



**Koilel & 47 others v Ntiya & 2 others (Environment & Land Case
47 of 2019) [2022] KEELC 14921 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 47 OF 2019
CG MBOGO, J
NOVEMBER 22, 2022**

BETWEEN

MOSOITO OLE KOILEL & 47 OTHERS PLAINTIFF

AND

SIPOI PARTEI NTIYA 1ST DEFENDANT

JONATHAN TOLIMO NDIYANI 2ND DEFENDANT

DISTRICT LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. The plaintiffs filed a plaint dated September 18, 2019 seeking the following orders: -
 - a. Cancellation of title of parcel of land known as Cis-Mara/Nailoklok/131.
 - b. An order to compel the 3rd defendant to issue the plaintiffs with title deed for the said parcel of land Cis-Mara/Nailoklok/131.
 - c. Costs of this suit be borne by the defendants.
2. In the plaint, the plaintiffs pleaded that at all times, the suit land belonged to Ndero Group Ranch which the plaintiffs are members and that the defendants have fraudulently transferred the suit land to themselves. The plaintiffs further pleaded that initially, the land was jointly owned by the defendants and two others but the same was later transferred to the 1st and 2nd defendants. Further, that the letter dated October 8, 2008 purported to have authorized the issuance of the suit land to the 1st and 2nd defendants is a forgery.
3. The 1st and 2nd defendant filed a statement of defence dated October 4, 2019. The 1st and 2nd defendants denied the plaint and stated that after the process of demarcation had been completed and all group members allocated land, the group was dissolved. Thereafter, the group members decided that the suit



land should be allocated to them as a thank you gift which was done through minutes dated November 4, 2008. The 1st and 2nd defendants further pleaded that the plaintiffs cannot be granted the said orders as the defendants are legally registered and title deeds issued to them.

4. The matter proceeded for hearing on February 8, 2021 where Mosoito Ole Koilel (PW1) testified that the suit land is a remainder of the original parcel of land that was not allocated to anyone and in a meeting held among members in the year 2019, it was agreed that the same be preserved for a school, hospital and a trading centre but later on they discovered that the suit land had been issued to the 1st and 2nd defendants. PW 1 further testified that they later reported to the District Land Adjudication and Settlement Officer, the Director of Criminal Investigations and the Lands Registrar as there were no transfer documents.
5. On cross examination, PW1 testified that the group land was dissolved in the year 2008 and each member was allocated their equal parcel of land and there was no dispute on the same. Further, that the suit land was to be for the community as agreed by members in a meeting held in 2008 but does not have minutes of the same. As regards the letter dated February 4, 2018 together with the minutes, PW1 testified that it is false as he was the chair of meeting which resolved that the suit land be preserved for the community. In addition, there was no transfer executed for the suit land as is usually the case. On re-examination, he reiterated that there was never a meeting held to allocate the suit land to the 1st and 2nd defendants.
6. Dopoi Ole Ntiyia (PW2) testified that at the dissolution of the group ranch, no one was allocated the suit land and it was to be registered in the name of the community as each member had already acquired their equal share of 52 acres. He further testified that although he does not recall when the group ranch was dissolved, most of the members own 52 acres. Further, that it was during collection of the titles that they realized that the suit land which had no allocation, was registered in the name of the 1st and 2nd defendants. He further testified that although he does not have minutes to show that the said parcel of land was to be reserved for a school, trading centre and a hospital, the same was recorded by PW1 whom they elected chairman of the suit land.
7. Nalengoyo Ole Nasieku (PW3) testified that he was a committee member of the group ranch and which they allocated each member 63 acres which was one share and the 1st defendant being the chairman had an equal share similar to other members. PW3 further testified that he does not know the suit land but he thinks that it is one that was preserved for a school, church and other social amenities but was acquired by two people. PW3 further testified that the suit land is currently vacated. Further that during subdivision, they had reserved a parcel of land which has a school and a church but the acreage is small. As far as he is concerned, there are minutes of all their meetings.
8. On December 7, 2021, the 3rd defendant was allowed to cross examine the plaintiffs witnesses. On further cross examination, PW1 testified that the signature on the witness statement dated September 18, 2019 is not his but the contents of the same are his. However, the suit property is not his only that he learnt that the same was fraudulently registered in the name of the defendants. On re-examination, PW1 reiterated that the signature on the witness statement is not his.
9. The defence hearing proceeded on October 11, 2022 when the 3rd defendant while adopting his witness statement dated July 19, 2021 testified that the subdivision of Cis-Mara/Narok/5 was done in the year 2008 and each member was allocated land and title deeds were issued but the suit land was not allocated to anyone and further there are no minutes to accompany the allocation. It was his evidence that in issuing titles, the Land Registrar requires a list of the beneficiaries from the Director of Land Adjudication as such it is not necessary to have the minutes. Further, that the officials of the Group Ranch who include the Chairman, Secretary and Treasurer are required to sign the transfer documents.



