



**Hamisi (The administrator of the Estate of Hamisi Mnyapara) v  
Kensalt Limited & 3 others (Environment & Land Petition 18 of 2021)  
[2024] KEELC 13591 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13591 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 18 OF 2021  
FM NJOROGE, J  
DECEMBER 4, 2024**

**BETWEEN**

**MOHAMED HAMISI (THE ADMINISTRATOR OF THE ESTATE OF HAMISI  
MNYAPARA) ..... PETITIONER**

**AND**

**KENSALT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF LANDS, KILIFI ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**The Petition**

1. The Petitioner, Mohamed Hamisi, acting as the administrator of the estate of his father, Hamisi Mnyapara, filed the present Petition dated 19/8/2021 seeking the following reliefs:
  - a. A declaration that the deceased Petitioner is the legal proprietor of Title No. Chembe/Kibabamshe/190.
  - b. Cancellation of the certificate of title in Title No. Chembe/Kibabamshe/190 issued to Kensalt Green Limited and reversal to the deceased Petitioner.
  - c. An order of permanent injunction to restrain the Respondents, their servants and/or agents from interfering with the Petitioner's use, ownership and utility of Title No. Chembe/Kibabamshe/190.



- d. An order of permanent injunction to prohibit the Respondents by themselves, servants, agents or whosoever authorized on their behalf from giving effect or implementing in any manner whatsoever gazette notice No. 6866 contained in the Special Issue Vol. CXIX-No. 97 and published on the 17<sup>th</sup> day of July, 2017 by the Chairman, National Land Commission.
  - e. Costs of the Petition.
  - f. Any other orders as the Court shall deem just.
2. The Petition was supported by a supporting affidavit sworn on the even date by the Petitioner. The Petitioner averred that the deceased, Hamisi Myapara, is the registered proprietor of the title Chembe/Kibabamshe/190 (hereinafter “the suit property”); that in a gazette notice issued on 17/7/2017 by the 2<sup>nd</sup> Respondent, it was indicated that the deceased had sold the suit property to one Joseph Said Okumu who is an agent of an entity referred to only as “Pici Investment”. He stated that following the death of his father, he retained the original title to the suit property and that as were, there was no possibility that it could have been transferred.
  3. The Petitioner deposed that the 2<sup>nd</sup> Respondent went ahead to hear a dispute over the suit property in the absence of the deceased and revoked his title. As a result, the 1<sup>st</sup> Respondent has continued to encroach upon the suit property claiming ownership.

### **The Responses**

4. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 20/11/2022 by Abdul Chea, its director, wherein he deposed that the suit property was initially owned by the deceased who entered into a sale agreement dated 27/9/2006 with Pici Investment Limited, a company he identified as a trustee of the 1<sup>st</sup> Respondent. Upon that sale and transfer, the deceased surrendered the original title deed to the 1<sup>st</sup> Respondent and a new title issued to the 1<sup>st</sup> Respondent on 4/7/2007; that due process was followed to actualize the transfer. He exhibited a copy of the transfer in favour of the 1<sup>st</sup> Respondent, consent letter and a copy of the stamp duty payment slip and receipt.
5. The deponent stated that the 1<sup>st</sup> Respondent has been in peaceful occupation of the suit property since then and its interest confirmed by the gazette notice dated 17/7/2017.
6. The 2<sup>nd</sup> Respondent’s replying affidavit sworn by its Director of Legal Affairs and Dispute Resolution Brian Ikol on 2/6/2022 was brief. He gave a detailed description of the verification exercise that was conducted in the year 2014 within the Chembe Kibabamshe Settlement Scheme. He asserted that according to the final gazette notice issued on 17/7/2017, the suit property was marked as cleared, showing that all interested parties attended the hearing and gave their submissions, and it was concluded that the deceased sold the same to Pici Investment Limited.
7. In a replying affidavit sworn on 7/3/2023 by Pamela Lisasa, a Land Registration Officer on behalf of the 3<sup>rd</sup> Respondent, the deponent exhibited a copy of the adjudication record and green card pertaining the suit property. According to her evidence, the suit property was first registered in 1978 to the deceased and a title deed issued in 1990. On 4/7/2007, the suit property was transferred to the 1<sup>st</sup> Respondent and a title deed issued on the even date. She equally annexed a copy of the transfer form, application for registration form, a copy of the letter of consent, a copy of the chief’s letter and valuation form.

### **Evidence**

8. Mohamed Hamisi (PW1) adopted his written statement dated 20/1/2022 as his evidence-in-chief and produced the documents in the list of documents dated 17/1/2022 as PExh.1-6. He further produced



as PExh.7 and 8, copies of documents showing the deceased's alleged true signatures. The witness told the court on cross-examination by Ms. Rita, counsel for the 1<sup>st</sup> Respondent, that the signature on the agreement between the deceased and Pici Investments Limited was different from the signature he knew of the deceased. He stated that the deceased died on 20/6/2016, that he was of sound mind and during his lifetime, he never reported that his title had been transferred illegally. He was not aware of whether or not the deceased had surrendered the original title for transfer. Upon further cross-examination by State Counsel Ojwang for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the Petitioner stated that they found the title at their home after the demise of the deceased, and that he had never seen the sale agreement.

9. Abdul Chea (DW1) adopted his replying and supplementary affidavit whose contents have been set out herein before as part of his evidence-in-chief; and produced the documents therein as DEXH 1-7. He told the Court on cross-examination by Ms. Mwangi, the Petitioner's counsel, that the consideration was Kshs. 630,000/- and he had no reason to offer as to why the stamp duty valuation was declared on Kshs. 530,000/-
10. Brian Ikol (DW2) equally adopted his replying affidavit dated 2/6/2022. He was present at the hearing conducted at the Red Cross Hall in Malindi in the year 2017. Although he could not recall whether the Petitioner was present at that hearing, he stated that the record of proceedings reveals that the deceased and one Joseph Said Okumu (director of Pici Limited) were present. He confirmed that they did not produce the ground report itself but that the gazette notice indicates who was actually on ground. The witness was referred to page 4298 of the gazette notice. He confirmed that the same shows that the deceased was in occupation on the ground in the year 2014.
11. Josephine Rama (DW3) testified that as per the original green card, the suit property measures 1.3 Ha and was allocated to the deceased on 30/5/1978 and title issued on 4/7/1990. On 4/7/2007, a transfer was registered in favour of the 1<sup>st</sup> Respondent and a title deed issued. She produced as Exhibits 1-7 the documents annexed in the replying affidavit sworn by Ms. Pamela Lisasa.
12. The witness was cross-examined by Ms. Mwangi. She stated that the signature on her Exhibit 1 and her Exh 3 do not resemble each other. She explained that assessment for stamp duty normally comes first before the registration.

## Submissions

13. The submissions filed on behalf of the Petitioner are dated 19/7/2024. Counsel cited the relevant statutes and case law in her arguments, to wit Article 40, 47 and 60 of *the Constitution*; Section 26 and 79 of the *Land Registration Act*; Section 6 and 8 of the *Land Control Act*; and Section 5 of the *National Land Commission Act*.
14. Counsel submitted that the 2<sup>nd</sup> Respondent failed to conduct a thorough and proper verification of the land documents and the transfer process; that as the title deed used in the transfer is identical to the one in the Petitioner's possession renders possible a strong presumption of fraud and misrepresentation, warranting the nullification of the 1<sup>st</sup> Respondent's title. She added that the signature in the transfer document and sale agreement did not even tally. Counsel pointed out that the title used in the alleged transfer was not even the same as that produced by the 1<sup>st</sup> Respondent herein.
15. Counsel further argued that the gazette notice of 17/7/2017 was not considered conclusive evidence of the legitimacy of the revocations, as it has been held severally by different courts.
16. Counsel relied upon the cases of Reuben Wanyama v Philip Rirei & another [2018] eKLR; Republic v NLC & Another ex-parte Muktar Saman Olow [2015] eKLR; Kenya Anti-Corruption Commission



v Online Enterprises Limited & 4 Others [2013] eKLR; and Joseph Njoroge Kiarie v Simon Gichangi Kiarie [2017] eKLR.

17. The 2<sup>nd</sup> Respondent's submissions are dated 2/9/2024. Counsel therein submitted that in the exercise of its powers conferred under Section 14 of the *National Land Commission Act*, the 2<sup>nd</sup> Respondent invited all interested parties to appear before it and present documents in support of their claims over the suit property; that upon consideration of both the deceased's and 1<sup>st</sup> Respondent's cases, the 2<sup>nd</sup> Respondent made a determination as it did, in favour of the 1<sup>st</sup> Respondent. According to counsel therefore, the 2<sup>nd</sup> Respondent exercised due diligence in accordance with Article 47 of *the Constitution*.
18. Counsel further argued that the allegation of fraud was not proved to the required standard, and he relied on the cases of Muriu & another v Embakasi Ranching *Company Limited & another (ELCA E093 of 2021)* [2023] eKLR; Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR; and Raila Odinga & others v IEBC & Others, Petition No. 5 of 2013.
19. He added that the 2<sup>nd</sup> Respondent conducted public hearings between 9<sup>th</sup> - 17<sup>th</sup> September 2015 and 1<sup>st</sup> - 4<sup>th</sup> February 2016 before the demise of the deceased, yet he failed to raise any objection during the said hearings. According to counsel therefore, the evidence produced by the Respondents remains uncontroverted.
20. Counsel urged that each party should bear its own costs.

### **Determination**

21. Having outlined and considered the pleadings, affidavits and annexures thereto, together with the evidence and submissions filed, I frame the following issues for determination:
  - i. Whether the 1<sup>st</sup> Respondent acquired title to the suit property by illegal and fraudulent means;
  - ii. Whether the Plaintiff is entitled to the prayers sought;
  - iii. Who is to bear the costs of the suit?
22. The Petitioner has stated that the 1<sup>st</sup> Respondent illegally acquired titles to the suit property and prayed to court to cancel the title. To succeed in claiming fraud, the Petitioner not only need to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must not only be pleaded but also strictly proved. I am guided by the Court of Appeal in case of Kuria Kiarie & 2 Others -v- Sammy Magera [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
23. The same procedure applies in respect of allegations of misrepresentation and illegality. (See Order 2 Rule 4 CPR).



24. As regards the standard of proof, this court in the case of *Kinyanjui Kamau –v- 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; 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.”

25. In the present case, it is undisputed that the deceased, was the original owner of the suit property. The Petitioner contends that the deceased during his lifetime did not and could not have transferred the suit property to any person, since he had the original title with him, which they found after his demise. The 1<sup>st</sup> Respondent on the other hand avers that it purchased the suit property through Pici Investments Limited. They exhibited a copy of the sale agreement dated 27/9/2006 and transfer of land form dated 20/6/2007. The Petitioner challenged the authenticity of the deceased’s signatures on those two documents. He exhibited copies of old cheques where the deceased’s apparent true signature appears.
26. The burden was upon the Petitioner to therefore distinctively prove to this court that the signatures appearing on both the agreement and transfer were forged. I am not satisfied that the Petitioner discharged this duty to the required standard that they were forged. I say so because the said signatures of the deceased on the old cheques exhibited by the Petitioner, read a different name to the deceased herein. It is not established by way of sufficient evidence that ‘Khamisi Juma’ appearing on those cheques refers to one and the same person as the deceased, Hamisi Mnyapara Thoya. Be that as it may, a cursory glance of the two contested signatures in the agreement and transfer, establishes that they are completely different. This raises serious questions as to the authenticity of the same.
27. It is also evident that the title annexed in the 1<sup>st</sup> Respondent’s Replying Affidavit, and which is said to be a copy of what was surrendered during the transfer, was issued on 13/5/2002.
28. As per the green card produced by the Land Registrar, the proprietorship section includes only four entries- the first dated 30/5/1978; the second entry is dated 4/7/1990 when the title was issued to the deceased; the third and fourth are both dated 4/7/2007 being transfer and registration of the title in favour of the 1<sup>st</sup> Respondent.
29. However, there is a copy of a title produced by the petitioner and attached to his supporting affidavit as Exhibit MH2 which, even upon a casual visual examination, differs from the copy attached to the 1<sup>st</sup> respondent’s replying affidavit. The Petitioner’s case is that his family has been holding, still holds the original of that title from the year 2002 to date.
30. It is clear that the copy of title relied on by the 1<sup>st</sup> respondent never originated from the petitioner. Further, it is the case that if there was, as the Land Registrar’s evidence stated, a title deed issued on 4/7/1990 to the deceased, no explanation from the 1<sup>st</sup> respondent as to why the same was not used in the transfer to the 1<sup>st</sup> respondent is given in this case. It is a mystery as to why the said transfer was effected using the purportedly re-issued title dated 13<sup>th</sup> May 2002 produced by the 1<sup>st</sup> respondent which



