



REPUBLIC OF KENYA



Fiolabchem Company Limited & 3 others v Ndule & 7 others (Environment & Land Case 46 & 17 of 2019 (Consolidated)) [2022] KEELC 14860 (KLR) (15 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 46 & 17 OF 2019 (CONSOLIDATED)**

**MAO ODENY, J
NOVEMBER 15, 2022**

BETWEEN

**FIOLABCHEM COMPANY LIMITED 1ST PLAINTIFF
ABDIRAHMAN MAALIM ABDULLAHI 2ND PLAINTIFF
LAWRENCE MUSYOKA ISIKAH 3RD PLAINTIFF**

AND

KATANA NDULE DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 17 OF 2019**

BETWEEN

KATANA NDULE PLAINTIFF

AND

**ROSEMARY AUMA OILE 1ST RESPONDENT
JOSHUA MUTINDA KITEME 2ND RESPONDENT
FIOLABCHEM COMPANY LIMITED 3RD RESPONDENT
SAID NUR OSMAN 4TH RESPONDENT
ROBIN MUNYUA KIMOTHO 5TH RESPONDENT
ABDULRAHMAN MAALIM ABDULLAHI 6TH RESPONDENT
ABDI OSMAN ABDI 7TH RESPONDENT**



JUDGMENT

1. By a plaint dated June 21, 2019 the Plaintiffs in ELC No 46 of 2019 sued the defendant seeking the following orders: -
 - a) A declaration that the Plaintiffs are the lawful and registered owners of the parcels of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950 and the subplots created therefrom.
 - b) An order for vacant possession of the parcel of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950.
 - c) An order of eviction of the Defendant, his servants and or agents from the suit property and demolition of any structures erected on the suit property.
 - d) A permanent injunction restraining the Defendant, his servants and or agents from remaining on or continuing in occupation of the suit property.
 - e) Costs and interest.

2. The Defendant filed a statement of defence and counterclaim dated August 14, 2019 seeking the following orders: -
 - a) An order to the Land Registrar, Kilifi Land Registry, cancelling the registration of Title No Kilifi/Mtondia/108 in the name of the Plaintiffs and cancelling all the subsequent registrations in the names of the Plaintiffs and nullifying all the resultant subdivisions and registrations in the names of the Plaintiffs and reinstate the title of parcel of land known as Title No Kilifi/Mtondia/108 and register the said title in the name of the Defendant as the absolute owner without requiring the Defendant to produce any other document for purposes of registration other than the judgment and decree of this Court.
 - b) An order of permanent injunction against the Plaintiffs, restraining the Plaintiffs, by themselves, their servants and or agents from entering onto the suit properties and from further subdividing the suit properties and or charging, leasing or transferring the suit properties and/or from dealing with the suit properties in any manner whatsoever.
 - c) Costs of this suit and interests thereon at court rates.
 - d) Any other relief that this honourable court may deem just to grant.

3. On March 22, 2021, this suit was consolidated with ELC No 17 of 2019, filed by the Defendant against the plaintiffs seeking the following orders: -
 - a) An order to the Land Registrar, Kilifi Land Registry, quashing, revoking and or nullifying the allocation of Title No Kilifi/Mtondia/108 in the name of the 1st Defendant and cancelling all the subsequent registrations in the names of the 1st and 2nd Defendants and nullifying all the resultant subdivisions and registrations in the names of the 3rd to 7th Defendants and reinstate the title of



parcel of land known as Title No Kilifi/Mtondia/108 and register the said title in the name of the Plaintiff as the absolute owner.

- b) An order of permanent injunction against the Defendants, restraining the Defendants by themselves, their servants and or agents from entering onto the suit properties and from further subdividing the suit properties and or charging, leasing or transferring the suit properties and/or from dealing with the suit properties in any manner whatsoever.
- c) Costs of this suit and interests thereon at court rates.
- d) Any other relief that this Honourable Court may deem just to grant.

