraud must be specifically pleaded, particularized and proved, as fraud cannot be inferred from the facts. Counsel cited the case of [*Kuria Kiarie and 2 others v Sammy Magera*](#) [2018] eKLR.
17. It was Mr. Nyongesa's submission that the 2nd Defendant produced a copy of a sale agreement and titles to the suit properties in his favour. That there was no dispute that the suit properties initially belonged to the 1st Defendant and that there was no caution registered against the titles to signify a third party's interest.
18. Counsel also stated that the 2nd Defendant purchased the suit properties in good faith and had no knowledge of any fraud as such, the 2nd Defendant has met the threshold of a bona fide purchaser as



was highlighted in the case of *Saad Otieno v James Muga Ogoda* [2021] eKLR. Counsel urged the court to dismiss the Plaintiffs' case and allow the 2nd Defendant's counter-claim with costs.

Analysis and Determination

19. The sole issue for determination is who between the Plaintiffs and the 2nd Defendant is the owner of the suit properties.
20. Counsel for the 2nd Defendant raised the issue of abatement of the Plaintiff's case against the 1st Defendant as he passed on in 2018. The Plaintiff in his testimony also admitted this.
21. It was counsel's submission that the since the Plaintiffs' case against the 2nd Defendant was dependent on the claim against the 1st Defendant; and since the claim against the 1st Defendant abated, then the Plaintiffs' claim against the 2nd Defendant could not survive.
22. Order 24 rule 4 of the *Civil Procedure Rules* provides;

Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

 - (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
 - (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
23. Upon death of a defendant and on application, the court has the discretion to substitute the deceased defendant and if no application is made after one year, the suit abates. The deceased defendant died in 2018 and no application for substitution was filed and the court endorsed the abatement on 7th March 2022.
24. The Plaintiff and the Plaintiff's evidence on record shows that the claim against the 2nd Defendant is pegged on alleged fraud between the 1st and 2nd Defendant. It is also clear that their interest over the suit property is the sale agreements between the 1st Defendant and themselves.
25. I agree with Mr. Nyongesa's argument that failure to substitute the 1st Defendant meant that the Plaintiff's claim against the 1st Defendant ceased to exist as early as 2019 long before the hearing date. Therefore, their allegation that the 1st Defendant breached the sale agreements between them could not be substantiated as a result of the abatement. The outcome therefore was that the Plaintiffs did not establish their interests over the suit properties.
26. The 2nd Defendant admitted that the 1st Defendant informed him about the Plaintiffs' sale agreements that he had rescinded and even offered to refund the monies collected. The 1st Plaintiff confirmed this in his testimony and told the court that he declined to accept a refund of the amount he had paid as part of the purchase price.



27. The suit properties are registered in the name of the 2nd Defendant. Section 24 and 26 (1) (a) and (b) of the [Land Registration Act](#), 2012 guarantees the sanctity and indefeasibility of title in the following terms;

24.

- (a) Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

26.

- (1) The Certificate of Title issued by the Registrar upon registration ... 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... 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.

28. In the case of [Willy Kipsongok Morogo v. 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.

29. The Plaintiffs did not give any evidence to prove the grounds as provided for under section 26 above to warrant the cancellation of the 2nd Defendant's titles. The 2nd Defendant exhibited a copy of the sale agreement and titles registered in his favour.

30. The upshot is that the Plaintiffs' case against the 2nd Defendant is dismissed with costs and the counter-claim is hereby allowed with the following specific orders:

- a. A declaration is hereby issued that the Plaintiff in the counter-claim (2nd Defendant) is a purchaser for value without notice.
- b. An order is hereby issued for the removal of all cautions and orders lodged by the defendants in the counterclaim against land titles Kilifi/Kijipwa/1324, 1326, 1327 and 1328.
- c. The Defendants in the counter-claim to give vacant possession of the suit properties within 45 days failure to which eviction orders to issue.
- d. A permanent injunction is hereby issued restraining the defendants in the counter-claim by themselves, servants and/or employees and agents or any other person acting through them from selling, leasing, cultivating, developing, putting any building materials or in any way interfering with the Plaintiff's in the counter-claim property being those pieces of land known as Kilifi/Kijipwa/1324, 1326, 1327 and 1328.
- e. Costs of the suit

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF NOVEMBER 2023.

M.A. ODENY



JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

