



**Mwimali (Suing as Leg. Rep. of Jared Mwimali Mukhwandala – Deceased) v Fwayia
(Environment & Land Case E016 of 2020) [2024] KEELC 5126 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E016 OF 2020**

BN OLAO, J

JULY 10, 2024

BETWEEN

**VITALIS ECHESA MWIMALI (SUING AS LEG. REP. OF JARED MWIMALI
MUKHWANDALA – DECEASED) PLAINTIFF**

AND

GODLIVER APONDI FWAYIA DEFENDANT

JUDGMENT

1. This judgment was due to be delivered on 28th March 2024. However, I was bereaved having lost my step mother on 14th March 2024. I resumed duties in April 2024 and thereafter proceeded on my pre-scheduled annual leave in May and June 2024. This judgment is being delivered soon after I reported back from leave on 1st July 2024. That explains the delay which is regretted.
2. Vitalis Echesa Mwimali (the Plaintiff herein and suing as the legal representative of the Estate of Jared Mwimali Mukhwandala – deceased) moved to this Court vide his plaint dated 14th May 2020 and filed on 15th May 2020 seeking judgment against Godliver Apondi Fwayia (the Defendant) in the following terms with respect of the land parcels No Bukhayo/Kisoko/3610 and 2948 (the suit land).
 1. An order cancelling the registration of the Defendant as the title owner of the land parcels No Bukhayo/Kisoko/3610 and 2948 and the same to revert to Jared Mwimali Mukhwandala – deceased.
 2. Costs of the suit.

It is the Plaintiff's case that before his demise on 14th October 2019, the deceased was the registered proprietor of the suit land. That while preparing to file the succession proceedings in respect to the deceased's Estate, the Plaintiff discovered that the Defendant had fraudulently, secretly, unlawfully and irregularly transferred the suit land to her name on 12th November 2019 and 17th December 2019.



3. The particulars of illegality, irregularity and fraud have been pleaded in paragraphs 4(a) to 4(f) as follows:
 - a. Causing the transfer of the deceased's property into the Defendant's names without a grant of Letters of Administration.
 - b. Forging the deceased's signature to make believe he had signed transfer for her.
 - c. Taking the opportune of death to unjustly enrich herself.
 - d. Attempting to disinherit the vast number of beneficiaries to the Estate of the deceased.
 - e. Causing a dead person to thumb print transfer forms while lying in state.
 - f. Grossly intermeddling in the Estate of the deceased.

The Plaintiff averred that the resultant title granted to the Defendant is bad in law and should be annulled hence this suit.

4. The Plaintiff filed together with the plaint his statement also dated 14th May 2020 in which he confirmed that he is the legal representative of the deceased who was his father and who was survived by three (3) widows and ten (10) children including a minor. That the Defendant was the 3rd wife and kept custody of some of the deceased's title deeds specifically those of the suit land which she refused to hand over. Following the demise of the deceased, the family commenced succession proceedings and discovered that the suit land had been transferred to the Defendant within a month of the deceased's demise yet no Grant of Letters had been issued in respect of the deceased's Estate. That transfer was therefore unlawful, tainted with fraud and must be cancelled.
5. By his list of documents dated 14th May 2020, the Plaintiff filed the following as his documentary evidence:
 1. Copy of Grant of Letters Ad Litem issued for purposes of filing this suit.
 2. Death Certificate for the deceased.
 3. Letter from Chief dated 28th February 2020 listing the deceased's beneficiaries.
 4. Certificate of Official Search for the land parcel No Bukhayo/khasoko/3610.
 5. Certificate of Official Search for the land parcel No Bukhayo/khasoko/2948.

By a further list of documents dated 28th October 2020, the Plaintiff filed the following documents:

1. Letter dated 31st August 2020 addressed to the Deputy County Commissioner Nambale sub-County by R. Omar Advocate.
 2. Letter dated 9th October 2020 from C. J. Onchoka Deputy County Commissioner Nambale sub-County addressed to R. Omar – Advocate.
6. The Plaintiff did not file any statement by his witness. However, during the plenary hearing before Omollo J on 6th July 2021, the Plaintiff called as his witness Caroline Onchoka (PW2) the Deputy County Commissioner Nambale Sub-County who testified and produced as the Plaintiff's documentary evidence her letter dated 9th October 2020 referred to above. I shall revert to that later in this judgment.



