



Esquire Investments Limited v Attorney General & 4 others (Environment and Land Case Civil Suit 952 of 2016) [2022] KEELC 14648 (KLR) (3 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 952 OF 2016
OA ANGOTE, J
NOVEMBER 3, 2022**

BETWEEN

ESQUIRE INVESTMENTS LIMITED PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 4TH DEFENDANT

KORARI AGENCIES LIMITED 5TH DEFENDANT

JUDGMENT

Background

1. Vide a Complaint dated August 4, 2016, the Plaintiff seeks the following reliefs as against the Defendants jointly and severally;
 - i. The purported consent to transfer of suit land dated the December 9, 2009 No 097408 to the 5th Defendant, Korari Agencies Limited was illegal, unlawful and void *ab initio* and be set aside.
 - ii. The application and registration of transfer of property dated September 4, 2009, presented by Kitur & Company Advocates purporting to transfer the suit property to the 5th Defendant Korari Agencies Limited, was illegal, unlawful and void *ab initio* and be set aside.
 - iii. The Gazette Notice No 3235 of March 16, 2012, purportedly issuing a provisional Certificate of Title for the suit property to the Plaintiff is illegal, unlawful, void *ab initio* and be set aside.



- iv. The purported City Council of Nairobi sub-division Certificate No 000485 dated April 7, 2014, is illegal, unlawful void *ab initio* and should be set aside.
 - v. The purported approval dated April 9, 2014, by the 4th Defendant to sub-divide the suit property was illegal, unlawful, void *ab initio* and should be set aside.
 - vi. That the two Certificates of Title namely Certificate of Title IR No 157642, LR No 3734/1411, Original Number 3734/28/2, Land Survey Plan Number 370113 dated September 9, 2014 in the name of the 5th Defendant Korari Agencies Limited; and Certificate of Title IR No 157643, LR No 3734/1412, Original Number 3734/28/3, Land Survey Plan Number 370114 both dated September 9, 2014 allegedly showing the registered proprietor as the 5th Defendant Korari Agencies Limited of PO Box Number 29296-00100 Nairobi dated September 9, 2014 are illegal, null and void *ab initio*.
 - vii. The Defendants actions amount to unconstitutionally dispossessing the Plaintiff of its right to property contrary to Article 40 of the [Constitution of Kenya, 2010](#).
 - viii. The Registrar of Titles and National Lands Commission recall and cancel the said alleged titles described in (f) above.
 - ix. Spent-The 5th Defendant Korari Agencies Limited be restrained whether by itself, its agents, servants, successors or assigns howsoever from entering, encroaching, trespassing, working, construction, fencing, alienating, building or transacting on all that parcel of land known as LR No 3734/28 Muthangari Road, Lavington Nairobi including the purported Certificate of Title IR No 157642, LR No 3734/1411 and Certificate of Title IR No 157642, LR No 3734/1411 pending the hearing and determination of this suit.
 - x. Costs of the suit and interest; and
 - xi. Any other remedy that the court deems fit and just.
2. It is the Plaintiff's case that it is and has at all material times been the registered proprietor of all that parcel of land known as LR 3734/28 Muthangari Road, Lavington, Nairobi (hereinafter the suit property) and that on or about January 14, 2014, the Plaintiff received from an unknown person a copy of a Judgment dated March 12, 2013 in respect of ELC Case No 103 of 2012(OS) John Muange Kithiokoi vs Ernst Hjalmar Fridolf Andreberg & Commissioner of Lands which suit had, without the Plaintiff's knowledge been commenced by Mr Muange Kithiokoi claiming ownership of the suit property by way of adverse possession.
 3. It was averred in the Plaintiff's Complaint that vide a Ruling delivered on March 17, 2016, the Court found that the suit property belonged to the Plaintiff; that on or about May 18, 2016, the Plaintiff discovered that the 5th Defendant purported to hold two Certificates of Title namely-Certificate of Title IR No 157642, LR No 3734/1411, Original Number 3734/28/2, Land Survey Plan Number 370113 and Certificate of Title IR No 157643, LR No 3734/1412, Original Number 3734/28/3, Land Survey Plan Number 370114 both dated September 9, 2012 which are alleged sub-divisions of the suit property authorized by the Urban Planning and Housing Department of Nairobi City County Government.
 4. According to the Plaintiff, it has never sold or transferred any of its proprietary interest in the suit property to the 5th Defendant or any other person, neither has it parted with possession nor applied for sub-division of the suit property; that the 5th Defendant has no legal title whatsoever on the suit property and that the approval by the Nairobi City County Government to sub-divide the suit property into two parcels is void *ab initio*.



