



**Elsa Akinyi Okuku (Suing as the Legal Administrator of the Estate of Hezekiah Okuku, Deceased) v Nyakundi Orindo (Suing as the Legal Administrator of the Estate of Fredrick Orindo Mosioma, Deceased) (Environment & Land Case 270 of 2013) [2022] KEELC 3973 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3973 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 270 OF 2013**

**JM ONYANGO, J**

**JULY 26, 2022**

**BETWEEN**

**ELSA AKINYI OKUKU (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF HEZEKIAH OKUKU, DECEASED) ..... PLAINTIFF**

**AND**

**NYAKUNDI ORINDO (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF FREDRICK ORINDO MOSIOMA, DECEASED) ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a Plaint dated April 30, 2001 and amended on June 4, 2015, the plaintiff filed suit against the defendant seeking the following reliefs:
  - a) A declaration that the transfer and the registration of land parcel LR No. Kitutu/Daraja Mbili/554 (hereinafter referred to as the suit property) in the name of Fredrick Orindo Mosioma, now deceased was irregular illegal, null and void.
  - b) An order for cancellation of the transfer of the suit property in the name of Fredrick Orindo Mosioma, now deceased and rectification of the register thereof by restoring the name of Hezekiah Okuku, now deceased.
  - c) A permanent injunction restraining the defendant either by himself, agents, servant and/or anyone claiming under the defendant from entering upon, re-entering, trespassing onto, interfering with and/or in any other manner dealing with the suit property any other portion thereof.



- d) Costs of the suit be borne by the defendant
  - e) Any further relief as the Honourable Court may deem fit and expedient to grant.
2. In support of her claim, the plaintiff averred that he is the Legal Administrator of the estate of the late Hezekiah Okuku who at all material times was the registered proprietor of the suit property following the completion of the adjudication and demarcation process within Daraja Mbili Adjudication Section.
  3. The plaintiff averred that following the registration of the suit property in the name of the late Hezekiah Okuku, he (Hezekiah Okuku) entered upon and took possession of the same and proceeded to develop it by constructing several houses thereon, which houses were then leased out to various tenants. He contended that the suit property was still under the occupation of agents assigned by the deceased to take care of them.
  4. It was the plaintiff's averment that on or about December 8, 1998, one Fredrick Orindo Mosioma, (now deceased) who was the original defendant in the suit, presented to the District Land Registrar a forged land transfer document, obtained registration by fraud and transferred the suit property to himself.
  5. She further stated that the said transfer and registration of the suit in the name of Fredrick Orindo Mosioma was procured and obtained by fraud and that Fredrick Orindo Mosioma did not acquire a genuine title over and in respect of the suit property.
  6. She lamented that as a result of the actions of the late Fredrick Orindo Mosioma by himself, his agents and/or servants the estate of the late Hezekiah Okuku has suffered loss and therefore claims damages.
  7. Upon being served with the Complaint, the defendant who is the legal representative of the estate of the late Fredrick Orindo Mosioma, filed a statement of Defence dated May 9, 2001 and amended on September 25, 2015 denying the plaintiff's claim that the late Fredrick Orindo Mosioma had fraudulently transferred the suit property to his name. He claimed that the late Fredrick Orindo Mosioma lawfully bought the suit property from the Plaintiff at valuable consideration.
  8. The matter was heard on various dates between January 28, 2021, and April 27, 2022 and the parties testified and called their witnesses.

### **Plaintiff's Evidence**

9. At the hearing of the plaintiff's case, the plaintiff called three witnesses to testify on his behalf.
10. Elisa Akinyi Okuku, the plaintiff herein testified as PW1. She adopted her witness statement dated June 30, 2015 as her evidence in this case. She also produced the documents in the Plaintiff's List of Documents as the plaintiff's exhibits. She told the court that she was a widow to the late Hezekiah Okuku and an Administrator of his estate which included the suit property. She went on to testify that she had conducted a search and discovered that the suit property had since been registered in the name of the defendant.
11. Further, she testified that her husband had obtained the ownership of the suit property before independence and had constructed rental houses thereon and benefited from them until he died. She contended that the main dispute between the parties was that her late husband made a discovery in 1998 that the suit property which was initially registered in his name had fraudulently been transferred to Fredrick Orindo Mosioma who has since died. She insisted that her husband did not at any time



