



**Shiundu v Malala & another (Environment & Land Case 287 of 2013)
[2023] KEELC 16173 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 287 OF 2013**

DO OHUNGO, J

MARCH 7, 2023

BETWEEN

JAMES AGGREY SHIUNDU PLAINTIFF

AND

CLEMENT O MALALA 1ST DEFENDANT

ALFRED SAKANI OKELLO 2ND DEFENDANT

JUDGMENT

1. Proceedings commenced in this matter on 9th October 2013, when the plaintiff filed plaint dated 7th October 2013. The defendants listed in the said plaint were Clement O. Malala as the first defendant and Alfred Sakani Okello as the second defendant. The record shows that on 22nd June 2017, the plaintiff's advocates filed Notice of Withdrawal of Suit against Alfred Sakani Okello. The withdrawal was formally ratified in open court on 19th October 2017 at the request of counsel for the plaintiff and an order to that effect made.
2. For some unstated reason, Notice of Motion dated 1st October 2018 was later filed on 1st October 2018, pursuant to which an order was sought that Alfred Sakani Okello (deceased) be substituted by Paul Sakani Okello. The application was allowed on 3rd October 2018. In view of the withdrawal on 19th October 2017, the substitution was totally unnecessary. In between the withdrawal and the substitution, the matter partly proceeded for hearing on 14th May 2018, when PW1 (the plaintiff) partly testified and was stood down, at his own advocates' request, before completing his evidence in chief.
3. The initial plaint was later replaced by amended plaint dated 15th October 2018, in which the second defendant is stated as "Alfred Sakani Okello - (deceased) substituted by Paul Sakani Okello as the personal representative of his estate." The plaintiff averred in the amended plaint that land parcel number South Wanga/Bukaya/131 (suit property) is ancestral land that initially belonged to his late



- grandfather one Mr. Mutimba and that during land adjudication in 1967 and after the demise of Mr. Mutimba, the first defendant fraudulently caused the suit property to be registered in his name despite knowing that the suit property belonged to the plaintiff by virtue of trust. The plaintiff further averred that on discovery of the fraud, he filed a complaint with the South Wanga Divisional Land Disputes Tribunal and that Tribunal ruled in his favour by ordering that the suit property be transferred to the plaintiff. That the tribunal's decision was thereafter adopted as court's judgment vide Kakamega CM Misc Awards No.125 of 2004 and that on 30th June 2006, the plaintiff was registered as the proprietor.
4. The plaintiff went on to aver that the suit property remained registered in his name until 1st July 2010 when it was fraudulently transferred back to the first defendant's name purportedly on account of fraudulent and forged order allegedly issued pursuant to an application by the second defendant. That the first defendant went on to fraudulently and unprocedurally subdivide the suit property into land parcel numbers South Wanga/Bukaya/1276 and South Wanga/Bukaya/1277.
 5. The plaintiff therefore sought judgment against the defendants jointly and severally for:
 - a. A declaration that the transfer of title number S/Wanga/Bukaya/131 in favour of the 1st defendant from the plaintiff pursuant to a forged court order purportedly issued in Kakamega CM's Award No. 125 of 2010 was fraudulent, irregular, illegal, unprocedural and a nullity ab initio and the same be revoked and or cancelled forthwith.
 - b. An order that the subdivision of the said title number S/Wanga/Bukaya/131 and the purported creation of title numbers S/Wanga/Bukaya/1276 and 1277 was illegal, irregular, unprocedural, improper and unlawful and the same be revoked and or cancelled and the original title No. S/Wanga/Bukaya/131 be reverted to and the same be transferred to the plaintiff.
 - c. An order that the transfer of title numbers S/Wanga/Bukaya/1276 and 1277 to the 1st and 2nd defendants respectively and the subsequent title deeds issued were irregularly, illegally, improperly, unprocedurally and unlawfully issued and the same be revoked and or cancelled forthwith.
 - d. A permanent injunction restraining the defendants herein either by themselves or through their relatives, agents, workers, employees, servants and or whomsoever claiming under them from alienating, selling, transferring, trespassing onto, carrying out any works on or in any other manner interfering with the plaintiff's occupation, possession and use of the suit land L. R. No. S/Wanga/Bukaya/131.
 - e. Costs of this suit and interest.
 - f. Any other or further relief deemed fit and just.
 6. The defendants filed a joint defence in which they denied the plaintiff's allegations and prayed that the suit be dismissed with costs.
 7. As noted earlier, the matter partly proceeded for hearing on 14th May 2018, when PW1 (the plaintiff) partly testified and adopted his witness statement filed on 9th October 2013 as his evidence in chief. He resumed his testimony on 30th November 2021. He stated that the suit property is ancestral land which initially belonged to his late grandfather Mr. Mutimba and that he is entitled to it by trust being an heir of his said grandfather. That during land adjudication in 1967, after the demise of the plaintiff's grandfather and in the plaintiff's absence, the first defendant fraudulently caused the suit property to be registered in his name and later caused it to be transferred in his real name on 24th January 1975. That on discovering the fraud, the plaintiff filed a complaint before the South Wanga Divisional Land Disputes



- Tribunal and the tribunal held in the plaintiff's favour by ordering that the suit parcel be transferred to the plaintiff. That subsequently, the tribunal's award was adopted through Kakamega CM Misc Award No. 125 of 2004 and that on 30th June 2006, the plaintiff was registered as the proprietor of the suit property.
8. The plaintiff further stated that he remained the registered owner of the suit property until 1st July 2010 when it was fraudulently transferred to the first defendant based on a court order allegedly issued on 19th May 2010 in Kakamega CM Misc Award No. 125 of 2004. That the first defendant then subdivided the suit property into title numbers South Wanga/Bukaya/1276 and 1277 which he registered in his name and in the second defendant's name respectively. The plaintiff also stated that upon becoming aware of the activities which he termed fraudulent, he made a report to the police and lodged a caution against the title. That upon investigations, the defendants were charged with numerous counts of fraud in Kakamega CM Criminal Case No. 2042 of 2010 but were acquitted.
 9. The plaintiff further testified that his late grandfather died in 1931 before the plaintiff was born in 1938 and that the suit property was registered for the first time in 1965. That the first registered owner of the of the suit property was one Panyako Okelo Malala who was registered as proprietor on 24th November 1967 and that Panyako Okelo Malala's family has no relationship with Mutimba's family. He also testified that he owns and resides on parcel number South Wanga/Bukaya/135 which was registered in his name in 1967.
 10. The plaintiff's case was then closed.
 11. During defence hearing, Paul Sakani Okello testified as DW1. He adopted his witness statement dated 16th June 2019 wherein he stated that he is Alfred Sakani Okello's son, that Alfred Sakani Okello was a brother to the first defendant herein and that plaintiff and the defendants herein do not have any relationship at all. That the suit property was first registered in the first defendant's name on 24th November 1967 and that the plaintiff first filed a claim before the South Wanga Land Disputes Tribunal whose proceedings resulted in Kakamega CM Misc Award No. 125 of 2004. DW1 further testified that the plaintiff thereafter fraudulently tried to register himself as the owner of the suit property on 30th March 2006 and that through a court order dated 19th May 2010, the suit property was reinstated to the first defendant, its original owner. That as the registered owner of the suit property, the first defendant proceeded to subdivide it into two portions known as South/Bukaya/1276 and 1277 and transferred the latter to the second defendant. That the defendants have been in occupation of their parcels and that criminal charges in Kakamega CM Cr. No. 2042 of 2010 were dismissed for lack of evidence. He urged the court to dismiss the suit with costs.
 12. Defence case was then closed. Parties thereafter filed and exchanged written submissions.
 13. The plaintiff submitted that the first defendant fraudulently transferred the suit property to his name despite knowing that the suit property was ancestral land belonging to the plaintiff and that the circumstances under which the defendants got registered as proprietors were fraudulent and a misrepresentation. That, consequently, the defendants' titles ought to be impeached and the prayers sought granted.
 14. In response, the defendants argued that from the plaintiff's testimony, it was admitted that the plaintiff and the defendants have no relationship at all and that it follows therefore that the plaintiff cannot claim trust. That the plaintiff has not tendered any evidence to support allegations of a forged court order or to prove fraud. That the subdivision of the suit property was lawful and procedural and cannot therefore be cancelled. That since the defendants are the registered proprietors of the suit property



