



REPUBLIC OF KENYA



KENYA LAW
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**Stadler v Onyando & 2 others (Environment & Land Case
12 of 2020) [2024] KEELC 593 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 12 OF 2020
SO OKONG'O, J
FEBRUARY 8, 2024**

BETWEEN

NIKOLAUS STADLER PLAINTIFF

AND

OCHIENG POLYCARP ONYANDO 1ST DEFENDANT

AMOS OKUNGU 2ND DEFENDANT

CAROLINE ACHIENG OGACHO 3RD DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendants through a plaint dated 12th February 2020 seeking for the following reliefs;
 - a. A declaration that the transfer of the parcel of land known as Title No. Kisumu/Ojola/4347(hereinafter referred to only as “the suit property”) from the name of the Plaintiff to the 1st and 3rd Defendants was fraudulent, illegal and null.
 - b. An order cancelling the transfer of the suit property from the name of the Plaintiff to the 1st and 3rd Defendants and the reversion of the property to the name of the Plaintiff.
 - c. A permanent injunction restraining the Defendants, their servants and/agents jointly and severally from selling, transferring, disposing, entering into, evicting the Plaintiff or in any way whatsoever interfering with the suit property.
 - d. Costs of the suit and interest.
2. The Plaintiff averred that it was at all material times to the suit the bona fide owner of the suit property having purchased the same from one, Lukas Gwara Agai and had it registered in his name on 4th December 2006.



3. The Plaintiff averred that after purchasing the property, he constructed thereon a children's home at a cost of Kshs. 22,000,000/- and engaged the services of the 1st Defendant as a caretaker of the same.
4. The Plaintiff averred that he fell ill and left Kenya for his home country Switzerland for treatment and when he returned in November 2019, he found the children's home closed down and all his documents relating to the suit property missing from his office at the children's home where he had kept them.
5. The Plaintiff averred that when he checked on the status of the suit property at the land office, he learnt that on 18th January 2008, the 1st Defendant registered himself as a co-owner of the suit property with the Plaintiff and on 15th March 2019, the 2nd Defendant registered a power of attorney and transferred the ownership of the suit property from the Plaintiff to the 1st and 3rd Defendants to own the same to the exclusion of the Plaintiff.
6. The Plaintiff averred that the transfer of the suit property by the 2nd Defendant from the name of the Plaintiff to that of the 1st and 3rd Defendants was unlawful and fraudulent. The Plaintiff averred that he reported the said fraudulent activities at Maseno Police Station and the Police was in the process of preferring criminal charges against the Defendants.
7. The Defendants filed a joint statement of defence on 15th February 2021. The Defendants denied the Plaintiff's claim in its entirety and put the Plaintiff to strict proof.
8. On 15th December 2021, the parties entered into a consent under which, entries numbers 6,7 and 8 in the register of the suit property were cancelled, the hearing was to proceed only in respect of entries numbers 4 and 5 in the register, and the suit against the 2nd and 3rd Defendants was withdrawn.
9. At the trial, the Plaintiff told the court that he was staying in Switzerland and that he was 77 years old. The Plaintiff adopted his witness statement dated 20th November 2021 as his evidence in chief. In the statement, the Plaintiff reiterated the contents of the plaint. The Plaintiff produced copies of a title deed for the suit property, extract of the register for the suit property, a letter dated 7th October 2019 from his advocates on record to the Land Registrar and his passport as exhibits.
10. For the defence, the 1st Defendant adopted his witness statement dated 31st January 2022 as part of his evidence in chief. In his statement, the 1st Defendant stated that the Plaintiff was known to him having worked with him at JOSEPH CHILDREN'S HOME (hereinafter referred to only as "the Children's home"). He stated that the Plaintiff was initially the proprietor of the land on which the Children's home was situated.
11. He stated that in 2013, the Plaintiff told him that he wished to transfer the suit property to the Children's home. He stated that the Plaintiff was advised that the Children's home was not a legal entity and as such it could not hold land in its name but in the name of trustees. He stated that it was upon this advice that the suit property was registered in the name of the Plaintiff and the 1st Defendant as trustees of the Children's home.
12. The 1st Defendant stated that the transfer of the suit property to his name and that of the Plaintiff as trustees of the Children's home was above board. He stated that the Plaintiff was also advised that as a foreigner he could not hold freehold land. The 1st Defendant stated that the suit property should remain in his name and that of the Plaintiff for the benefit of the Children's home. The 1st Defendant stated that the Plaintiff was suspended by the sponsors of the Children's home for misappropriation of funds and conversion of the Children's home's property as his personal property. The 1st Defendant averred that the Plaintiff had not proved fraud against him. He stated that the Plaintiff voluntarily transferred the suit property to his name.



