



**Ahmed v Shee & 4 others (Environment & Land Case 20 of 2021)
[2022] KEELC 4902 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 4902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 20 OF 2021**

AE DENA, J

MAY 30, 2022

BETWEEN

MOHAMED ABUSHIRI AHMED PLAINTIFF

AND

MWINYIAMIRI MOHAMED SHEE 1ST DEFENDANT

ASHA MOHAMED NASSIR 2ND DEFENDANT

ALI MOHAMMED SHERIA 3RD DEFENDANT

LUSTER LIMITED 4TH DEFENDANT

LAND REGISTRAR-KWALE 5TH DEFENDANT

JUDGMENT

Background

1. The plaintiff filed this suit by way of plaint dated December 22, 2020. The plaintiff alleges that he is the registered owner of land parcel number Kwale/Kidimu/289 herein referred to as the suit property. That he was issued with a title deed over the suit land sometime in August, 2006. It is the plaintiff's case that he was allocated the suit land in 1979 together with Mshee Mwinyamiri Bwajiko and Alaw Nasiri Kombora but lodged a complaint at the Land Adjudication Office Kidimu Centre against the said co proprietors. It is further stated that since then he made follow up on the outcome of the said dispute with no feedback until sometime in June, 2016 when he received communication that the same was still pending before the Deputy County Commissioner awaiting hearing and determination.
2. The plaintiff further alleges that he conducted an official search over the property on May 13, 2015 and discovered that the same was registered in the names of the 1st and 2nd defendants who had fraudulently obtained title while the dispute was pending determination by the Deputy County Commissioner. That from the green card the 1st defendant became the registered proprietor of the suit property on



October 10, 2013 and the 2nd defendant on May 25, 2016. That the 5th defendant had issued the said titles without due regard to the law considering that the suit land had a pending dispute. The particulars of the irregularities are given in the plaint. The plaintiff seeks the following relief; -

- a. A declaration that the plaintiff is the lawful owner of parcel number Kwale/Kidimu/289
 - b. An order that the 1st to 4th defendant do deliver up to the 5th defendant the title deed to parcel number Kwale/Kidimu/289 and the 5th defendant to cancel the same
 - c. An order that 1st to 4th defendants do sign all the requisite and/or transfer forms transferring the suit property to the plaintiff in default the deputy registrar to sign all the requisite and/or transfer documents transferring the suit property to the plaintiff.
 - d. An order of a permanent injunction restraining the defendants either by themselves or through their agents/servants and/or employees from selling, charging, sub dividing, taking possession or otherwise dealing in any manner with the said parcel number Kwale/Kidimu/289.
 - e. An order for vacant possession from parcel number Kwale/Kidimu/289 by way of eviction of the 1st to 4th defendants.
 - f. Costs and interest at court rates
3. The suit is undefended. According to the proceedings attempts at service upon the 1st – 4th defendants by Timothy Kitsao process server on February 24, 2021 were not successful (see affidavit of non-service sworn on May 19, 2021). Leave was granted on September 24, 2021 for substituted serve by way of advertisement. Despite the advert being placed on the Daily Nation newspaper of September 28, 2021 the 1st -4th respondents failed to enter appearance. Satisfied with service the matter proceeded for hearing before this court.
4. The 5th defendant is the Land Registrar Kwale who was served on March 2, 2021 and failed to enter appearance.

Evidence

4. PW1 was the plaintiff who testified before this court on December 14, 2021 and was represented by Mr Nyange. He adopted his witness statement made on December 22, 2020. Together with this he produced 5 documents being a copy of Kidimu Adjudication Office letter November 11, 1979, copy of green card dated May 31, 2016, copy of search on land parcel Kwale/Kidimu/289 dated May 13, 2015, copy of letter from Ministry of Lands dated June 6, 2016 and his own letter to the Director of Public Prosecution dated September 25, 2019 as per the plaintiffs list of documents dated December 22, 2020. The plaintiff informed the court that he was given the suit property by his parents in 1968 and tilled the same until 1970 when adjudication commenced. That he realized the suit land had already been adjudicated and allocated to himself and two other people who were Mwinyi Amiri Bwanjiko and Alaw Nasiri Kombora [both deceased] who alleged they were related to the plaintiff. He further stated that he made a complaint at the Land Adjudication Committee which had decided that the land be shared equally. Unhappy with the decision he filed an objection at the adjudication office which was never heard. He told the court that he also travelled out of the country on personal issues but discovered latter that the 1st defendant who is a grandchild to Mwinyi Amiri Bwanjiko and the 2nd defendant a relative to Alaw Nasiri Kombora were registered as the owners of the suit land.
- 6 The plaintiff further testified that the title deed to the suit property was issued to the 1st and 2nd defendants before the objection was heard and determined. He asked the court to help him get back his land. On inquiry by this court on the status of occupation of the suit property, the plaintiff stated



that there was no one in occupation of the suit land except for a few squatters who plant sugarcane and his coconut and cashew nut trees.