7. The Defendant filed a defence dated 30th July 2020 in which she denied the particulars of illegality, irregularity and fraud levelled against her. She added that the deceased had transferred the suit land to her on 6th June 2019 and this suit is malicious and brought in bad faith.
8. In her statement of even date, the Defendant confirmed that she is the widow of the deceased who died on 14th October 2019 and since then, the Plaintiff and his brothers have frustrated her by beating her, destroying the boundaries to the suit land and cutting down her trees. She has been living in fear since the demise of the deceased and the Plaintiff and his brothers even carried away the nine (9) cows which the deceased left with her. That the Plaintiff and his brothers also sold a plot in Nambale town and shared the proceeds without involving her yet she has young children. That the Plaintiff and his brothers also stopped her from ploughing land in Teso-Apokor which the deceased left her ploughing and instead leased it out for their own benefit. That the sole intention of this suit is to frustrate her being the youngest widow of the deceased who has been in exclusive possession and use of the suit land while the Plaintiff has his land.
9. That she was the one living with the deceased at the time of his demise and he had transferred the suit land into her name having obtained the relevant consent and paid all the fees. That before the title deeds to the suit land were issued, the deceased was admitted to the hospital for an operation but died on 14th October 2019. Before his demise, the deceased informed her that he had done everything at the Lands Office and all she needed to do was to collect the title deeds. Before his demise, the deceased had also held a meeting with all the beneficiaries of his Estate and asked them if any of them was without land and nobody said a word including the Plaintiff. She is holding the suit land for the benefit of her young children. That the allegations of the fraud and illegality are not backed by any proof as the suit land was transferred to her before her late husband's demise and therefore do not form part of his Estate having been transferred inter vivos.
10. That on 22nd June 2020 she was served with this Court's order dated 17th June 2020 directing her to file a response to an application within 14 days. However, on 4th July 2020, the Plaintiff and his brothers attacked her and her daughters on the pretext that this Court had ordered her not to use the suit land any longer. She reported to the Police and was issued with an Occurrence Book (OB) and medical report. It is therefore in the interest of justice that this suit be dismissed with costs.
11. The Defendant filed the following documentary evidence by her list of documents dated 30th July 2020:
 1. Defendant's Identity Card.
 2. Deceased's certificate of death.
 3. Birth Certificates of the Defendant's children with the deceased.
 4. Transfer Form for the land parcel No Bukhayo/Kisoko/3610.
 5. Transfer Form for the land parcel No Bukhayo/Kisoko/2948.
 6. Application for consent of the Land Control Board dated 6th June 2020 for transfer of the land parcel No Bukhayo/Kisoko/3610.
 7. Application for consent of the Land Control Board dated 6th June 2020 for transfer of the land parcel No Bukhayo/Kisoko/2948.
 8. Letter of consent for the transfer of the land parcel No Bukhayo/Kisoko/3610.
 9. Letter of consent for the transfer of the land parcel NO Bukhayo/Kisoko/2948.



10. Copy of the deceased's KRA PIN.
11. Copy of the Defendant's KRA PIN.
12. Receipt for stamp duty.
13. Copy of the deceased's Identity Card.
14. Copy of the Defendant's Identify Card (this is actually a repeat of No 1 above).
15. Copy of the title deed for the land parcel No Bukhayo/Kisoko/3610.
16. Copy of the title deed for the land parcel No Bukhayo/Kisoko/2948.
17. Copy of the Occurrence Book (OB) and Treatment notes.

The Defendant also filed two affidavits by his witness Edwin Lunzalu Wadenya (DW2) one dated 4th April 2023 and the other dated 19th July 2023 in support of the Defendant's case.

