



**Sabore v Wanene & another (Environment & Land Case
19 of 2021) [2024] KEELC 5336 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 19 OF 2021
LC KOMINGOI, J
JULY 11, 2024**

BETWEEN

TULETO OLE KISHAPUI SABORE PLAINTIFF

AND

JOSEPH MUIGAI WANENE 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, KAJIADO 2ND DEFENDANT

JUDGMENT

1. This suit was first filed at ELC Machakos as ELC Case No. 286 of 2012 but later transferred to ELC Kajiado vide an order issued on 24th November 2021.
2. By the Plaint dated 25th July 2012 the Plaintiff claims that he was the owner of property known as Kajiado/Kaputiei North/2904 which the 1st Defendant fraudulently obtained, transferred to himself, caused its subdivision to parcels Kajiado/Kaputiei North/4255-4259 and sold some of the parcels to third parties. The Plaintiff's case is that the 1st Defendant obtained the original title to property Kajiado/Kaputiei North/2904 from him for purposes of undertaking verification but did not return it to the Plaintiff.
3. It is also his case that the transfer and subdivision of the suit property was done fraudulently and in collusion with the 2nd Defendant without the Plaintiff's knowledge or consent. The subdivided parcels are registered as follows: Kajiado/Kaputiei North/4256, 4257 and 4259 registered to the 1st Defendant; Kajiado/Kaputiei North/4255 registered to the Plaintiff and Kajiado/Kaputiei North/4258 registered to Fistec Investment Limited.
4. The Plaintiff thus sought orders for;
 - a. An annulment and/or cancellation order of the above stated five title deeds issued by the Registrar of lands at Kajiado without following the due process of the law.



- b. Permanent injunctions restricting the 1st and 2nd Defendants from entering and/or interfering with the suit property in any manner whatsoever.
 - c. General damages.
 - d. Costs of the suit and interest thereon.
 - e. Any other relief as the court may deem fit and just so to grant.
5. The 1st Defendant only entered appearance but did not file his defence. He did not participate in these proceedings. Shortly before judgement was delivered counsel for the 1st Defendant filed an application to arrest judgement. This court indulged him and deferred the judgement awaiting hearing of the said application. However, Counsel for the 1st Defendant never made an attempt to prosecute the application or appear in court despite being served. The application was therefore dismissed for non attendance.
 6. The 2nd Defendant neither entered appearance nor filed his defence.

Evidence of the Plaintiff's

7. PW1, Tuleto Ole Kishapui adopted his witness statement filed on 25th July 2012 as part of his evidence in chief. He produced ten documents to support his case which were marked as P. Exhibits 1-10.
8. PW2, Joseph Tuleto Kishapui, the Plaintiff's son also adopted his witness statement filed on 25th July 2012 as part of his evidence in chief. He stated that his father was the owner of the land that had been subdivided.
9. At the close of the oral testimony the Plaintiff tendered final written submissions.

The Plaintiff's Submissions

10. They are dated 27th September 2023. Counsel for the Plaintiff submitted that the Plaintiff did not sell the suit property to the 1st Defendant as required by Section 3(3) of the [Law of Contract Act](#) and what transpired was that the 1st Defendant duped the Plaintiff into giving him the original title deed to undertake a search at the Lands Registry since he was desirous of purchasing a portion of the suit property. He then disappeared. As such, any subsequent titles were obtained fraudulently and should be impeached as it was not protected by Section 26(1) of the [Land Registration Act](#) citing *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR.
11. Counsel also submitted that the 1st Defendant obtained the original title deed from the Plaintiff fraudulently by lying that he needed it to procure a search of the suit property. He added that the mutation form given to the Plaintiff by the surveyor showed that the 1st Defendant had appended his signature as the owner of the suit property which was an act of misrepresentation since he was aware that the property had not been passed to him. Therefore any consequent titles passes to third parties were null and void and should be cancelled as was held by the Supreme Court in *Dina Management Ltd v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR).
12. Counsel further submitted that despite the suit being undefended, the Plaintiff had discharged his burden of proof to show that the 1st Defendant obtained title to the suit property fraudulently and illegally.