- That the minimum number of officials supposed to sign the transfer documents are two. The 3rd defendant testified that as per the minutes dated November 4, 2008 it was resolved that the suit land be registered in the names of the 1st and 2nd defendant and in this case, the suit land was registered in the names of the 1st and 2nd defendant in the year 2019 and were issued the said title while relying on the minutes prepared in the year 2008. According to the minutes, the members present were 15 while 4 were absent with apology. That the area list contains 70 members but he is not aware that there must be sixty percent attendance. In addition, the third defendant testified that indeed there are cautions lodged against the title with regards to fairness of the allocation of the suit land.
10. On cross examination, the third defendant testified that transfer documents can be executed by a minimum of two officials of the group ranch and that the suit land was initially not allocated to anyone and it is only after the area list and minutes were presented to it that they issued the 1st and 2nd defendant with a certificate of title based on their good work. The third defendant further testified that the transfer documents were executed on August 7, 2019 and the 2nd restriction was dated April 1, 2020. He testified that he does not know the number of members required to sign the minutes but relied on the members list.
 11. On re-examination, the third defendant testified that the restrictions were placed after the title deed was issued and the Directorate of Criminal Investigations have not asked for any information and further, that he does not know whether the investigations are complete. He further testified that it is not his duty to carry out investigations on the legality of the minutes and so far no member of the Group Ranch has complained about missing a parcel of land.
 12. The 2nd defendant while adopting his witness statement dated October 16, 2020 testified that as the Secretary of the Group Ranch, they demarcated the Group Ranch in the year 2003 and carried out subdivision in the year 2008 and all members were allocated their parcels of land. That the Group Ranch consisted of 69 members but added one school to make the membership reach 70. He further testified, that as per the area list, the suit land does not have an owner and that their aim was first to ensure that each member was allocated land. He further testified that later, together with the 1st defendant, they were issued with the suit land as a gift for the good work.
 13. On cross examination, the 2nd defendant testified that he knows the Treasurer and the Chairman of the group as he was the Secretary and that the Treasurer did not attend the said meeting that was held which resolved to give them the suit land. He further testified that there are minutes indicating that the treasurer consented to them acquiring the suit land. That the committee had ten members and that some of them did not participate in the demarcation and subdivision for the reason that they were opposed to the process and that the members who attended the meeting were 15 whereas the Group Ranch consisted of 69 members. Further, in the said meeting there was no Government Official in attendance and he is aware that the matter was reported to the Directorate of Criminal Investigation and upon being summoned, and carrying out the investigations, it was confirmed that there was no fraud. The 2nd defendant admitted that together with the 1st defendant, they signed the transfer forms after the meeting approved of the allocation. That there was no complaint before the title deed was issued. He further testified that there was a case filed against them by the rest of the members but the DCI assured them that there was no element of fraud and it was advised that this matter can be settled out of court.
 14. On re-examination, the 2nd defendant testified that he was not criminally prosecuted for fraud but they were interrogated but never charged. He further testified that the Treasurer was not allocated the suit land as there was an agreement but which was not in writing and also, there was no need for the adjudication officers to be present when the suit land was allocated to them. With regard to the court



