

REPUBLIC OF KENYA



**IN THE ENVIRONMENT AND LAND COURT AT
MAKUENI
ELC CASE NO. E038 OF 2022**

BONIFACE NZYOKA SYANO.....
.....PLAINTIFF

VERSUS

LAZARUS MUVUVA SYANO.....1ST
DEFENDANT

SUSAN KIUMENZE SYANO.....2ND
DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a Plaint dated 2nd December 2022, seeking the following orders: -
 - a) A declaration that Plot No. NZAUI/MUMBUNI/677 belongs to the Plaintiff and the Defendants be ordered to remove themselves from the suit land.***
 - b) Costs***
2. The Plaintiff averred that the Defendants, in an attempt to entrench their interest in the suit land, filed Makueni ELC No. 80 of 2017, which was ultimately dismissed.
3. The Defendants filed a statement of Defence dated 3rd March 2023 denying the Plaintiff's claim. The Defendants stated that the suit property is family land.

THE PLAINTIFF'S CASE

4. The Plaintiff Boniface Nzyoka Syano testified as the sole witness in support of his case. He adopted his undated witness statement as his evidence-in-chief. He also produced the documents in his list dated 2nd December 2022 as PEX 1 and 2.
5. The Plaintiff informed the court that the Defendants are his siblings. He testified that their father, Syano Kitunga, subdivided his land among his children and allocated him land parcel No. Nzai/Mumbuni/ 677 (the suit property herein), while the first Defendant received parcel No. Nzai/Mumbuni/678. He explained to the court that he transferred his property to himself, but the Defendants refused to register their respective properties.
6. On cross-examination by Mr Muthiani, he reiterated his evidence as above. He testified that his late father had chased away the Defendants from the suit property, but they refused to vacate. He confirmed that he did not purchase the suit property from his father and that he was issued a title deed in 2011. Concluding his evidence, he urged the court to grant the orders sought in the Plaint.
7. He further testified that the 1st Defendant had occupied the suit property for 10 years and had refused to vacate. He maintained that title No. Nzai/Mumbuni/678 is registered in the name of the 1st Defendant.

8. In re-examination, he stated that the Defendants constructed their homes on the suit property after the land was transferred in his name. He further stated that although land parcel No. Nzai/Mumbuni/ 678 was registered in their father's name, he gave it to the 1st Defendant who has refused to transfer it his name.

THE DEFENDANTS' CASE

9. The 1st Defendant, Lazarus Muvuva Syano, testified as DW1. He adopted his witness statement as his evidence-in-chief. He also produced the documents in his list dated 20th April 2023 as DEX 1-4 and the document in his list dated 3rd May 2023 as DEX 5. He informed the court that the Plaintiff is his elder brother.
10. DW1 testified that the green card shows that the Plaintiff purchased the suit property for Kshs. 900,000/= . He further testified that the property was registered in their father's name and that he had resided on the property for 24 years. He stated that all his siblings, including the Plaintiff, have built their homes on the suit land.
11. He explained that there was no dispute over ownership rights during their father's lifetime and that the Plaintiff had never asked his siblings to vacate the suit property. He told the court that their father had never expelled them from the suit property. He further stated that he had never been informed of any sale transaction or seen a sale agreement related to the suit property.

12. On cross-examination by Mr Mutuku, he testified that the suit property arose from the subdivision of land parcel No. Nzai/Mumbuni/90. He further testified that his father did not sell any portion of the land or transfer the suit property to the Plaintiff.
13. He testified that land parcel No. Nzai/Mumbuni/190 was subdivided into seven portions, and he did not know the other portions that arose from the subdivision.
14. DW1 informed the court that his deceased father told his sons, in the presence of the clan, that he would not transfer his land during his lifetime. He acknowledged having seen the surveyor's documents but not the surveyor himself on the ground.
15. He confirmed that the transfer of the suit property was effected during their father's lifetime. He also stated that his late father had designated the site for the construction of their homes. He denied the allegations that he was given land parcel No. Nzai/Mumbuni/678.
16. On re-examination, he denied having seen the transfer documents for the suit property.
17. After the close of the hearing, parties agreed to file and serve their written submissions.

THE PLAINTIFF'S SUBMISSIONS

18. The Plaintiff filed his submissions dated 25th May 2024
On behalf of the Plaintiff, Counsel submitted that the defence admitted the following facts:-

- a) *that there had been a clan meeting regarding the land issue;*
 - b) *that the area chief was in attendance;*
 - c) *that the larger Plot No. 90 was over 100 acres;*
 - d) *that the suit property was transferred to him;*
 - e) *that land parcel 678 was transferred to another brother;*
 - f) *that their father was not sued in HCC No. 80 of 2017 while he was alive; and*
 - g) *that their mother was alive but was never called as a witness.*
19. According to Counsel, the suit property, having been transferred to the Plaintiff following subdivision, clearly indicates that the other siblings also received their respective lands. Counsel submitted that the Defendants have not transferred their portions to themselves. Counsel claimed that the suit property belongs exclusively to the Plaintiff and the Defendants should vacate the premises.

THE DEFENDANTS' SUBMISSIONS

20. The Defendants filed their submissions dated 17th April 2024. On their behalf, Counsel outlined the following issues for the court's determination: -
- a. *Whether or not the suit property belongs to the Plaintiff;*
 - b. *Whether the acquisition was legally done in accordance with proper procedure;*

c. Whether the Defendants encroached on the suit property; and

d. Appropriate orders.

21. On the first issue, Counsel submitted that the Plaintiff was holding the suit property on behalf of the Defendants as they had resided there for 24 years. It was submitted that each Defendant had been allocated their respective portions and had built their individual homes on the suit property.
22. Counsel further submitted that the Plaintiff did not explain why he filed the suit after their father's death rather than before. According to Counsel, there was no evidence of a sale agreement, transfer documents, or consent from the Land Control Board, thereby casting doubt on the manner in which the suit property was acquired.
23. Counsel contended that the title was obtained illegally or through a corrupt scheme, as the green card shows that the title was transferred to the Plaintiff for a consideration of Kshs. 900,000/=. To buttress this point, Counsel relied on Section 24 (a) and 26(1) of the Land Registration Act
24. Counsel further submitted that the Plaintiff failed to produce any documents to demonstrate the manner in which he acquired the suit property.
25. Counsel cited the case of **Munyu Maina v. Hiram Gathiha Maina [2013] eKLR** to submit that when the origin of a title is disputed, the registered owner must do

more than show the instrument; they must also demonstrate that the manner in which the title was acquired is lawful and free from encumbrances.

26. According to Counsel, the Plaintiff should have provided evidence of acquisition that meets the criteria outlined in Sections 107 (1) and 112 of the Evidence Act.
27. Regarding the third issue, Counsel argued that the Plaintiff neither produced evidence of trespass nor submitted a Surveyor's report to specify the extent of the encroachment.
28. