



REPUBLIC OF KENYA



KENYA LAW
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**Rombosia v Murunga & 7 others (Environment & Land Case
15 of 2018) [2023] KEELC 20614 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20614 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 15 OF 2018
EC CHERONO, J
OCTOBER 12, 2023**

BETWEEN

CHARLES KITUI ROMBOSIA PLAINTIFF

AND

SILAS SIMIYU MURUNGA 1ST DEFENDANT

PHAUSTINE NAMALWA SIMIYU 2ND DEFENDANT

FREDRICK KUNDU WAMALWA 3RD DEFENDANT

ZAINABU ASETI MURUNGA 4TH DEFENDANT

SELLAH MARY AKINYI BARASA 5TH DEFENDANT

PAUL NYONGESA MUSABI 6TH DEFENDANT

THE COUNTY LAND REGISTRAR 7TH DEFENDANT

THE ATTORNEY GENERAL 8TH DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 19th April 2018 seeks the following ordersP;
 - a. An order in terms of paragraph 18 of the plaint above.
 - b. An order in terms of paragraph 19 of the plaint above.
 - c. Costs of this suit.
2. To put into perspective the dispute herein, the plaintiff at paragraph 18 & 19 of the plaint averred as follows;



- “18. The plaintiff’s claim against the defendants is for an order that the transfer, registration and subdivision of land parcel No. W.Bukusu/S.Mateka397 and 398 was fraudulent and unlawful and therefore the defendants’ title be cancelled for the attendant fraud and consequently the original titles No. W.Bukusu/S.Mateka397 and 398 be returned to the plaintiff.
19. The plaintiff’s claim against the defendants is for an order for eviction from land parcel No. W.Bukusu/S.Mateka397 398 and 399”
3. In a written statement of defence dated 29th June, 2018 and filed on 13th July 2018, the 1st, 2nd, 3rd, 4th and 6th defendants denied the plaintiff’s claim and sought to have the suit dismissed with costs.
4. The 7th and 8th defendants through the Hon. Attorney General only entered Appearance but did not file Defence.
5. This case proceeded for hearing between 3/5/2023 and 25/7/2023

Plaintiff’s Case

6. After the plaintiff was sworn, he referred to his witness statement recorded and filed in court on 19th April 2018 which he requested to be adopted in his testimony-in-chief. The plaintiff also referred to his list of documents also dated the 19th April 2018 containing two items which he produced as 1(a), (b), (c), (d), (e), (f), (g) &(h) and 2 respectively.
7. On cross-examination, the plaintiff stated that he was the registered owner of land parcel No. W.Bukusu/S.Mateka399 Measuring approximately 100 acres (25 HA.). He stated that he sold three portions to three people. The first person was Richard Mbinga whom he sold one (1) acre. The second was Cosmas Barasa whom he sold 5 acres and lastly was one Michael who bought 2 acres. He said that he has given Title deed to Cosmas Barasa. The plaintiff stated that he also sold a portion of one acre of the land to another person who pays fees for his child and also gave him a title deed. The plaintiff further stated that he also subdivided land parcel No. W.Bukusu/S.Mateka399 into three portions being L.R No. W.Bukusu/S.Mateka5917, 5918 and 5919 respectively.

1st, 2nd, 3rd, 4th And 6th Defendants’ Case.

8. DW1 was Fredrick Kundu Wamalwa who introduced himself as a resident of Kabula Location and referred to her witness statement he recorded and filed in court on 11/06/2018 and requested to have the same adopted as his testimony-in-chief. He referred to his list of documents dated 29/6/2018 containing 18 items which he produced as exhibits. He testified that he is the registered owner of land parcel No. W.Bukusu/S.Mateka5485 which is a subdivision of land parcel No. W.Bukusu/S.Mateka397 which was also registered in his name and that of his elder brother. He also stated that after subdivision, he was registered as proprietor of resultant parcel No. W.Bukusu/S.Mateka5485 while parcel No. W.Bukusu/S.Mateka5484 was registered in the name of Phaustine Namalwa Simiyu who is the widow to his brother John Wamalwa(deceased). He stated that they acquired titles to the two parcels genuinely and did not commit any fraud. He said that the original land parcel W.Bukusu/S.Mateka/397 was given to his father by the clan during the land demarcation in 1973 and since his father had died by then, the land was registered in his name and that of his elder brother John Wamalwa.
9. DW2 was Phaustine Namalwa Simiyu. She gave sworn testimony and introduced herself as a resident of kabula Location. She referred to her witness statement dated 29/6/2018 which she adopted in her testimony-in-chief.



