



**M'ethara & another v District Land and Adjudication Officer
Tigania West & 10 others (Environment & Land Case E025 of 2021)
[2023] KEELC 22338 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22338 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E025 OF 2021
CK YANO, J
DECEMBER 20, 2023**

BETWEEN

JOSEPH M'ETHARA 1ST PLAINTIFF

JAMES MUKARIA ETHARA 2ND PLAINTIFF

AND

**DISTRICT LAND AND ADJUDICATION OFFICER TIGANIA
WEST' 1ST DEFENDANT**

LAND REGISTRAR MERU COUNTY 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

SHADRACK KANAMPIU 4TH DEFENDANT

BERNAD GATIMBA 5TH DEFENDANT

FRANCIS KUBANIA 6TH DEFENDANT

JACOB KIMATHI 7TH DEFENDANT

DAVID KAIBIRIA CHOKERA 8TH DEFENDANT

NAOMI KIENDE 9TH DEFENDANT

M'MUNGANIA M'MWITARI 10TH DEFENDANT

JULIUS KABUNYA M'IRURA 11TH DEFENDANT



JUDGMENT

Background

1. By a consent dated 6th August, 2021, the plaintiffs sued the defendants seeking the following reliefs:-
 - a. A declaration that the registration of Land Parcel Nos. Nyambene/Uringu/2033, 1/1627, 1/1630, 1/3129, 1/1628, 1/1626, 1/3763, 1/1512 and 1/1629 in the names of 4th to 11th defendants was illegal, null and void absolutely.
 - b. An order directing the 2nd and 3rd defendants to rectify the register and register all land parcels in the name of the plaintiffs.
 - c. An order directing the 2nd and 3rd defendants to implement the original course of the road of access as appears on the Original Survey Map.
 - d. A mandatory and permanent injunction restraining the 4th to 11th defendants from entering, interfering with the quiet possession of all Land Parcels i.e. 1/1626, 1/3763, 1/1512 and 1/1629 respectively
 - e. Costs of this suit.
2. The 1st, 2nd and 3rd defendants filed a joint statement of defence dated 23rd May, 2022 in which they denied the plaintiff's claim in toto. By way of defence the 1st, 2nd and 3rd defendants averred that it is their statutory duty to carry out survey and register any instruments that is presented for registration that is in compliance with the law. They further aver that should there be any error in relation to any instruments, the law has laid down a clear procedure on how the same is to be addressed and that they have not in any way denied the plaintiffs such right, hidden any documents from the plaintiffs or acted with malice towards any person in relation to this suit.
3. The 1st, 2nd and 3rd defendants further averred that the records in relation to any parcel have always been available for scrutiny for which the plaintiffs base their case due to the openness with which the defendants carry out their statutory mandate. They also averred that they were never served with any demand notice or intention to sue.
4. The 1st, 2nd and 3rd defendants denied the jurisdiction of this court and averred that the plaint does not disclose any reasonable cause of action and only serves to embarrass the defendants, adding that the plaintiffs are not entitled to any claim of interest as alleged or at all and put the plaintiffs to strict proof thereof.
5. The plaintiffs filed a reply to defence to the 1st, 2nd and 3rd defendants' statement of defence dated 21st October, 2022 wherein they reiterated the contents in the plaint.

Plaintiffs' case

6. It is the plaintiffs' claim that at all material times, Land reference No. Uringu/1/229 Adjudication Section was gathered by the 1st plaintiff and recorded in his name in the 1960s. That the 1st plaintiff and his family took possession and occupied all the land to date and have greatly developed it and are still in possession. The plaintiffs have listed the particulars of the alleged developments to include 8 living houses, 2000 miraa plants, 200 coffee trees, 500 banana plants, 300 gravelia trees, 8 mango trees and 20 eucalyptus trees.



