



REPUBLIC OF KENYA



KENYA LAW
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**Kisui v Walah (Environment & Land Case 202 of 2017)
[2022] KEELC 3567 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 202 OF 2017**

DO OHUNGO, J

MAY 17, 2022

BETWEEN

PAULINE ANDISI KISUI PLAINTIFF

AND

PETER ALEKO WALAH DEFENDANT

JUDGMENT

1. By plaint dated 14th June 2017, the plaintiff averred that she is the widow and administrator of her husband's estate comprising the parcel of land known as Isukha/Shirere/1829 (the suit property). That on 28th June 2001 the defendant fraudulently registered himself as the registered owner of the suit property without undertaking succession proceedings and without following the requisite provisions of law to obtain title in relation to a deceased person's property.
2. The plaintiff further averred that the actions of the defendant were fraudulent and meant to deny her title to the suit property which is part of the estate of the late Bwali Joseph Sangolo Kutwa alias Joseph Bwali Sangoro. The plaintiff therefore prayed for judgment against the defendant for the following orders:
 - a. Cancellation of entries number 5,6,7 and 8 in respect of the register of land parcel number Isukha/shirere/1829 by the Kakamega County land registrar.
 - b. Cancellation of the title deed issued to the defendant in respect of land parcel number Isukha/shirere/1829.
 - c. Costs of this suit.
3. The defendant filed his Statement of Defence on 27th July 2017. He denied the plaintiff's allegations and averred that the plaintiff's claim is statute barred by Section 4 (2) of the Limitations of Actions Act. He further averred that he lawfully purchased the suit property from Wycliffe Keya Bwali, the



- administrator of the estate of the late Bwali Joseph Sangolo Kutwa. He therefore prayed that the plaintiff's suit be dismissed with costs.
4. The plaintiff filed a Reply to Defence in which she averred that the suit is not statute barred since it is based on fraud which allows her to bring the suit at any time when fraud is discovered. That the late Wycliffe Keya Bwali did not institute any succession proceedings of the estate of the late Bwali Joseph Sangolo Kutwa alias Joseph Bwali Sangoro to enable him lawfully transact in respect of the suit property and hence any transaction taken by him was void ab initio.
 5. At the hearing, the plaintiff testified as PW1. She stated that she is a farmer and a resident of Bunyore. That she is a widow and the administrator of the estate of the late Bwali Joseph Sangolo Kutwa alias Joseph Bwali Sangoro who passed away on 31st March 1999. That at the time of his demise, the deceased was the registered owner of the suit property and that the deceased left the suit property with her upon his demise. PW1 further stated that the defendant prepared false documents which he gave to the Land Registrar to register himself as the registered owner of the suit property and that the defendant's actions were fraudulent because he forged documents to obtain title deed for the suit property. She further stated that her late son Wycliffe Njeya Bwali did not institute any succession proceedings in respect of her late husband's estate and she is the one who did so through Kisumu High Court Succession Cause No. 371 of 2015 wherein she obtained letters of administration. She thus urged the court to allow her claim as prayed.
 6. The plaintiff's case was closed at that point.
 7. The defendant testified as DW1. He stated that he is a Chief Inspector of Police and Director of Disaster Management at Taita Taveta County. That in 2001 while engaged in a land transaction at Kakamega Land Registry he met one Wycliffe Njeya Bwali who informed him that he was selling the suit property. That Wycliffe Njeya Bwali had a copy of the title deed for the suit property which was in the name of Bwali Joseph Kutwa whom Wycliffe Njeya Bwali informed DW1 was his deceased father. That DW1 inquired from Wycliffe whether he had letters of administration in respect of his father's estate and in response Wycliffe produced to him letters of administration which showed that Wycliffe was the heir of the suit property.
 8. DW1 further stated that he noticed that the suit property was charged and that the original of the title was with the bank. That he visited the bank and learnt that Wycliffe's father had given Wycliffe's name as next of kin. That as the loan had been paid, the bank gave Wycliffe a Discharge of Charge as well as the original title. That he and Wycliffe later travelled to Nairobi where a sale agreement for the sale of the suit property was drawn by DW1's advocates who also drew the application for Land Control Board consent and the transfer. He added that they travelled together back to Kakamega to attend the Land Control Board which gave consent for the transaction and that they proceeded to the lands office where they registered the transfer whereupon he paid Wycliffe. He further stated that the plaintiff is not the widow of Bwali Joseph Sangolo Kutwa but a sister to the wife of Bwali Joseph Sangolo Kutwa and that he did not receive any demand letter from her prior to the filing of this case.
 9. The defence case was closed. Parties were ordered to file and exchange written submissions.
 10. For the plaintiff, it was argued that her evidence was not contradicted in any way since the defendant failed to produce any certificate of confirmation of grant showing that the suit property was inherited by Wycliffe or even receipts showing that he paid stamp duty or consent of the Land Control Board. It was further argued that entries numbers 5, 6, 7 and 8 in the register of the suit property were made fraudulently. Accordingly, the plaintiff urged the court to allow her claim as prayed.



11. For the defendant, it was argued that the documents filed by the plaintiff do not support her claim, that the defendant lawfully obtained title to the suit property and that the plaintiff had failed to prove her case which should therefore be dismissed with costs.
12. I have carefully considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether the suit is statute barred, whether there was fraudulent transfer of the suit property and whether the reliefs sought should issue.
13. The defendant contended, right from the onset through his defence and even in his final submissions, that the plaintiff's suit is statute barred by virtue of Section 4 (2) of the Limitations of Actions Act. The section provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. The plaintiff has countered by arguing that her claim is based on fraud and has cited Section 26 of the [Limitation of Actions Act](#) which provides that where the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent, then the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. The defendant has not identified which tort the claim is founded on so as to bring it within Section 4 (2) of the Limitations of Actions Act. On the contrary, the plaintiff has conspicuously pleaded fraud and in the absence of any contrary evidence, I am persuaded that this suit was properly filed pursuant to Section 26 of the [Limitation of Actions Act](#). The suit is not statute barred.
14. The next issue for determination is whether there was fraudulent transfer of the suit property. Black's Law Dictionary defines fraud as follows:

Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. ... Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.
15. As a starting point, it must be remembered that 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.
16. Both the plaintiff and the defendant produced a certified copy of the register or green card, as it is popularly known, in respect of the suit property. It shows at entry number 2 that Bwali Joseph Sangoro was registered as proprietor of the property on 8th September 1976 and that a land certificate was issued to him on 6th October 1976. On 7th June 2001, under entries numbers 5 and 6, Wycliffe Njeya Bwali became the registered proprietor and subsequently, the defendant became registered proprietor on 21st June 2001, under entry number 7. A certificate of title was issued to the defendant on 21st June 2001, under entry number 8.
17. Under Section 26 of the [Land Registration Act](#), the court is required to accept a certificate of title as proof of ownership. Nevertheless, 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.

