



**Wawire v Kapchanga & another (Environment & Land Case
93 of 2016) [2022] KEELC 3346 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 93 OF 2016**

DO OHUNGO, J

MAY 30, 2022

BETWEEN

SALIM NYONGESA WAWIRE PLAINTIFF

AND

CHARLES SIFUNA MANYURU KAPCHANGA 1ST DEFENDANT

TOBIAS ODINGA OLUNGA 2ND DEFENDANT

JUDGMENT

1. By plaint dated May 31, 2016, the plaintiff averred that in the course of the year 1990, the 1st defendant colluded with one Isa Sifuna Lubukae and obtained title for land parcel number Bunyala/Nambacha/1044 (hereinafter the ‘suit property’) despite knowledge that the suit property belonged to the plaintiff who inherited it from his father and that in the course of the year 2013 the 1st defendant transferred it to the 2nd defendant.
2. The plaintiff further averred that the 1st defendant obtained title to the suit property fraudulently and consequently, the 1st and 2nd defendants’ titles should be cancelled. The plaintiff therefore prayed for judgment against the defendants jointly and severally for the following orders:
 - i. Cancellation of the title deed held by the 2nd defendant in respect of land parcel number Bunyala/nambacha/1044 and issuance of a new title deed in favour of the plaintiff.
 - ii. Costs of this suit.
3. Despite evidence of service of summons to enter appearance being availed, the 1st defendant neither entered appearance nor filed a defence. He equally did not participate in the hearing of the matter.



4. The 2nd defendant filed his Statement of Defence on September 30, 2016. He admitted that the 1st defendant transferred the suit property to him but denied the allegations of fraud. He further averred that the plaintiff has never owned the suit property, that the plaintiff sold off his 5 acres being his share of inheritance out of land parcel No. Bunyala/Nambacha/503 to the 1st defendant and upon subdivision the 1st defendant's share became the suit property and that he (the 2nd defendant) bought the suit land from the 1st defendant who had a valid title. He therefore urged the court to dismiss the plaintiff's suit with costs.
5. At the hearing, the plaintiff testified as PW1. He stated that his late father owned land parcel No. Bunyala/Nambacha/503 which was subdivided by the plaintiff's elder brother Isa Sifuna into land parcel numbers Bunyala/Nambacha/1043, 1044, 1045 and 1046. That his late brother Isa Sifuna did the subdivision and assured him that the suit property belonged to him (the plaintiff). He further testified that when he conducted a search, he discovered that the 1st defendant had fraudulently obtained title to the suit property and transferred it to the 2nd defendant. That he last used the land in 1982 and that he found the 2nd defendant on the land. PW1 further testified that he never sold the suit property to the 1st defendant and therefore the title obtained by him was fraudulent and that equally the title held by the 2nd defendant is not a good title.
6. David Luseno Karani testified as PW2 and stated that he knows the plaintiff's family. That Isa Sifuna was the administrator of the estate of the late Asman Macho Lutukai comprising of land parcel No. Bunyala/Nambacha/503 which he subdivided into four portions out of which the plaintiff was given the suit property. That when Isa Sifuna wanted to transfer the suit property, PW2 advised him not to do so as the suit property belonged to the plaintiff. He further testified that Isa Sifuna had no authority to transfer the suit property and that the plaintiff was not involved in the transfer and therefore the transfer was fraudulent.
7. Peter Simiyu testified as PW3 and stated that he is the plaintiff's nephew and therefore knows the family of the late Asman Macho Lutukai. He reiterated that land parcel No. Bunyala/Nambacha/503 was subdivided into four portions out of which the plaintiff was given the suit property and that Isa Sifuna had no authority to sell the suit property.
8. The plaintiff's case was closed at that point. There being no appearance by the 1st defendant, his case was closed.
9. The 2nd defendant testified as DW1. He stated that he bought the suit property from the 1st defendant on 13th November 2012 after exercising due diligence to confirm that the land was available in the 1st defendant's name and that he paid the entire purchase price and the land was later registered in his name. He added that the green card of the suit property shows that the 1st defendant was registered on June 26, 1990 and that the suit is therefore time barred. He therefore prayed for dismissal of the suit.
10. The 2nd defendant's case was then closed. Parties were ordered to file and exchange submissions.
11. The plaintiff filed his submissions on December 8, 2021 reiterating the contents of his plaint. He further submitted that he never transferred the suit property to the 1st defendant and that he never authorized his late brother to transfer his portion of land to the 1st defendant. It was his further submission that the 1st defendant didn't have a good title which he was capable of transferring to the 2nd defendant and that the 1st defendant admitted the plaintiff's claim since he never filed any defence. That the 2nd defendant never produced any evidence of payment of stamp duty in respect of the transfer to himself. He therefore submitted that he had proven his case on a balance of probabilities and urged the court to grant the reliefs sought.



