



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**E.L.C CASE NO. 24 OF 2020**

**BEATRICE MATOYA.....1<sup>ST</sup> PLAINTIFF**

**TABITHA BONARERI MATOYA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR KISII.....3<sup>RD</sup> DEFENDANT**

**HENRY MANYANGE MATOYA alias HENRY MATOYA MANYANGE**

**(Administrator of the estate of FRANCIS OBAGA MATOYA alias**

**OTWORI MATOYA –Deceased).....4<sup>th</sup> DEFENDANT**

**JAMES MANYANGE OBIRI (The only surviving 1<sup>st</sup> line beneficiary of**

**ZACHARIA OBIRI MATOYA –Deceased).....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. This matter has had a long and checkered history as it has been the subject of various suits both in the High Court and this court. In this suit the Plaintiffs who are co-administrators of the estate of Walter Otworu Matoya have sued the Defendants claiming that the Defendants have fraudulently deprived them of 1/3 share in the parcel of land known as KISII MUNICIPALITY/BLOCK 111/140. They therefore pray for rectification of the land register in respect of KISII MUNICIPALITY/BLOCK 111/140 to include the name of Walter Otworu Matoya who was one of the allottees. They also pray for cancellation of the title in the name of Zachariah Matoya and Francis Matoya as well as special and general damages together with costs of the suit.

2. Although the Plaintiffs filed a lengthy plaint comprising of 72 paragraphs, their suit in brief as can be gleaned from the pleadings is as follows: The 1<sup>st</sup> Plaintiff is the daughter while the 2<sup>nd</sup> Plaintiff is the widow of Walter Otworu Matoya–deceased. The said Walter Otworu Matoya was the brother of Francis Obaga Matoya-deceased and Zacharia Obiri Matoya-deceased (fathers to the 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively). The three brothers Walter, Francis and Zachariah ran a partnership known as Kisii Vegetable and Fruit Suppliers Store. The said Kisii Vegetable and Fruit Suppliers Store was allotted plot no. Z1 Section 11 Kisii Township vide a letter of allotment dated 28<sup>th</sup> October 1967. The plot was subsequently surveyed as L.R No. 1436/287 and a Grant No. IRN 2447/1 for a term of 33 years from 1.5.1967 was issued in the names of Zakariah Matoya and Francis Matoya instead of Kisii Fruit and Vegetable Suppliers Store on 23.1.1970. The title was later converted to KISII MUNICIPALITY/BLOCK111/140 and the same was charged to Industrial and Commercial Development Cooperation (ICDC) on diverse dates in July and August 1970 to secure 3 loans to boost the business of Kisii Vegetable and Fruit Suppliers Store. It is the Plaintiff's case that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded to fraudulently register the suit property in the name of Francis Obaga Matoya and Zachariah Matoya thereby depriving Walter Otworu Matoya of his share in the suit property.

3. Upon the demise of Francis Obaga, the 4<sup>th</sup> Defendant applied for a Grant of Letters of Administration vide Kisii HCC Succession Cause

No. 290 of 2000 and included the suit property as one of the assets of the deceased. The 1<sup>st</sup> Plaintiff applied for revocation of Grant on the ground that the same had been obtained fraudulently. In addition, she prayed that an order be issued to Land Registrar, Kisii to rectify the records on the fraudulent green card of KISII MUNICIPALITY/BLOCK 111/140 that inadvertently omitted the name of the initial partner of Kisii Vegetable and Fruit Suppliers Store – Walter Otworu Matoya as a condition for releasing a valid and current lease for the lease which expired on 1<sup>st</sup> May 2000.

4. The court declined to revoke the Grant and held that it had no jurisdiction to deal with the rectification of the register of the suit property as the same related to the use, occupation and title to land which falls within the jurisdiction of the Environment and Land Court.

5. The Plaintiffs had initially filed Miscellaneous Application No. 124 of 2014 seeking similar orders but in view of the contentious nature of the application and the prayers sought therein, the Plaintiffs were advised to file a fresh suit by way of Plaint hence this suit. Despite being served with Summons to enter appearance, none of the Defendants entered appearance or filed a Defence.

6. After the Plaintiff had complied with order 11 the suit was set down for hearing on 18.5.2021 when the 1<sup>st</sup> Plaintiff testified and closed their case.

