



**Ombete (Suing as the Administrator of the Estate of Samuel Ombete Oyando) v Githiri
(Environment & Land Case E008 of 2023) [2025] KEELC 1039 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E008 OF 2023**

DO OHUNGO, J

MARCH 6, 2025

BETWEEN

**ZAKARIA MALOA OMBETE (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF SAMUEL OMBETE OYANDO) PLAINTIFF**

AND

GEORGE THIONG'O GITHIRI DEFENDANT

JUDGMENT

1. The Plaintiff moved the court through Plaintiff dated 13th April 2023 wherein he averred that Samuel Ombete Oyando (deceased) who was the proprietor of land parcel number Butso/Indangalasia/5239 (suit property) passed away on 30th January 2015 and that when he conducted an official search in respect of the suit property in February 2021 with an intention to commence succession proceedings in respect of the deceased's estate, he discovered that the Defendant fraudulently, deceitfully and illegally had the suit property registered in his name on 6th March 2015, long after the demise of the deceased.
2. The Plaintiff therefore prayed for judgment against the Defendant for:
 - a. A declaration that the plaintiff is the lawful owner of L.P. Butso/Indangalasia/5239 and the registration of the Defendant as the owner of the suitland on 6.3.2015 was fraudulent, illegal, null and void.
 - b. An order of cancellation of the defendant as the registered owner of L.P. Butso/Indangalasia/5239 and direct the defendant to deliver to the registrar of lands Kakamega land registry for cancellation the fraudulent title deed issued to the defendant.
 - c. A permanent injunction restraining the defendant, its agent, servants, employees or any person claiming under the defendant from possessing, trespassing, using, alienating, cultivating, entering or dealing with L.P. Butso/Indangalasia/5239 in any manner whatsoever.



- d. An order directing the defendant to remove any or all structures erected on L.P. Butso/Indangalasia/5239 and an eviction order evicting the defendant from the suit land supervised by the officer commanding Kakamega Police Station.
 - e. General damages for fraudulent misrepresentation.
 - f. Mesne profits.
 - g. Costs of this suit and interest.
 - h. Any other or further relief this court deems fit to grant.
3. The Defendant filed Statement of Defence dated 11th July 2023. He denied the allegations of fraudulent, deceitful and illegal acquisition and averred that he acquired the suit property in the year 2005 at a consideration of KShs 130,000 from the deceased. He added that the deceased willingly took all the steps to transfer the suit property to him. The Defendant therefore prayed for the dismissal of the Plaintiff's claim with costs.
 4. At the hearing, the Plaintiff adopted his witness statement dated 13th April 2023 and produced copies of the documents listed as item numbers 1 to 7 in his list of documents dated 13th April 2023 as his exhibits. He stated in the statement that his father passed away on 30th January 2025 and that when he conducted the search, he realised that the Defendant had fraudulently registered himself as proprietor on 6th March 2015 after the deceased's death. That he registered a restriction on the suit property and that after obtaining copies from the land registry, he learnt that the transfer was purportedly signed by the deceased on 27th February 2015 after his death. That the Land Control Board (LCB) form was dated 3rd February 2011 was a forgery and that the deceased did not attend any LCB meeting on 3rd February 2011. He also stated that the deceased did not enter into any sale agreement with the Defendant.
 5. In his oral testimony, the Plaintiff stated that he knew the Defendant for the first time when the Defendant went to the suit property with the area chief with a view to taking possession and that when he resisted, he was arrested and charged with robbery. That the Defendant constructed a house on the suit property while he was in custody for over one and a half years. He also stated that he was 26 years when his father passed away and that the Defendant was in occupation of the suit property as of the date of his testimony.
 6. The Plaintiff's case was then closed.
 7. The Defendant testified as DW1 and adopted his witness statement dated 11th July 2023. He also produced copies of the documents listed as item numbers 1 to 6 in his list of documents dated 11th July 2023 as his exhibits. The Defendant stated in the witness statement that he purchased the suit property from the deceased in the year 2005 at a consideration of KShs 130,000 and that the sale agreement was destroyed during post-election violence. That he took possession immediately and that at the time of the purchase, the deceased did not have a title. He further stated that around the year 2009, all persons who had purchased land from the deceased agreed to help the deceased to process title in respect of his portion so that they could in turn get their titles.
 8. The Defendant further stated that they were introduced to a surveyor by the name Hesbon Ozimbo who conducted the survey, and that the deceased was registered as the owner of land parcel number Butso/Indangalasia/4868 which the deceased thereafter subdivided into 17 parcels ranging from parcel number 5233 to 5249. That the Defendant was given the suit property and that the deceased attended LCB. He also stated that the delay in processing his title was due him having faced challenges in remitting funds for stamp duty and that the date on the transfer was an innocent error by the



advocate who certified the transfer. The Defendant further testified that he was not residing in the suit property as of the date of his testimony.