12. In his affidavit dated 4th April 2023, the said Edwin Lunzalu Wadenya (DW2) stated that he is a surveyor by profession and knew the deceased because he used to carry out survey and registration work for him. He deposed further that sometime in April 2019, he went to the deceased's home in Segero for purposes of transferring his two parcels of land to the Defendant who was living with him. That the deceased expressed to him his concern that his elder children might frustrate the Defendant. The witness was instructed to start the process and subsequently, the suit land was transferred to the Defendant with the deceased signing all the necessary documents and paying the fees. The witness ensured that the registration was done. He denied that the Defendant obtained the said registration without the consent of the deceased.
13. In his further affidavit dated 19th July 2023, the witness deposed that among the other work which he did for the deceased included the transfer of the land parcel No Bukhayo/kisoko/3045 to one Fredrick Mukhwandala a brother to the Plaintiff.
14. The hearing commenced before Omollo J on 16th March 2023. The Plaintiff testified and adopted as his testimony the contents of his statement dated 14th May 2020. He also produced as his documentary evidence the list of documents filed herein and which I have already referred to above.
15. The Plaintiff also called as his witness Caroline Onchoka (PW2) the Deputy County Commissioner Nambale as his witness. This is the right time to revert to this witness's testimony. She did not record any statement, perhaps, riding on the provisions of Order 3 Rule 2 (a) of the Civil Procedure Rules which require that "witness statements signed by the witness excluding expert witnesses" be signed. It is not clear why Caroline Onchoka (PW2) did not record any statement. I do not consider her to have been an expert witness. However, she testified without any objection and nothing turns on that. In her testimony, she simply produced the documents given to her by the Plaintiff as her evidence. These are the letter written to her by counsel for the Plaintiff and her response thereto. She added further that she had examined the application to the Land Control Board and the consent letter which did not correspond with the register No 70 of 2019. That the said register was for the sub-division of the land parcel NO L.R 15207 in the name of one Emmanuel Odunga Orodi while register NO 79 is in respect to the transfer of parcel No Ebukhao/Ebusibwao/5974 in the name of one Sabastian Nasubo Okurie. She added that the consents in question are not in their records and that the address given was not that of Nambale which is 222.
16. The Defendant and her witness Edwin Lunzalu Wadenya (DW2) testified before me.



17. The Defendant testified before me on 12th October 2022. She adopted as her evidence the contents of her statement dated 30th July 2020 and also produced as her documentary evidence the documents filed herein as per the list referred to above.
18. Her witness Edwin Lunzalu Wadenya (DW2) testified on 8th May 2023 and 15th November 2023. He adopted as his testimony the contents of his two affidavits dated 4th April 2023 and 19th July 2023 which I have already referred to above.
19. Submissions were thereafter filed both by MRS Rayhana Omar instructed by the firm of R. Omar & Company Advocates for the Plaintiff and by Mr Moses Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Defendant.
20. I have considered the evidence by the parties as well as the submissions by counsel.
21. The Plaintiff's case is that the Defendant illegally, irregularly and fraudulently transferred the suit land belonging to a deceased person into her name without having obtained a Grant of Letters of Administration in respect of the deceased's Estate. That title should therefore be cancelled and revert in the name of the deceased. The Defendant's case is that the title to the suit land was transferred in her name during the life time of the deceased and there was no illegality, irregularity or fraud committed by her.
22. I consider the following to be the issues arising for my determination in this dispute:
 1. Whether the Defendant obtained title to the suit land illegally, irregularly or fraudulently and if the same should be cancelled and revert to the name of Jared Mwimali Mukhwandala.
 2. Who meets the costs of the suit?

1. Whether the Plaintiff has Proved Illegality, Irregularity or Fraud, on the Part of the Deed.

23. While the Defendant's case is that the suit land was transferred to her by the deceased during his life time, the Plaintiff's case is that infact the Defendant did so illegally, irregularly and fraudulently. Particulars whereof have been pleaded in paragraphs 4(1) to 4(f) of the plaint and which I have already itemized above. The titles to the suit land have since 12th November 2019 been registered in the name of the Defendant as is clear from the copies of title deeds produced herein. Those title deeds confer absolute ownership of the suit land to the Defendant but the same can be challenged as stated in Section 26 (1) of the *Land Registration Act* which provides that:

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."