Plaintiff's Case

4. PW1 Joshua Mutinda Kiteme a director of the Plaintiff Company, adopted his statement dated June 21, 2019 and stated that he bought the suit property from one Rosemary Auma Oile who had purchased the same from one Simon Alfred Mole in 1991.
5. PW1 further stated that upon purchase of the suit land he later transferred it to the Plaintiff company. It was PW1's evidence that when he bought the suit property, there was a structure thereon which he was informed belonged to a caretaker (the Defendant) who had requested for time to harvest his crops from the land but did not leave even after harvesting his crops.
6. PW1 also testified that they subdivided the suit property, sold the portions to 3rd parties and gave 1 acre to the Defendant who chose to clear the entire suit property.
7. PW2 Rosemary Oile adopted her written statement dated June 24, 2021 as her evidence in chief and told the court that she bought the suit property from one Retired Captain Mole in the year 1991. She explained that the original number was Plot No 108 and as at that time of the purchase the Defendant was on the suit property as a caretaker. According to PW2, the Defendant requested via a letter in 1991, to be allowed to harvest his crops before he could vacate the suit property but failed to do so. That the defendant continued to threaten her until she decided to sell the same.
8. PW 3 Lawrence Musyoka Isika equally adopted his statement dated June 24, 2021 and testified that he purchased a portion from the suit property in 2011 but has been unable to take possession thereof due to the Defendant's threats.
9. PW4 Abdurahman Maalim Abdillahi also adopted his written statement dated June 24, 2021 and stated that he bought two portions within the suit property in 2011 but has not been able to access the same due to the Defendant's threats. He added that there was a quarry on the suit property but was not aware who was operating the same.

Defendant's Case

10. DW1 adopted his statement dated August 14, 2019 and testified that he moved into the suit property in 1975 upon being allocated the same by the government and paying for the same but that he was yet to be issued with a title to the same.
11. DW1 produced a list of documents dated August 14, 2019 which included a letter of offer from the Ministry of Lands dated March 16, 2011 in respect of Plot No 108 Mtondia., green cards showing ownership and history of the parcels of land known as Kilifi/mtondia/108 and 949, the proprietorship Section of Plot 108 which shows that Rosemary Oile was issued with a title in 2000 and transferred



the said land to Joshua Mutinda Kitema in May 2001, further that the suit plot was subdivided and Plots Nos 949 and 950 were created in July 2001.

12. DW's also produced a document which showed that the proprietorship section of Plot 949 was transferred to the 1st Plaintiff in September 2001 and that in 2012 the land was subdivided into several parcels and new titles created.
13. Further that the search Certificate shows Plot No 950 is registered in the name of Joshua Mutinda Kitema, the 1st Plaintiff's director.
14. DW2 also adopted his written statement dated April 11, 2019 and told the court that he was the Defendant's neighbour.

Plaintiffs' submissions

15. Counsel relied on Section 26 of the *Land Registration Act, 2012*, and the case of *Jaj Superpower Cash & Carry Limited v Nairobi City Council & 2 others*, and submitted that the Plaintiffs having established that they are duly registered owners of the suit property, they are therefore entitled to the prayers sought.
16. It was counsel's submission that the Plaintiffs are still desirous of allowing the Defendant to continue occupying Kilifi/mtondia/950 and obtain ownership thereof by paying stamp duty to facilitate the transfer of title to his name. Further that the Plaintiffs are ready to surrender the title of Plot No 950 to the Defendant's advocates with a view to effecting the transfer.

Defendant's Submissions

17. Counsel for the Defendant identified five issues for determination as follows: -
 - a) Whether the suit by the 1st Plaintiff is competent or properly before the court.
 - b) Whether the Plaintiffs claim for recovery of land title no Kilifi/Mtondia/949 and title no Kilifi/Mtondia/950 is time barred by the *Limitation of Actions Act*.
 - c) Whether the registration of the suit properties in the names of the Plaintiffs were obtained by means of fraud, misrepresentation or omission.
 - d) Whether the Plaintiffs can maintain a suit for a declaration that they are the owners of the parcel of land known as Title No Kilifi/Mtondia/949 and the parcel of land known as Title No Kilifi/Mtondia/950 and a suit for recovery of their vacant possession as filed herein.
 - e) Whether the Defendant is entitled to be registered as owner of title no Kilifi/Mtondia/108.
18. On the first issue whether the 1st Plaintiff's suit is competent, counsel submitted that the 1st Plaintiff's suit was incompetent for failure to avail evidence of a company resolution authorizing the institution of the suit and relied on the case of *Omondi v National Bank of Kenya & Others [2001] EA 177* quoted in the case of *Smart Shop Limited v Daniel Karanja Mutitu ELC No 13 of 2017*.
19. On the second issue whether the suit is time barred, it was counsel's submission that the Defendant was in occupation long before PW1 and PW2 purchased the suit property but no suit for recovery of land was filed until 2019, long after the lapse of a period of 12 years as stipulated under Section 7 of the *Limitation of Actions Act*.