12. The 2nd defendant filed his submissions on December 8, 2021 submitting that the plaintiff had failed to prove his case on a balance of probabilities and that the plaintiff failed to prove fraud against both defendants. The 2nd defendant further submitted that from the register of the suit property, the suit property is a subdivision of Bunyala/Nambacha/503 and that the first registered owner of the suit property was Isa Sifuna Lutukai who transferred the suit property to the 1st defendant on 26th June 1990 and that since then the 1st defendant was in ownership of the suit property up to July 29, 2013 when he transferred it to the 2nd defendant by way of sale. He further submitted that on February 18, 2020 when the plaintiff testified, he confirmed on cross examination that he has never used the suit land at all having moved from his ancestral home in the 60's and has never returned. That among the plaintiff's list of documents is a hand written agreement made on September 25, 1990 between the initial registered owner and the 1st defendant for the sale of 5 acres out of Land parcel no. Bunyala/Nambacha/503 and that the plaintiff is indicated as the first witness to the aforesaid agreement. That the plaintiff also produced a second agreement dated June 21, 1990 where the plaintiff was the seller and the 1st defendant was the buyer and that the 2nd defendant was never a party in the aforementioned two agreements and therefore the plaintiff's claim of fraud is an afterthought. He concluded by arguing that the plaintiff has no proper cause of action against him and urged the court to dismiss the suit with costs.
13. I have carefully considered the parties' pleadings, evidence and submissions. Only two issues arise for determination: Whether there was fraudulent transfer of the suit property and whether the plaintiff is entitled to the reliefs sought.
14. There is no dispute that the 2nd defendant is the registered proprietor of the suit property. The green card which was produced by both the plaintiff and the 2nd defendant shows that the 2nd defendant became registered proprietor on July 29, 2013 and that a title was issued to him on the same date. Prior to that date, the 1st defendant was registered as proprietor of the suit property on June 25, 2013. The suit property is a subdivision of Bunyala/Nambacha/503. The plaintiff's name does not feature anywhere in the green card.
15. Under section 26 of the *Land Registration Act*, the court is ordinarily required to accept a certificate of title as proof of ownership. That said, a title can be nullified if it is demonstrated that its acquisition was tainted by fraud or misrepresentation to which the registered proprietor is shown to be a party. Equally, a title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:
 26. Certificate of title to be held as conclusive evidence of proprietorship
 - (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.



- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
16. The path of attack that the plaintiff has chosen to launch his onslaught against the 2nd defendant's title is that of fraud. Fraud is a serious allegation that has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. Thus, a party who approaches the court on allegations of fraud knows, or should know, that he has raised the bar and has placed upon his own shoulders an onerous burden. To succeed, he needs to work much harder than the ordinary litigant.
17. The plaintiff claims that he is entitled to the suit property having inherited it from his father. The plaintiff did not produce the title in respect of Bunyala/Nambacha/503 to show that it belonged to his father. Even assuming that Bunyala/Nambacha/503 belonged to the plaintiff's father, the plaintiff was still required to produce evidence from the administrators of his father's estate as well as confirmed letters of administration demonstrating that he was entitled to inherit the suit property. He failed to do so.
18. As correctly pointed out by the 2nd defendant, among the documents produced by the plaintiff was a hand written agreement pursuant to which Sifuna Lutukai sold to the 1st defendant 5 acres out of land parcel number Bunyala/Nambacha/503. The plaintiff signed the agreement as a witness. Further, the plaintiff also produced a typed agreement dated 21st June 1990 pursuant to which the plaintiff sold to the 1st defendant 5 acres out of land parcel number Bunyala/Nambacha/503. I note that the suit property herein is 2.10 hectares which translates to approximately 5 acres, the same size as that specified in the agreements. The plaintiff has not explained his role in the agreements vis a vis the suit property.
19. The plaintiff has not only failed to demonstrate fraud, he has also failed to show that the 2nd defendant was party to any fraud in the acquisition of the suit property. That being the case, the plaintiff is not entitled to the reliefs sought. He has failed to prove his case to the required standard.
20. In the result, I dismiss the plaintiff's case with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Manyoni for the plaintiff

No appearance for the 1st defendant

Ms Ashitsa holding brief for Ms Munihi for the 2nd defendant

Court Assistant: E. Juma