Having pleaded irregularity, illegality and fraud on the part of the Defendant in the manner in which she acquired the title to the suit land, the duty was on the Plaintiff to prove those allegations. Sections 107, 108 and 109 of the Evidence Act provide that:

107

- (1) “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.”
- (2) “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

108: “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

109: “The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The standard of proof where a party alleges fraud has been set out in many cases. In the case of *R. G. Patel -V- Lalji Makanji* 1957 E.A 314 the then Court of Appeal for Eastern Africa described that standard as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

In the case of *Vijay Morjaria -v- Nansingh Madhusingh Darbar & another* 2000 eKLR, Tunoi J.A stated that:

“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis mine.

In *Ndolo -v- Ndolo* 2008 1 KLR (G&F) 742 the Court said:

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required on him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

Finally, in the case of *Central Kenya Ltd -v- Trust Bank Ltd & Others* C.A. Civil Appeal No 215 of 1996 (1996 eKLR), the Court addressed the same issue in the following terms:

“The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”



The thread which runs through those cases is that the burden on the Plaintiff to prove the allegations of irregularity, illegality and fraud, though not as heavy as required in criminal cases, is certainly heavier than what is required in ordinary civil cases. Has the Plaintiff met that threshold?

24. I shall now revisit the particulars of illegality, irregularity and fraud as pleaded by the Plaintiff himself in paragraphs 4(a) to (f) of his plaint.

25. The first allegation is that the Defendant caused the transfer of the suit land into her names without a Grant of Letters of Administration. The certificate of death shows that the deceased died on 14th October 2019. The letter of consent to transfer the suit land from the deceased to the Defendant was issued on 6th June 2019 that is some four (4) months before the demise of the deceased. The Defendant was categorical that the deceased transferred the suit land into her names before his demise. In paragraph 15 of her statement she has stated thus:

15: “That my late husband before his death equally transferred the two parcels into my name for the betterment of my children. Annexed and marked as GAF-3 is a copy of the transfer Forms.”

The transfer form is dated 6th June 2019 and is certified by an Advocate namely Betty Maloba. The transfer of the suit land from the deceased to the Defendant having been executed during the life time of the deceased, the Defendant did not need to obtain any Grant of Letters of Administration to do so. A property owner has the capacity, during his life time, to divest himself of any property through a sale or even as a gift. Where, as in this case, the transfer was done for the benefit of the deceased’s children with the Defendant, then that was an inter-vivos transfer which is defined in Black’s Law Dictionary 10th Edition as:

“ A transfer of property made during the transfer’s life time.”

Although the transfer was finally registered on 12th November 2019, the position in law is that lack of the completion of the transfer process does not of itself render the gift inter vivos invalid. In his statement dated 14th May 2020 at paragraphs 8 and 9, the Plaintiff stated that:

8: “Upon conducting the required official searches for purposes of succession, we were shocked to find that the suit property had been transferred to the Respondent with (sic) a period of a month after the deceased’s death.”

9: “No Letters of Administration were obtained to effect the transfer neither can such letters of administration be obtained in a period of one month.”

It is true that the Plaintiff discovered the transfer of the suit land one month after the demise of the deceased. However, as is now clear from the evidence of the Defendant and her witness Edwin Lunzalu Wadenya (DW2), the transfer process had begun in June 2019 some four (4) months before the demise of the deceased. And although the Plaintiff’s witness Caroline Onchoka (PW2) tried to discredit the letter of consent signed by her predecessor on 6th June 2019, she could not produce the register to show that there was no Land Control Board meeting to sanction the transfer yet she agreed in cross-examination by Mr Ouma that she reported to Nambale sub-County on 22nd July 2019 and replaced one Mr Mutai as Deputy County Commissioner. That was a month after the transfer. This witness can therefore not purport to testify on behalf of her predecessor who signed the consent of the Land Control Board.



26. The bottom line really is that the transfer of the suit land having been executed during the lifetime of the deceased, there was no need for the Defendant to have obtained any Grant of Letters of Administration in respect to the deceased's Estate.
27. The Plaintiff has also pleaded that the Defendant forged the deceased's signature to make believe that he had signed the transfer. The transfer form was thumb printed by the deceased in the presence of an Advocate by the name Betty Maloba as I have already stated above. Counsel's signature and stamp appears on the transfer form produced herein. Counsel for the Plaintiff in trying to discredit this document has submitted as follows:

“Notably, the attesting person Betty Maloba Advocate was not called by the defence to dispel the doubtful execution of the transfer.”