Plaintiffs Submissions

7. Mr Sharia Nyange Advocate submitted that registration is not absolute proof that a person is the legal owner of land especially when the title is under challenge. That there must be proof that the title has been issued/procured in accordance with the law and laid down procedures. Counsel referred the court to the provisions of section 26 of the [Land Registration Act](#) which echo those of section 28 of the [Registered Land Act](#) [repealed] and the holding in [Esther Ndegi Njiru & Another V Leonard Gatei](#)[2014]eKLR to buttress this point.
8. Citing section 143 of the [Registered Land Act](#) [Repealed] and section 80 its equivalent in the [Land Registration Act](#), Counsel urged that this court has powers to order rectification of the register by directing that any registration be cancelled or amended if satisfied that any registration was obtained made or omitted by fraud or mistake. According to counsel the plaintiff had demonstrated that while he was initially allocated the suit property together with the 1st defendant and one Nasiri Kombora sometime in 1980, he had challenged the same before the adjudication office and further appealed to the minister under the Adjudication Act but the other two individuals failed to disclose the appeal that was pending and obtained title to the suit property before a decision on the appeal.
9. It was further submitted that records from the Lands Registry in Kwale provide conflicting information on the suit land and hence show that there were fraudulent dealings on the same. That information on the search certificate show that the registered owners of the suit property are Mwinyamiri Mohammed Shee and Asha Mohammed Nassir but the said names do not appear on the green card. Further that while the green card shows the history of ownership of the suit property the search certificates indicate current registered owners and encumbrances yet both documents should tally in content.
10. It was lastly submitted that the defendants did not stand to suffer any prejudice in the event that a judgement is made in favour of the plaintiff since the defendants were not in occupation of the suit property. The court was asked to award the prayers sought in the plaint to the plaintiff.

Analysis And Determination

11. I have carefully considered the pleadings, the oral testimony of the plaintiff, the evidence produced, submissions and authorities placed before this court. This court noted that this was a very old dispute and had to assure that the same is not barred by limitation. It is trite that where fraud is pleaded then time for purposes of limitation of action Act starts to run from the time the fraud is discovered- see section 26 of the [Limitation of Actions Act](#). In this case it was discovered in the year 2015.
12. This suit is undefended however it is trite that the plaintiff must prove his case on a balance of probability whether the evidence is unchallenged or not. The court must interrogate the evidence tendered by the plaintiff as was the holding in [Kenya Power & Lighting Company Limited Vs Nathan Karanja Gachoka & another](#) [2016] eKLR, [Gichinga Kibutha V Caroline Nduku](#) (2018) eKLR and [Propwa Company Limited v Justus Nyamo Gatondo & another](#) [2020] eKLR.
13. The issues for determination in my view are Whether the 1st to 4th defendants lawfully acquired the suit property and whether the plaintiff is entitled to the reliefs sought in the plaint.
14. In addressing the above issues my first point of call is whether the plaintiff has a legal or equitable interest in the suit property. It is pleaded in the plaint the plaintiff was issued with a title over the suit



land sometime on August 28, 2006 by the 2nd defendant (I will assume that this is an error and invoke my jurisdiction under section 100 of the *Civil Procedure Act* to amend it to read the 5th defendant in the interests of justice). I will state at this point that this alleged title has not been produced in court as part of the evidence. It is also pleaded that in 1979 he was allocated the suit property together with Mshee Mwinyiamiri Bwajiko and Alaw Nasiri Kombora but lodged a complaint at the Land Adjudication Office Kidimu Adjudication section against the said co proprietors. In his witness statement he states that the suit property belonged to his grandfathers' brother who died, thereafter the suit property was inherited by his children one being Mwanaisha wa Mohamed Mkulu. Subsequently in 1968 Mwanaisha and her siblings gifted the suit property to the plaintiff and this was witnessed by the 1st defendant and Alaw Nasir one of the coproprietors. Further in his oral testimony PW1 informed the court that he cultivated the land until 1970 when adjudication commenced and realized that the suit property had already been adjudicated, allocated to himself and Mwinyi Amiri Bwanjiko and Alaw Nasiri Kombora [both deceased] who alleged they were related to the plaintiff. He denies they were his relatives. At this point I will proceed to analyze the documentary evidence and whether there is proof that the suit property was indeed allocated to the plaintiff and the two co-proprietors. I have seen a copy of the letter dated November 11, 1979 from Kidimu Adjudication Section addressed to LAO Kwale which I will assume is the acronym for the Land Adjudication Officer. The letter confirms that the suit property belonged to Muhamad Abushiri Ahmed the plaintiff, Mshee Mwinyiamiri Bwajiko and Alaw Nasiri Kombora though the plaintiff was claiming the shares of the co-proprietors. I have noted the words in the letter 'Note that Muhamad Abushiri Ahmed is one of the proprietors.....'. This clearly corroborates the fact that the plaintiff was allocated the suit property though with co proprietors. If this is the case then entries at the land registry in respect of the proprietorship ought to have captured this information.

