



**Sakwa v Oduor & another (Environment & Land Case 384 of 2017)
[2022] KEELC 4775 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 384 OF 2017
DO OHUNGO, J
SEPTEMBER 20, 2022**

BETWEEN

PATRICK MAKOKHA SAKWA PLAINTIFF

AND

FREDRICK BARASA ODUOR 1ST DEFENDANT

CHARLES ODUOR WAKANDA 2ND DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced in the High Court on September 7, 2010 as Kakamega HCCC No 134 of 2010 when the plaintiff filed plaint dated July 10, 2010. The matter was later transferred to this court, hence its current case number. The plaintiff averred in the plaint that he was the registered owner of the parcel of land known as N Wanga/Namamali/1008 (the suit property) while the second defendant was the registered owner of the parcel of land known as N Wanga/Namamali/1007 which borders the suit property. That the defendants trespassed onto and forcefully occupied a portion of the suit property.
2. The plaintiff therefore prayed for judgment against the defendants jointly and severally for:
 - (a) An eviction order against the defendants, their family, servants, agents or any other person claiming on their behalf and thereafter an order restraining them from trespassing, encroaching or interfering with the plaintiffs use, occupation or enjoyment of land parcel LR No N Wanga/Namamali/1008.
 - (b) Costs of this suit.
 - (c) Any other relief the court deems just.
3. The defendants filed a defence and counterclaim in which they averred that the plaintiff acquired the suit property following a fraudulent subdivision of the second defendant's parcel of land known as N



Wanga/Namamali/812. They therefore prayed that the plaintiff's suit be dismissed with costs and that judgment be entered in their favour for:

- a) Cancellation of the registration of the plaintiff as proprietor of title N/Wanga/Namamali/1008.
 - b) Revocation of the sub-division of title no. N/Wanga/Namamali/812 and restoration of the same into the 2nd defendant's name.
 - c) Costs of the counter-claim.
 - d) Any other or further relief.
4. Charles Oduor Wakanda, the second defendant, passed away on August 5, 2017 and was substituted by the first defendant, pursuant to an order of the court made on April 25, 2019. The plaint was however not amended to reflect the substitution. The matter later proceeded to hearing.
 5. The plaintiff testified as PW1. He stated that he is the registered owner of the parcel of land known as N Wanga/Namamali/1008 (the suit property) while the second defendant is the registered owner of the parcel of land known as N Wanga/Namamali/1007 which borders the suit property. That he acquired the suit property from his late father's estate through transmission and that his father had purchased the property from the second defendant who was the first defendant's father. That the second defendant caused the first defendant to trespass onto the suit property and further that the first defendant had refused to give vacant possession. He added that the defendants had denied him use and enjoyment of the suit property.
 6. The plaintiff further stated that his father purchased 4 acres of N Wanga/Namamali/812 from the second defendant in 1975 upon which N Wanga/Namamali/812 was subdivided to result in N. Wanga/Namamali/1007 and N. Wanga/ Namamali/1008. That his father bought 4 acres of land from the second defendant in 1975. That the second defendant obtained consent to subdivide the land, the land was surveyed, and that the second defendant executed mutation form and transfer in favour of his father. That his father and his family started cultivating the suit property as soon as he purchased it and that they planted sugarcane on it under contract with Mumias Sugar Company from 1978 to 1997.
 7. The plaintiff went on to state that his father died in 1982 and that in 1997, the second defendant stopped them from using the suit property. That although his father had not collected the title document, the parcel number had been issued and that they used it in the contract with Mumias Sugar Company. That they went to land registry and discovered that all transfer documents were in the parcel file though the same had not been registered and that the officers at land told him and his mother that registration had not been done since no stamp duty and registration fees had been paid. That they paid and the titles were registered in 2001.
 8. The plaintiff also stated that the first defendant forcefully entered the suit property in 2004 when Kakamega High Court Misc Application No 118 of 2003 in which the plaintiff sought to quash the decision of Matungu Land Disputes Tribunal was pending in court against the first defendant's father. That the case was later determined in the plaintiff's favour. He added that the second defendant filed Kakamega Chief Magistrate Court Civil Suit No 529 of 2004 against him seeking cancellation of his title to the suit property on allegations of fraud and that the said suit was dismissed for want of prosecution.
 9. David Masila Kimaulo (PW2), a Land Registrar at Kakamega, produced the instruments that were used to register LR No N. Wanga/Namamali/1007 and 1008. These included copy of transfer dated June 4, 1975 in respect of N Wanga/Namamali/1008 from the second defendant to Makokha Sakwa, copy



of transfer dated February 26, 2002 in respect of N Wanga/Namamali/1008 from Aliproda Amukale Makokha as personal representative of Makokha Sakwa to the plaintiff as trustee for three minors and certified copy of the register for N Wanga/Namamali/1008. He added that normally, the registry recalls and cancels old titles before new parcels or subdivisions are registered and that the second defendant's title was surrendered prior to registration of the subdivisions. Upon being shown an original of a title for parcel 812 in the name of the second defendant and a green card for the said parcel, he stated that the said title was questionable since it did not bear the registrar's stamp and that he did not trust the green card since it had a cancellation at its entry number 3.

