



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 296 OF 2014

DAVID GEORGE MDACHI & 44 OTHERS.....PLAINTIFF

VERSUS

KATANA CHEMBE KARISA.....1ST DEFENDANT

CHENGO CHEMBE.....2ND DEFENDANT

CHARO CHEMBER KARISA.....3RD DEFENDANT

CHEMBE KARISA (all sued on their own behalf

and also as the beneficiaries and administrators

of the estate of CHEMBE KARISA (deceased).....4TH DEFENDANT

THE CHIEF LAND REGISTRAR, KILIFI.....5TH DEFENDANT

JUDGEMENT

Plaintiffs' case

1. The suit was instituted by way of a plaint dated 25TH November 2014 and the plaintiffs pray for:-

- a) **A mandatory injunction, to issue to the defendants, either by themselves, their employees, servants, agents and/or anybody acting under their direction from dealing with the parcel of land know as Plot No. Kaloleni/Chalani/698 in any manner whatsoever**
- b) **Cancellation of the title on Plot No. Kaloleni/Chalani/698.**
- c) **Cost of this suit and interest.**

2. The plaintiffs averred that the suit property Plot No. Kaloleni/Chalani/698 is registered in the names of the late Chembe Karisa Magombe. The plaintiffs pleaded that at all material times they have been in occupation of the suit property and have even developed their homes. The plaintiffs further claimed that the late Chembe Karisa Magombe fraudulently and by misrepresentation managed to have the suit property registered in his name. The plaintiffs averred that the defendants have laid claim to the suit property by virtue of being beneficiaries to the Estate of the Late Chembe Karisa Magombe. The plaintiffs prayed to court to cancel the said title and issue a mandatory injunction preventing them from dealing with the suit property.

Defendants' case

3. The defendants filed their statement of defence on 21st May 2013 and pleaded that they are heirs to the late Chembe Karisa Magombe who rightfully inherited the suit property from his father in 1963 and prayed court to dismiss the suit with costs.

Evidence Adduced

4. George Benjamin Mdachi testified as PW1 and adopted his witness statement as evidence-in-chief, and produced the plaintiff's list of documents as exhibits. He asked court to cancel the defendants' title because when it was issued in 2013, demarcation had not been carried out on the suit property. He stated that neither the late Chembe Karisa Magombe nor his children live on the suit property. He claimed that the area in which the suit property is situated in Kitenywani sub-location was declared an Adjudication Section on 30th September 2014. He refuted the claim that the suit property was demarcated in 1975. He prayed to court to cancel the title deed and have it registered in the names of the plaintiff's 40 families living on the suit property.

5. On cross examination he stated that he knew the Late Chembe Karisa who died in December 1978, and was the father to the defendants. He clarified that adjudication was carried out in 1975 but not on the suit property. He acknowledged the adjudication record dated 28th June 1975 in the names of Chembe Karisa Magombe the father to the defendants. He also admitted that in the plaintiff's letter dated 30th September 2014, Plot 698 was not demarcated as before. He concluded by stating that Plot No. 698 and 733 were demarcated during the Chalani Adjudication Section.

6. On reexamination, he clarified that Chalani Adjudication section does not include Mtsengo village. He also stated that the late Chembe Karisa Magombe did not live on Plot 698 but though the title was issued in his name, the land belongs to the plaintiffs and that title should be cancelled.

7. PW2 (Katana Mwakidudu Kimera) adopted his witness statement as his examination in chief. On cross examination by Mr. Lewa, he stated that he knew that the late Chembe Karisa Magombe lived on a portion of the suit property situated in Mtsengo. He disclosed that the defendants were the children of the late Chembe Karisa and are currently living on the suit property. He concluded by stating that he does not know who has title to the suit property.

8. On reexamination, he reiterated that he did not know who has title to the suit property but it belongs to the 1st plaintiff's grandfather who sold off some portions. With that the plaintiffs closed their case.