- case, the 2nd defendant testified that the court referred them back to the village to settle the same out of court and that so far there are no criminal charges preferred against him and the 1st defendant.
15. The 1st defendant while adopting his witness statement dated October 16, 2020 testified that he was the Chairman of the Group Ranch and the Group Ranch had 68 members and they allocated a parcel of land to each member bringing the total membership of the group to around 69 to 70 or thereabout and none of the members missed out on land allocation. He further testified that initially, the suit land was not allocated to anyone but he applied to be allocated the same so as to recover on the expenses he had incurred working for the Group Ranch. Later, the Secretary approached him to be included and he asked the Treasurer to allow him own the suit land and he was agreeable to the same. Further, that they held a meeting where it was allowed that the suit land be allocated to them and together with the 2nd defendant, they signed the transfer documents.
 16. On cross examination, the 1st defendant testified that he became Chairman of the Group Ranch in the year 1998 and that a restriction was placed on the suit land at the behest of the DCI through five members who were opposed to allocation of the same but had initially been allocated the same. That together with the 2nd defendant, they acquired the suit land as appreciation for the good work that they did. Further, that he does not remember when the names of the five members were deleted and substituted with his name but that the suit land was transferred from the Group Ranch to him. The 1st defendant further testified that he can recall that Ole Sunya was Secretary of the meeting but does not recall exactly when he died but he was deceased by the time subdivision commenced. He does also recall electing Jonathan Tolimo in a meeting that was held but does not remember whether there were any minutes. He further testified that he was allocated the suit land alone in the year 2008 and the said Jonathan requested him to include him in ownership of the suit land but did not acquire the title because of opposition from members. Further, that he has never appeared before the DCI over the suit land.
 17. On re-examination, the 1st defendant testified that the 5 people were not included in the title deed because they did not agree for the reason that he sought allocation of the suit land before the meeting of 2008. Further, the membership of the Group Ranch resolved that Jonathan Tolimo be included in the ownership and that it was because of the opposition that he did not acquire the title deed earlier but in the year 2019. He further testified that by the time they were carrying out the subdivision, three of the committee members were already deceased and were replaced by others who were not very active and that it was only him and the 2nd defendant who were active and they rightfully own the suit land.
 18. The plaintiffs filed written submissions dated November 15, 2022 and they raised one issue for determination which is whether fraud was committed involving parcel known as Cis-Mara/ Nailoklok/131. The plaintiffs submitted that the suit land was not allocated to any one after individual members were allocated their parcels of land. The plaintiffs submitted that the 3rd defendant was deliberate in refusing to produce the transfer documents to show how the suit was transferred. Further, that in the exhibit number 9 is a certificate of incorporation which indicates the officials of the Group Ranch and the 2nd defendant who purports to be the secretary, is not an official of the same and has never been officially elected as a Secretary. The effect of such is that the transfer document was signed by only one official which means that title to the suit land was illegally acquired.
 19. The plaintiffs further submitted that the 2nd defendant was a member of the Group Ranch and not an official and going by this submission the letter dated November 4, 2008 is therefore null and void. Further, that in the said meeting, two thirds of the members of the Group Ranch did not attend and that the evidence of the 1st defendant contradicts the evidence of the 2nd defendant on the reasons



