



**Mosigisi v Mosigisi & another (Environment & Land Case
386 of 2015) [2022] KEELC 2942 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 386 OF 2015**

JM ONYANGO, J

MAY 12, 2022

BETWEEN

WILFRED OGERO MOSIGISI PLAINTIFF

AND

JULIUS OGERO MOSIGISI 1ST DEFENDANT

DOUGLAS MAYORE MOSIGISI 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff instituted this suit by way of a Plaint dated the 21st day of August, 2015 claiming that the Defendants had trespassed on his land parcels known as Nyaribari Masaba/bonyamasicho/1008 and Nyaribari Chache B/b/boburia/4068 (hereinafter referred to as the suit properties).
2. It was the Plaintiff's contention that as a result of the acts of trespass, his right to the suit properties and his peaceful occupation thereto has been interfered with. In particular he contended that the Defendants had threatened his tenants and incited them not to pay rent thereby interfering with the Plaintiff's proprietary rights over the suit property. He therefore sought the following reliefs:
 - a) A permanent injunction restraining the Defendants by themselves, their employees, servants, agents and any other person whomsoever from encroaching upon, trespassing onto, remaining on or in any manner whatsoever interfering with all those parcels of land known as Nyaribari Masaba/bonyamasicho/1008 and Nyaribari Chache B/b/boburia/4068 together with all the developments thereon situated in Kisii County.
 - b) General Damages for trespass and injury occasioned to the said parcels of land.
 - c) Costs of the suit.



- d) Interest on (b) and (c) above.
 - e) Any other relief that this Honourable Court may deem fit and just to grant.
3. Upon being served with the Plaint and Summons to enter Appearance, the Defendants filed a Defence dated 3rd November, 2015 denying the Plaintiff's claim and contended that the suit properties were registered in the name of their father Johnson Mosigisi Machuki, who died intestate on 23rd July, 2015 and that the Plaintiff had obtained the title to the suit properties fraudulently.
 4. The suit was set down for hearing and both parties testified.

Plaintiff's Case

5. The Plaintiff testified as PW1. He testified that he knows the Defendants, but he has no relationship with them. It was his testimony that his late father had transferred the suit properties to him and his siblings during his lifetime. He stated that his late father commenced the process of transfer in 2014 when they went to Masimba Land Control Board. He produced the application for Land Control Board Consent Forms, Transfer Forms, Title deeds for Nyaribari Masaba /bonyamasicho/1008 and Nyaribari Chache /b/b/boburia/4068 and a Certificate of Official Search in respect of the suit properties as his exhibits. He told the court that the Defendants invaded the suit properties in the year 2015 claiming that they were his step brothers. They harassed the tenants who were occupying the rental houses on parcel number 4068 and forced them to pay rent to them.
6. He told the court that in October 2015, he was arrested on allegations that he had forged title deeds in respect of the suit properties. He was charged with forgery *vide* Keroka Criminal Case No. 1498 and 1499 of 2015 but he was acquitted of the charges. He denied that he had acquired the title deeds fraudulently.
7. Upon cross-examination, he reiterated that his father had transferred the suit properties to him. He said they had obtained a letter of consent although he did not produce the same as an exhibit. He stated that his father was involved in a road traffic accident in May 2015 and he remained in a hospital in a coma upto the time of his death in July 2015. He said he was not sure whether his late father had delegated the task of following up on the transfer process to someone else. He said he was not aware that a caution had been placed on the suit properties nor did he know who had obtained a court order removing the said caution.

Defendant's Case

8. The 1st Defendant testified as DW1. He told the court that the Plaintiff was his step brother while the 2nd Defendant was his brother from the same mother. He relied on his witness statements dated 3rd November, 2015 and 16th July, 2018. He stated that while his father was hospitalized in a coma at Kisii Teaching and Referral Hospital, the 1st Defendant was informed that his step brothers Nicholas Ontita Mosigisi and Charles Makori Mosigisi were spotted trying to put his thumb prints on some documents. The matter was reported to the Hospital authorities. He testified that he conducted an official search and established that the suit properties were in his father's name. He then lodged a caution over the suit properties.
9. He stated that after his father's death and burial, the elders called him and his siblings for a family meeting to see how they could live harmoniously, but the Plaintiff was uncooperative and produced what he purported to be a will prepared by their late father in 1985. The said will was rejected by the elders. He testified that during his lifetime his father had divided land parcel No. 1008 between his two



wives and his brother, the 2nd Defendant was occupying the portion that had been allocated to their late mother.

10. He further testified that after his father's death, he discovered that the Plaintiff had obtained a fake court order dated July 3, 2015 which he used to remove the caution that the 1st Defendant had placed on the suit properties. He reported the matter to the police and the Plaintiff was arrested and charged with the offence of forgery.
11. He denied that he was a trespasser on parcel 4068 as that had been his home since childhood. He told the court that land parcel no. 1008 was initially used by the Defendant's mother for farming, but his father subsequently divided it between his two houses in 1996. He claimed that the Plaintiff had obtained the titles in respect of the suit properties fraudulently as they had not obtained the consent of the Land Control Board and that his father's signature had been forged.
12. Upon cross examination, he stated that he was the first child of his father's first wife and he denied that his father had divorced his late mother. He said that the transfer of the suit properties was done on 2nd and 7th July, 2015 respectively before his father's death. He stated that his father died on 23rd July, 2015 and he was buried on land parcel no. 1441 where he had a home.
13. Douglas Mayore, the 2nd Defendant testified as DW2. He told the court that the suit properties were initially registered in his father's name. He stated that he was staying with his father and he had given him the titles for the suit properties for safekeeping. He still had the said original titles which he showed to the court. He testified that his father was involved in a road traffic accident and he went into a coma, after which he died on 23rd July, 2015. After his father's death he conducted an official search and discovered that the Plaintiff and his other step brothers had been registered as the owners of the suit properties. Since he suspected foul play, he sought advice from his advocate who wrote to the Lands office and he discovered that the transfer was done irregularly. He reported the matter to the police and the Plaintiff together with his step brothers Michieka Mosigisi and Nicodemus Mosigisi were arrested and charged with the offence of forgery at Keroka court. They were however acquitted for lack of evidence.
14. He told the court that his step brothers Wesley Monyenye Mosigisi and Jackson Onzere Mosigisi were subsequently arrested and charged with the offence of forgery at Keroka court. The case was later transferred to Nyamira court. He produced the proceedings in Nyamira CM Criminal Case No. 1092 of 2019 as Defendant's exhibit 3. It was his testimony that the process of transfer was done fraudulently when his father was in a coma. He produced the receipts for transfer fees paid on July 6, 2015 as Defendant's exhibit 1(a) – (e). He also produced the transfer documents and a copy of the Forensic Document Examination Report dated 13.4 2018 which showed that the letter of consent and transfer forms used to effect the transfer of the suit property to the names of the Plaintiff and his siblings were forged. He showed the court the original title deeds for parcels number Nyaribari Chache /b/ b/boburia/ 4068 and Nyaribari/masaba/ Bonyamasicho/1008 in the name of the Johnson Mosigisi Machuki after which he produced copies thereof.
15. Upon cross examination, DW2 denied that him and his brother Julius were trespassers. He asserted that they were the biological sons of the late Johnson Mosigisi Machuki and they were rightfully occupying their late father's property. He maintained that the suit properties were transferred unlawfully after his father's death. He stated that his step brothers were charged with forgery and even though they were acquitted of the charges, the court held that the transfer of the suit properties was done fraudulently. He stated that land parcel No. 4068 was transferred following the removal of a caution using a fake court order. He stated that the suit properties belonged to his late father and all the deceased's children



including the Plaintiff were entitled to a share of the same after applying for succession. That marked the close of the Defendant's case.

Plaintiff's Submissions

16. In her submissions, learned counsel for the Plaintiff submitted that the Plaintiff had proved his case on a balance of probabilities. She contended that the Plaintiff had adduced evidence to prove that the suit properties were registered in the names of Wilfred Ogero Mosigisi, Patrick Machori Mosigisi, Jackson Onserio Mosigisi, Wesley Mosigisi, Nicholas Ontita Mosigisi and Jared Makori Mosigisi. It was her contention that even though the suit properties were initially registered in the name of Johnson Mosigisi Machuki, now deceased, land parcels number Nyaribari Chache /b/b/boburia/ 4068 was transferred to them on the 7th day of July, 2015 while parcel number Nyaribari Bonyamasicho/1008 was transferred to them on the 2nd day of July, 2015. It is on the basis of the said registration that the Plaintiff claimed that the Defendants were trespassers.
17. Counsel submitted that whereas the Defendants alleged that the suit properties were fraudulently transferred to the Plaintiff and his brothers, the Defendants had not proved that the said transfer was done fraudulently as they failed to file a Counterclaim to that effect. She pointed out that even though the Plaintiff and some of his brothers had been charged with the offence of forgery with regard to the transfer of the suit properties *vide* Keroka PMCR No. 1498 of 2015 and Keroka PMCR 1499 of 2015, they had been acquitted. She faulted the production of the proceedings in Nyamira CMCR No. 1092 of 2019 where the learned Magistrate declared the Plaintiff's titles null and void and stated that the Plaintiff's siblings had appealed against the said judgment.
18. It was counsel's submission that even though the Defendants had testified that their late father had apportioned the suit properties between their mother and the Defendant's mother, they had not produced any evidence to that effect as the suit properties were both registered in the names of the Plaintiff and his siblings from the second house.
19. Counsel further submitted that even though the Defendants alleged that the Plaintiff and his siblings had obtained the titles to the suit properties by way of fraud, they failed to amend their pleadings to incorporate a Counterclaim. She emphasized that fraud must be pleaded and strictly proved as was held in the cases of *Kinyanjui Kamau v George Kamau Njoroge* [2013] eKLR and *Vijay Morjaria v Nansingh Madhusingh Darabar & Another* [2000] eKLR.
20. She concluded that since the Defendants failed to call witness to prove their allegations of fraud, it must be construed that the transactions leading to the alienation, transfer and registration of the suit properties to and in favour of the Plaintiff is indefeasible and sacrosanct and the Plaintiff is therefore entitled to the reliefs sought.

Defendant's Submissions

21. On his part learned counsel for the Defendants submitted that the Defendants had in their Defence dated 3rd November, 2015 denied the Plaintiff's allegations in the Plaint and pleaded that the Plaintiff had acquired the titles to the suit property through fraud by excluding the Defendants. He pointed out that the Defendants had stated the particulars of fraud as follows:

“Knowingly making a false and/or forging all documents necessary to effect transfer to his and/or their names including:

- i. Execution of mutation forms



- ii. Application for consent of Land Control Board
 - iii. Land Control Board Consent for both sub-divisions and/or transfer
 - iv. Forging a court order
 - v. Forging a will.”
22. He submitted that the Plaintiff and the Defendants are siblings and that the suit property belongs to their late father Johnson Mosigisi Machuki. He submitted that the Plaintiff had in his evidence admitted that he saw a letter from the Assistant County Commissioner stating that the Letter of Consent used to transfer the suit properties did not emanate from his office. He also admitted that him and his siblings did not all attend the meeting of the Land Control Board and he could not remember if his siblings had signed the application for consent of the Land Control Board in respect to title no. 1008.
 23. With regard to title no. 4068, counsel submitted that the Plaintiff had confirmed that he was aware of the fake court order that was used to remove the caution so as to facilitate the transfer, but he stated that he did not know whom his father had used to obtain the said order. Counsel further submitted that the Plaintiff had produced a green card indicating that the suit parcel no. 4068 was registered in their late father’s name.
 24. Counsel submitted that after investigations revealed that the Defendants used a fake consent letter and court order to remove the caution over parcel no. 4068, the Plaintiff was arrested and charged with the offence of forgery but he was acquitted because the prosecution failed to bring its witnesses.
 25. He further submitted that the Plaintiff’s siblings namely Jackson Onserio Mosigisi, and Wesley Monyenye Mosigisi were charged *vide* Nyamira CMCRC No, 1092 of 2019. He referred to the proceedings in the said case which were produced by the 2nd Defendant as a Defence Exhibit. It was his submission that according to the said proceedings, the evidence of PW1 Nehemiah Angwenyi Onserio confirmed that the late Johnson Mosigisi Machuki was in ICU from 30th April, 2015 to 19th May, 2015 and thereafter he got a stroke and went into a vegetative state upto the time of his death.
 26. According to the same proceedings, PW2 Joseph Morema, the Executive Officer at Kisi Law Courts confirmed that the court order in Misc Application No. 143 of 2015 did not originate from Kisii Court. PW4 Superintendent Michira Ndege a Document Examiner from DCI confirmed that the consent letter was not signed by the Assistant County Commissioner Masimba ward while PW5 confirmed that the rubber stamps used on the consent letter from the Land Control Board was not genuine and that no meeting of the Board had taken place to approve the transfer.
 27. Counsel submitted that the court had come to the conclusion that fraudulent dealings were made on the suit properties. The court found that the fraudulent dealings were engineered by the accused persons.
 28. It was counsel’s contention that the Defendants had proved the allegations of fraud stated in their Defence. He submitted that the right to property does not extend to property that has been unlawfully acquired. It was his further submission that the Plaintiff’s title having been obtained through fraud to which the Plaintiff was a party, could be challenged under the provisions of section 26 of the [Land](#)



Registration Act. He relied on the case of *Elijah Makori Nyangwara v Stephen Mungai Njuguna* [2013] eKLR where the court held that:

“It needs to be appreciated that for section 26(i) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme...”

29. He concluded that the Plaintiff having obtained the titles to the suit properties fraudulently from the deceased, the same cannot stand and the Plaintiff has no good title from which he can derive any property rights. He stated that the Defendant’s failure to file a Counterclaim cannot be used to sanitize an illegality and that the titles are null and void.

Issues For Determination

30. The issues for determination are:
- i. Whether the Plaintiff is the lawful owner of land parcels no. Nyaribari Chache/b/b/boburia/4068 And Nyaribari Masaba/ Bonyamasicho/1008.
 - ii. Whether the Defendants have trespassed on the said properties.
 - iii. Whether the Plaintiff is entitled to the reliefs sought.

Analysis And Determination

31. It is not in dispute that the Plaintiff is registered as the owner of land parcels number Nyaribari Chache/ Bonyamasicho/1008 and Nyaribari Chache /b/b/boburia /4068 and that he is jointly registered as such with his brothers Patrick Machori Mosigisi, Jackson Onserio Mosigisi, Wesley Mosigisi, Nicholas Ontita Mosigisi and Jared Makori Mosigisi as indicated on the title deeds which he produced as his exhibits. He stated that the suit properties initially belonged to his late father and he transferred the same to him and his siblings during his lifetime. He claimed that the Defendants had invaded the suit properties and cut down trees claiming that they were his step brothers.
32. He stated that he had been arrested on allegations that he had forged the title deeds, but he was acquitted of the charges. He denied that he had acquired the titles fraudulently. However, having reviewed the evidence on record, it is clear that the transfer of the suit properties from Johnson Mosigisi Machuki to the Plaintiff and his 6 siblings was not above board.
33. Even though he alleges that the transfer was carried out during the lifetime of his father, it is clear that the transactions carried out between 30th April, 2015 and the time when the titles were issued on 2nd and 3rd July, 2015 are questionable as his father was critically ill and was for the most part in a vegetative state and therefore he could not have processed the transfer.
34. From the evidence on record, the Plaintiff could not confirm that they had all signed the application for consent of the Land Control Board nor could he confirm whether they all went to the Land Control Board. The consent letter was disowned by the Assistant County Commissioner who is alleged to have signed it, when he testified in Nyamira CMCR case No. 1092 of 2019. Additionally, the Executive Officer, Kisii Law Courts who testified as a Prosecution witness in the said criminal case stated that the order in CM Misc Application No. 143 which was used to remove a caution over parcel number 4068 did not emanate from Kisii Court.
35. The document examiner who also testified in the criminal case as PW4 categorically stated that the signature and rubber stamp used on the consent letter were fake. It is also inconceivable that the



deceased who was staying with the 2nd Defendant in one of the suit properties could have transferred it to the Plaintiff and his sons from his second wife to the exclusion of the Defendants. The fact that the 2nd Defendant still has the original title deeds of the suit properties after the alleged transfer by the deceased, also casts doubt on the validity of the said transfers. All in all, the Plaintiff's desperate attempts to prove that his titles are valid came to naught as there were too many alarm bells.

36. The Plaintiff having pleaded that he was the registered owner of land parcels number Nyaribari Bonyamasicho/1008 and Nyaribari Chache /b/b/boburia/4068, it was incumbent upon him to prove that he obtained good title. This was so particularly because the Defendants did not merely deny the plaintiff's claim in their Defence but they went further and pleaded that the Plaintiff's titles were obtained fraudulently and set out the particulars of fraud. They then proceeded to prove the allegations of fraud.
37. There is no legal requirement that a Defendant who raises fraud in his Defence must file a Counterclaim. All that is required is that fraud must be pleaded and proved. The Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR in considering the issue of fraud observed as follows:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* [1880] 5 App. Cas.685 at 697, 701, 709, *Garden Neptune v Occident* [1989] 1 Lloyd's Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence v Lord Norreys* [1880] 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy v Garrett* [1878] 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

38. In the instant case, I am satisfied that the Defendants have proved that the Plaintiff's titles were obtained fraudulently and therefore he could not base his claim of trespass on fraudulent titles.
39. Although the right to property is guaranteed under Article 40 of the *Constitution*, Article 40(6) states that:

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

40. It therefore follows that since the Plaintiff has failed to prove his case on a balance of probabilities, he is not entitled to the reliefs sought. What then is the fate of the titles held by the Plaintiff and his siblings? Having found that the said titles were fraudulently obtained, the same are illegal, null and void and even though the Defendant did not pray that they be cancelled, substantive justice would not be served in conformity with Article 159 of the *Constitution* if the court failed to order that the said titles be cancelled in accordance with section 80 of the *Land Registration Act*, 2012.



41. Accordingly, I dismiss the Plaintiff's case with costs to the Defendants and direct as follows:-

- a. Land titles No. Nyaribari Masaba/ Bonyamasicho/1008 and Nyaribari Chache B/b/ boburia/4068 are hereby cancelled.
- b. The titles shall revert to the name of Johnson Mosigisi Machuki -Deceased for the benefit of all his beneficiaries after succession.
- c. The Land Registrar shall rectify the register in respect of the two titles accordingly.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF MAY, 2022.

J.M ONYANGO

JUDGE