13. In his testimony in court, the 1st Defendant stated that he had known the Plaintiff for some years. He stated that the Plaintiff adopted him as his son and he worked with him for 6 years. He stated that since the Plaintiff and one of his colleagues, Ulrich were foreigners, he was brought in to hold the land as one of the trustees. He stated that he was paid for 3 months and that he was promised land in lieu of a salary. He stated that the money used to purchase the suit property was raised from donors. He stated that the Children's home was not operating and that its operation was suspended by one of the donors.
14. After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed submissions dated 28th August 2023. The Plaintiff submitted that after the Plaintiff's claim against the 2nd and 3rd Defendants was compromised, as aforesaid, the only issue that was left for determination was whether the Plaintiff lawfully transferred joint ownership of the suit property to the 1st Defendant. The Plaintiff submitted that on 18th January 2013 when the 1st Defendant caused himself to be registered as a co-owner of the suit property with the Plaintiff, and on 15th March 2019 when the suit property was registered in the names of the 1st and 3rd Defendants to the exclusion of the Plaintiff, the Plaintiff was out of the country. The Plaintiff submitted that this fact was proved by the Plaintiff through a copy of his passport that he produced in evidence as P.EXH.4.
15. The Plaintiff submitted that he never signed the instrument of transfer in favour of the 1st Defendant or the Power of Attorney in favour of the 2nd Defendant. The Plaintiff submitted that he never appeared before the advocates who allegedly witnessed his signature in the said documents. The Plaintiff submitted that the 1st Defendant did not challenge his evidence that he was out of the country when he was alleged to have executed a transfer making the 1st Defendant who was not even a director of the Children's home a co-owner of the suit property. The Plaintiff submitted that there was no evidence that the Plaintiff appeared before the Land Control Board for a consent in respect of the purported transfer in favour of the 1st Defendant. The Plaintiff submitted that there was also no evidence of a trust deed for the Children's home on the strength of which the 1st Defendant could be made a trustee.
16. The Plaintiff submitted that he had proved his case against the 1st Defendant and urged the court to grant the reliefs sought in the plaint against the 1st Defendant.
17. The 1st Defendant filed submissions dated 6th October 2023. The 1st Defendant framed two issues for determination namely, whether the Plaintiff proved fraud against the 1st Defendant to the required standard, and who should bear the costs of the suit. The 1st Defendant submitted that the burden of proof of fraud was upon the Plaintiff. The 1st Defendant cited Section 109 of the *Evidence Act*, Chapter 80 Laws of Kenya, *Viyay Morjaria v. Madhusingh Darbar & Another*[2000]eKLR, and *Christopher Ndaru Kagina v. Esther Mbandi Kagina & Another*[2016]eKLR in support of this submission. The 1st Defendant submitted that while the Plaintiff particularised the alleged fraud, the same was not proved.
18. The 1st Defendant submitted that the Plaintiff did not prove that he reported the alleged fraud to the Police for investigations and appropriate action. The 1st Defendant averred that the Plaintiff did not produce in court the particulars of the Occurrence Book Number under which his alleged report was booked. The 1st Defendant submitted further that although the Plaintiff claimed that his signature in the transfer was forged, the Plaintiff admitted in part during the cross-examination that the signature in the document was his. The 1st Defendant submitted that the Plaintiff did not tender sufficient evidence in proof of the particulars of fraud pleaded against the 1st Defendant.
19. I have considered the pleadings and the evidence on record. The following in my view are the issues arising for determination in this suit:



- a. Whether the transfer of the suit property from the name of the Plaintiff to the names of the Plaintiff and the 1st Defendant as trustees of Joseph Children's Home was lawful.
- b. Whether the Plaintiff is entitled to the reliefs sought against the 1st Defendant.
- c. Who is liable for the costs of the suit?

Whether the transfer of the suit property from the name of the Plaintiff to the name of the Plaintiff and the 1st Defendant as trustees of Joseph Children's Home was lawful

20. The suit property was transferred from the name of the Plaintiff to the name of the Plaintiff and the 1st Defendant as trustees of Joseph Children's Home after the repeal of the Registered [Land Act](#), Chapter 300 Laws of Kenya by the [Land Registration Act](#), 2012. Sections 24, 25, 26 and 80 of the [Land Registration Act](#), 2012 provide as follows:

24. 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.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (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.

80.

- (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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.