9. The defendants called their only witness Charo Chembe Karisa on 27th January 2021, who adopted his witness statement dated 28th January 2015 and filed on 29th January 2015 as his evidence in chief. He also produced the defendants list of documents that were filed on 29th January 2015 and a supplementary list of documents filed on 17th February 2020 as defendants' exhibits 1-6 respectively. He stated that he is the 3rd defendant and that the 1st and 2nd defendants are his brothers. He also revealed that the late Chembe Karisa, his father died in 1979, but he and his brothers have not obtained the letters of administration for his estate.

10. He denied that his late father was fraudulently registered as the proprietor of the suit property. He claimed that the land was surveyed in 1975 and registered in their father's name as seen in D.exhibit-6. He sought to clarify that the recent adjudication claimed by the plaintiffs was over different parcels of land and that the suit property was adjudicated upon in 1975. He recognized the 1st plaintiff and stated that the 1st plaintiff's father came and operated a shop outside the suit property. That when he died, the 1st plaintiff and his family requested a place to bury him and build a house, which they previously did not have. He asked court to dismiss the plaintiffs suit since none of them had any right over the suit property which rightfully belongs to his deceased father.

11. On cross examination by Mr Okanga, the advocate on record for the plaintiffs, he acknowledged that the plaintiffs and their families were living within the suit property. He was at pains to explain why his late father's signature was not on D.Exhibit-6. He further stated that the title deed that he has produced was issued on 13th November 2013 and that he personally went to Kilifi to pick the title deed since it was lying in the lands' office. He stated that his father was present when the land was surveyed in 1975. About the recent survey, he stated that he witnessed the second survey after hearing over the radio that it was being carried out. He then stated that he lives on the suit property, and the plaintiffs are his neighbors, but made it clear that they don't have documents and have no right to be on the land.

12. On reexamination, he stated that when the land was being surveyed in 1975, his late father was present and none of the plaintiffs complained when the land was surveyed and registered in his name. He also stated that the 1st plaintiff requested for a place to farm and live, and that some of the plaintiffs are the 1st plaintiff's children and the rest, were invited onto the suit property by the 1st plaintiff. With that the defendants closed their case.

Submissions

13. The plaintiffs herein filed their submissions on 10th March 2021. They submitted on the Adjudication Record for the suit property, produced by the defendants in their supplementary list of documents filed on 17th February 2020, and stated that the record was not complete as it lacked the signature/thumb print of the late Chembe Karisa Magombe. They submitted that Section 23 (6) of the Land Adjudication Act provides that the Chairman and the Executive Officer of the Committee shall sign the Adjudication Record and the owner of each interest in the parcel and that the signature of the owner shall be witnessed. That the provisions of Section 23 (6) are mandatory and since the adjudication record had not been signed, consequently the title to the suit property was obtained irregularly and the court should cancel the same.

14. They further submitted that the adjudication process which the defendants claim their father got title, through is extremely vigorous. That it was impossible for the plaintiffs especially PW-1 and the ones who were alive in 1975 not to have known about it yet they were living on the suit property. They submitted that the process of registration of the late Chembe Karisa Magombe was suspicious and required the scrutiny of court. They further submitted that the DW-1 admitted that the plaintiffs were living in the suit property.

15. The plaintiffs pleaded with court to apply Section 26 of the Land Registration Act which empowers court to cancel a title obtained through fraud. They submitted that the adjudication process that led to the late Chembe Karisa Magombe as the registered proprietor was defective, for the reason that the adjudication record was not signed by the late Chembe Karisa Magombe certifying the details of the record

as correct, and that there is no name of the Executive officer on the record and the signature appearing is of an unknown person. The plaintiffs submitted that the form could have been the creation of R. Kazungu to achieve illegal registration of the late Chembe Karisa Magombe as the proprietor of the suit property. The plaintiffs relied on the case of **Alice Chemutai Too V Nickson Kipkurui Korir & 2 others (2015)eKLR**, to plead with court to make a finding that the late Chembe Karisa Magombe registered himself as the owner of the suit property illegally.

16. The defendants filed their submission on 22nd March 2021 and stated that none of the defendants herein are the administrators of the estate of Chembe Karisa Magombe and as such they lack capacity to be sued on behalf of the estate of their late father. They further submitted that the allegations of fraud and misrepresentation made against the late Chembe Karisa Magombe, that he was fraudulently registered as proprietor of the suit property are serious and the plaintiffs have failed to prove the said allegations.