10. DW3 was Silas Simiyu Murrunga who was also sworn and introduced himself as a resident of Harambee village within Kakamega County. He stated that he is the registered owner of Land parcel No. W.Bukusu/S.Mateka4336. He referred to his witness statement dated 29/6/2018 which he adopted in his evidence-in-chief.
11. DW4 was Zainabu Aseti Murunga who resides at Osiri Location, Kisumu West Sub-County, Kisumu County. She stated that She was the registered owner of land parcel No. W.Bukusu/S.Mateka4337. She referred to her witness statement dated 11/6/2018 which she adopted in her testimony-in-chief.
12. DW5 was Zaina Nafula Wekesa who introduced herself as a resident of Naburereya Area within Bungoma County. She referred to her witness statement dated 14/9/2020 which she adopted in her testimony-in-chief. She stated that she is the widow to one Francis Wekesa Sikanga(deceased) and that on 16/11/2010, her late husband purchased a portion of land measuring approximately 1 acre comprised in L.R No. W.Bukusu/S.Mateka4144 from one Joseph Wakoli Nakoyo at an agreed consideration of Kshs. 167,000/ which was paid in full. The witness further stated that the said Joseph Wakoli Nakoyo executed all the necessary transfer forms and application for consent of the land control Board for one acre in favour of her late husband Francis Wekesa Sikanga. She also stated that land parcel NO. E.Bukusu/S.mateka/4144 was closed on subdivision creating new numbers to wit land parcel No. W.Bukusu/S.Mateka4335-4337 and the one acre purchased by her late husband was comprised in L.R No. W.Bukusu/W.Mateka/4336 and title was issued to him on 25/07/2011
13. The witness further stated that on 09/06/2012 Francis Wekesa Sikanga executed a land exchange agreement with Mr. Silas Simiyu Murunga and pursuant to the said agreement her husband transferred land parcel No. W.Bukusu/S.Mateka4336 to Silas Simiyu Murunga whereas Silas transferred land parcel No. W.Bukusu/S.Mateka1870 to her husband Francis Wekesa Sikanga(deceased)

Plaintiff's Written Submissions

14. The firm of Ateya & Company Advocates on behalf of the plaintiff submitted on the following issues;
 1. Whether the suit land initially belonging to the late Mike Rombosia Bikanyi who was the plaintiff's father.
 2. Whether the plaintiff father Mike Rombosia Bikanyi left the land to be shared among the families of his few sons and two daughters.
 3. Whether the transfer, registration and subdivision of land parcel No. W.Bukusu/S.Mateka397 and 398 was fraudulent and unlawful.
 4. Whether the Defendants title could be cancelled for the attempted fraud
 5. Whether the plaintiff is entitled to an order of eviction against the defendants from land parcel No. W.Bukusu/S.Mateka397, 398 and 399 respectively.
15. On the first issue, counsel submitted that it clearly noted by both parties that the suit land was ancestral despite the fact that the same had not been registered, the defendants also disclosed that it belonged to the plaintiff's father and therefore none of the parties raised any objection throughout the proceedings, and as such it is imperative to note that the land in the suit never underwent Succession exercise vide the succession law and procedural act.
16. As to whether the plaintiff father Mike Rombosia Bikanyi left the land to be shared among the families of his sons and two daughters, it was answered in the affirmative and that the late Mike Rombosia Bikanyi's (deceased) intentions did not take place due to the interruption of the defendants herein. It



is further submitted that the late Mike Rombosia Bikanyi never at any given time sold part of the land in question and that his demise gave rise to the plaintiff to take inherent responsibility of sharing the suit land between his brother and the two sisters in accordance with the late Mike Rombosia Bikanyi's (deceased) intention.

