



REPUBLIC OF KENYA



**Ndaa & another v Karisa & 3 others (Land Case 119 of 2017)
[2022] KEELC 2549 (KLR) (4 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 119 OF 2017**

**MAO ODENY, J
JULY 4, 2022**

BETWEEN

KAHINDI JOHN NDAA 1ST PLAINTIFF

DENNIS MZUNGU MBARU 2ND PLAINTIFF

AND

MICHAEL KARISA 1ST DEFENDANT

FERDINAND KAZUNGU 2ND DEFENDANT

GEORGE KENGA CHARO 3RD DEFENDANT

MILLICENT AKINYI AWUOR 4TH DEFENDANT

JUDGMENT

1. By a plaint dated May 30, 2017 the Plaintiffs herein sued the Defendants jointly and severally seeking the following orders: -
 - a) A permanent injunction restraining the Defendants from interfering in any way with Plot No. C.R 66180 Kilifi MN/III/9066 measuring 1.911 Ha or thereabouts.
 - b) A declaration that the Plaintiffs are the rightful owners of Plot No. CR 66180 Kilifi MN/ III/9066 measuring 1.911 Ha or thereabouts.
 - c) The Defendants to relinquish the title issued to them for Plot No. C.R 66180 Kilifi MN/ III/9066 measuring 1.911 Ha or thereabouts and new title be issued in favour of the Plaintiffs by the Registrar of Titles Mombasa.
 - d) Costs and interests of this suit



Plaintiffs'case

2. PW1 adopted his witness statement and stated that they were the original owners of Plot No. 234/201 Section /III/MN which they inherited from their late father John Ndaa. He further stated that they engaged the 1st Defendant Michael Karisa (deceased) to assist in getting a surveyor to do the subdivision to the land and to obtain new title on their behalf.
3. It was PW1's evidence that the deceased delivered a title deed for the piece of land registered under their names, Plot No. CR 66340 Kilifi MN/III/9067 measuring 1.616 Ha. PW1 further stated that they had agreed to pay the 1st Defendant Kshs 1.5Million being survey costs and when they wanted to sell part of the land to raise the agreed fees, they found out that the 1st Defendant had fraudulently registered part of their parcel of land as Plot No. Kilifi MN/III/9066 in his name together with those of his brothers who are also Defendants in this case.
4. On cross examination by Mr. Shujaa, he stated that the suit property belonged to his late father who did not have a title deed. He testified that he did not know the exact acreage of the suit property.
5. PW2- Andrew Tune Mrabu adopted his witness statement and added that the suit land was taken by the 1st Defendant who was to process a title deed for them which he did but gave them a title deed for 4 acres.
6. On cross examination he stated that the land belonged to their late father John Ndaa who did not have a title deed thus prompting them seek the help of the 1st Defendant who was their neighbor in processing a title deed. He stated that the processing was done on credit.

Defendants'case

7. DW1 and DW2 adopted their statements and stated that they had agreed with the Plaintiff to assist them process title deeds to the portion they were occupying which was 4acres. It was further their evidence that the agreement was that they would pay themselves in kind by having a portion of the adjacent land transferred to them for the services rendered. That there was no agreement that they be paid the sum of Ksh. 1,500,000/-.
8. According to DW1 and DW2, Plot No.234/201 the original parcel of land before the subdivision was not owned by the Plaintiffs but by Arabs who were absentee landlords and that the Plaintiffs and the Defendants who are neighbors occupying the same land were merely squatters on that land which had no title deeds. They urged the court to dismiss the Plaintiffs' case with costs.

Plaintiffs' Submissions

9. Counsel for the Plaintiff filed submissions and listed the following issues for determination by the court: -
 - a) Whether the Plaintiffs were in the occupation of Plot No. 234/201 Section/III/MN.
 - b) Whether the Plaintiffs contracted Michael Karisa (now deceased) to have a surveyor and to acquire title for the said land No. 234/201/MN/III.
 - c) Whether the 1st Defendant was to be paid Kshs 1,5Million for the work done.
 - d) Whether in the cause of the said subdivision the Defendants fraudulently acquired Plot No. CR 66180 Kilifi MN/III/9066.
 - e) Costs



10. Counsel relied on the evidence by the parties and submitted that it is not disputed that the Plaintiffs were in occupation of Plot No. 234/201 which they inherited from their late father, John Ndaa. Further that they sought the assistance from the 1st Defendant, now deceased, to have the said land surveyed and the title documents be processed in their names.
11. Counsel further submitted that the Defendants admitted that they registered the excess portion in their names as they stated that the land belonged to the Arabs who were absentee landlords and that they had paid themselves for the work done for processing the titles.

Defendants Submissions

12. Counsel submitted that the 1st Defendant passed away before the suit commenced and no legal representative was brought into the suit before the hearing of the suit.
13. Counsel further submitted that it is not in dispute that the Defendants carried out survey and subdivision of the suit land on behalf of the Plaintiffs. That after the subdivision, the Plaintiffs were registered as owners of the 4acre portion of land that they were in occupation of.
14. Mr. Shujaa submitted that the issue for determination is whether the registration of the Defendants as owners of portion No. 9066(Orig. No 234/201) Section 111MN and the issuance of certificate of title registered as CR.66180 was obtained by fraud.
15. Counsel relied Section 26(1) of the *Land Registration Act* No.2 of 2012 which provides that a Certificate of Title issued by the Land Registrar upon registration pursuant to a transfer or transmission is to be taken by all Courts as prima facie evidence that the person named therein as the proprietor is the absolute and indefeasible owner of the land in question and that the title can only be challenged on the ground of fraud or misrepresentation, or on the ground that the title was acquired illegally, unprocedurally or through a corrupt scheme.
16. Mr. Shujaa relied on the case of *Demutilla Nanyama Pururmu-vs-salim Mohamed Salim*-Civil Appeal No.138 of 2018 on the need to specifically plead and prove fraud. Counsel stated that the Plaint as drawn does not set out with specificity the particulars of fraud alleged to have been committed by the Defendants.
17. That the Plaintiffs made generalized allegations of fraud against the Defendants but the acts constituting fraud and alleged to have been committed by the Defendants were not pleaded in the Plaint as Paragraphs 11 and 12 of the Plaint merely states that the 1st Defendant in collaboration with the 2nd and 3rd Defendants fraudulently subdivided and registered the said plot in their names and that the Defendants were dishonest and fraudulent.
18. Mr. Shujaa relied on Section 107, 108 and 109 of the *Evidence Act* Chapter 80 of the Laws of Kenya and submitted that it was incumbent upon the Plaintiffs to prove that the certificate of title issued in the name of the Defendants was acquired fraudulently. Counsel urged the court to dismiss the Plaintiffs claim with costs as they have not proved fraud against the Defendants.

Analysis And Determination

19. The issues for determination are as to whether the Plaintiffs are the owners of the suit land registered in the Defendants name, whether the Defendants registered the suit land in their names fraudulently and whether the Plaintiffs are entitled to the orders sought in the Plaint.
20. The first issue that I will deal with is whether the Plaintiffs have met the threshold of specifically pleading fraud in the Plaint. A party alleging fraud must specifically plead the particulars of fraud and



specifically lead evidence to prove the allegations of fraud. The Plaintiff generalized allegations of fraud but did not particularize how the Defendants engaged in the fraudulent registration of the suit land in their names.

21. The particularization of fraud is important in that a party accused of fraud must be given notice vide the pleadings to enable him/her to prepare a proper defence. There are steps that must be taken to prove fraud.
22. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* (supra), where Tunoi, JA. (as he then was) stated 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. As regards the standard of proof, the Court of Appeal in the case of *Kinyanjui Kamau vs 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.”

24. The allegation of fraud, apart from being specifically pleaded, must be specifically proved. It is not a walk in the park where a party just alleges without proof.
25. Order 2, Rule 4 of the *Civil Procedure Rules*, 2010 provides for matters which must be specifically pleaded thus: -
 - (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
 - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or,
 - (c) which raises issues of fact not arising out of the preceding pleading.
26. This is a requirement by law and not a procedural technicality as it goes to the root of this case. There is no dispute that the Defendants were to process the subdivision of the title on behalf of the Plaintiffs which was done but the Defendants ended up registering themselves as owners of a portion of the suit land. The Plaintiffs having failed to specifically plead and prove fraud I find that their claim must fail due to the mandatory requirement.
27. The upshot is that the Plaintiffs suit is dismissed with costs to the Defendants



DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