- transfer the suit property to Fredrick Orindo Mosioma. She urged the court to evict the defendants from the suit property and to cancel the title issued to Fredrick Orindo Mosioma.
12. When cross-examined by counsel for the defendants, she stated that she could not recall when Hezekiah Okuku discovered that the suit property had fraudulently been transferred to the late Fredrick Orindo Mosioma. She also said that she was not aware that there had been another suit filed by one Anna Kerubo against both Fredrick Orindo Mosioma and Hezekiah Okuku, nor was she aware that Fredrick Orindo Mosioma had obtained transfer documents in respect of the suit property in 1977.
  13. She stated that she did not meet the late Fredrick Orindo Mosioma since she later moved to their rural home. She also stated that since she had moved back to her rural home, she did not know what was going on in the suit property. She admitted that she did not have anything to show the signature on the transfer form did not belong to her husband. She further stated that her husband did file this suit as an afterthought and especially after the case filed by Ann Kerubo abated.
  14. Upon re-examination, she confirmed that her husband discovered the fraudulent transfer of the suit property in 1998 and that she was not aware of the case filed by Ann Kerubo. She also confirmed that she did not know whether her husband had signed the transfer documents but insisted that her husband did not sell the suit property. She stated that she was still the one collecting the rent from the rental houses constructed on the suit property.
  15. Mr. Cyilas Maniga Ototo testified as PW2 and adopted his witness statement dated September 28, 2018 as his evidence. Mr. Cyilas Maniga Ototo testified that he was the one who has been taking care of the suit property on behalf of the family of the late Hezekiah Okuku since April 30, 2001 and insisted that the suit property belonged to late Hezekiah Okuku.
  16. He told the court that the late Hezekiah Okuku had during his lifetime constructed semi-permanent rental houses and that her mother was buried on the suit property. He testified that the dispute between the parties arose in 1998 when the late Hezekiah Okuku discovered after conducting a search at the land registry that the suit property had illegally been transferred to the late Fredrick Orindo Mosioma. It was his testimony that he was aware of a dispute between Ann Kerubo who was a tenant in the rental houses on the suit property constructed by the late Hezekiah Okuku. He testified that he had known the late Hezekiah Okuku for 25 years and that he didn't sell the suit property to the late Fredrick Orindo Mosioma.
  17. During cross examination by counsel for the Defendants, he confirmed that he was aware that Ann Kerubo sued both Hezekiah Okuku and Fredrick Orindo Mosioma over the suit property. He confirmed that it was the late Hezekiah who had told him that he was the one who had constructed the structures. He insisted that he was the estate agent of the suit property and that he started living on the suit property in 1997 and was not aware of any transaction before 1997, specifically 1977.
  18. When re-examined by counsel for the Plaintiff, he confirmed that he was the sole estate agent appointed by the late Hezekiah Okuku and the Plaintiff had not appointed any person to act in his place. He also confirmed the houses on the suit property were constructed by the late Hezekiah Okuku.
  19. Ms. Cecilia Oswera, the Land Registrar based at the Kisii Lands Office, testified as PW3. She testified that the first registered owner of the suit property was one Hezekiah Okuku who was registered as such on August 9, 1973 and a land certificate issued to him on May 18, 1974. She informed the court that the said Hezekiah Okuku transferred the suit property to one Fredrick Orindo Mosioma on December 16, 1977 and the same was registered on October 8, 1998 after which a title issued to Fredrick Orindo Mosioma on the same day.



20. She explained that the delay in the registration of the transfer was occasioned by a caution that had been registered on the suit property by Anna Kerubo on December 16, 1977. The said Anna Kerubo was claiming a purchasers' interest on the suit property. However, on December 4, 1998 the caution was lifted by the Land Registrar after the cautioner failed to attend several hearings to which she had been summoned regarding the removal of the said caution. It was her further testimony that eventually the transfer of the suit property to the defendant's father was registered on October 8, 1998 and a title deed issued to him on the same day.
21. She stated that on October 23, 2002, a suit had been filed against Hezekiah and the Defendant's late father by Ann Kerubo in 1998 (KISII HCC NO. 144 OF 1998) and an injunction was issued restraining any dealings on the suit property pending the hearing of the suit. The said suit abated and thus all restrictions on the suit property were removed by the Land Registrar. He concluded by stating that according to the records the suit property belonged the late Fredrick Orindo Mosioma.
22. When cross examined by counsel for the plaintiff, she confirmed that the application for Land Control Board and the letter of consent were not in file though she stated that she was not sure whether Land Control Board consent was necessary in 1977. She clarified that the date of the transfer is not necessarily the date when the transfer form is received. She also clarified that a property cannot be transferred when a caution is in place. She insisted that the transfer of the suit property to the late Fredrick Orindo Mosioma was legal.
23. Upon cross examination, the Land Registrar confirmed that there were minutes of the Land Control Board showing that before the transfer was effected there was an approval of the transfer by the Land Control Board. She also confirmed that there was an application for Land Control Board dated December 12, 1977 and consent letter dated December 15, 1977 by the Kisii Municipal Council in the parcel file. She reiterated that the said documents were the requirements for transfer of the property at that time. She also stated that there was no complaint from Hezekiah concerning the suit property and as far as the records were concerned the registration of the suit property was proper.

### **Defendants Case**

24. The defendant testified as DW1. He stated that he had been sued on behalf his father one Fredrick Orindo Mosioma (deceased), whose estate he represents as an Administrator. He requested the court to adopt his witness statement which was filed in court on February 18, 2022. He also produced a list of documents and urged the court to consider the same. He testified that his late father was the registered owner of the suit property having bought the same from one Hezekiah Okuku in 1977. He stated that his father immediately took possession of the suit property. He testified further that his father was sued together with Hezekiah Okuku by one Anna Kerubo claiming that she was the owner of the suit property.
25. The case (KisiiHC No. 444 of 1998) was heard and dismissed. He stated that since 1977, the late Hezekiah Okuku did not raise any complaint regarding the transfer of the suit property to his father because he was aware that he had sold the same to his father. He wondered why the Land Registrar had not been sued in the matter, since his father could not have transferred the suit property to himself without the involvement of the Land Registrar.
26. When cross examined by counsel for the Plaintiff, he admitted that the case (Kisii HC No. 444 of 1998) was never heard but instead it abated. He also confirmed the title deed was issued to his father four days after a caution that had been placed on the suit property was removed. He confirmed that the caution was removed before the case filed by Ann abated. He told the court that his father's witnesses to the sale had since died and he did not have any documents to show how the transfer was done.



27. When re-examined by counsel he stated that by the time the caution was placed on the suit property, the consent to transfer had already been approved. He also confirmed that the removal of the caution was occasioned by the Land Registrar before the title deed was issued to his father. He also stated that there was nothing on the green card that prevented his father from being the registered as owner of the suit property.
28. Thereafter, the court directed the Plaintiff and the Defendant to file their written submissions. Both Parties filed their submissions which I have considered.

### **Issues for Determination**

29. Having considered the pleadings, evidence on record and rival submissions, the main issue for determination is whether the Defendant's father, Fredrick Orindo Mosioma acquired the title to the suit property fraudulently.

### **Analysis and Determination**

30. The Kenya's land system operates under the Torrens System, where the certificate of title is prima facie conclusive and indefeasible proof of ownership of land. This principle is set out in section 26 of the Land Registration Act. Subsection 1 (a) and (b) of section 26 however provide exemptions to this rule, which is that a title can be challenged on grounds of fraud or misrepresentation, to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or under a corrupt scheme.
31. It is therefore clear that a title fraudulently obtained cannot be allowed to stand. This point was emphasized in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* (2015) eKLR, where the Court of Appeal upheld the decision of the Environment and Land Court to cancel the titles of land to which crooks had fraudulently acquired titles and later sold the same to other parties.
32. However, it is trite law that allegations of fraud must be pleaded and proved. In the case *Vijay Morjaria vs Nansing Madhusingh Darbar & others* [2000] eKLR, court stated as follows as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
33. In the instant suit, the plaintiff in Paragraph 4 of his amended Plaintiff sets out the particulars of fraud as follows:
  - a) The defendant's late father prepared and executed a transfer document dated December 16, 1977 purporting to have been signed by, Hezekiah Okuku when it was not him and presented the same for registration.
  - b) The defendant's late father presented a transfer document to the Land Registrar on December 19, 1977 for registration and did obtain fraud registration of that transfer on December 8, 1998.



- c) The defendant's late father, presented a forged letter of consent purporting the same to have been legally obtained when actually, Hezekiah Okuku had not appeared or made any application to any Land Control Board to obtain the same in respect of the suit property.
- d) The defendant's late father obtained a land title deed on December 8, 1998 from the Land Registrar purporting that it to be genuine.
34. In an attempt to prove the above-mentioned particulars of fraud, the plaintiff testified and called two witnesses being the Land Registrar, Kisii and her late husband's estate agent. From the evidence of the Plaintiff and her two witnesses, there was no proof that the transfer of the suit property to the Defendant's father was fraudulent. Infact, the Land Registrar categorically stated that the transfer was legal and proper and that the necessary consent of the Land Control Board was obtained.
35. It is rather surprising that during cross-examination, the plaintiff stated that she could not recall when her late husband discovered that the suit property had fraudulently been transferred to the late Fredrick Orindo Mosioma. She also admitted that she was not aware that Fredrick Orindo Mosioma had obtained transfer documents in respect of the suit property in 1977. As if that is not enough, she admitted that she did not have anything to show that the signature on the transfer form did not belong to her late husband.
36. The Land Registrar who was her third witness did not support the Plaintiff's claim of fraud. Instead, she stated that the title deed that the defendant's late father had over the suit property was genuine and that the same was not fraudulently acquired. She gave a detailed explanation of the transfer process from approval of the transfer by the Land Control Board through a consent letter from the Kisii Municipal Council dated December 15, 1977, the registration of the transfer on to the issuance of title deed to the Defendant's late father on December 8, 1998. She explained that the delay in effecting the transfer was occasioned by the fact that there was a caution placed over the suit property.
37. Even though counsel for the Applicant has correctly pointed out the minutes referred to were made in 1974 and have no relation to the transfer of the suit property, he did not in any way challenge the legality of the transfer form, the application for consent of the Land Control Board dated December 12, 1977 and the letter of consent dated December 15, 1977. The Plaintiff admitted that she had nothing to prove that her late husband's signature had been forged.
38. The issue of the caution by one Anne Kerubo that counsel for the Plaintiff tried to rely on to demonstrate that the transfer was fraudulent does not help his client's case at all. In fact, the Land Registrar explained clearly that the transfer of the suit property was delayed because of the caution placed by Anne Kerubo. The Land Registrar also confirmed that the caution did not exist by the time the registration was taking place because the same had been removed following the failure of Ann Kerubo to honour the summons of the Land Registrar. Furthermore, the plaintiff and her husband did not complain to the Land Registrar or any other office about the alleged fraudulent transfer of the suit property.
39. That notwithstanding, it is not lost to the court that the plaintiff failed to sue the Land Registrar who was part of the transfer process she claims to be fraudulent. The burden of proof lay on the Plaintiff to prove her case to the required standard. Unfortunately, she was unable to prove the particulars of fraud outlined in paragraph 4 of her Plaint and the court cannot infer fraud from the evidence on record. As mentioned in the cases of *Vijay Morjaria vs Nansing Madbusingh Darbar & others* [2000] eKLR (*supra*), fraud must be distinctly pleaded and proved and the standard of proof is higher than on a balance of probabilities.



40. The upshot is that the plaintiff has failed to prove her case to the required standard and the same is hereby dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 26<sup>TH</sup> DAY OF JULY, 2022.**

**J.M ONYANGO**

**JUDGE**