20. Counsel further submitted that the cause of action accrued on May 22, 2000 when PW2 was registered as the owner of the suit property and relied on the case of *Githu v Ndetee [1984] KLR 776* cited in *Lnaola Nerima Karani v William Wanyama Ndege Civil Appeal No 142 of 2007.*
21. On the third issue whether the Plaintiffs can maintain a suit for a declaration that they are the owners of the parcel of land known as title no Kilifi/Mtondia/949 and the parcel of land known as title no Kilifi/Mtondia/950 and a suit for recovery of their vacant possession as filed herein, counsel submitted that following subdivision of parcel Kilifi/Mtondia/949, that parcel ceased to exist hence the 1st Plaintiff cannot maintain any action in respect of the same.
22. Counsel also stated that as a result of the subdivision, the only mutations registered in favour of the 1st Plaintiff were Kilifi/Mtondia/ 1682 and 1710 which were not mentioned in the Plaint.
23. With regard to Kilifi/Mtondia/950, counsel submitted that the Plaintiffs' claim could not be maintained because none of the three Plaintiffs is registered as owner of the said parcel therefore, they have no locus standi to institute the present suit. Counsel also stated there was no evidence to show that Simon Mole was at any time a settler on the suit property and that he had been allotted the land.
24. That according to the Defendant, the first allottee was one Nancy Mkui Nene as per exhibit No 7 who failed to meet the trustee's conditions and that the land was owned by the Settlement Fund Trustees as at September 8, 1980.
25. On the 4th issue as to whether the Plaintiff obtained registration by fraud and misrepresentation, counsel submitted that PW2 did not avail any evidence to show that Alfred Mole was the original owner of the suit and that his name was not in the nominal role of the Settlement Fund Trustees.
26. Counsel therefore urged the court to dismiss the plaintiff's case and allow the defendant's counterclaim.

Analysis And Determination

27. This matter was consolidated with ELC NO 17 OF 2019 on March 22, 2021 and ELC NO 46 OF 2019 became the lead filed. The issues for determination are as follows: -
 - a) Whether the 1st Plaintiff's suit is competent.
 - b) Whether this suit is time barred.
 - c) Whether the Plaintiffs' registration as owner of the suit land was fraudulent.
 - d) Who is the rightful owner of the suit land between the Plaintiffs and the defendant?
28. On the issue whether the 1st Plaintiff's suit is competent for failure to file a Board resolution to file this suit, the PW1 swore an affidavit for verification under Order 4 rule 1 (2) whereby he stated that he is a director of the Plaintiff company and therefore authorized and competent to swear this affidavit.
29. In the case of *Spire Bank Limited v Land Registrar & 2 others [2019]eKLR*, the Court of Appeal interpreted the law thus: -

' It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court.



The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.'

30. In the case of *Livestock Research Organization v Okoko & another (Civil Appeal 36 A of [2021] [2022] KEHC 3302 (KLR)* the Court of Appeal held that:

' It is however clear from the above binding decision in the Makupa Transit Shade Limited & another v Kenya Ports Authority case that the absence of a Resolution to institute a suit or authority to swear an affidavit is not fatal to a suit. The Respondents' contention that the appellant failed to attach a Resolution or authority to swear an affidavit is true. However, such omission was not fatal to the suit. This is because the deponent of the verifying affidavit stated on oath that he was authorized by the appellant and being the Director General of the appellant corporation, unless the contrary was shown that he had no such authority to swear the verifying affidavit, which evidence the Respondents did not adduce,