17. The second issue is whether the transfer, registration and subdivision of the land parcels No. W.Bukusu/S.Mateka397 & 398 was fraudulent and unlawful. It is the plaintiff's submission that as the son of Mike Rombosia Bikanyi(deceased), he never participated in the unlawful transfer of the suit land and the averments by the 4th defendant that he bought land parcel No. W.Bukusu/S.Mateka4337 from one Joseph Wakoli Nakoyo who was never the owner of the land in question confirms the extent of the fraud committed by the defendants.
18. As to whether the defendants' title deeds should be cancelled for the attendant fraud, the plaintiff answered in the affirmative and submitted that title deeds acquired as a result of fraud by a process which is unlawful deem to be cancelled by operation of law. He submitted that the defendants title deeds were not verified by the statement of the land Registrar who did not appear before the Honourable court for cross-examination to confirm the veracity of the land title deeds.
19. The last issue is whether the plaintiff is entitled to an order of eviction against the defendants from the land parcel No. W.Bukusu/S.Mateka397, 398 & 399 respectively. On this issue, the plaintiff submitted that the defendants having acquired the titles in respect of suit properties fraudulently and unlawfully, the defendants should be ordered to vacate the suit land. In conclusion, the plaintiff submitted that he has established a prima facie case and is entitled to the prayers sought in the plaint dated 19th April 2018.

Legal Analysis and Determination

20. I have considered the pleadings, the proceedings, the testimony by the parties and the witnesses, the evidence adduced, the submissions and the applicable law. From the materials placed before me, the issues that commend for determination are as follows;
 1. Whether the plaintiff has discharged his burden of prove on the required standard?
 2. Who should bear the costs of this suit?

Whether The Plaintiff Has Discharged His Burden Of Prove On The Required Standard?

21. The plaintiff in this case is seeking for an order that the transfer, registration and subdivision of land parcel Numbers W.Bukusu/S.Mateka/397 and 398 was fraudulent and unlawful and that the defendants' titles be cancelled and an eviction order be issued.
22. Section 25 of the *Land Registration Act* No. 3 of 2012 guarantees the proprietor of land the absolute and indefeasible right to land together with all privileges and appurtenances belonging thereto free from all other interests and claims except those that are shown in the register and subject to such liabilities, rights and interests as affect the same and are declared by section 28 of the Act not to require noting on the register.
23. Section 26 of the same Act which is the applicable law provides as follows;

“26

- (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 a corrupt scheme...”

24. The defendants in this case are proprietors of titles in respect of resultant subdivisions of land parcels No. W.Bukusu/S.Mateka397 and 398 initially registered in the names of John Wamalwa & Kundu Wamalwa and Peter Nakoyo respectively.

25. The plaintiff is challenging the acquisition of certificates of title in respect of the suit properties on grounds of fraud.

26. At paragraph 17 of the plaint dated 19th April 2018, the plaintiff set out particulars of fraud by the as follows;

- a. The defendants colluded to subdivide the plaintiff’s land parcel No. W.Bukusu/S.Mateka397, 398 and 399 without the consent and/or knowledge of the plaintiff and other beneficiaries.
- b. The defendants fraudulently encroached and/or entered the plaintiff’s land and caused the same to be registered in their names.
- c. The defendants’ conduct amounted to criminal conspiracy and the plaintiff has suffered loss and damages.

27. There is no doubt that fraud is a criminal offence punishable by imprisonment but is also a serious accusation which must be pleaded and proved. Bullen, Leake & Jacobs on pleadings 13th Edition provides as follows;

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of(see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. ‘General allegations, however strong may be by words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.’”

28. The Court of Appeal in the case of *Kinyanjui Kamau v George Kamau*(2015) eKLR held as follows;

“ ...It is trite Law that any allegations of fraud must be pleaded and strictly proved...In cases where fraud is alleged, it is not enough to simply infer from the facts....”

29. The plaintiff made general allegations of fraud against all the defendants and failed to prove the allegations against each and every defendant distinctly. No evidence of fraud was proved against any of the defendants. In my view, the claim of fraud was ‘therefore a still born as no evidence was adduced to crystalize its birth.’

30. The certificate of titles issued in favour of the defendants are to be taken by courts as prima facie evidence that the person(s) named as proprietor(s) is/are the absolute and indefeasible owner pursuant



to Section 26 of the *Land Registration Act*. Title documents are prepared and issued by the Land Registrar. In the absence of contrary documents from the office of the land Registrar, this Court has no reason to doubt the authenticity of such instruments of ownership or make inference that they are fraudulent. The plaintiff in my view has miserably failed to prove the alleged fraud against the defendants.

31. Having considered and analysed all the materials placed before me, I find and hold that the plaintiff has failed to prove his case against the defendants on the required threshold. Accordingly, the plaintiff's suit is hereby dismissed with costs.

READ, DATED, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 12TH OCTOBER, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of

Mr. Ateya for plaintiff

M/S Masekeri for 1st, 2nd, 3rd, 4th, & 6th defendants

7th & 8th defendants/Advocate-absent