7. The 1<sup>st</sup> Plaintiff testified that she is the daughter and one of the administrators of the estate of Walter Otworu Matoya- Deceased. She stated that her father was the proprietor of Kisii Vegetable and Fruit Suppliers Store which was registered as a business name in 1961. He later invited his two brothers Zakariah Matoya and Francis Matoya to join him in the business. She told that court that Kisii Vegetable and Fruit Suppliers Store was issued with an allotment letter in respect of a plot known as Z 1 Section 11 Township Kisii on 28.10.1967. The plot was subsequently registered in the name of Zakariah Matoya and Francis Matoya as Grant No. IRN 2447 for a term of 33 years from 1.5.1967. The RTA title was later converted to KISII MUNICIPALITY/BLOCK 111/140 under the Registered Land Act. She said she was doubtful about the manner in which the title was registered in the names of Zakariah Matoya and Francis Matoya instead of Kisii Vegetable and Fruit Suppliers Store which was the initial allottee. She stated and she wished to rely on her witness statement dated 5.10.2020. She then produced the documents in her List and Bundle of documents filed in court on 3<sup>rd</sup> January 2020 and the same were marked as Plaintiff's exhibits 1-84. She concluded her testimony by praying for the reliefs in her plaint. The Plaintiff did not call any witness.

#### **ISSUES FOR DETERMINATION**

8. Having considered the plaint, oral and documentary evidence on record, the following issues arise for determination:

- i. Whether the Plaintiffs have proved fraud against the Defendants.
- ii. Whether the Plaintiffs are entitled to the reliefs sought.

#### **ANALYSIS AND DETERMINATION**

9. The Plaintiffs' suit is founded on fraud. The Plaintiff testified that her late father Walter Otworu Matoya registered as business name known as Kisii Vegetable and Fruit Supplies Store in 1961. He later invited his two brothers Zakariah Matoya and Francis Matoya to join him in the business. On 28.10.1967 they were issued with a letter of allotment by the Commissioner of Lands on behalf of the County Council of Gusii. The said allotment letter was in respect of plot No. Z1 Section 11 Kisii Township (Plaintiff's exhibit 7) After making the necessary payment as evidenced by the letter written by Walter Matoya on behalf of Kisii Vegetable and Fruit Supplies (PEX 10), a title Grant No. I.R.N 2447 was issued in the name of Zakariah Matoya and Francis Matoya on 23.1.1970. The said Grant was for a term of 33 years from 1.5.1967. The title was subsequently converted to a leasehold title KISII MUNICIPALITY/BLOCK 111/140. The lease expired in the year 2000 and it would appear that the same since has not been extended or renewed.

10. As stated in the Plaintiff's witness statement, there have been various suits filed in relation to the subject matter herein including Kisii HCCC No. 54 of 2004(O.S), KISI HCCC No. 255 of 2009(O.S), Kisii HC SUCCESSION Cause NO. 290 of 2000, Kisii ELC Case No. 272 of 2013 and Kisii ELC Misc Civil Application No.124 OF 2014 but none of them has conclusively dealt with the issue of fraud and rectification of title.

11. It is trite law that fraud must not only be pleaded but it must be proved to the required standard.

12. The Court of Appeal in the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** in considering the issue of fraud observed as follows:-

***“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:***

***“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 (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308).***

***The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and***

*accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.*

13. In the instant suit the Plaintiffs have pleaded and provided particulars of fraud allegedly committed by the Defendants. The Plaintiffs have referred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as the initial fraudsters who have successively colluded and connived to defraud the Plaintiffs of the suit property. They allege that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants failed to register title L.R. NO. 1436/287 in the name of Kisii Vegetable and Fruits Suppliers Store in accordance with the Letter of Allotment dated 28<sup>th</sup> October 1967 and instead registered it in the names of two partners, leaving out the name of the principal partner Walter Otworu Matoya. Among the documents produced by the 1<sup>st</sup> Plaintiff are the letter of Allotment dated 28.10.1967, a copy of the Grant issued in the name of Zakariah Matoya and Francis Matoya as well as the Certificate of Lease in the name of Zakariah Matoya and Francis Matoya. The Plaintiff also produced the copy of the white card showing entries in the register.

