



Peter (Suing as administrator of the Estate of the Late Pietro Rossini) v Omar (Environment & Land Case E006 of 2024) [2024] KEELC 7275 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E006 OF 2024
FM NJOROGE, J
NOVEMBER 4, 2024**

BETWEEN

WINNIE KAMENE PETER (SUING AS ADMINISTRATOR OF THE ESTATE OF THE LATE PIETRO ROSSINI) PLAINTIFF

AND

ROSSINI OMAR DEFENDANT

JUDGMENT

1. This suit was instituted by the Plaintiff by way of a plaint dated 22/1/2024 against the Defendant. The plaintiff seeks the following reliefs: -
 - a. A declaration that Plot No. 11140 (Original No. 1794/7) Malindi belongs to the late Pietro Rossini forms part of his estate.
 - b. An order that the registrar of lands Mombasa does cancel the registration of the indenture of conveyance dated 8th November 2012 and registered as entry No. 634 on the 26th November 2012 and cause the property to revert to the name of Pietro Rossini.
 - c. A permanent injunction does issue preventing the defendant from interfering with the Plaintiff's quiet occupation and enjoyment of Plot No. 11140 (Original No. 1794/7) Malindi.
 - d. Costs of this suit with interest.
 - e. Any other relief this Honourable court may deem fit to grant.
2. The Plaintiff pleaded that at all material times, she was the widow and administrator of the estate of the deceased, Pietro Rossini, the owner of Plot No. 11140 (Original No. 1794/7) situated in Malindi (the suit property); that during the pendency of the petition for grant of letters of administration, the Plaintiff discovered that the Defendant had unlawfully and deceitfully created an indenture of



conveyance, and transferred the suit property to himself; that the Defendant purported the same to have been done by the deceased for a consideration.

4. The Plaintiff averred that upon commencement of investigations and charges, the Defendant left the jurisdiction of this court and has since declined to surrender the indenture for the purpose of its revocation, despite demand and notice of intention to sue.
5. Despite service, no memorandum of appearance or defence was ever filed. The suit hence proceeded undefended.
6. PW1, Winnie Kamene Peter the Plaintiff, adopted her written statement dated 22/1/2024 as her evidence. She also produced the documents listed in her list of documents evenly dated, as PEXH 1-9 respectively. She stated that the Defendant is her step-son and that he forged the deceased's title while she was in the process of obtaining the grant of letters of administration. She reported the matter at the Kilifi Police Station, where they found that the cheque that he claimed was payment for the transfer, was fake. A warrant of arrest was issued against the Defendant who absconded jurisdiction.
7. I have considered the pleadings, evidence and submissions filed herein and I frame the issues for determination as follows: -
 - i. Whether transfer of the suit property to the Defendant was unlawful;
 - ii. Whether an order for cancellation of the registration of the indenture of conveyance dated 8/11/2012 and entry dated 26/11/2012 should be given;
 - iii. Whether an order of permanent injunction restraining the Defendant from interfering with the Plaintiff's quiet possession of the suit property should be given.

Analysis and Determination

8. It is trite that uncontroverted evidence bears a lot of weight. However, a Plaintiff in an undefended suit, such as the present one, must still prove their case on a balance of probabilities as is required by law as per the holding of the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR where it stated as follows:

"It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."

9. In the case of Gichinga Kibutha –v- Caroline Nduku (2018) eKLR the Court held that:

"It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."



10. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides 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 the rights and privileges belonging or apparent thereto.”

11. Section 26(1) of the *Land Registration Act* further provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”

12. The law of evidence is also clear. Section 107, 108 and 109 of the *Evidence Act*, Cap 80 provide as follows:

107. Burden of proof.

- (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. Incidence of burden.

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. Proof of particular fact.

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.”

13. According to the Plaintiff herein, the deceased never transferred the suit property to the Defendant. The Plaintiff believes so because the said cheque that was apparently the consideration paid by the Defendant was found to be a forgery. The plaintiff produced a copy of a forensic report from the Directorate of Criminal Investigations. According to that report, the said cheque was a sham and no such amount of Kshs. 9,180,000 (the consideration) was debited from the Defendant’s account. In the absence of any other evidence to contradict the Plaintiff’s evidence, I am inclined to believe that the transfer of the suit property to the Defendant was tainted with illegality and fraud.

14. The upshot of the foregoing is that prayers a, b, c and d sought in the Plaint dated 22/1/2024 are merited and they are hereby granted as prayed.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4TH DAY OF NOVEMBER, 2024.



MWANGI NJOROGE
JUDGE, ELC, MALINDI