- 15 Having found that indeed the plaintiff was allocated the land together with others that is the co-proprietors, I will proceed to look into the allegations of fraud as pleaded and reiterated in the plaintiff's oral evidence. These are particularised in paragraph 12 of the Plaint as hereunder; -

Particulars of irregularities of the 1st – 4th defendant

- a. Making or obtaining a title deed parcel No.Kwale/Kidimu/289 while well aware the property belonged to the plaintiffs.
- b. Presenting themselves as the owners of parcel No Kwale/Kidimu/289 while well aware that there was a pending dispute lodged by the plaintiff challenging Co proprietorship
- c. Attempting to obtain parcel No. Kwale/Kidimu/289 without taking the due process of law.

Particulars of irregularities of the 5th defendant

- a. Issuing title to the 1st and 2nd defendants during the pendency of a land dispute.
- b. Issuing title to the 3rd and 4th defendants during the pendency of a land dispute.
- c. Issuing green card that conflicts with certificate of official search.
- d. Removal of the plaintiff as the registered owner without following the due process and the law.

16. This court keenly looked at the correspondence produced by the plaintiff and in none of them did I see a confirmation that the appeal by the plaintiff was lodged. The letter dated November 11, 1979



requests the LAO to ‘allow the plaintiff to file a land adjudication committee case’ and therefore clearly it is not the filed dispute itself. Indeed, it was received as it bears a received stamp whose date appears to me to be January 19, 1980 though the plaintiff states in a subsequent letter dated September 25, 2019 as having been received on January 19, 1988. I will however adopt the plaintiff’s date. Even the letter dated June 6, 2016 from the Land Adjudication Office Nairobi addressed to Land Adjudication/Settlement Officer seeks to confirm if an appeal was filed to the Minister. From the letter it appears that the Land Adjudication Settlement Office Kwale was required upon payment to prepare and forward to the Land Adjudication and Settlement Department Nairobi for processing. According to the letter there only existed at the Land Adjudication and Settlement Department Nairobi Appeal Case No 881 of 1985 filed by the co-proprietors against the plaintiff which was pending and which appears to me to be in respect of a different plot that is P/No 454. From the facts and evidence placed before me I will be hesitant to proceed from the premise that the appeal was indeed filed. I have no evidence to prove that it was filed. I’m also minded of the fact that the plaintiff told the court that he travelled out of jurisdiction for personal reasons and or exile as stated in his witness statement.

17. I will further state that since the issue of appeal featured substantively, I had occasion to look at the Land Adjudication Act chapter 248 of the Laws of Kenya and the process of lodging an appeal and its effect upon final registration by the Chief Land Registrar under section 28 of the Act among other provisions. Guided by section 23(4) the Land Adjudication Officer acted within the law to allocate the land as co-owned between the plaintiff and the co- owners herein and stated the shares to be on 50% basis. The plaintiff raised an objection. The objection is to be in writing as per section 26(1) which I must confess was not produced as part of the evidence. Be that as it may, then there is appeal to the minister and sections 27 and 29 of the Act are relevant. Section 27 is on finalization of the Land adjudication register subject to Appeal and subsection (3) (c) required the Land Adjudication Officer to file together with the Land adjudication register, a list of pending appeals with the Director of Land Adjudication Nairobi. It appears this is why the letter dated June 6, 2016 from the land Adjudication Office Nairobi addressed to Land Adjudication/Settlement Officer seeks to confirm if an appeal was filed to the Minister. Under section 29 of the Act appeal lies to the Minister.

18. The effect of a pending appeal can be deduced from section 28 in the proviso which states that; -

‘Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register: Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.’

I think this is the basis upon which the plaintiff claims that the registration of the 1-4th defendants should not have been undertaken before the appeal was determined. The plaintiff is right as long as the appeal was lodged.

19. In addition section 29 as to appeals provides thus; -

‘Appeal (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by— (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final. (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.



(3) When the appeals have been determined, the Director of Land Adjudication shall— (a) alter the duplicate adjudication register’

From the above provisions the appeal should be in writing and the letter of November 11, 1979 is authorizing that the plaintiff should be allowed to file appeal. It is noteworthy any appeal was to be filed within 60 days. Further was the appeal filed and forwarded to the Minister. The plaintiff did not produce the appeal before this court.