14. From the evidence on record, it is clear that the Commissioner of Lands flouted the law by failing to issue a title in the name of the three partners of Kisii Vegetable and Fruits Suppliers Store after issuing an allotment letter in their business name. There is no valid reason why the name of Walter Otworu Matoya was omitted yet the Certificate of registration of the business clearly shows that there were three partners. For this reason, it is my finding that the Commissioner of Lands acted fraudulently. I am however unable to attribute any fraud to Zakariah Matoya-deceased and Francis Matoya or the 4<sup>th</sup> and 5<sup>th</sup> Defendants in the absence of any evidence to support that claim.

15. That leads me to the next issue, which is whether the court can grant the reliefs sought. The Plaintiffs have prayed for rectification of the Land Register in respect of KISII MUNICIPALITY /BLOCK 111/140 to include the name of Walter Otworu Matoya who was one of the allottees. They have also prayed for cancellation of the title in the name of Zachariah Matoya and Francis Matoya as well as special and general damages together with costs of the suit.

16. With regard to the first prayer for rectification of the register, it needs to be appreciated that the process of registration herein took place under the old land law regime. By dint of the provisions of Section 107 of the Land Registration Act, 2012, the law applicable to the title that was held by Zachariah Matoya –deceased and Francis Matoya –deceased is the Registered Land Act, Cap 300 Laws of Kenya (now repealed). The said section provides as follows:

**“107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.**

**(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act...”**

17. It is not in dispute that a title was issued to Zakariah Matoya and Francis Matoya under the Registration of Titles Act Cap 281 of the Laws of Kenya (now repealed) and the same was converted to Certificate of Lease under the Registered Land Act Cap 300 of the Laws of Kenya (now repealed). Section 143 of the Registered Land Act provides as follows

**“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that a registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default...”**

18. As can be gleaned from section 143 of the Registered Land Act (now repealed) the court had power to order rectification of the register as long as the same was not a first registration. However, before dealing with the issue of rectification, it is important to note that the interest in the title issued to Zakariah Matoya and Francis Matoya ceased upon the expiry of the term of the lease in the year 2000 which is more than 20 years ago and the suit property reverted to the County Council of Gusii, (now County Government of Kisii). The position on an expired lease is as set out in section 9 (2) (c) (ii) of the Land Act, 2012 which provides as follows:

**“private land may be converted to public land by reversion of leasehold interest to Government after the expiry of a lease”**

19. In the circumstances, the court cannot issue an order of rectification or cancellation of a title whose term has expired. The court does not act in vain and it only grants orders that are capable of being enforced.

20. Having said that, the Plaintiffs have indicated that they have initiated the process of renewal of the lease and there is correspondence showing that the Commissioner of Lands had no objection to the renewal of the lease in favour of the three partners of Kisii Vegetable and Fruit Suppliers Store. In his letter dated 23<sup>rd</sup> November 2012 addressed to the 1<sup>st</sup> Plaintiff the Commissioner of Lands stated as follows:

*“I refer to your letter dated 20<sup>th</sup> September 2010.*

*Please note that the government has approved renewal of lease for the above property for a term of 66 years with effect from 1<sup>st</sup> May 2000.*

*In order to facilitate implementation of the renewal of lease, you are hereby advised to pursue the issues of Probate and Administration of the estates of the three partners in the business name Kisii Vegetable and Fruit Suppliers Store, you should also seek court direction on the interests of the initial partners given that one of the partners was inadvertently excluded in the expired title.*

*Kindly forward Grants of Letters of Administration and confirmation of the Grants of the three partners and the court's direction on the interests of the initial partners in the business and property for my action"*

21. In view of the said letter and in the interest of justice, the successor to the Commissioner of Lands ought to consider including the name of the administrators of the estate of Walter Otworu Matoya at the time of renewal of the lease since it is clear that the Commissioner of Lands omitted his name without any proper justification.

22. The Plaintiffs did not specifically plead and prove special damages nor did they demonstrate that they are entitled to general damages and their claim for the same is hereby dismissed. I make no order as to costs.

**Dated, signed and delivered at Kisii this 23<sup>rd</sup> day of September, 2021.**

**J.M ONYANGO**

**JUDGE**