The truth of the matter is that the Defendant was under no duty to dispel anything. The allegation of forgery having been made by the Plaintiff, Section 109 of the *Evidence Act* placed the burden on him to show that the thumb print on the transfer form was not that of the deceased.

28. The Plaintiff also pleaded in paragraph 4(c) that the Defendant took the opportunity of the deceased's "death to un-justly enrich herself". Again, the answer to that is that the transfer was executed during the life time of the deceased. It was not done by the Defendant after the demise of the deceased. By the time of the deceased's demise on 14th October 2019, he had done all that was necessary to perfect the gift. All that the Defendant needed to do was to pay for the Stamp Duty which was done on 8th November 2019 and the title deed to the suit land was issued on 12th November 2019.
29. On ground No 4 (e) where the complaint is that the Defendant caused "a deed person to thumbprint transfer forms while lying in state", this Court is not sure that the deceased was a public figure. Most importantly, however, it is highly unlikely that MS Betty Maloba Advocate would have had the courage to obtain the thumb print of the deceased and attest it while he was "lying in state." I can only describe that complaint by the Plaintiff as preposterous and dismiss it as such.
30. Finally, the Defendant has been faulted in paragraph 4(f) of the plaint for "grossly intermeddling in the estate of the deceased." As is now clear from the preceding discussions on this issue, it has been shown that prior to his demise, the deceased had transferred the suit land to the Defendant by doing all that was required of him to enable the Defendant get the title thereto and which she eventually did. By the time of the deceased's demise on 14th October 2019, the suit land was no longer free property forming part of his estate. He had voluntarily relinquished his interest in the suit land and the Defendant cannot be accused of intermeddling with the deceased's estate. To intermeddle with the estate of a deceased person must mean any acts done by a person in relation to the free property of the deceased without the authority of the Court or a grant of representation allowing him to do so. It is infact a criminal offence for which the person intermeddling may be sentenced to imprisonment, fine or both as provided under Section 45 of the *Law of Succession Act*. The Plaintiff has been unable to establish that the Defendant intermeddled with the suit land herein.
31. It is also not in doubt that the Defendant has always been in occupation and possession of the suit land even during the lifetime of the deceased. In paragraph 10 of her affidavit dated 30th July 2020, the Defendant states:
- 10: "That it is and has been common ground both of us herein and other beneficiaries, that I have had exclusive possession and use of titles Bukhayo/Kisoko/3610 and Bukhayo/Kisoko/2948 before the death of the deceased herein since the Plaintiff equally has his parcels allocated to him."



And when he was cross-examined by Mr Ouma on 16th March 2021, the Plaintiff said:

“Defendant lives on parcel No 2948. There is no other parcel given to the Defendant to cultivate. L.R No 3610 is used by 3 people i.e. Rajab Fredrick, Defendants and Evans Wanga. LR No 3610 is only for cultivation. I am not aware this land was given to Defendant.”

It is instructive to note that neither Rajab Fredrick, Evans Wanga nor any other member of the deceased’s family has joined the Plaintiff in complaining about the Defendant’s use and registration of the suit land in her names. That can only mean that other than the Plaintiff, the other children of the deceased acknowledge the Defendant’s interest in the suit land. It also confirms the Defendant’s claim in paragraph 8 of her affidavit that the Plaintiff’s sole aim is to frustrate her being the youngest widow of the deceased. It must also be remembered that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights as was held in the case of *Mwangi & Another -v- Mwangi* 1986 KLR 328.

32. Having considered all the evidence herein, I am not persuaded that the Plaintiff has proved any of the allegations of fraud, irregularity or illegality in the manner in which the Defendant obtained the titles to the suit land. His case is clearly for dismissal.
33. On the issue of costs, the parties are family. The order which commends itself to make on costs is that each party should meet their own costs.
34. The up-shot of all the above is that this Court makes the following disposal orders in determination of this suit:
 1. The Plaintiff’s suit is dismissed.
 2. Each party to meet their own costs.

BOAZ N. OLAO

JUDGE

10TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 10TH DAY OF JULY 2024 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.

Right of appeal.

BOAZ N. OLAO

JUDGE

10TH JULY 2024