5. Vide their Defence dated October 25, 2021, the Defendants averred that the records show that the parcel of land number LR 3734/28 which measures approximately 0.950 acres is a resultant sub-division of LR No 3734/3, which created fourty one sub-division of parcels of land being LR No 3734/6-3734/46 assigned with original land parcel numbers LR No 3734/3/1 to LR No 3734/3/41 respectively and that the corresponding title to LR 3734/28 is LR No 3734/3/23.
6. According to the Defendants, LR No 3734/28 was later sub-divided into two sub-division parcels and an access road, which sub division was approved and authenticated by the Director of Surveys on August 25, 2014; that the subdivisions were as follows: LR No 3734/28/1 measuring approximately 0.0180 Ha, Deed Plan No 370112; LR No 3734/1411 measuring 0.1832, Ha-Deed Plan No 370013; and LR No 3737/1412 measuring 2.348HA, Deed Plan No 370114 which Deed Plans were issued by the Director of Surveys on August 26, 2014;
7. According to the Defendants, approvals were issued for the sub-divisions based on the notification of approval of development permission-PPA2 Ref CPD/PIS/076/3734/28/NHM/bs dated March 24, 2014, and that a ground report of the property and a copy of the provisional Certificate of Title LR No 3734/28 was issued on 31st December, 2012 as recorded in entry number 17 indicating and that title to the property was registered in favour of Korari Agencies Limited as entry number 16, presentation number 745 on September 8, 2009.
8. The Defendants stated in their Defence that following the advice of the Chief Land Registrar vide a letter dated August 22, 2019 showing that the sub-division of LR No 3734/28 was a fraudulent transaction, the Director of Surveys proceeded to quarantine all the records of the sub-division survey and survey computations no 6635 and that Deed Plan Numbers 370112,370113 and 370114 were cancelled on July 22, 2020.
9. The 5th Defendant filed its Defence in which it denied the contents of the Plaintiff asserting that it became the registered proprietor of the suit property on September 8, 2009; that upon acquiring the title to the property, it sub-divided the parcel of land into two portions being LR No 3734/1411 and LR 3734/1412 and that from 2009 to date, the 5th Defendant has been and continues to be in possession of the suit property.
10. It was averred that it is not possible for the Plaintiff in ELC 103 of 2012 to have acquired adverse rights in the property as against the Plaintiff in the year 2012 because the Plaintiff herein had sold its proprietary interest in 2009 to the 5th Defendant and that an adverse right cannot arise against a party that has disposed of its interest in the property.

Hearing and Evidence

The plaintiff's case

11. The Plaintiff's Director, PW1, informed the court that the Plaintiff is and has from August 31, 2000, been the registered owner of the suit property; that vide a caveat emptor published in the newspapers on 10th and October 12, 2009, the Plaintiff notified the public of its ownership rights over the suit property and that by a notice dated November 12, 2009 and delivered on November 13, 2009, the Registrar of Titles was notified that unknown persons were attempting to interfere with the suit property.
12. PW1 informed the court that sometime in 2014, the Plaintiff received from unknown persons a copy of a Judgment dated March 12, 2013, in respect of ELC No 103 of 2012-John Muange Kithiokoi vs Ernst Hjalmar Fridolf, where the said John Kithiokoi laid a claim to the suit property by way of adverse



possession; and that the Court found that the Plaintiff was the rightful proprietor of the suit property and set aside the ex-parte judgment that had been entered.

