



Muhati (Suing as a legal representative of the Estate of Abdalla Mang'oli Likhaya) v Musindi & another (Environment & Land Case 293 of 2017) [2023] KEELC 16174 (KLR) (7 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 293 OF 2017**

DO OHUNGO, J

MARCH 7, 2023

BETWEEN

HASSAN ABDALLA MUHATI (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF ABDALLA MANG'OLI LIKHAYA) PLAINTIFF

AND

GEORGE MAGENZI MUSINDI 1ST DEFENDANT

JAMES NGAIRA SIEMA 2ND DEFENDANT

JUDGMENT

1. By an amended plaint dated October 23, 2019, the plaintiff averred that land parcel No Isukha/Shirere/1153 initially belonged to his father one Abdalla Mang'oli Likhaya (deceased) and that by misrepresentation and concealment of facts, one Simon Miheso Mutondo (deceased) subdivided the said parcel resulting in new titles known as Isukha/Shirere/5856 and Isukha/Shirere/5857 which subdivisions the said Simon (deceased) sold to the first and the second defendant respectively.
2. The plaintiff therefore sought judgment against the defendants jointly and severally for cancellation of land parcel numbers Isukha/Shirere/5856 and Isukha/Shirere/5857, reversion to the original owner Abdalla Mang'oli Likhaya (deceased), eviction of the defendants from land parcel numbers Isukha/Shirere/5856 and Isukha/Shirere/5857, mesne profits and costs of the suit.
3. The defendants filed a joint defence in which they averred that they are bona fide and innocent purchasers for value having obtained the registration following due process and after conducting due diligence and confirming that Simon Miheso Mutondo was the registered owner. They further averred that the plaintiff is guilty of laches for failing to pursue Simon Miheso Mutondo in his lifetime. They therefore prayed that the suit be dismissed with costs.



4. At the hearing, the plaintiff testified as the sole witness in respect of his case and adopted his witness statement dated August 3, 2017 as his evidence in chief. He stated that he is the administrator of the estate of his father Abdalla Mang'oli Likhaya (deceased) who was the registered owner of land parcel number Isukha/Shirere/1153. That his father acquired the land in 1962, took possession of it and put the plaintiff's uncle one Christopher Likhaya to take charge of it. He further stated that Christopher Likhaya constructed a permanent house on the land, planted trees and cultivated it for over fifty years.
5. The plaintiff went on to state that his father died in 1993 and that Simon Mutondo Miheso filed a claim against his mother Asha Nyangweso Abdalla before the Kakamega Municipality Land Disputes Tribunal, which proceedings were later quashed by the High Court with the result that Abdalla Mang'oli Likhaya (deceased) remained the registered owner of land parcel number Isukha/Shirere/1153. That Simon Mutondo Miheso thereafter filed succession proceedings in which he misled the court that he was a nephew of Abdalla Mang'oli Likhaya (deceased) and obtained title to land parcel number Isukha/Shirere/1153 after which he sold portions of the property to the defendants who later evicted the plaintiff and his family members from land parcel Isukha/Shirere/1153. The plaintiff also stated that he neither sought revocation of the certificate of confirmation of grant that was issued to Simon Mutondo Miheso nor redistribution of Abdalla Mang'oli Likhaya's estate.
6. The plaintiff's case was then closed.
7. George Magenzi Musinzi, the first defendant, testified next as DW1 and adopted his witness statement dated August 7, 2018 as his evidence. He stated that he entered into a land sale agreement with Simon Miheso Mutondo on November 3, 2012 pursuant to which he purchased 4 ½ acres of land to be excised from Isukha/Shirere/1153 which was registered in Simon Miheso Mutondo's name. That he paid a consideration of KShs 5,000,000 which Simon Miheso Mutondo acknowledged and added that Simon Miheso Mutondo became registered owner through Kakamega High Court Succession Cause Number 333 of 2008 wherein a certificate of confirmation of grant was issued to him in respect of Abdalla Mang'oli Likhaya's estate. He added that the grant had not been revoked and that at the time of purchasing the land, the only houses on it belonged to Simon Miheso Mutondo who demolished them. He further stated that arising from the transaction, he became the registered owner of Isukha/Shirere/5856 while the second defendant became the registered owner of Isukha/Shirere/5857.
8. Naomi Vujete Miheso testified as DW2 and stated that she is the widow of Simon Miheso Mutondo who passed away in October 2015. She adopted her witness statement dated August 7, 2018 as her evidence and stated that before her late husband was registered as the proprietor of Isukha/Shirere/1153, the parcel had been fraudulently registered in Abdalla Mang'oli Likhaya's name after Clement Muhati who was the elder brother to DW2's father in law grabbed the parcel and sold ¼ acre of it to Abdalla Mang'oli Likhaya, thereby prompting her husband to proceedings which led to him obtaining registration and selling to the defendants.
9. James Ngaira Siema, the second defendant, testified as DW3 and adopted his witness statement dated August 7, 2018. He stated that he purchased land parcel known as Isukha/Shirere/5857 from Simon Miheso Mutondo on May 18, 2013 at a consideration of KShs 2,000,000 and that he permitted the first defendant who is his uncle to take care of the land by planting sugar cane on his behalf. That he took immediate possession since the vendor had already demolished his home and moved to Kabras where he bought another land for settlement. DW3 concluded by stating that he is an innocent purchaser and that the plaintiff's case against him is misguided.
10. Defence case was then closed and parties thereafter filed and exchanged written submissions.



11. The plaintiff argued that Simon Miheso Mutondo did not have a good title to pass and that he could not join Simon Miheso Mutondo to this case since he passed away. Relying on the cases of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR and *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the plaintiff further argued that a registered proprietor whose title is challenged must prove the legality of how he acquired it. He therefore urged the court to grant the orders sought.
12. The defendants argued that Simon Miheso Mutondo, who the plaintiff accuses of wrongdoing, is not only a non-party to the suit but is also deceased and that consequently, the suit is bad in law. Relying on *Jayesh Autospares Ltd v Kapterit Rapid Co. Ltd & 2 Others* [2020] eKLR, they contended that the plaintiff failed to discharge his duty under Section 107 of the *Evidence Act* since did not any demonstrate fraud, concealment, or misrepresentation by the defendants. Lastly, the defendants cited Sections 25 (1) and 26 (1) of the *Land Registration Act* and argued that they are bona fide purchasers for valuable consideration whose titles should be protected. They therefore urged the court to dismiss the suit with costs.
13. I have carefully considered the pleadings, evidence, and submissions in this matter. The issues that emerge for determination are whether fraud, misrepresentation and concealment of facts have been established against the defendants and whether the reliefs sought should issue.
14. As pleaded in the amended plaint dated October 23, 2019, the plaintiff's case is that Simon Miheso Mutondo did not have a good title to pass to the defendants owing to fraud, misrepresentation and concealment of facts. All those allegations are levelled exclusively against Simon Miheso Mutondo who had died as at the date of institution of the suit, as the plaintiff stated at paragraph 6 of the amended plaint. Even the particulars of concealment and misrepresentation were stated to be against Simon Miheso Mutondo. It needs no emphasis that to validly prosecute a suit against the estate of a deceased person, his personal representative(s) must be joined. See *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR. The plaintiff herein having deliberately chosen not to pursue the personal representative(s) of Simon Miheso Mutondo, all their allegations against Simon Miheso Mutondo are simply stillborn and of no effect. The right to a hearing is at the core of our justice system. The plaintiff cannot litigate against the estate of Simon Miheso Mutondo without joining it to the case.
15. The plaintiff's case is that the defendants are the registered proprietors of land parcel numbers Isukha/Shirere/5856 and Isukha/Shirere/5857. Both sides of the litigation produced copies of certificates of search which confirm that the first defendant is the registered proprietor of land parcel number Isukha/Shirere/5856 while the second defendant is the registered proprietor of land parcel number Isukha/Shirere/5857.
16. As registered proprietors, the defendants are entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept their certificates of title as conclusive evidence of proprietorship, unless of course the provisos under Section 26 (1) (a) or (b) are established. The said sections provide as follows:
 24. Interest conferred by registration 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;
 26. Certificate of title to be held as conclusive evidence of proprietorship



- (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. ...

17. The plaintiff did not plead any fraud or misrepresentation against the defendants. Even if fraud had been alleged, the plaintiff would be required to prove such allegations to a standard above a balance of probabilities but not beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. I am quite certain that the plaintiff has not met the requisite standard of proof as regards fraud. I agree with the defendants that the plaintiff has failed to discharge the burden of proof under Section 107 of the *Evidence Act*.
18. In view of the foregoing, I find that the plaintiff has not established any fraud, misrepresentation or concealment of facts against the defendants. I find no merit in the plaintiff's case and I therefore dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF MARCH 2023.

D. O. OHUNGO

JUDGE

