



Khan (Suing as the Personal Representative of the Estate of Esmail Khan Fakir Daudi) & 2 others v Ondigo & 3 others (Environment & Land Case 1 of 2023) [2023] KEELC 22518 (KLR) (29 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 1 OF 2023
MN KULLOW, J
DECEMBER 29, 2023**

BETWEEN

**MARIAM ESMAIL KHAN (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ESMAIL KHAN FAKIR DAUDI) 1ST PLAINTIFF
VILAYAT KHAN 2ND PLAINTIFF
NIRMALA BALDAYE KUMAR 3RD PLAINTIFF**

AND

**GORDONS OTIENO ONDIGO 1ST DEFENDANT
BENJAMIN ODERO ONYANGO 2ND DEFENDANT
PRISCA AKELO OGWENO 3RD DEFENDANT
LAND REGISTRAR, MIGORI COUNTY 4TH DEFENDANT**

JUDGMENT

1. The Plaintiff commenced this suit by way of a Plaint dated 8th January, 2023; seeking the following Orders: -
 - i. A declaration that the transfer of land parcel No. Kanyamkago/ Kawere 1/1284 to the 1st, 2nd and 3rd Defendants is unlawful, fraudulent, null and void and of no legal consequence.
 - ii. An Order directed to the 4th Defendant to cancel the titles issued to the 1st, 2nd and 3rd Defendants and revert land parcel No. Kanyamkago/ Kawere 1/1284 in the name of the Plaintiffs.
 - iii. Punitive costs by the 1st, 2nd and 3rd Defendants as general damages of illegal and fraudulent transfer of the Plaintiffs' land.



- iv. Costs of the suit.
- v. Any other or better relief the Honourable Court may deem fit to grant.

Plaintiffs' Case

2. The Plaintiffs aver that they are the absolute, registered and lawful owners of the suit land measuring approx. 4.0Ha; having been issued with a title deed on the 11/07/ 1989 to that effect.
3. It is their claim that the suit property was fraudulently, unlawfully, illegally and irregularly transferred by the 4th Defendant to the names of the 1st, 2nd and 3rd Defendants sequentially and irregular title deeds issued to that effect without their knowledge or consent. They contend that they have neither engaged the Defendants in any land transaction nor did they transfer the suit land to them or any proprietary rights/ interests. The said 1st – 3rd defendants remain strangers to them.
4. They further outlined the particulars of fraud thereof and outlined the order of transfer of the suit land in the names of the defendants as follows; that the land was transferred in the name of the 3rd defendant on 24/8/1994, the 3rd defendant then illegally transferred the property to the 2nd defendant on 06/09/2013, who subsequently transferred the same to the 1st defendant on 28/2/2017.
5. It is also their contention that as at 28/05/2020 and as supported by the certificate of official search produced as exhibit, the subsisting entries on the register of the suit parcel reflected and affirmed their proprietorship of the suit land.
6. It was further their assertion that they hold the original title deed of the suit property and have been in possession and occupation of their lawful property all along, despite the said irregular and unlawful transfers in the names of the defendants. They thus urged the court to allow the suit and grant the orders sought therein.
7. The matter proceeded for the formal proof hearing of the Plaintiffs' case on 06/07/2023. The same proceeded ex- parte, the absence of the Defendants, who had been served by way of substituted service, notwithstanding.
8. The 1st Plaintiff testified as PW1, on her own behalf and on behalf of her co-plaintiffs; she adopted her witness statement dated 08/01/2023 as her evidence in chief. She further testified that sometimes in the year 2020, she conducted a search and the certificate of search revealed that the suit land was still registered in the name of her deceased father. However, when she requested for a copy of the Green Card, she found out that the suit land had been fraudulently transferred to persons (1st – 3rd defendants) who were claiming that they (plaintiffs) transferred the land to them.
9. She also produced the documents on her List of Documents dated 08/01/2023 as PExhibits 1- 5 as follows; copy of letter of Authority as Pexh. 1, copy of the Title Deed as Pexh. 2, copy of the Green Card as Pexh. 3, copy of the Certificate of Official Search as Pexh. 4 and copy of the Certificate of Confirmation of Grant as Pexh. 5.
10. She thereafter urged the court to allow their claim and grant the orders sought of cancellation of the title issued to the 1st, 2nd and 3rd defendants and for the land to revert to their names. The Plaintiffs thereafter closed their case.
11. The Defendants were served by way of Substituted Service on the Daily Nation Newspaper on the 22nd May, 2023 at page 33 and an Affidavit of Service was filed as proof thereof. However, they neither entered appearance nor filed any statement of defence in response to the allegations levelled against them by the Plaintiffs.



12. There being no lawful justification and/ or explanation for their non- attendance and having been satisfied that service was properly effected, I proceeded to close the defence case. The Plaintiffs' case thus remained unchallenged and the exhibits adduced remained uncontroverted.

Analysis and Determination

13. It is this court's considered view that the following issues arise for determination: -
- a. Who is the rightful and/or legal owner of the suit property.
 - b. Whether the Plaintiffs are entitled to the reliefs sought in the Plaint.

I. Who is the rightful and/or legal owner of the suit property

14. Section 26 (i) of the Registered [Land Act](#) provides: -

“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.”

15. The Plaintiffs have attached a copy of the Title deed and a Certificate of Official search as Pexh. 2 and 4 respectively, clearly outlining their names as the registered proprietors, having been registered as joint owners thereof sometimes in the year 1989.
16. The Plaintiffs also adduced a copy of a Green Card as Pexh. 3 which showed various transfers effected to the 1st, 2nd and 3rd defendants sequentially on diverse dates, claiming purchasers' interest. It is the Plaintiffs contention that they neither sold nor transferred the suit parcel or any portion thereof to the 1st – 3rd defendants who remain strangers to them.
17. The Defendants on the other hand neither entered appearance or filed a statement of defence nor adduced any documentary evidence to support the various transfers to their names or to challenge the plaintiffs' averments. In the absence of any proof to the contrary, I find that Pexh. 2 and 4 adduced by the plaintiffs remain uncontroverted and is the right/ actual position.
18. It has been said time and again that a Title Deed is indefeasible evidence of the ownership of land. There has not been any challenge by the Defendants on the Plaintiffs' title by reason of fraud or otherwise as envisaged under section 26 (1) (a) and (b) of the [Land Registration Act](#).
19. I have looked at both Pexh. 2 & 4 and I am satisfied that the suit property indeed belongs to the Plaintiffs, who are the joint registered proprietors thereof. Their registration and proprietorship is therefore not in dispute and thus, they remains the rightful, absolute and indefeasible owners of the suit property with all the rights and privileges accruing therefrom; including the right to a quiet and peaceful occupation and right to use their property.
20. I therefore find and hold that the Plaintiffs are the rightful registered proprietors of the suit land, having been issued with the title deed and are thus entitled to protection of the law.
- II. Whether the Plaintiffs are entitled to the reliefs sought in the Plaint
21. The Plaintiffs have sought the grant of an order of cancellation of the title deeds fraudulently issued to the 1st, 2nd and 3rd Defendants by the 4th Defendant, Punitive costs by the 1st, 2nd and 3rd defendants and a declaration that the said transfer was unlawful, fraudulent, null and void and of no legal consequence.



22. The Plaintiffs produced a copy of the Green Card as Pexh. 3 which revealed several entries of transfers effected on the suit parcel on diverse date to the 3rd, 2nd and 1st Defendants respectively. The 1st – 3rd Defendants did not provide a lawful justification, basis or explanation of how, when and why the said transfers were effected. The 4th Defendant, who is the custodian of all the land records did not also enter appearance, filed a statement of defense or offered any explanation or justification on how and why entries No. 9 – 14 as captured in the Green Card (Pexh. 3) were done and whether the same strictly complied with the lawful procedure that govern the transfer of parcels of land. There was also no explanation on the variance as seen on the Green Card (pexh. 3) and on the Certificate of Official Search (pexh. 4).
23. Further, what raises eyebrows and remains suspicious is that the said transfers, evidenced by entry No. 9 – 14 on pexh. 3, which were effected long before the year 2020 were not indicated on the certificate of search which was conducted in the year 2020 as evidenced by Pexh. 4. It is common ground that a certificate of official search is a replica of what is contained on the Green Card.
24. It is the Plaintiffs contention that the title deeds issued in favor of the defendants and particularly the 1st defendant who currently holds the title deed of the suit land were procured fraudulently and the same ought to be cancelled on account of fraud.
25. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR held that where an instrument of title is challenged, such proprietor must go beyond the instrument to prove legality:
- “We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
26. No such explanation was tendered by the defendants, who neither entered appearance or filed a statement of defense nor adduced any evidence to challenge the averments by the plaintiffs.
27. The consequence of the Defendants’ failure to file a defense or enter appearance is that the evidence by the plaintiffs remaining unchallenged. The position on the search certificate (pexh. 4) remains the actual position on the ground. In the absence of any proof as to the contrary and without any lawful explanation and proof; I find that the said transfers in the names of the 2nd, 3rd and 1st defendants respectively, were indeed fraudulent, null and void.
28. Section 80 of the [Land Registration Act](#) on the Rectification by an Order of Court provides that: -
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
29. The Court of Appeal in *Mombasa, in Civil Appeal No. 312 of 2012; Emfil Limited Vs Registrar of Titles Mombasa & 2 others* [2014] eKLR held as follows; -
- “Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.
30. As earlier held, allegations of fraud are serious allegations and the plaintiff is under a duty to strictly prove the same. From a look at the evidence adduced by the plaintiffs in support of their claims of



fraud, particularly Pexh. 3 and 4; it is evident that there were fraudulent activities on the part of the defendants which have not been explained.

31. In the totality of the foregoing; it is my considered opinion that even though the 1st Defendant is the current holder of the title deed of the suit land; he has not demonstrated the legality of his title deed and it is clear that the initial process of acquiring the same by the defendants was unprocedural and fraudulent. Accordingly, I find that the plaintiffs have proved their case to the required standard to warrant the grant of the prayers sought for cancellation of the title issued in the name of the 1st Defendant.
32. The Plaintiffs have also sought punitive damages against the Defendants. Maraga, J as he then was held in Abdulhamid Ebrahim Ahmed Vs Municipal Council Of Mombasa [2004] eKLR that: -

“Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant’s conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute”
33. Guided by the decision above, I find that the Plaintiffs have not demonstrated and/or established the categories outlined above; that the actions by the defendants was oppressive, arbitrary or unconstitutional particularly on the part of the 4th defendant, or that the actions by the defendants were intended to earn them profits or that the same is expressly authorized by the statute.
34. It is not in dispute that the Plaintiffs are the ones who are in possession, occupation and use of the suit land to date. Even though the land was transferred and registered in the names of the defendants on diverse dates; they never took possession or evicted or interfered with the plaintiffs’ use and occupation thereof. It is therefore my finding that they have not proved their claim on punitive damages and are therefore not entitled to the same as sought.

Costs

35. Costs generally follow the event, and in this instant case, since the Plaintiffs have been inconvenienced, I find that they are entitled to costs of the suit.

Conclusion

36. The upshot of the foregoing is that the Plaintiffs have sufficiently proved their case to the required threshold and I accordingly allow the Plaint dated 8th January, 2023 on the following terms: -
 - i. A declaration that the transfer of land parcel No. Kanyamkago/ Kawere 1/1284 to the 1st, 2nd and 3rd Defendants is unlawful, fraudulent, null and void and of no legal consequence.
 - ii. An Order directed to the 4th Defendant to cancel the titles issued to the 1st, 2nd and 3rd Defendants and revert land parcel No. Kanyamkago/ Kawere 1/1284 in the name of the Plaintiffs.
 - iii. Costs of the suit to be borne by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF DECEMBER, 2023.

MOHAMMED N. KULLOW



JUDGE

In presence of; -

No appearance for the Plaintiffs

No appearance for the Defendants

Court Assistants - Tom Maurice/ Victor