18. There is no dispute that Bwali Joseph Sangoro is deceased. The plaintiff produced a certificate of death that shows that he passed away on 31st March 1999. There is equally no dispute that Wycliffe Njeya Bwali also passed away sometime after he had transferred the suit property to the defendant.
19. The particulars of fraud that the plaintiff pleaded against the defendant include registering himself as the proprietor of the suit property without going through succession proceedings, preparing and presenting documents to the land registrar to transfer the suit property to himself and obtaining title without the consent of the deceased's family and or the plaintiff.
20. The defendant herein is no ordinary citizen. He is a senior public officer who should know the importance of record keeping and practice it. It is his case that he purchased the suit property from Wycliffe who had letters of administration in respect of the estate of Bwali Joseph Sangoro. The defendant did not produce the said letters of administration. From the defendant's testimony, it is clear that as at the date he met Wycliffe, the suit property was still registered in the name of Bwali Joseph Sangoro and yet to be discharged. The defendant actively participated in the discharge process since he personally visited the chargee bank as well as in the process of having the suit property transferred to Wycliffe.
21. As at 7th June 2001 when Wycliffe became the registered proprietor, the Registered Land Act (repealed) was still in force. Section 107 of the said statute made it clear that the law of testate or intestate succession was applicable whenever a registered proprietor passed way. The law that governs intestate or testamentary succession in our jurisdiction is the Law of Succession Act. Pursuant to Section 55 of the Law of Succession Act, only a confirmed grant confers power to distribute assets of the estate of a deceased person.
22. Further provisions regarding the manner in which the land registrar was supposed to deal with change of proprietorship upon death of the registered proprietor are found at Section 119 of the Registered Land Act (repealed) as follows:
 - (1) If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words "as executor of the will of deceased" or "as administrator of the estate of deceased", as the case may be.
 - (2)



- (3) In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.
23. As at the date Wycliffe became the registered proprietor, Bwali Joseph Sangoro had been dead for over two years. It follows therefore that entry number 5 on the register needed to be justified by production of a confirmed grant and to include the phrase “as administrator of the estate of Bwali Joseph Sangoro deceased”. Failure to produce the requisite confirmed grant and failure to include the phrase is not a small matter since the plaintiff has maintained from the onset that Wycliffe was not the administrator of the estate of Bwali Joseph Sangoro. If Wycliffe had such a grant, nothing would have been easier than the defendant, who as we have already seen was actively involved in the discharge of the suit property and its transfer to Wycliffe, producing it. In the circumstances, the only viable conclusion to draw, which I now draw, is that Wycliffe did not hold a confirmed grant in respect of the estate of Bwali Joseph Sangoro. That being the case, Wycliffe had no power to transfer the suit property either to himself or even to the defendant.
24. Besides the issue of letters of administration, the defendant testified that he and Wycliffe travelled to Kakamega and attended the Land Control Board whereupon the board granted a consent for the transfer of the property to him and that they then proceeded to the lands office where they registered the transfer. The defendant however produced neither the consent nor the transfer form. He did not even produce evidence of payment of stamp duty or evidence of actual movement of funds to demonstrate payment of the purchase price. For an accomplished public officer, I found those gaps in this case to be telling. He is certainly not some hapless villager who would approach a land transaction “with the alacrity of a potato dealer in Wakulima market.” See *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR. His failure to avail the all-important supporting documents can only point to one thing; those documents don’t exist.
25. The defendant seemed to be content to wave his title document to the court. That is not helpful at all. The Court of Appeal demonstrated its disapproval of that kind of conduct when it stated in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR thus:
- We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.
26. From the foregoing discourse, I am satisfied that the suit property was fraudulently and unprocedurally transferred from the estate of Bwali Joseph Sangoro and equally fraudulently and unprocedurally transferred to the defendant and that the defendant was actively involved in the fraud.
27. It follows therefore that the plaintiff has made a case for the relief sought. Regarding costs, I agree with the defendant that no demand before action was issued. For that reason, I will not award the plaintiff any costs.
28. Even as I grant the final orders, I am keenly aware that the plaintiff has not exhibited any confirmed grant. For the avoidance of doubt, the suit property will have to be dealt with after this judgment strictly in accordance with the *Law of Succession Act*.



29. In the end, I make the following orders:

- a. The Land Registrar Kakamega is hereby ordered to cancel entries number 5, 6, 7 and 8 in the register of land parcel number Isukha/Shirere/1829 with immediate effect.
- b. The title deed issued to the defendant in respect of land parcel number Isukha/Shirere/1829 is hereby cancelled.
- c. No order as to costs of the suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

No appearance for the defendant

Court Assistant: E. Juma