- why they were allocated the suit land. The plaintiffs relied on the case of *Karanja Guchu versus Sabera Wanjiku Guchu* [2018] eKLR.
20. The 3rd defendant filed undated written submissions on November 17, 2022. The 3rd defendant raised two issues for determination as follows: -
- i. Whether the 3rd defendant acted fraudulently.
 - ii. That the cost of the suit be granted.
21. On the first issue, the 3rd defendant submitted that the green card presented in court does not indicate that the suit land was transferred to the 3rd defendant but to the 1st and 2nd defendants. The 3rd defendant further submitted that this suit is not only vexatious but also a waste of judicial time for the reason that the plaint does not enumerate the precise elements of fraud or forgery. Further, that the hearing established that the issues are mixed up, the witness statements were disowned and the title number in the witness statement was different from what is claimed and since the Group Ranch has since been dissolved, the persons suing have no capacity to sue. That the hard task would be for the court to patch up the scanty information and fill the puzzle on who is the rightful owner. The 3rd defendant relied on the case of *Ali Abdalla Mwakupigwa (Suing as Administrator of the Estate of the late Abdul Mwakupigwa Juba) versus Attorney General & 3 others* [2021] eKLR and asked the court to dismiss the claims on the grounds of uncertainty.
22. The 3rd defendant further submitted that the process of transfer involves submission of an application for transfer documents to the Land Registrar and that in this case, the necessary transfer documents were presented by the 1st and 2nd defendant to the 3rd defendant who then issued a title deed upon satisfying himself that the documents presented were sufficient. The 3rd defendant relied on the case of *Elijah Makeri Nyangw'ra versus Stephen Mungai Njuguna & another* [2013] eKLR and submitted that the proceedings never established that the Land Officer committed any fraud in his official capacity if indeed there was any fraud committed, it would be by the parties themselves as there was no criminal investigation report. In addition, the 3rd defendant testified that no complaint was registered before the 3rd defendant claiming that they were left out without a parcel of land.
23. On the second issue, the 3rd defendant submitted that the 3rd defendant executed their statutory mandate in good faith and the registration of the title in the names of the 1st and 2nd defendants was proper. As such the award of costs is therefore not cast in stone but courts have ultimate discretion and that having satisfied that the 3rd defendant has no fault in the plaintiffs' misadventure, he prays the court to decline to award any costs against it.
24. The 1st and 2nd defendants filed written submissions dated November 17, 2022 and raised one issue for determination which is whether the 1st and 2nd defendant fraudulently transferred the suit land.
25. The 1st and 2nd defendant submitted that the plaintiffs' claims are mere allegation since they have not provided to the court any evidence to show how the fraud took place. That the 1st and 2nd defendants did a good work and the members agreed to give them the said portion as appreciation. The 1st and 2nd defendant submitted that any allegations of fraud must be pleaded and strictly proved. The 1st and 2nd defendants relied on the cases of *Kuria Kiarie & 2 others versus Sammy Magera* [2018] eKLR and *Eviline Karigu (Suing as administratrix of Estate of Late Muriungi M'Chuka Alias Miriungu M'Gichuga) versus M'Chabari Kinoro* [2022] eKLR.
26. I have carefully analysed and considered the pleadings and the issue for determination is whether the plaintiffs are entitled to the orders sought in the plaint. A certificate of title is conclusive evidence



of ownership and is prima facie evidence that the registered proprietor is the owner. Section 24 of the [Land Registration Act, 2012](#) gives the registered proprietor absolute rights over land, it provides “Subject to this Act— (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

27. Further, this title is protected under section 26 of the same Act which provides: -

“(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, un procedurally or through a corrupt scheme.”

28. Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of title as long as he/she can show that the title was acquired procedurally. The circumstances when title can be cancelled or revoked have been enumerated above (26(1) (a) & (b) of the [Land Registration Act](#).

29. In the instant case, the regime governing acquisition of land stems from the [Land Adjudication Act](#) where land is declared an adjudication section and the adjudication process kicks in. In this case, the plaintiffs and the 1st and 2nd defendant were members of Ndero Group Ranch vide a certificate of incorporation dated July 1, 1998. It is not in dispute that all the members were allocated an equal share of the larger Group Ranch save for the suit land which as per the records produced by the parties remained unallocated. It was the plaintiffs’ assertion that they learnt that the defendants had fraudulently transferred the suit land to themselves despite being aware that the same was contested.

30. The standard of proof for allegations of fraud has been set out by the courts in several decisions. In [David Wahome Mbeu v Catherine Wanjiru Maina & another](#) [2019] eKLR the court relied on the case of [Arthi Highway Developers Limited v West End Butchery Limited & 6 others](#) [2015] eKLR, where the court held that; -

“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 Casm685 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 chD 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.”