31. There was no contrary evidence that PW1 was neither a director nor authorized to give evidence on behalf of the 1st Plaintiff. Nobody has complained and therefore if the Defendant had an issue then they should have given evidence to counter the allegation that he had such authority. I find that the Plaintiffs' case is proper before the court.
32. From the evidence on record, the Plaintiffs' case is that the suit property originally identified as Kilifi/Mtondia/108 belonged to the Settlement Fund Trustee which allocated the same to one Simon Mole. Around 1994. Mole sold the same to Rosemary Oile PW2 upon obtaining a letter of consent to transfer on December 19, 1991. This prompted PW2 to pay stamp duty to the Settlement Fund Trustee on October 5, 1994 for purposes of transferring the same to her. She was issued with a title deed in the year 2000 upon completing payment of the requisite fees.
33. The subsequent transfers were to Joshua Mutinda Kiteme in 2001, a director of the 1st Plaintiff Company who later subdivided the land into two parcels namely Kilifi/Mtondia/949 and Kilifi/Mtondia/950 and then transferred Kilifi/Mtondia/949 to the 1st Plaintiff.
34. PW1 Joshua stated that Kilifi/Mtondia/949 was sub-divided into 39 separate parcels which were sold to third parties upon issuance of titles. It is further evident from the record that the Defendant occupied the suit property as a caretaker who promised to vacate upon harvesting his crops but now wants to claim that he had been allocated the land vide an offer letter. If that was the case Alfred Mole could not have sold the land to Rosemary Oile with the Defendant on the suit land. The first thing that would have happened was to offer an explanation as to why the Defendant was on the suit land which was done by informing her that he was a caretaker.
35. It is further on record that the Defendant had requested to be allowed to harvest his crops and then vacate but never did so as agreed. The history of this suit land is as enumerated by both parties. There is no dispute that the Plaintiffs are the registered owners of the suit land and from the Defendant's list of documents it shows the transaction history entries which only show the Plaintiff's entries and not the Defendants. The Defendant states that he has been awaiting issuance of title from the Ministry. His allegation is not supported by documentary evidence.



36. The transactions on the suit land have been very active which includes subdivisions, consents to charge, discharge of charge, transfers and issuance of titles as late as 2012 and 2015. The Defendant was a caretaker whose claim as an owner cannot be tenable in adverse possession. His position as a caretaker was with the permission of the owners of the suit land so he should not be heard to claim the whole suit land.
37. It should also be noted that in the Defendant's counterclaim, he sought for an order of cancellation of title No Kilifi/ Mtondia /108 which ceased to exist upon subdivision and issuance of various titles to third parties. It follows that the order sought cannot be granted.
38. The *Land Registration Act* provides under Section 24(a) of the *Land Registration Act* 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.
39. Section 26 (1) of the *Land Registration Act* further states 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.
 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.
40. The Defendant claimed that the Plaintiffs acquired the titles through fraud and misrepresentation but failed to prove the fraud. The documents that he produced were in support of the Plaintiffs' registration. It is not enough just to throw the word fraud in pleadings, a party must prove that there was fraud in which the Defendant participated in. The root of a title is very crucial as it is tainted with fraud then the court has powers to impeach it as was held in the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another [2013] eKLR* where the court stated that a 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.
41. I find that the original title Kilifi/Mtondia/108 measuring approximately 12 acres, was under the Mtondia Settlement Fund Trustees and that the Plaintiffs have demonstrated how the property was transferred from the Settlement Fund Trustees to PW2. They attached a copy of transfer dated October 5, 1994, a letter of consent dated December 19, 1991 and receipts thereof. The Plaintiffs also produced a sale agreement between PW2 and the director of the 1st Plaintiff dated February 26, 2001.



42. The Defendant also produced a copy of letter of offer and payment receipt thereof of Kshs 30,298/ being the purchase price, dated March 16, 2011 and April 5, 2011 respectively. This letter of offer was issued when the land was not available for allocation or alienation as it had been transferred to the Plaintiffs.
43. Counsel for the Plaintiffs submitted that the Plaintiffs are still desirous of allowing the Defendant to continue occupying Kilifi/Mtondia/950 and obtain ownership thereof by paying stamp duty to facilitate the transfer of title to his name. Further that the Plaintiffs are ready to surrender the title of Plot No 950 to the Defendant's advocates with a view to effecting the transfer.
44. I have considered the pleadings, the evidence and the documents produced and come to the conclusion the Plaintiffs have proved their case on a balance of probabilities. The Defendant has failed to prove his counterclaim as at the time he received the offer letter the land was not available for allocation. Further that the land having been subdivided and other titles issued, Kilifi/Mtondia/108 ceased to exist. The counterclaim is therefore dismissed with costs.
45. I therefore make the following specific orders: -
- a) A declaration is hereby issued that the Plaintiffs are the lawful and registered owners of the parcels of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950 and the subplots created therefrom.
 - b) An order is hereby issued that the defendant do give vacant possession of the parcel of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950 within 45 days' failure to which eviction order to issue.
 - c) In the alternative if the defendant takes up the plaintiff's offer allowing the Defendant to continue occupying Kilifi/mtondia/950 and obtain ownership thereof by paying stamp duty to facilitate the transfer of title to his name.
 - d) An order is hereby issued for demolition of any structures erected on the suit property.
 - e) A permanent injunction restraining the defendant, his servants and or agents from remaining on or continuing in occupation of the suit property if the defendant does not take the alternative at (c)
 - f) Costs and interest.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF NOVEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