21. The Plaintiff contended that the 1st Defendant was registered as a co-proprietor of the suit property on 18th January 2013 fraudulently. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

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“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)”

22. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* (supra), the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is



also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

23. I am not satisfied from the evidence on record that the registration of the 1st Defendant and the Plaintiff as joint proprietors of the suit property in trust for Joseph Children’s home was fraudulent. As mentioned earlier, the registration was done on 18th January 2013 (not 2008 as claimed by the Plaintiff in the plaint). The Plaintiff claimed that he was not in Kenya at the material time and that the purported transfer of the suit property from the name of the Plaintiff to that of the 1st Defendant and the Plaintiff as joint proprietors was a forgery. The Plaintiff claimed that he made a report to the Police and that the 1st Defendant among others was to be charged with fraud. The Plaintiff produced in evidence a copy of his passport to show when he entered and left Kenya on several occasions.
24. I have perused the said passport. From the entries in the said passport, I have noted that in 2012, the Plaintiff entered Kenya on 7th November 2012 and exited on 21st November 2012. I have noted that the Plaintiff came back again on 29th December 2012. The Plaintiff did not produce a copy of the page of his passport with the stamp for his exit after this entry into the country on 29th December 2012. The Plaintiff has therefore not proved that after coming to Kenya on 29th December 2012 he left the country before 18th January 2013 when he is said to have executed the instrument of transfer through which the suit property was transferred to the Plaintiff and the 1st Defendant as trustees of Joseph Children’s Home (the Children’s home).
25. As observed by the 1st Defendant in his submissions, although the Plaintiff claimed that his signature in the document was forged and that he had reported the matter to the Police for action, no evidence was tendered before the court showing that such a report was made and of any action or inaction by the Police. I have also noted further that the Plaintiff’s signature in the said instrument of transfer is said to have been witnessed by an advocate; Ben Nyanga Aduol who is based in Kisumu. There was no evidence that a complaint had been made against Ben Nyanga Aduol advocate for certifying that the Plaintiff appeared before him on 18th January 2013 and signed the said transfer.
26. From his passport, I have noted that the Plaintiff came in and left the country several times after 18th January 2013 when the property was transferred to his name and the 1st Defendant as trustees of the Children’s home. It was not until November 2019 that the Plaintiff is said to have discovered the alleged fraud. I wonder why the Plaintiff did not complain about the transfer earlier. This court cannot also see the reason why the 1st Defendant would have transferred the suit property to the Plaintiff and the 1st Defendant as trustees of the Children’s home if he intended to dispossess or defraud the Plaintiff of the property. Why would he not just transfer the property to his sole name? The Plaintiff did not rebut the explanations that were given by the 1st Defendant for the transfer of the suit property to the name of the Plaintiff and the 1st Defendant as trustees of the Children’s home which I found convincing. The Plaintiff did not also persuade me that the signature on the impugned instrument of transfer was not his.
27. From the totality of the evidence on record, it is my finding that the fraud alleged against the 1st Defendant concerning the transfer of the suit property to Plaintiff and the 1st Defendant as trustees of the Children’s home on 18th January 2013 was not proved. The impugned transfer was in the circumstances lawful.

Whether the Plaintiff is entitled to the reliefs sought in the plaint against the 1st Defendant.

28. I have set out at the beginning of this judgment the reliefs sought by the Plaintiff. From the findings that I have made above, I am not satisfied that the Plaintiff has proved his case against the 1st Defendant



on a balance of probabilities concerning the registration on 18th January 2013 of the Plaintiff and the 1st Defendant as the proprietors of the suit property in trust for the children's home. The Plaintiff is therefore not entitled to the cancellation of entry number 5 made on 18th January 2013 in the register of the suit property. The Plaintiff may have a case for the revocation, setting aside or dissolution of the trust but that is not the case before me.

Who is liable for the costs of the suit?

29. Under section 27 of the *Civil Procedure Act*, the costs of and incidental to a suit is at the discretion of the court and as a general rule, costs follow the event. The Plaintiff has not succeeded in his claim against the 1st Defendant. From the findings of the court, the Plaintiff and the 1st Defendant shall remain registered as proprietors of the suit property in trust for the Children's home until such a time when the trust shall be terminated. Their relationship is already strained. The court would not wish to strain it further by condemning the Plaintiff to pay the costs of the suit. For that reason, I will order that each party bear its costs.

Conclusion

30. In conclusion, I hereby make the following orders in the matter:
- a. The transfer of Title No. Kisumu/Ojola/4347 on 18th January 2013 from the name of the Plaintiff to the names of the Plaintiff and the 1st Defendant as trustees of Joseph Children's Home was lawful.
 - b. I decline to cancel the entry in the register of Title No. Kisumu/Ojola/4347(the suit property) relating to the transfer.
 - c. The entries numbers 6, 7 and 8 in the register of the suit property shall remain cancelled in terms of the orders that were made by the court on 15th December 2021.
 - d. Each party shall bear its costs of the suit.

DATED AND DELIVERED AT KISUMU ON THIS 8TH DAY OF FEBRUARY 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Khisa h/b for Mr. Odeny for the Plaintiff

N/A for the Defendants

Ms. J.Omondi-Court Assistant

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