31. It was the evidence of the plaintiffs’ that in a meeting held in the year 2008, members resolved that the suit land be reserved for public use. However, no evidence was tendered to show that indeed the said meeting took place. It appears that the plaintiffs made complaints including filing a report with the Directorate of Criminal Investigations on allegations of fraud. On the other hand, it was the defendants’ evidence that fraud did not take place and that the suit was legally transferred to the 1st and 2nd defendants having had a meeting with the members on November 4, 2008.

32. Section 107 of the *Evidence Act*, states that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

33. It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court.

34. The allegations of fraud calls for detailed evidence to reach the threshold of proof. In the case of *Koinange and 13 others – vs - Koinange* [1986] KLR 23 the court restated the cardinal precept of the law of evidence that he who alleges must prove it. In the cases of *Ratilal Gordhanbhai Patel V Lalji Makanji* [1957] EA 314 and *Ulmila Mahindra Shah v Barclays Bank International and anor* [1979] KLR the courts have stated that fraud has everything to do with one’s state of mind and intentions, and not the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.

35. The *Black’s Law Dictionary* defines fraud thus: -

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.”

36. The plaintiffs in their plaint pleaded fraud albeit without precision in the particulars save to say that despite filing a case in court, the suit land was transferred fraudulently and without their knowledge to the 1st and 2nd defendants. It was upon the defendants to show that indeed they acquired title to the property through a lawful procedure. Interestingly, the defendants testified that they executed transfer forms but none including the 3rd defendant produced evidence of existence of transfer documents. Who exactly executed the transfer documents if at all they existed? It was also the evidence of the



2nd defendant that being the Secretary of the Group Ranch, he was in a position to execute transfer documents as they had done to other members but I note some discrepancy based on the certificate of incorporation produced as exhibit number 9. The name of the 2nd defendant is not included as a representative of the Group Ranch. The minutes said to be relied on by the 3rd defendant to register a title in the name of the 1st and 2nd defendants is also wanting. The minutes indicate that a meeting was held on November 4, 2008. It does not even provide for the venue. There is also doubt as to the reasons for allocating the suit land to the 1st and 2nd defendants. If at all it was as a token of appreciation, then it would mean that all the committee members could have been beneficiaries of the same. The evidence of the 1st and 2nd defendants was also contradicting. On one hand the 2nd defendant stated that owing to the good work that they undertook, members agreed to reward them. On the other hand, the 1st defendant testified that he was entitled to the suit land as a way of recovering the expenses he incurred in the Group Ranch activities. In my humble view, the reasons advanced are not persuasive because that would call for a undisputed consensus of the members to agree on the same.

37. Equity has exercised a general jurisdiction in case of fraud, sometimes concurrent with and sometimes exclusive of common law courts. Fraud would, therefore, consist of deceitful actions which may be made through either positive assertions or concealment of facts.

38. Section 80 of the same *Land Registration Act*, which provides;-

“(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.”

39. This court will only be guided with availability of evidence and with lack of the said evidence, there is nothing to inform this court that indeed the transfer of the suit land was lawful. Bearing in mind that the Group Ranch was dissolved, and in the interest of justice, it is only fair that the suit land is subdivided in equal shares amongst all the 69 members.

40. Having evaluated the evidence on record and the submissions filed, I am satisfied that the plaintiffs have on a balance of probabilities a cause of action against the defendants jointly and severally.

41. Arising from the above, I am satisfied that the 1st and 2nd defendants acquired the suit land through fraudulent means and as such I allow the plaint as follows: -

i. It is hereby ordered that there be cancellation of the certificate of title of the parcel of land known as Cis-Mara/Nailoklok/131.

ii. That parcel of land known as Cis-Mara/Nailoklok/131 be subdivided in equal shares and certificate of title issued to the 69 members of Ndero Group Ranch.

iii. Each party to bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 22nd NOVEMBER, 2022.

Mbogo C.G

Judge



22/11/2022.

In the presence of: -

CA: Timothy Chuma

Plaintiffs:

Defendants:

