



**Mwalimu & 6 others v Halal & another (Environmental and Land Originating Summons 370 of 2010) [2022] KEELC 15035 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15035 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 370 OF 2010  
NA MATHEKA, J  
NOVEMBER 22, 2022**

**BETWEEN**

**ATHMAN MWALIMU & 6 OTHERS ..... PLAINTIFF**

**AND**

**HIRJI RAMJI HALAL ..... 1<sup>ST</sup> DEFENDANT**

**NARAN RAMJI HALAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

- 1 The plaintiffs/applicants claim to be proprietor of land/plot and or premises known and registered as title No Mombasa Island Block XV/29 & 31, by way of adverse possession for the determination of the following questions;
  1. Are the plaintiffs/applicants entitled to be declared as the proprietor of the plot, land or premises known as title No Mombasa Island Block XV/29.
  2. Was the transfer of plot No title No Mombasa Island Block XV/31 effected procedurally or by fraud.
  3. Are the plaintiffs/applicants entitled to be registered as the owner of plot/ land or premises known as title No Mombasa Island Block XV/29. If the property was fraudulently acquired, what are the orders appropriate in the circumstance?
  4. Are the plaintiffs /applicants entitled to the costs of this suit.
2. This court has considered the evidence and the submissions therein. This suit was instituted *vide* an originating summons dated October 25, 2010 by the applicants who sought to be declared proprietors of plot No Mombasa Island Block XV/29 the property of Hirji Ramji Halal and Naran Ramji Halal. The applicants attached certified copy of the green card to plot No Mombasa/Block XV/29, which shows the respondents were registered as the owners of the suit property on February 1, 2001. The



applicants then filed an amended originating summons dated February 12, 2020 where they averred that the respondent acquired title to plot No Mombasa/Block XV/31 fraudulently and prayed for court to declare that plot No Mombasa/Block XV/29 and Mombasa/Block XV/31 be registered in the name of the applicants by way of adverse possession. The respondents disputed the applicants claim that they have acquired title to Mombasa/Block XV/31, they maintained that the applicants are heirs of Maalim Fadhil who entered one of the godowns as a tenant. The 2<sup>nd</sup> respondent produced a certificate of official search dated February 28, 2022 which confirmed that Mombasa/Block XV/31 has since been registered in his own name on September 16, 2020.

3 For a claim of adverse possession, the applicant must institute the suit through an originating summons pursuant to section 37 and 38 of the Limitation of Actions Act as read together with order 37 rule 1 and 7 of the Civil Procedure Rules. The originating summons must be supported by an affidavit to which a certified extract of the title to the suit land has to be annexed. The applicants attached a certified copy of the green card for plot No Mombasa/Block XV/ 29 to show that the respondents were registered as the proprietors on February 1, 2001. From the certificate of official search dated February 28, 2022, produced by the 2<sup>nd</sup> respondent indicate that he was issued with title on September 16, 2020 (DEX-1).

4 The Land Registration Act is very clear on issues of ownership of land and section 24(a) of the Land Registration Act provides as follows:

"Subject to this Act, 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."

5 Section 26 (1) of the Land Registration Act states as follows:

"The certificate of title issued by the Registrar upon registration ... 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... 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."

6 The law is clear that, the certificate of title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground 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 through a corrupt scheme.

7 This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

"-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."



- 8 It is not in dispute that the respondents are the registered owners of title No Mombasa Island Block XV/29 & 31. The issue to be determined is whether or not the applicants have acquired the same by way of adverse possession.
- 9 During examination in chief, the 1<sup>st</sup> applicant testified that his late father was the first to settle in the suit property and together with the other applicants, his siblings and they have operated their garage Mwalimu Auto Works for about 30 years. He maintained that they first entered the godown as tenants of Georgina Christian and Marie Vadalis. They paid rent between 1970 and 1980 but since then they have not paid rent and have been living in the suit property as owners and have only paid electricity and water. From the green card attached to the affidavit in support of the initial originating summons, it is clear that Georgia Christian and Maria Vidalis were the first registered owners of the Mombasa Block/XV/29, and transferred the same to the respondents.
- 10 For a claim of adverse possession to succeed, the occupation of the suit land by the applicants who are pleading adverse possession must be without permission from the registered owners. The applicants entered and took possession of plot 29 as a result of a tenancy contract whether express or implied, such possession in law is legal and proper and cannot be said to be adverse. It does not matter how the applicants want to describe the nature of being given and then taking possession, their possession of the suit property was not against the will of Georgia Christian and Maria Vidalis the first registered owners of plot 29. The applicants failed to demonstrate to court how and when their possession ceased to be permissive and became adverse.
- 11 The respondents became registered owners of plot 29 & 31 on February 1, 2001, the applicants cannot claim adverse possession under the respondents title because their possession only became hostile to the applicants on April 29, 2002 when the respondents through the firm of KA Kasmani wrote to the 1<sup>st</sup> applicant demanding for rent arrears and threatened legal action and auctioning the applicants to recover the arrears (DEX-4). The time between the demand letter and the institution of this suit does not accumulate 12 years as required by section 7 of the *Limitation of Actions Act*.
- 12 In their amended originating summons dated February 12, 2020, the applicants claimed that the respondents fraudulently to include allegations of fraud, they claimed that the respondents fraudulently transferred Mombasa/Block XV/29. In order to sustain a claim of fraud, the applicants needed to prove that the respondents acquired title in a way that is illegal, unprocedurally or through a corrupt scheme. The Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR 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 Cas 685 at 697, 701, 709, Garden Neptune v Occident [1989] 1 Lloyd's Rep 305, 308)."
- 13 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”.

14 Fraud is a question of evidence and the plaintiffs failed to not only particularize fraud but also to prove fraud on a standard of proof that is more than a mere balance of probabilities. Section 26 of the *Land Registration Act* secures the absolutory and indefeasibility of a title and for court to take draconian measure of canceling title as prayed by the applicants, there has to be simple, credible and consistent evidence of fraud committed by the respondent in acquiring title. In the absence of such evidence, the court finds no merit in the originating summons dated October 25, 2010 and amended on February 12, 2020 and I dismiss it with costs to the defendants.

15 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>TH</sup> DAY OF NOVEMBER 2022.**

**N.A. MATHEKA**

**JUDGE**