20. In view of the foregoing I’m more comfortable to proceed with the other grounds of misrepresentation pleaded. First a look at the law in this regard. Section 143(1) Registered Land Act, cap 300 (now repealed) and which is echoed in section 80(1) of the [Land Registration Act](#) provides: -

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.”

Section 26 of the [Land Registration Act](#), 2012 provides;

(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.

‘Fraud’ has been defined in [Blacks Laws Dictionary](#) as;

Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further [Black’s Law Dictionary](#) Ninth Edition at Page 731 also defines ‘fraud’ as: -

A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”

21. Arising from the above provisions in order for the plaintiff to defeat the title issued to the 1st and 4th defendants the plaintiff must prove that the said defendants were party and knowingly misrepresented the truth about the suit property, concealed material facts to induce the 5th defendant, the Land Registrar Kwale to register them as the suit proprietors to the detriment of the plaintiff. This therefore leads me to an analysis of the Land registry documents produced as evidence before this court. The green card produced in respect of the suit property has entries 2,3,4,5. Entry No 2 made on 10th October 2013 shows the registered proprietor as Ali Mohammed Sheria and No 3 is the title issued to him on the same day. Entry No 4 made on May 25, 2016 shows the 4th defendant as the registered proprietor and No 5 is the title issued to the 4th defendant on the same date. It is noteworthy that Entry No. 1 is missing. It is also noteworthy that the register for this parcel was opened on August 26, 1993. A certificate of official search was produced dated May 13, 2015 which shows that the register had only two entries 5 and 6 made on January 10, 2013. Entry 5 shows Mwinyi Amir Mohamed Shee and Asha Muhamed Nassir the 1st and 2nd defendants respectively as proprietors of the suit property. Entry No. 6



shows the title deed was issued on the same day. The proprietor Ali Mohammed Sheria as shown in the green card as at October 10, 2013 is different from the one shown in the search who as at that date were the 1st and 2nd defendants. The entries are nine months apart and there are no entries to explain how the difference has emerged whether by sale or transfer. In the absence of such entries explaining the difference then ordinarily the entries should correspond on both documents. Entries 1,2,3, and 4 are lacking in the search certificate yet the green card has entries 2,3,4 and 5 as highlighted above. As against the green card entries No 5 is title deed issued to Luster Limited and not the 1st and 2nd defendants in entry No 5 as given in the search which entries ought to correspond. Further there is no history or explanation in the register as to how Luster Limited acquired the property such as sale, transfer or transmission. Clearly there are discrepancies between the two documents which both emanate from the Land Registry. There are also gaps that go against the normal practice of issuance of title deeds. There is no parcel history especially in respect of the allocation by the land adjudication process herein. If the land adjudication list was forwarded as per the law then there is no reason why the plaintiffs co-ownership with the two others was not entered assuming that I was correct on the finding that there was no pending appeal filed to the Minister. Clearly there is something that is amiss here. In my view this goes to support the fact that there was fraud and impropriety by the defendants.

22. The upshot of the foregoing is that this court is satisfied that the plaintiff has proved the allegations of fraud. As to ownership of the suit property, this court having found that there was no proof of the appeal having been filed by the plaintiff it then follows that there was no proof that an appeal was pending determination. Accordingly, my hands are tied to the initial decision of the Land Adjudication that the suit property is co-owned on the basis of 50% share to Muhamad Abushiri Ahmed the plaintiff, Mshee Mwinyamiri Bwajiko and Alaw Nasiri Kombora.
23. This court therefore enters judgement for the plaintiff against the defendants in the following terms.
 1. A declaration that the plaintiff is the lawful owner of 50% share in parcel number Kwale/Kidimu/289.
 2. An order that the 1st to 4th defendant do deliver up to the 5th defendant the title deed to parcel number Kwale/Kidimu/289 and the 5th defendant to cancel the same.
 3. An order that 1st to 4th defendants do sign all the requisite and/or transfer forms transferring 50% share of the suit property to the plaintiff in default the deputy registrar to sign all the requisite and/or transfer documents transferring the said 50% share of the suit property to the plaintiff.
 4. An order for vacant possession from the parcel number Kwale/Kidimu/289 comprising of the plaintiff's 50% share by way of eviction of the 1st to 4th defendants to be carried out in accordance with the law
 5. Costs to the plaintiff.

DELIVERED AND DATED AT KWALE THIS 30TH DAY OF MAY 2022.

A.E. DENA

JUDGE

JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:

No appearance for Mr. Nyange for the plaintiff

Mr. Denis Mwakina- Court Assistant.