9. Hosbon Ozimbo Master (DW2) adopted his witness statement dated 25th May 2023 wherein he stated that he was a retired surveyor, and that the deceased engaged him around the year 2009 to help him obtain title to a portion of land that was to be carved from an ancestral land known as Butsotso/Indangalasia/2602 which was to be shared between the deceased and Barrack Joshua Oyando who was the deceased's brother. That upon obtaining LCB approval, parcel number Butsotso/Indangalasia/2602 was subdivided into Butsotso/Indangalasia/4867 which was assigned to Barrack and Butsotso/Indangalasia/4868 which was registered in the deceased's name.
10. DW2 further stated that upon instructions from the deceased, he obtained LCB approval and subdivided Butsotso/Indangalasia/4868 into 17 portions ranging from Butsotso/Indangalasia/5233 to 5249 so that all beneficiaries including the Defendant could obtain titles. He added that the deceased attended LCB and that there was a delay in the Defendant availing funds for stamp duty hence his title was issued in 2015. He further testified that he retired from Ministry of Lands and Settlement in the year 2010 and that there were no complaints about the survey and subdivisions up to the deceased's death in 2015.
11. The defence case was then closed, after which directions for filing and exchange of written submissions were given. Although Counsel for the Plaintiff indicated that he had filed submissions, I have not seen any submissions by the Plaintiff either in the Case Tracking System or in the physical file. On the other hand, the Defendant filed submissions dated 12th September 2024.
12. I have carefully considered the pleadings, evidence and submissions. The issues that arise for determination are whether fraud and illegality have been established and whether the reliefs sought should issue.
13. There is no dispute that the Defendant is currently the registered proprietor of the suit property. As a registered proprietor of land, the Defendant is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the Court to accept his certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
14. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof 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. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
15. The Plaintiff's case is that the Defendant obtained registration of the suit property in his name on 6th March 2015 after the demise of the deceased on 30th January 2015. Among the particulars of fraud pleaded are that the Defendant obtained registration without any letters of administration in respect of the deceased's estate, by misrepresenting that he purchased it and by use of a forged transfer form.
16. There is no dispute that the deceased passed away on 30th January 2015. The Defendant's case is that he purchased the suit property from the deceased in the year 2005 at a consideration of KShs 130,000. He stated that they had a sale agreement, but it was destroyed in a fire. I note that he produced an application for consent of the Land Control Board dated 2nd February 2011 and a consent of the Land



Control Board dated 3rd February 2011. Both those dates fell during the lifetime of the deceased. There is no suggestion that the deceased's signature on the application for consent of the Land Control Board was forged. The Plaintiff did not produce minutes of the Land Control Board to demonstrate that the deceased did not appear before the said board.

17. The Plaintiff's major grouse with the Defendant's title is narrowed down to dates. He contends that the deceased could not have signed the transfer on 27th February 2015 since he had passed away by then. On the other hand, the Defendant has explained that the date on the transfer was erroneously entered by the attesting advocate. At the end of the day, the question that must be answered is whether the deceased signed the transfer, the date notwithstanding. In that regard, I find the evidence tendered by the Defendant to be consistent. The transaction that led to the transfer started some ten years before the demise of the deceased. It was not an isolated transaction. Instead, there is evidence that the deceased subdivided Butso/Indangalasia/4868 into 17 new parcels which he transferred to various buyers and that the Defendant was only one of such buyers.
18. The Plaintiff's allegations of forgery of the transfer have not been supported by any forensic document examination evidence. The mere fact that the transfer was registered after the deceased's death does not ipso facto demonstrate fraud or illegality. A transfer can be validly registered even after death of the transferor. While addressing the validity of a transfer effected after the death of a proprietor, the Court of Appeal stated in the case of *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment) thus:
 33. We have revisited that rival position on the record and agree with the position taken by the Judge that a deceased person has capacity to divest himself of property during his lifetime known in law as gifts inter vivos which in the Judge's opinion and correctly so in our view are not only protected under the Act but are also sanctionable by a court of law irrespective of whether they are perfect or imperfect. By perfect is meant, complete, meaning the transfer of the gift inter vivos in favour of the beneficiary was effected and completed during the lifetime of the deceased while by imperfect is meant the transfer of the gift in favour of the recipient was incomplete as at the time of the demise of the deceased. As correctly observed by the Judge, lack of completion of the process of transfer does not of itself render the gift inter vivos invalid. It can be perfected by the grant holder if there is no contest over it, or alternatively sanctioned by a court where proven.
 34. Our take on the above rival position is that we find no mis-appreciation or misapplication of the law on intermeddling. The position taken by Tanui, J. in the *Gitau & 2 Others v Wandai & 5 Others* case [*supra*] is the correct threshold to be applied by a court addressing a complaint of alleged intermeddling in a deceased person's estate and which we find from the record the Judge properly appreciated and applied.
19. While dealing with an analogous situation, S. Okong'o, J. held in *Pardeep Singh Ghatabhora v Exotic Crafts Limited & another* [2018] eKLR as follows:

I am of the view that after receipt of the purchase price and the execution of the instrument of transfer, the deceased held the suit property in trust for the 1st defendant pending registration of the said transfer. I am not persuaded in the circumstances that the suit property formed part of the estate of the deceased. As to whether or not the deceased had entered into the said agreement for sale and executed the instrument of transfer, there is no evidence placed before the court to the effect that the deceased was not in sound mental condition when he is said to have executed the said agreement and transfer. As rightly



pointed out by the defendants', the signature of the deceased on the two documents was not contested.

20. It must be restated that fraud cannot be inferred but must be strictly proven to the required standard. What the Plaintiff has done is to raise questions and arguments around dates. That is not enough considering the serious allegations that he has made. I find that he has not proved fraud or illegality. He has not presented a case to warrant impeaching the Defendant's title.

21. I find no merit in the Plaintiff's case, and I therefore dismiss it with costs.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 6TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Ondieki for the Plaintiff

Ms Luseno for the Defendant

Court Assistant: B Kerubo