13. It was the evidence of PW1 that sometime in May, 2016, the Plaintiff learnt that the 5th Defendant had applied for a rates clearance certificate and a consent to transfer which was issued by the Commissioner of Lands on September 7, 2009; that the 5th Defendant further obtained a valuation requisition for stamp duty, rates clearance certificate, rate payment receipts and Kenya Revenue Authority Stamp duty declaration assessment for the land and that the 5th Defendant made an application for registration of the transfer which was allegedly done on September 8, 2009.
14. It was the evidence of PW1 that the 5th Defendant was unlawfully issued with a provisional Certificate of Title, City Council of Nairobi sub-division certificate no 000485 dated April 7, 2014 and a letter from Director of Urban Planning Nairobi City Council dated April 9, 2014.
15. According to PW1, the Plaintiff has never parted with possession of the suit property through sale transfer or in any other manner; that the documents in respect of applications for sub-divisions and two separate titles in the names of the 5th Defendant being IR No 157642, LR No 3734/1411 and IR No 157643, LR No 3734/1412 are forgeries and that the Plaintiff still has possession of the original title to the suit property.
16. During cross-examination, PW1 stated that their claim against the 1st and 2nd Defendants is with respect to correction of the records; that the search as well as the letters by the Chief Land Registrar confirm the Plaintiff's ownership of the suit property; that the purported transfer of the suit property to the 5th Defendant shows that the transfer was done by one Jane Kuto who has never been a director of the Plaintiff and that the lease was cancelled by the registrar.
17. It was the evidence of PW1 that the sub-division that was used by the Defendants to sub divide the suit property was equally cancelled by the Director of Surveys, who also cancelled the Deed Plans and that as at the time of filing the suit in 2016, the titles issued to the 5th Defendant had not been cancelled.
18. DW1 was Lucas Muchei who works in the Ministry of Lands in the department of Survey. It was his evidence that he is a land surveyor and has been in the survey office for 20 years and that a Deed Plan is a document prepared to support the registration of a parcel of land and may be prepared by either the government surveyor or a licensed surveyor.
19. It was the evidence of DW1 that the survey records office indicates that the suit property measures approximately 0.950 Ha; that it was sub-divided into two parcels and an access road being LR No 3734/28/1 measuring 0.180Ha, Deed Plan No 370112; LR 3734/1411 measuring 0.1832Ha, Deed Plan no 370113 and LR 3737/1412 measuring 2.348Ha, Deed Plan No 370114 issued on the August 26, 2014.
20. DW1 stated that following advice from the Chief Lands Registrar vide a letter dated August 22, 2019 to the effect that the aforementioned sub-divisions were fraudulent, the Director of Surveys proceeded to quarantine all the records and thereafter Deed Plans 370112, 370113 and 370114 were cancelled.
21. It was the evidence of DW1 that following an application by the Plaintiff, a change of user was approved for the suit property resulting in a survey of the property in this respect and the issuance of a new Deed Plan on July 28, 2020 and a new land reference number being LR 3734/1483 was assigned to the property. None of the Defendants testified.



Submissions

22. The Plaintiff's counsel submitted that the Plaintiff has proven his proprietorship of the suit property by producing in evidence the copy of the title, official search, the court's Ruling in ELC 103 of 2012 and that the legal consequence of the Plaintiff's registration is captured in Section 24 of the [Land Registration Act](#) which is to the effect that the registration of a person as proprietor vests in that person absolute ownership of the land together with the privileges appertaining thereto.
23. As to whether the 5th Defendant fraudulently acquired the suit property, it was submitted that the 5th Defendant failed to prove his alleged ownership of the suit property contrary to the provisions of Section 107 of the [Evidence Act](#) and that it is in any event apparent that the 5th Defendant title was fraudulently acquired and the same should be impugned pursuant to the provisions of Section 26(1) of the [Land Registration Act](#).
24. It was submitted by counsel for the Plaintiff that the alleged transfer was issued by unknown fraudsters purporting to be Directors of the Plaintiff; that the said persons had no lawful authority to transfer the suit property; that the land registrar who purportedly endorsed and signed the transfer denied the same and that on the advice of the Chief Land Registrar, the Director of Surveys cancelled the impugned Deed Plans on July 22, 2020.