since 1967 and considering that the plaintiff has never been in possession thereof, the reliefs sought cannot issue. They therefore urged the court to dismiss the suit with costs.

15. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the plaintiff has established trust, whether the plaintiff has established any fraud or irregularity and lastly, whether the plaintiff is entitled to the reliefs sought.

16. Whether trust exists is a question of fact which must be proven through evidence. The key considerations are the nature of the holding of the land and intention of the parties. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court stated as follows:

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

17. There is no dispute that the first defendant was registered as proprietor of land parcel number South Wanga/Bukaya/131 on 24th November 1967 as Panyako Okelo Malala and that on 24th January 1975, there was a change of name of the registered to read Clement Otieno Okelo. The plaintiff does not dispute that the first defendant was the registered proprietor from 24th November 1967 to 30th June 2006 when the plaintiff became registered owner pursuant to orders made in Kakamega CM Misc Award No. 125 of 2004. On 1st July 2010, the registered proprietor was changed back to the first defendant, on the strength of another order said to have been issued on 19th May 2010 in Kakamega CM Misc Award No. 125 of 2004. The plaintiff contends that the order of 19th May 2010 was irregular and even fraudulent. I think that is an issue that should have been raised and determined in Kakamega CM Misc Award No. 125 of 2004 and any subsequent proceedings by way of appeal or judicial review. It cannot be leapfrogged to the present proceedings. Besides, no evidence has been availed to demonstrate the alleged fraud concerning the order.

18. The plaintiff contends that land parcel number South Wanga/Bukaya/131 is ancestral land that it initially belonged to his late grandfather one Mr. Mutimba and that he is heir of his said grandfather and therefore entitled to it by virtue of trust. He contends that during land adjudication in 1967 and after the demise of Mr. Mutimba, the first defendant caused the suit property to be registered in his name despite knowing that the suit property belonged to the plaintiff by virtue of trust.

19. Beyond the bare allegation that land parcel number South Wanga/Bukaya/131 is ancestral land which initially belonged to the plaintiff's late grandfather, the plaintiff has tendered no evidence to support



the contention. It has not been demonstrated that land parcel number South Wanga/Bukaya/131 is the plaintiff's ancestral land or that there was any intention that the first defendant holds it in trust for the plaintiff. In fact, the plaintiff admitted that no family relationship exists between him and the defendants. The plaintiff has failed to establish trust.

20. There is no dispute that land parcel number South Wanga/Bukaya/131 was subdivided into title numbers South Wanga/Bukaya/1276 and South Wanga/Bukaya/1277. South Wanga/Bukaya/1276 was registered in the first defendant's name while South Wanga/Bukaya/1277 was registered in the second defendant's name.
21. The registered proprietors of land parcel numbers South Wanga/Bukaya/1276 and South Wanga/Bukaya/1277 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.
22. The plaintiff's allegations of fraud require proof 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. As noted earlier, the plaintiff's allegations of fraud and irregularities revolve around circumstances in which orders were made in Kakamega CM Misc Award No. 125 of 2004 and registration effected pursuant to such orders. Since this court is not sitting on appeal or review of the orders made in Kakamega CM Misc Award No. 125 of 2004, this court lacks jurisdiction to determine legality or otherwise of the orders. I find that the plaintiff has failed to establish fraud or irregularity.
23. In view of the foregoing, I find no merit in the plaintiff's case. I dismiss it with costs to the defendants.

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

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Muthami holding brief for Mr Akwala for the plaintiff

No appearance for the defendants

Court Assistant: E. Juma