differs from the one exhibited by the petitioner. Needless to say, the issuance of that title is not reflected on the green card for reasons not well understood.

31. The petitioner faulted the NLC for failing to conduct a thorough and proper verification of land documents and the transfer process in violation of the petitioner's right to property and fair administrative action enshrined in Articles 40 and 47 of *the Constitution* respectively. There must have been serious misgivings that gave rise to the need for a verification exercise by the NLC in the region. Title verification would require examination of the title documents held by the opposing claimants. Regarding this aspect of the case, I note that the NLC report does not assert that the deceased was present or was represented by any person at the proceedings that led to its recommendations published in the gazette notice. It only points out that one Joseph Said Okumu was present on behalf of Pici Limited. The replying affidavit of the 2<sup>nd</sup> respondent gives generalities regarding attendance of parties at paragraphs 6 and 9. The respondents have therefore not established that the deceased was ever heard in those proceedings on his land rights, or that both title documents relied on by the 1<sup>st</sup> respondent and the petitioner were ever subjected to visual examination or any other test for their authenticity. The conclusion of this court is that the deceased was not heard prior to the making of the NLC's decision.
32. In the light of the foregoing, and having noted the visually detectable differences between the copy of title exhibited by the petitioner and that of the 1<sup>st</sup> respondent, an inquiry arises in the mind as to from where or as to how, and when, the title dated 13/5/2002 relied upon by the 1<sup>st</sup> respondent for the transfer, was issued or how it came to existence. It is obvious that the same could not have come from the deceased's hands. If the title that was in the deceased's hands was, without any reason therefor being advanced, not the one used in the transfer of the land to the 1<sup>st</sup> respondent, then the deceased can not have been said to have been involved in the said transfer and this court's conclusion is that the issuance of that title was illegal.
33. I have already stated herein before that notwithstanding the gaps in the petitioner's evidence regarding forgery, it is very clear that the great variance in the appearance of the signatures attributed to the deceased is a serious cause for concern as to the authenticity of his purported signatures on the agreement dated 27<sup>th</sup> September 2006 and the transfer dated, whose altered date could either be read to be either 26<sup>th</sup> June 2006 or 26<sup>th</sup> June 2007, made in favour of the 1<sup>st</sup> respondent.
34. Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
35. The above cited Act frowns on fraud, misrepresentation, illegality, unprocedural procurement of title, and corrupt schemes. Where any of these have been proved in respect of a title document the same is subject for nullification. Having regard to the totality of the evidence in this case, this court is of the view that the petitioner has proved both fraud and illegality against the 1<sup>st</sup> respondent's and also the violation of his right to violation of property rights and the right to fair administrative action against the 2<sup>nd</sup> -4<sup>th</sup> respondents beyond the level of a mere balance of probabilities. This court is persuaded



that the title held by the 1<sup>st</sup> respondent being fraudulent and illegal, must be cancelled and the status of the register rectified to restore the deceased as the registered proprietor of the suit land. The prayers in the petition for declaration of ownership and permanent injunction automatically flow from the foregoing findings. In fairness, the respondents are also liable to the costs of the present suit.

36. In the foregoing, I am convinced that the 1<sup>st</sup> Respondent acquired title to the suit property by illegal and fraudulent means. It follows therefore that the Petitioner is entitled to the reliefs sought in the petition. I therefore enter judgment in favour of the petitioner and I allow prayers no. a), b), c), d) and e) of the petition dated 19/8/2021 as prayed.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4<sup>TH</sup> DAY OF DECEMBER 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