10. Next on the stand was John Karanja Njenga (PW3), the officer in charge of Kenya National Archives at Kakamega, who stated that his office had registers for Land Control Board for year 1975 and catalogue showing documents which his office collected from District Officer Mumias. He produced copy of minutes of Mumias Land Control Board dated July 25, 1975 Minute No 313/75 of which indicated that consent was granted in respect of an application made by Charles Oduori to sub-divide N Wanga/Namamali/812 into two portions and thereafter transfer one portion to Makokha Sakwa.
11. Lastly, Beatrice Chimoso Lishenga, a government surveyor based at Kakamega District Surveyor's Office, testified as PW4. She produced a copy of mutation form dated June 5, 1975 pursuant to which N/Wanga/Namamali/812 was subdivided into parcels 1007 and 1008. She stated that the persons listed in the form as interested parties were Charles Odwori Wakanda and Makokha Sakwa and that it was prepared by a land registrar since in those days Land Registrars would prepare mutations before submitting them to the District Surveyor. She further stated that the form was signed by the interested parties.
12. The plaintiff's case was then closed.
13. Fredrick Barasa Oduor, the first defendant, opened the defence case by testifying as DW1. He stated that N/Wanga/Namamali/1008 is a subdivision of N/Wanga/Namamali/812. That N/Wanga/Namamali/812 was fraudulently subdivided into N/Wanga/Namamali/1007 and N/Wanga/Namamali/1008 in 2002. That N/Wanga/Namamali/1008 was transferred to the plaintiff's father while N/Wanga/Namamali/1007 was left in the second defendant's name. He added that he is in occupation of about 3 acres of what was the larger 812 and that he is on N/Wanga/Namamali/1008. That he was given the land which he is occupying as his home by his late father and that he constructed a permanent house on the land in 1992.
14. The first defendant went on to state that the plaintiff's father leased part of N/Wanga/Namamali/812 for six harvests of sugar cane and when the term of the lease ended the second defendant allotted his six sons, including the first defendant, their respective portions of the said parcel 812. That the plaintiff and his family started claiming that part of parcel 812 was sold to the plaintiff's father, a claim which claim the second defendant refuted. That the dispute went before the Matungu Land Disputes Tribunal but the tribunal's decision was later quashed through judicial review proceedings. That a caution lodged by his brother Salim Nakhungu Oduori on June 15, 2002 was removed without any notice and the title in respect of parcel 812 was closed on April 17, 2002 upon subdivision into parcels 1007 and 1008. He added that he is surprised that despite being unable to produce any documents to support the alleged purchase and transfer for years, the plaintiff filed documents in this case on November 9, 2020, which documents are in his view cooked up. He urged the court to revoke the subdivision of parcel 812 and to revert the said parcel to the name of the second defendant.
15. Lastly, Salim Nakhungu Oduori testified as DW2. He stated that the second defendant was his father while the first defendant is his elder brother. That he lodged a caution on May 15, 2002 against parcel number 812 but the caution was secretly removed without notice to him.