Analysis and Determination

13. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
- i. Whether the Plaintiff has discharged his burden in proving that he is the owner of property Kajiado/Kaputiei North/2904;
 - ii. Whether the Plaintiff has proved the allegation of fraud against the 1st Defendant;
 - iii. Whether the Plaintiff is entitled to the orders sought;
 - iv. Who should bear costs of the suit?
14. The Plaintiff stated that in 1995, the 1st Defendant showed interest in purchasing a portion of the suit property measuring approximately 50 acres. To confirm that the land indeed belonged to the Plaintiff, the 1st Defendant asked for the original title deed so as to carry out a search at the Land Registry. The Plaintiff gave him the original title deed in 1996 never to be seen again. The Plaintiff states that he tried looking for the 1st Defendant at his place of work in vain. However, it was until 2009 when he informed his family about the loss of the title deed and they advised him to file a report with the police and apply for a provisional title deed. This he did as per the documents marked P. Exhibit 1 to 7 but he was never issued a new title despite several efforts. In 2012, in his course of business he noticed someone on the suit property and after approaching and questioning about her business on the land, she stated that she was a valuer hired by Fistec Limited who were owners of the property having purchased it from Joseph Muigai Wanene (the 1st Defendant). He requested to get copies documents of the alleged sale and transfer and he was given a mutation form dated 3rd January 2012 for parcels 4255-4259; title deed for parcel 4258 in favour of Fistec Limited dated 25th November 2011 to Fistec Limited and a certificate of search dated 14th December 2011 showing Fistec Limited as the owner of parcel 4258 marked as P. Exhibit 8-10. Upon this discovery he filed the instant suit to seek recovery of his land which he risked being dispossessed using misrepresentation and fraudulently acquired title deed.
15. Whether the suit is defended on not, the burden of proof remains the same and the threshold must be met. This was the holding by the Court of Appeal in *Karugi & another v Kabiya & 3 others* [1983] eKLR where it was held;
- “... Neither can I agree ... that the burden of proof is in any way lessened because the case is heard by way of formal proof. The burden on the plaintiff to prove his case remains the same...”
16. Similarly in the case of *Kenya Power and Lightening Co. Ltd Vs. Nathan Karanja Gachoka & Another* (2016) eKLR where the court stated;
- “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant and that a court should not take it truthful without interrogation for the reason only that it was uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence was unchallenged or not.”
17. The Supreme Court of Kenya in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 6 (KLR) went at great lengths in elaborating the standard of proof and stated: “... By contrast, in civil law, which is private matter between two individuals, a wrong only needs to be proved on a balance of probability...”



18. I have carefully considered the evidence presented by the Plaintiff. I find that on a balance of probability that there is prima facie evidence that the transactions on the suit property are questionable. This is because there was no sale between the Plaintiff and the 1st Defendant and there is also evidence that the Plaintiff reported the loss of his title which it was yet to be replaced but the suit property was transferred and subdivided before then.
19. How such transactions would be undertaken with a missing title and the owner having reported about the loss reeks of irregularity. The whole process of sale and subdivision was un-procedural. The documents produced further accentuate the glaring procedural anomalies within the transfer and subdivision process of the suit parcel. Notably, the mutation form on record subdividing parcel Kajiado/Kaputiei North/2904 to parcels 4255-4259 is dated 3rd January 2012, yet the title deed for parcel 4258 in favour of Fistec Limited is dated 25th November 2011. Is it even remotely possible that a title deed is issued before the suit property is subdivided? I fervently believe that such a sequence, where a title deed precedes the subdivision of the property, is implausible and grossly irregular.
20. This leads the court to the second issue for determination on whether fraud was proved. It is trite law that fraud being a serious allegation ought to not only be strictly pleaded but also proved. Courts have also held that the standard of proof in fraud should be higher than the balance of probability but lower than beyond reasonable doubt. This was emphasised by the Court of Appeal in *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR where it stated thus;
- “As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows:-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...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 of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
21. In this particular case, I find that the above threshold of proving fraud against the Defendants has been met. I find that the transfer and subdivision of the suit property was un-procedural. A title acquired un-procedurally is not sacred and cannot be protected under sanctity of title as espoused by Section 26 of the *Land Registration Act*. That title should thus be rectified as guaranteed by Section 80 of the *Land Registration Act*:
- (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.
22. Therefore, this court finds that the Plaintiff is entitled to the order of cancellation of title prayed. The court thus orders the Land Registrar Kajiado to cancel all titles emanating from parcel Kajiado/Kaputiei North/2904 and rectify the register to reflect the Plaintiff, Tuleto Ole Kishapui as the rightful owner.
23. The Plaintiff also prayed for an award of general damages for breach of his right to property. The Supreme Court of Kenya in *Attorney General v Zinj Limited* [2021] KESC 23 (KLR) held: “... In case of general damages, a court of law exercises discretion guided by the circumstances of each case...”



24. I have already determined that the 1st Defendant unprocedurally transferred and subdivided the suit property to himself and other third parties thus breaching the Plaintiff's right to enjoy his property. I therefore find that the Plaintiff is entitled to an award general damages in the amount of Kshs. 1,000,000/= .
25. Accordingly Judgement is entered for the Plaintiff as against the Defendants as follows:
- i. That the Land Registrar Kajiado is ordered to cancel all titles emanating from parcel Kajiado/ Kaputiei North/2904 and rectify the register to reflect the Plaintiff, Tuleto Ole Kishapui, within 60 days from the date of this Judgement.
 - ii. That a permanent injunction is hereby issued against the Defendants, their servants, assignees, transferees and/or anyone acting on their instructions from entering and/or interfering with property Kajiado/Kaputiei North/2904 in any manner.
 - iii. The Plaintiff be awarded general damages of Kshs 1,000,000/=.
 - iv. The costs of the suit shall be borne by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. H. Orina for the Plaintiff.

Mr. Namude for the 1st Defendant.

N/A for the 2nd Defendant.

Court Assistant - Mutisya