17. On the adjudication records, the defendants submitted that the late Chembe Karisa Magombe did not sign as required since he could not be traced by the adjudication officer. That the said record was signed by both the Chairman and Executive Officer of the Adjudication Committee, and that during the entire adjudication process there was no objection filed against the recording of the suit property in the name of Chembe Karisa Magombe. Further, they submitted that the 1st entry on the title deed is dated 8th February 1977 in which Chembe Karisa Magombe was registered as the proprietor of the suit property. That the mere collection of the title documents on 18th November 2012 cannot be proof of fraud as alleged by the plaintiffs.

18. The defendants questioned the evidence adduced by the plaintiffs and the documents produced. They stated that PW-1 testified in chief that the suit property became an adjudication section in 2014, and produced exhibit 3 a letter dated 30th September 2014 by the Land adjudication and Settlement Officer, Kilifi which referred to Kitengwani Adjudication Section. The defendants concluded by stating that the plaintiffs have failed to prove that the title held by the late Chembe Karisa Magombe was obtained by fraud and that as the beneficiaries of his estate, the defendants' are entitled to quiet possession of the suit property. They invited the court to dismiss the plaintiffs' suit with costs.

Analysis and determination

19. I have considered the pleadings, the evidence tendered and the submissions made. The court finds that the issues for determination are as follows:-

- i. *Whether the defendants have capacity to be sued.*
- ii. *Whether the plaintiff is entitled to the prayers sought.*
- iii. *Who is to bear the costs of the suit?*

20. The plaintiffs have averred in their plaint that the defendants are heirs and beneficiaries to the Estate of the late Chembe Karisa Magombe who holds title to the suit property. The defendants admit to being beneficiaries to the estate of Chembe Karisa Magombe. DW-1 testified that he and his brothers (1st and 2nd defendants) have not taken out letters of administration to their father's estate. The defendants submitted that, they were not yet administrators and thus did not have the capacity to be sued on behalf of their father's estate.

21. In **Isaya Masira Momanyi V Daniel Omwoyo & anor (2017)eKLR Mutungi J** stated:-

“It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person.”

22. I associate myself with the above findings. Without the letters of administration, the defendants though children of the deceased proprietor of the suit property cannot be sued. The arguments by the plaintiffs in their submissions that since the defendants did not file a memorandum of appearance under protest or raise any preliminary objection that they are not administrators of the estate of the Late Chembe Karisa Magombe, they are rightfully before court as necessary parties cannot wish away the requirements to sue the legal representatives of the deceased.

23. The plaintiffs ought to have moved to the High Court under Rule 22 of the Probate and Administration Rules, for the defendants to be cited to either accept, refuse or take out grant of letters of administration. In **Re the Estate of Josiah Muli Wambua - Deceased [2014] eKLR**, court held that:-

“Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf.”

24. The plaintiffs' have stated that the late Chembe Karisa Magombe fraudulently acquired title to the suit property and prayed to court to cancel the title. To succeed in claiming fraud, the plaintiffs not only need to plead, but also particularize it by laying out water tight evidence upon which the court would make such finding. I am guided by the **Court of Appeal in the case of Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR where it was held:**

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, 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.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

As regards the standard of proof, this Court 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.”

25. The plaintiffs are challenging title to the suit property and claim that the suit property is yet to be adjudicated upon, as per the letter from the Land Adjudication and Settlement Officer- Kilifi dated 30th September 2014. The plaintiffs have not called the land adjudication officer to support this claim and tender evidence before court on how the process was carried out. The certificate of title that was produced by the defendants dated 18th November 2013 to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per 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, the court has no reason to find the title document to be fraudulent.

26. Accordingly, and in light of the above I find that the plaintiff's case has no merit for the reason that they have sued the defendants' who are not the legal representatives to the estate of the late Chembe Karisa Magombe and for failing to prove the alleged fraud. For that reason I dismiss the plaintiffs' suit with costs to the defendants.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS, 7TH DAY OF JUNE 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE