



Mwadziwe & another v Agricultural Finance Corporation & another (Environment & Land Case E6 of 2020) [2022] KEELC 2424 (KLR) (12 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E6 OF 2020**

JO OLOLA, J

MAY 12, 2022

BETWEEN

JOSEPHINE NYEVU MWADZIWE 1ST PLAINTIFF

RAYMOND GONZI MWADZIWE 2ND PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION 1ST DEFENDANT

COUNTY/DISTRICT LAND REGISTRAR, KILIFI 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated October 14, 2020 and filed herein on October 19, 2020, Josephine Nyevu Mwadziwe and Raymond Gonzi Mwadziwe (hereinafter “the Plaintiffs”) pray for orders:
 1. That a declaration do issue that the deceased Joseph Patrick Mwadziwe Mwinga, having purchased and fully paid for Title No. Kilifi/Mtondia/85 from the 1st Defendant which sold it in exercise of its statutory power of sale, the said property ought to be transferred to the Plaintiffs as the Administrators of the Estate of the Deceased.
 2. That a declaration do issue that the Transfer by Chargee in exercise of the power of sale and Land Certificate given to the deceased by the 1st Defendant on or about the 26th November, 1987 cannot be found and have thus been misplaced and/or lost and effectively, an order do issue directing the 1st Defendant to execute another Transfer by Chargee in exercise of its statutory power of sale in favour of the Plaintiffs as the Administrators of the estate of the deceased.
 3. That in the alternative this Honourable Court do issue an order directing the 2nd Defendant to deregister the Notification of Charge in favour of the 1st Defendant in the encumbrance section of the property herein and to process and issue a Title Deed for Title No. Kilifi/Mtondia/85



in favour of the Plaintiffs, in their capacities as the Administrators of the Estate of the deceased Joseph Patrick Mwachizi Mwachizi.

4. That the costs of the suit/application be provided for.
2. The Originating Summons which is supported by an affidavit sworn by Raymond Gonzi Mwachizi (the 2nd Plaintiff) is premised on the grounds that:
 - (a) The 1st Defendant had charged the property having advanced money to the initial proprietors – James Mutua and Charity Kanyeche Mutua who failed to service the loan advanced;
 - (b) The deceased purchased the property at a public auction conducted by the 1st Defendant and paid the entire purchase as required;
 - (c) The deceased thereafter on 28th October, 1987 collected the Transfer by charge document as well as the Land Certificate for the property from the 1st Defendant;
 - (d) Subsequent to the transaction the deceased took over possession of the suit land and he and the Plaintiffs have been in actual physical possession thereof to-date;
 - (e) The deceased died on 17th April, 2003 and the Plaintiffs thereafter obtained a certificate of Confirmation of Grant of his estate on 3rd February, 2020;
 - (f) The Plaintiffs have made every effort to trace the title deed and other requisite documents for the property since the death of the deceased but have been unsuccessful in tracing the same;
 - (g) The Plaintiffs later discovered that the documents transferring the suit property in favour of the deceased have never been registered and efforts to get assistance from the 1st Defendant to this end have been unsuccessful; and
 - (h) In pursuance of the provisions of Article 14 of *the Constitution* of Kenya, 2010 and in the interest of justice, there is need to grant the Orders sought in this suit.
3. The Agricultural Finance Corporation (the 1st Defendant) is however opposed to the Orders sought. In a Replying Affidavit sworn by its Legal Officer John Kithinji and filed herein on March 17, 2021, the 1st Defendant avers that it did issue the transfer documents relating to the suit property to the late Patrick Mwachizi Mwachizi on November 26, 1987.
4. The 1st Defendant avers that it was the duty of the proprietor having picked the documents from its offices to have the same lodged and registered in his name. The 1st Defendant thus asserts that it performed its obligation and issued relevant transfer documents and it no longer owes any obligation to the Plaintiffs.
5. The Land Registrar, Kilifi County (the 2nd Defendant) is equally opposed to the grant of the orders sought by the Plaintiffs. In their Grounds of Opposition dated January 15, 2021 and filed on January 27, 2021, the 2nd Defendant opposes the suit herein on the grounds:
 1. That the Originating Summons is fatally and incurably defective for failure to comply with the provisions of Order 37 Rule 7(2) of the *Civil Procedure Rules* in that it is not supported by an affidavit to which a certified extract of title is annexed;
 2. That the Plaintiffs have no cause of action (against) the 2nd Defendant;
 3. That the Plaintiffs have not laid any evidential basis for the grant of the orders sought; and
 4. That the application is otherwise an abuse of the process of this Honourable Court.



6. By directions given herein on March 29, 2021, it was agreed by the parties that the Originating Summons would proceed by way of affidavit evidence and submissions. I have accordingly carefully perused and considered the pleadings filed herein as well as the annexures to both the Supporting and Replying Affidavits filed. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Counsels representing the parties herein.
7. The Plaintiffs have sought a declaration that land parcel No. Kilifi/Mtondia/85 be transferred to themselves as the Administrators of the Estate of the late Joseph Patrick Mwachizi Mwinga who passed away on April 17, 2003. They also seek a declaration that the Transfer by Chargee documents and the Land Certificate for the said parcel of land that were issued to the deceased are lost and hence an order should issue directing the 1st Defendant to execute another transfer.
8. In the alternative, the Plaintiffs have urged the Court to direct the 2nd Defendant to deregister the Notification of Charge in favour of the 1st Defendant in its register and to process and issue a title deed for the suit property in favour of the Plaintiffs.
9. As it were, there was no dispute that the late Joseph Patrick Mwachizi Mwinga did purchase the suit property at a public auction conducted by the 1st Defendant. Subsequently on October 28, 1987, the deceased collected the transfer by Chargee document and the Land Certificate for the said parcel of land from the 1st Defendant. It is the Plaintiffs' case that following the death of the deceased on April 17, 2003, they have been unable to trace the said documents and that their efforts to get the 1st Defendant to issue them with new documents have hit a snag after the 1st Defendant declined to comply with their request.
10. While the 1st Defendant in its reply to the summons asserts that it had discharged its duties to the deceased and that it had no obligation to assist the Plaintiffs, it would appear from their submissions dated and filed herein on May 25, 2021 that the whole misunderstanding arose from the fact that the 1st Defendant had not been supplied with documents confirming the position of the Plaintiffs as the Administrators of the Estate of the late Joseph Patrick Mwachizi Mwinga.
11. In their submissions herein, the 1st Defendant now asserts that it has no objection to issuing another Transfer by Chargee documents to the Plaintiffs now that they have taken cognizance of the Certificate of Confirmation of Grant issued to the Plaintiffs on February 7, 2020.
12. That being the case, I did not find any reason to delve further into the matter herein as the concession by the 1st Defendant settles the major borne of contention herein.
13. Accordingly, I allow the Originating Summons in terms of Prayers 1 and 2 thereof. Each Party shall bear their own costs in the circumstances.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 12TH DAY OF MAY, 2022.

In the presence of:

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

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J. O. OLOLA



JUDGE

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