



**Sheikh v Board of Governors of Maina Wanjigi Secondary School (Environment & Land Case 402 of 2011) [2022] KEELC 12823 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12823 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 402 OF 2011  
OA ANGOTE, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**ABDALLAH MOHAMED SHEIKH ..... PLAINTIFF**

**AND**

**BOARD OF GOVERNORS OF MAINA WANJIGI SECONDARY  
SCHOOL ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this suit filed a plaint dated August 10, 2011 in which he sought for the following orders:-
  - a. The defendant by himself, agents, servants, employees or otherwise howsoever be restrained from remaining on, entering upon, trespassing upon and/or interfering with plaintiff quiet possession of the property known as LR No 209/12681.
  - b. A permanent injunction against the defendant prohibiting whether by himself, his servants, officers or agents from entering upon, remaining upon, transferring, occupying, leasing, charging, mortgaging, assigning or interfering with plaintiff quiet possession of the property known as LR No 209/12681.
  - c. A mandatory injunction do issue compelling the defendants, their servants and/or their agents and any other person occupying LR No 209/12681 to vacate unconditionally and remove any materials deposited or erected thereon at their own cost.
  - d. A declaration that the plaintiff as the lawful, legal, absolute and registered owner of the property known as LR No 209/12681.
  - e. Damages for trespass against the defendant.



- f. Costs of this suit together with interest thereon be for such period and at such rate as this court may deem appropriate.
    - g. Any such other or further relief as this honourable court may deem appropriate.
2. The plaintiff's case is that at all material times, he has been the registered owner and entitled to possession of the land situate at Eastleigh Nairobi known as LR No 209/ 12681 (the suit property), which he purchased vide an instrument dated November 26, 2008.
3. According to the plaintiff, on or about July 26, 2011, the defendant trespassed on the suit land; that he has been deprived of the use and enjoyment of the said land and that he has suffered loss and damage. The plaintiff asserted that the defendant's acts of trespass are illegal and are intended to deprive him of his proprietary rights.
4. The plaintiff stated that he has had previous cases, namely ELC No 523 of 2009, where the court confirmed that he is the absolute owner of the suit land; that unless restrained by this court, the defendant intends to continue to remain in wrongful occupation of the suit land and that notwithstanding the notice to vacate the suit property, the defendant wrongfully remained and/or forcefully re-entered the suit property and wrongfully remains in possession thereof.
5. The defendant, vide an amended defence and counterclaim dated May 2, 2013, denied the assertion that the plaintiff is the registered owner of the suit property; that the suit land was fraudulently registered in the plaintiff's name because the site had been earmarked for a school; that the suit land was illegally registered in the name of the plaintiff and that the suit property is part of Plan No 267. The defendant averred that the plaintiff is fully aware that the suit land is school land and has been notified by the Ministry of Lands that the plot had been erroneously been allocated to him.
6. The defendant sought the following orders in its counterclaim:
  - a. A declaration that the plaintiff acted illegally and fraudulently in acquiring the said piece of land Reg No 209/12681.
  - b. Cancellation of the title Reg No 209/12681 and rectification of the lands register to reflect the aforesaid cancellation.
  - c. Costs and interest of the suit.

### **Plaintiff's Evidence**

7. The plaintiff, PW1, testified that he had title to the suit land, which is LR No 209/12681, measuring 50 by 100 feet; that the land was transferred to him by Francis Kimende and John Nyanchoke and that he has all the documents for the land.
8. PW1 denied the allegation that he fraudulently obtained title to the suit land; that since 2008, when he last did a search of the suit property, he has been the one paying the requisite rates, with the last payment being of Kshs 300, 000 and that his plot is outside the land of the secondary school. PW1 acknowledged that he had received a letter purporting to cancel the approved plans.

### **Defendant's Evidence**

9. DW1, stated that she was the school's Principal since 2019, and the Board Secretary at the defendant's school; that the land claimed by the plaintiff is within the boundaries of the school land; that the defendant did not have a title to the suit land because of the "missing piece of land" and that the



defendant only had a letter of allotment for the land, which measures 3.0 hectares. DW1 asserted that all other people who were claiming the land within the school returned their titles except the Plaintiff.

10. In cross-examination, DW1 indicated that they realised the fraud much later although the plaintiff obtained the title to the suit land in 2006; that the defendant was issued with a letter of allotment in 2007, while the school was established in 1989 on the same land; that the school land was fenced in 2010 and that the suit land is within the fence of the school.

### Submissions

11. The plaintiff submitted that he acquired the title to the suit land through a transfer from its previous owners, Francis Kumenda and John Nyanchoka, who had a valid title, for a consideration of Kshs 1,500,000 on August 29, 2008 and that his title was not challenged by the defendant in its counterclaim.
12. It was submitted by the plaintiff that the defendant school found him on the suit property and started laying claim to the same; that the defendant never called for evidence to prove the allegations of fraud and illegality which ought to be proved beyond reasonable doubt and that the defendant's claim is anchored on a letter of allotment which cannot automatically confer title and cannot be proof of ownership.
13. The plaintiff submitted that the defendant, in its claims for restoration of the subject land, ought to have approached this court by way of an originating summons or petition, and not by way of a counterclaim as in the present case and that the defendant has not proved that it has a right of claim to the suit property save for a few correspondence.
14. The defendant submitted that the plaintiff has not shown his root of title yet the courts have held that it is not enough for a registered owner of land in dispute to dangle a document of title as proof of ownership. The defendant relied on the Court of Appeal decision in *Munyu Maina vs Hiram Gathiba Maina* (2013) eKLR and *Hubert L Maina & 2 others vs Margaret JKamar & 5 Others* [2016] eKLR.
15. On the plaintiff's claim that he bought the land from Francis Kumenda and John Nyanchoka, the defendant submitted that the plaintiff did not produce any evidence as proof of purchase of the suit land and that he did not produce in evidence any sale agreement between himself and the said vendors.
16. It was submitted that no evidence of payment of the consideration was produced by the plaintiff and that the Commissioner of Land's consent and of payment of land rent and land rates was not presented, neither was there evidence to show that a rates clearance certificate was obtained from the City Council of Nairobi.
17. The defendant submitted that it has proved the root of its ownership of the suit property despite not having a title document in its favour; that it produced in evidence an Approved Part Development Plan No 267 dated July 3, 2007 which shows the existing site for a secondary school with an area of 3.0 hectares and that the plan was duly gazetted and advertised in a Newspaper with wide circulation as legally required.
18. The defendant submitted that an allotment letter dated July 19, 2007 in respect of the land belonging to the school, was issued by the Ministry of Lands; that the school paid the requisite charges, evidenced by the receipt dated September 29, 2008 and that a beacon certificate was issued to the school on July 8, 2009 with an accompanying plan that defines the boundary of the beacons of the school land.



## Analysis and Determination

19. Upon consideration of the plaint, the defence and counterclaim, and the submissions filed in this matter, the issues for determination are as follows:
  - a. Whether the plaintiff is the lawful registered owner of the suit land, LR No 209/12681
  - b. Whether the parties are entitled to the prayers they have sought
20. This suit concerns ownership of the suit land situate at Eastleigh Nairobi known as LR No 209/12681 (the suit property) measuring 50 by 100 feet, and which is adjacent to the defendant's school land. To support his claim of ownership, the plaintiff adduced a certificate of title to the said land, a transfer dated November 26, 2010, a land rent demand note dated August 9, 2011 and a land rates clearance certificate dated November 22, 2010.
21. It is an undisputed fact that the defendant is in occupation of the suit land. The plaintiff's claim is that it has been deprived of the use and enjoyment of the said land and has suffered loss and damage. The plaintiff produced in evidence a letter from the Ministry of Lands and Physical Planning dated October 21, 2009 being a request to surrender the suit land for public use and a letter from the City Council of Nairobi dated December 22, 2009, cancelling the plaintiff's building plans which it had approved on February 28, 2009.
22. The plaintiff has consequently sought for several orders, including a mandatory injunction against the defendant and its agents, to vacate the suit land unconditionally and remove any materials deposited or erected thereon at their own cost, as well as a permanent injunction and a declaration that the plaintiff is the lawful, legal, absolute and registered owner of the suit property and damages for trespass against the defendant.
23. The defendant's case is that the suit land was fraudulently registered in the name of the plaintiff and that the suit land is part of Plan No 267. The defendant asserted that despite notice from the Ministry of Lands and Physical Planning that the suit land is part of the school land, the plaintiff refused and or neglected to surrender the suit land.
24. In its counterclaim, the defendant has sought for a declaration that the plaintiff acted illegally and fraudulently in acquiring the suit land. The defendant has prayed for the cancellation of the Title LR No 209/12681 and rectification of the lands register to reflect the aforesaid cancellation. In support of its claim to ownership of the suit land, the defendant adduced in evidence a copy of a letter of allotment dated July 19, 2007 and an Approved Development Plan No 267.
25. The defendant also produced in evidence a Gazette Notice of the Part Development Plan (PDP) 42/13/06/03, dated May 26, 2006 inviting interested persons to make objections on the same and the letter dated October 21, 2009 from the Ministry of Lands to the Plaintiff, requesting him to surrender the suit property and the title for LR No 209/12681.
26. The law on sanctity of title is provided for under section 26 of the [Land Registration Act](#), No 3 of 2012 as follows:
  - “(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.”

27. The relief for rectification of the register is provided for under section 80 of the [Land Registration Act](#) as follows:

- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

28. The [Black’s Law Dictionary](#) defines fraud as follows:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

29. It is trite that allegations of fraud must be pleaded and strictly proved. The Court of Appeal in [Kinyanjui Kamau vs George Kamau Njoroge](#) [2015] eKLR quoted with approval the case of [Ndolo vs Ndolo](#) (2008) 1 KLR (G&F) 742 where the court set out the standard of proof in claims of fraud to be higher than that which is required in ordinary civil suits:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

30. Similarly, the Court of Appeal in [Kuria Kiarie & 2 others vs Sammy Magera](#) [2018] eKLR quoted and relied on the case of [Vijay Morjaria vs Nansingh Madhusingh Darbar & Another](#) [2000] eKLR, where Tunoi, JA (as he then was) stated 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

31. It will be seen from the provision of section 26 of the [Land Registration Act](#), which is similar to the provision of section 23 (1) of the [Registration of Titles Act](#) (repealed), that although title to land is protected by law, the protection is removed and the title can be impeached, if it is procured through



fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.

32. It is trite that a title to land is an end product of a process. For a title to be protectable, the title holder must show that he followed due process in acquiring the same. The Court of Appeal in the case of *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR, stated that where a title document is challenged, as in this case, a registered proprietor must prove the legality of the process through which he acquired such land. The Court of Appeal in *Munyu* case held as follows:

“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.”

33. The process of alienation of public land under the repealed *Government Lands Act* was restated by this court in *Nelson Kazungu Chai & 9 others vs Pwani University* [2014] eKLR as follows:

“130. It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease.”

34. The Court’s decision in *Nelson Kazungu Chai & 9 others vs Pwani University* (*supra*) was upheld by the Court of Appeal in *Nelson Kazungu Chai & 9 others vs Pwani University College* [2017] eKLR. The process of alienation of public land was similarly articulated in the case of *African Line Transport Co Ltd vs The Hon AG* Mombasa HCCC No 276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

35. In proving root of title to property that was once public land, under the repealed *Government Lands Act* and the *Registration of Titles Act*, a proprietor of such land must present evidence of a Part Development Plan drawn and approved by the Commissioner of Lands or the Minister for Lands, a letter of allotment, a cadastral survey and thereafter a certificate of lease.

36. The evidence that the plaintiff has presented falls short of this legal standard. While the plaintiff has produced in evidence the sale agreement, a transfer in his favour and the certificate of title to the suit land, these documents do not show the root of the title nor do they prove that he acquired the suit property procedurally.



37. On the other hand, the defendant has adduced a copy of the approved development plan No 267, a copy of a letter of allotment dated July 19, 2007 for Approved Development Plan no 267 and the Gazette Notice of the Part Development Plan (PDP) 42/13/06/03, dated May 26, 2006 inviting interested persons to make objections on the same. This court is thus satisfied that the Defendant's reservation of the school land vide the said part development plan was legal and formal.

38. Further, DW1 testified that the school was established on the land in 1986. This means that when the original owners, Mr Francis Kumenda and John Nyanchoka purported to acquire title to the land in 1996, the school was already occupying the land. That being the case, court is persuaded by the dicta of the court in *Kenya Anti-Corruption Commission vs Frann Investments Limited & 6 others* [2020] eKLR, where it stated that:

“ ... where Government land had been specifically assigned for a specific public purpose, then so long as that public purpose remains, that land ought to be considered to be part of Government land that cannot be alienated to private individuals for private use. I do not think any other interpretation would make sense. I say so because it is a fact that historically, not all Government land had been titled. Probably the Government was easy that because such land is under its use, or has been assigned a public use, then nobody is going to tamper with it. But does it mean that because the Government has not issued an allotment letter to such land, to say a Government parastatal or Government Department, and has not issued a title to the body that is supposed to make use of the land, then the said land can be allocated to private individuals for private use? I do not think so. If this was to be the position, then developed infrastructure including roads, hospitals, schools, and even courts could be allocated to private individuals simply because no allotment letter or title had been issued...

My view is that so long as land had, or has been, set aside by the Government for specific use, which use is apparent from the pertinent records, including survey plans and/or PDPs, or visible on the ground, then that land must be considered to be part of “alienated Government land.” That was indeed the basis of the holding by the Court of Appeal in the case of *Chemey Investment Limited vs Attorney General & 2 others (supra)*.”

39. It is not controverted that the suit land, LR No 209/12681 is being used as part of a public secondary school, Maina Wanjigi Secondary School. This, coupled with the PDP for the school, shows that the suit property was not available for alienation to any person, including the plaintiff. That being the case, this court finds that the plaintiff has not proved its case on a balance of probabilities while the defendant has proved its counter claim to the required standards.

40. For these reasons, the court dismisses the plaintiff's plaint with costs and allows the defendant's counterclaim as follows:

- a. A declaration be and is hereby issued that the plaintiff acted illegally and fraudulently in acquiring the title for LR No 209/12681.
- b. A declaration be and is hereby issued cancelling the title for LR No 209/12681 and rectification of the land register to reflect the aforesaid cancellation.
- c. Costs of the suit and the counter claim to be paid by the plaintiff.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**



**O. A. Angote**

**Judge**

**In the presence of;**

Ms Kemunto for the Plaintiff

No appearance for the Defendant

Court Assistant - June