7. The plaintiffs averred that in the course of time, there arose some disputes from people including the 4th to 11th defendants, by themselves, their next of kin or people claiming under their title. That due to that, the 1st defendant pursuant to the provisions of the Land Adjudication Act, Cap 284 Laws of Kenya, arbitrated and presided over various disputes in accordance with the said Act.
8. The plaintiffs averred that in the year 2011, the 1st plaintiff filed Constitutional Petition No. 182/2011 in the High Court at Meru to challenge issues relating to the right to occupy and use the original Uringu/1/229. That while the Petition was pending in court in 2015 the 1st, 2nd and 3rd defendants fraudulently subdivided the original parcel Uringu 1/229 into Land Parcels No. 2033, 1627, 1630, 1629,3129,1628,1626,3763,1512 and 1629. It is the plaintiffs' contention that the transfer and registration of the said parcels of land in the names of the 4th to 11th defendants under the Land Registration Act was illegal and that it was done in collusion with the 1st and 2nd defendants in favour of the 4th to 11th defendants. The plaintiffs have listed the particulars of collusion, illegality and fraud as follows: - that the registration was done behind the plaintiffs' knowledge and participation yet they are in possession, that the registration was done while petition No. 182/2011 was pending in the High Court, and fraudulently purporting to ignore the interest of the plaintiffs.
9. The plaintiffs further averred that the 1st and 3rd defendants unlawfully schemed to divert the course of the road of access which was originally scheduled to pass the edge of land parcel No. Nyambene/ Uringu/1/229 to pass along Karebe village, Njuri Ncheke Shrine to joint Imenti forest. The plaintiffs have also listed the alleged particulars of illegality that the decision was unilateral as the occupiers and original owners were not consulted, that the new course will divide and waste a big chunk of land than before and will inconvenience the plaintiffs to a large extent, that the whole burden will be on the plaintiffs instead of sharing as it were before and that the new course will not serve the intended purpose.
10. At the hearing, James Mukaki Ethara, the 2nd plaintiff testified as PW1 and adopted his statement dated 6th August, 2021. He also produced a copy of the Petition No. 182/2011, copy of application dated 14th February, 2014, proceedings in objection No. 774, order dated 19th February, 2014, gathering book, Search Certificates for parcels Nos. Nyambene Uringu 1/2033, 1627 and 3129, Letter dated 3rd June 2014 and report on missing person as P. Exhibits 1- 9 respectively. He basically reiterated the averments contained in the plaint and stated that initially, land Parcel No. 229 Uringu Adjudication Section measuring 5.89 acres was ancestral land in which they have lived on since time immemorial and carried out various development. That initially, the land belonged to one Mugambi Riara his grandfather, and father to the 1st Plaintiff.
11. PW1 stated that the 1st defendant has over time presided over three arbitration board cases namely, Objection Cause No. 526 of 1969, Objection No. 774 and 536 which gave contradictory decisions which made the plaintiff file Constitutional Petition No. 182/2011. That at one time Njuri Ncheke ordered the taking of "*Nthenge Oath*". That history will show that ownership of the suit parcels were contested long before and during adjudication process. PW1 wants the cancellation of the titles issued to the defendants and the land to revert to his father the 1st plaintiff herein.
12. The 1st plaintiff, Joseph M'Ethara testified as PW2. He stated that the suit land is his which he inherited from his father who had gathered it. He too adopted his witness statement dated 1st April 2022 as his evidence in chief and relied on the documents produced by PW1. His evidence is that they have been in occupation, and possession and use and have never vacated the land. He urged the court to grant them the orders sought in the plaint.



Defendants' case

13. None of the defendants attended court during the hearing and therefore the defendants never adduced any evidence and their cases were marked as closed. I note however that on 28th September, 2023, Mr. Ondari, learned counsel for the plaintiffs informed the court that the case against the 9th – 11th defendants was withdrawn.

Plaintiff's submissions

14. Mr. Ondari, learned counsel for the plaintiffs filed submissions dated 6th November, 2023 wherein he gave a summary of the case. It is his submission that the plaintiffs' evidence is not challenged. It is the plaintiffs' contention that since the 1st plaintiff was the original gatherer of Parcel No. 1/229 any dealing with the said land ordinarily ought to have involved him at all stages. The plaintiffs' counsel pointed out that the plaintiffs provided two cases, Objection No. 774 and No. 634 (Arbitration Board Case) which were not conclusive or effective. That the 1st, 2nd and 3rd defendants never came to court to testify as to how the land was subdivided to several portions and given to the 4th to 11th defendants. That the records are with the 1st defendant and his refusal to testify and produce the documents would be deemed to be against him/her.
15. The plaintiffs' counsel cited section 24 and 26 of the *Land Registration Act* which provide the circumstances under which a title can be cancelled or revoked and relied on the case of *Munyu Maina v Hiram Gathila Maina* [2013] eKLR and *William Rerimoi Lagat v Dickson Kiprop Kabui* Iten ELC Case No. E21/2022.
16. It is the plaintiffs' submission that their assertions have not been controverted by the defendants and that they have proved their case on a balance of probabilities and urged the court to grant them all the prayers sought in the plaint as well as costs. The plaintiffs relied on the case of *Kanyungu Njogu v Daniel Kimani Maina* [2000] eKLR and cited Section 80(1) of the *Land Registration Act*.
17. In this case, the 1st, 2nd and 3rd defendants opted not to adduce any evidence in support of their case. They, however filed submissions dated 31st October, 2023. In such a scenario, the averments in their statement of defence remain mere allegations. The defence filed in my view is not available for consideration having not been proved by evidence (see the case of *CMC Aviation Limited v Cruisair Limited* No. 1 [1987] KLR 103). The plaintiffs, however have the onus of proving their case against the defendants whether or not the defendants adduced evidence. This is because the plaintiff's claim is defended and there is no interlocutory Judgment entered against the defendants the case not being a liquidated claim.

Analysis and Determination

18. The court has carefully considered the pleadings and the evidence adduced. The court has also taken into account the submissions filed, the cited authorities and the relevant provisions of Law. The court identifies the following issues for determination:-
 - i. Whether fraud has been proved against the defendants
 - ii. Whether the plaintiffs are entitled to the reliefs sought.
19. The plaintiffs contend that their family gathered and have been in occupation and possession of Parcel No. Uringu 1/229. That a dispute arose between the 1st plaintiff and the 4th – 11th defendants regarding the ownership of the said land where the dispute was determined by the 1st defendant. The



plaintiffs testified that they instituted constitutional Petition No. 182 of 2011 at the High Court, Meru. The Plaintiffs allege that the 1st and 2nd defendant in collusion with the 4th to 11th defendants caused fraudulent sub-division and transfer of land Parcel Uringu 1/229 to Land Parcels Nos. 2033, 1627, 1630,3129,1628, 1626,3763,1512 and 1629 to the 4th to 11th defendants during the pendency of the said Petition. Additionally, the plaintiffs allege that the 1st and 2nd defendants unlawfully diverted the course of an access road in the suit land which has inconvenienced the plaintiffs.

20. From the evidence adduced, it is clear to me that there were objections that were heard and determined by the 1st defendant in respect to the suit land in accordance with the provisions of the Land Adjudication Act Cap 284 Laws of Kenya. The plaintiffs produced proceedings in respect of objection No. 774 as an exhibit. In my view, if the plaintiffs were not satisfied with the decisions made by the 1st defendant, the plaintiffs had a right of appeal to the Minister as stipulated under the Land Adjudication Act or file Judicial Review proceedings instead of filing this suit.
21. In this case, the plaintiffs case is based on alleged fraud and collusion. Allegations of fraud must be strictly proved. The evidence on record suggests that there were disputes over the suit land that were heard in accordance with the then relevant law, which is the Land Adjudication Act. The plaintiffs had a right to pursue their claim under that Act up to the Appeal to Minister stage or apply for Judicial Review Section 107 and 108 of the Evidence Act is clear that the burden of proof lie in the person who alleges. In this case, no sufficient evidence has been tendered and I am not satisfied that the alleged fraudulent dealings and collusion have been proved against the defendants. From the evidence on record, it is my finding that the plaintiffs' claim based on fraud has not been proved and must fall. It is Trite Law that charges of fraud should not be lightly made or considered. They must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. However, the standard of proof required must be something more than a mere balance of probabilities. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.
22. The court is cognizant of Sections 26 and 80 of the Land Registration Act under which a title can be challenged and rectified. In the absence of evidence or proof that there was any fraud, it is my finding that the plaintiffs are not entitled to the reliefs sought herein. It was up to the plaintiffs to prove to the court's satisfaction that there was fraud but they have not tendered sufficient evidence to that effect.
23. From the foregoing on a balance of probabilities, the plaintiffs have not proved their case. The upshot is that the plaintiffs' suit is dismissed with costs to the 1st 2nd and 3rd defendants.
24. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF DECEMBER, 2023

C. K. YANO

JUDGE

In the presence of

Court Assistant: V. Kiragu

Ondari for Plaintiff

No appearance for 1st - 3rd defendants

No appearance for the 4th - 8th defendants

No appearance for the 9th - 11th defendants - Case Withdrawn