16. The defence case was then closed. Parties thereafter filed and exchanged written submissions.
17. Counsel for the plaintiff relied on section 26 of the *Land Registration Act* and argued that the plaintiff is the registered owner of the suit property and that the defendants have not any fraud or that the plaintiff participated in any fraud in the acquisition of the suit property. He therefore urged the court to allow the plaintiff's case with costs.
18. On his part, counsel for the defendants argued that the plaintiff failed to prove his case and that it should be dismissed. That no explanation was offered by the plaintiff why the transfer dated June 4, 1975 in respect of N Wanga/Namamali/1008 from the second defendant to Makokha Sakwa predated the mutation creating the title sought to be transferred and that in any case N Wanga/Namamali/1008 did not exist in 1975. Further, that the land registrar did not offer a proper explanation as to why change in registration was effected notwithstanding the existence of the caution lodged against parcel number 812 by DW2 and in the absence of the original title which remained in the hands of the second defendant. That the plaintiff's title is vitiated by fraud and was obtained through an unprocedural process. He urged the court to dismiss the plaintiff's case and to allow the counterclaim.
19. I have considered the parties' respective pleadings, evidence and submissions. There is no dispute that the plaintiff is the registered proprietor of the suit property. As pleaded in their defence and counterclaim, the defendants have attacked the plaintiff's title exclusively on allegation of fraud. The issues that arise for determination are whether fraud has been established and whether the reliefs sought should issue.
20. Fraud is a serious allegation that must 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.
21. From the material on record, it is apparent that the plaintiff is the registered proprietor of the suit property pursuant to title issued to him on April 17, 2002. The said title as well as a certified copy of the register which was produced by the land registrar show that the plaintiff is registered as proprietor of the suit property to hold it in trust for Elizabeth Saina, Jane Amanyana and Joyce Akwiri who were all minors as at April 17, 2002. Mathematically, the three have since attained age of majority.
22. As registered proprietor of land, the plaintiff and indeed the erstwhile minors are entitled to the rights and privileges accorded by the law. Under section 26 of the *Land Registration Act*, the court is required to accept the plaintiff's certificate of title as proof of ownership. Nevertheless, the 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.
23. As noted earlier, based on their defence and counterclaim, the defendants have opted to attack the plaintiff's title exclusively on allegation of fraud. The particulars of fraud that they pleaded include subdividing parcel 812 without the knowledge or consent of the second defendant, transferring the suit property to the plaintiff's name without a sale agreement, consent of the land control board, mutation form or transfer form and effecting the transfer while the second defendant retained the original title deed for parcel number 812.
24. As the ones moving the court for nullification of the plaintiff's title, the defendants must have been aware of the rule under section 107 (1) of the *Evidence Act* that he who alleges must prove as well as the provisions of section 108 of the same Act which place the burden of proof squarely on them.
25. A major plank of the defendants' case is that subdivision of parcel number 812 and registration of the resultant subdivisions was done while the second defendant held the original of the title deed for parcel number 812. In an effort to demonstrate that they still have the said original, the defendants showed to the court what they maintain is the said original and also produced what they claimed to be a certified copy of the register in respect of the parcel and a certificate of search in respect of the parcel as at May 3, 2002, all of which purport that the second defendant is still the registered proprietor of N/Wanga/Namamali/812.
26. I have found it curious that while the defendants have claimed that the plaintiff acquired the suit property following a fraudulent subdivision of N Wanga/Namamali/812, they have gone ahead to produce a copy of register certified on May 24, 2002 and a certificate of search dated May 3, 2002, both of which do not support their claim regarding subdivision and transfer. It is instructive that according to the certified copy of the register that the land registrar produced, the plaintiff was registered as proprietor of N Wanga/Namamali/1008 on April 17, 2002. How then could the defendants obtain a certified copy of the register of N Wanga/Namamali/812 over a month later which does not reflect the subdivision?
27. More importantly, during his testimony, the land registrar, upon being shown the title that the defendants claim to be the original and as well as the purported certified copy of the register that the defendants have relied on, expressed serious doubt on the said title since it does not bear the registrar's stamp and the certified copy of the register since it has a cancellation at its entry number 3. On my part, I perused both documents and I agree with the land registrar. It seems to me that the original of the title in respect of N Wanga/Namamali/812 was procedurally surrendered and that the defendants generated other documents to support their allegations of fraud.
28. The defendants claimed that the no consent of the land control board was obtained in respect of the subdivision of N Wanga/Namamali/812. I note however that PW3 produced copy of minutes of Mumias Land Control Board dated July 25, 1975 Minute No 313/75 of which indicates that consent was granted in respect of an application made by the second defendant to sub-divide N Wanga/Namamali/812 into two portions and to thereafter transfer one portion to Makokha Sakwa. No contrary evidence has been tendered by the defendants to challenge the evidence of PW3.
29. The defendants argued that there were inconsistencies in the identity card number of the second defendant as captured in the documents produced by the plaintiff. I note however that the defendants did not produce a copy of the second defendant's identity card to enable the court to compare and draw its own conclusions. An elector's card and a political party membership card is not proof of registration details in a national identification card.



30. In view of the above discourse, the defendants have failed to prove fraud to the required standard. It follows therefore that the counterclaim fails.
31. The plaintiff has sought eviction of the defendants, their servants and agents from N Wanga/Namamali/1008 and an order restraining them from trespassing on the said parcel or interfering with the plaintiff's use of it. As a registered proprietor, the plaintiff and the erstwhile minors are entitled to occupation and enjoyment of the suit property. In his testimony, the first defendant stated that he is in occupation of about 3 acres of what was N. Wanga/Namamali/812 and that he constructed a permanent house on the land in 1992. He added that they are a total of six brothers all occupying what was N. Wanga/Namamali/812 and that he is on N/Wanga/Namamali/1008. In essence, the first defendant admitted the plaintiff's claim for vacant possession. I am thus persuaded that the plaintiff has proven his case and is entitled to the reliefs sought.
32. In the result, I make the following orders:
- a) The defendants, their family, servants, agents or any other person claiming on their behalf, to vacate the parcel of land known as N/Wanga/Namamali/1008 within 90 (ninety) days from the date of delivery of this judgment.
 - b) In default of (a) above, the defendants, their family, servants, agents or any other person claiming on their behalf, be evicted from the parcel of land known as N/Wanga/Namamali/1008.
 - c) Upon, the defendants, their family, servants, agents or any other person claiming on their behalf vacating or being evicted from the parcel of land known as N/Wanga/Namamali/1008, they shall stand restrained from trespassing upon or encroaching on the parcel of land known as N/Wanga/Namamali/1008 or interfering with the plaintiff's and the erstwhile minors' use, occupation or enjoyment of the parcel of land known as N/Wanga/Namamali/1008.
 - d) The defendants' counterclaim is dismissed.
 - e) The plaintiff shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2022.

DO OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff

Mr Nyikuli for the defendants

Court Assistant: E. Juma