Analysis & Determination

25. The dispute herein revolves around the ownership of the suit property which both the Plaintiff and the 5th Defendant lay claim to. Whereas the 5th Defendant asserts that it purchased the suit property from the Plaintiff, the Plaintiff denies parting with possession of the same. The 1st and 2nd Defendants did not dispute the Plaintiff's proprietorship of the suit property while the 3rd and 4th Defendants did not participated in the suit.
26. The crux of the present dispute relates to the alleged transfer and sub-division of the suit property and the issuance of titles resulting from the sub-division. The Plaintiff asserts that it has never parted with possession of the suit property and all transactions leading up to the issuance of titles IR No 157642, LR No 3744/1411 and IR No 15743 LR No 3734/1412 are fraudulent and therefore void *ab initio*.
27. In support of its assertions, the Plaintiff adduced into evidence a copy of the Ruling dated 15th February, 2016 affirming its proprietorship of the suit property and the Ruling of the court setting aside the Judgment of the Court in ELC No 103 of 2012-Muange Kithioki vs Ernst Hjalmar Fridolf Andreberg.
28. The Plaintiff further adduced into evidence a certificate of official search dated April 24, 2018 showing the Plaintiff as the registered proprietor of the suit property; letters dated May 2, 2017 and July 5, 2018 from the Ministry of Lands and Physical Planning to Okwach & Co Advocates and BMA Associates respectively affirming the Plaintiff as the proprietor of the suit property.
29. The 5th Defendant asserted in its Defence that it lawfully purchased the suit property from the Plaintiff and that upon issuance of a title, it sub-divided the parcel of land into two portions being IR 157642, LR No 3734/1411 and LR 3734/1412 and that from 2009 to date, it continues to be in possession of the suit property.
30. It is noted that despite the 5th Defendant filing a statement of Defence setting its case as aforesaid, no witness testified on its behalf during trial. It therefore follows that the 5th Defendant failed to substantiate the allegations made in its Defence and produce any evidence to counter the Plaintiff's testimony rendering its Defence mere allegations. The Plaintiff's evidence remained uncontroverted and unchallenged.



31. Notwithstanding the 5th Defendant's failure to testify, the burden of proof remains on the Plaintiff. Section 107 (1) (2) of the [Evidence Act](#) provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. And Sections 109 and 112 of the same Act states as follows;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

33. The Court in [Charterhouse Bank Limited \(Under Statutory Management\) vs Frank N Kamau](#) [2016] eKLR affirmed this position by stating;

“The suggestion, however implicit, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his Defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct..”

While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the Defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.”

34. The Plaintiff adduced into evidence the impugned certificates of title being IR 157642 and IR 157643 registered in the 5th Defendant's name on September 9, 2014 pursuant to the provisions of the [Land Registration Act](#). However, the holding of such title is not absolute as the same may be impeached under certain circumstances. Section 26 (1) of the [Land Registration Act](#), provides as follows:

“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.”

35. It can be seen from the above provisions that where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder



was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, procedurally, or through a corrupt scheme, it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.

36. According to the Plaintiff, the 5th Defendant fraudulently caused the transfer of the suit property to its name, sought for its sub-division and subsequent issuance of two titles being Certificate of Title IR No 15764, LR No 3734/1411 and IR No 157643, LR No 3734/1412 and that the entire process right from the sub-division constitute illegalities and is void *ab initio*.
37. The Plaintiff's witness informed the court that the Plaintiff has never parted with possession of the property in any manner whatsoever. The transfer of the suit property to the 5th Defendant is indicated to have been done by one Jane Kuri and Owuoch Edward Amatoya on behalf of the Plaintiff.
38. The Certificate of Incorporation and the two CR12's dated March 27, 2003 and the July 26, 2012 shows the directorship of the Plaintiff consisting of Ramji Devji Varsan and Meghbai Ramji Devji. It is therefore obvious that the Plaintiff never sold the suit property to the 5th Defendant, or at all, considering that the Plaintiff could only transfer its property through its authorized officials.
39. The Plaintiff's claim that it never transferred the suit property received support from the 1st and 2nd Defendants who not only admitted that the Plaintiff was the lawful proprietor of the suit property, but went ahead to cancel the Deed Plans for the impugned titles. In light of the uncontroverted evidence above, it is the finding of this court that the 5th Defendant fraudulently procured the transfer and sub-division of the suit property to itself.
40. Having found that the transfer of the suit property to the 5th Defendant was actuated by fraud, it follows that any transaction founded on an illegal transfer is a nullity. That being the case, the court has no other option but to revoke the 5th Defendant's title pursuant to the provisions of section 80 of the [Land Registration Act](#).
41. For those reasons, the Plaintiff's claim is allowed as follows:
 - a. The Certificate of Title IR 157642, LR No 3734/1411 (Original Number 3734/28/2) in the name of the 5th Defendant, Korari Agencies Limited, was obtained fraudulently and the same is null and void.
 - b. The Certificate of Title IR 157643, LR No 3734/1412, (Original Number 3734/28/3) in the name of the 5th Defendant, Korari Agencies Limited, was obtained fraudulently and the same is null and void.
 - c. The Certificates of Title for LR No 3734/1411 and LR No 3734/1412 be and are hereby cancelled.
 - d. The 5th Defendant to pay the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Okwach for Plaintiff

Mr. Allan Kamau for 1st and 2nd Defendants



Mr. Nyawa for 4th Defendant

Court Assistant - June

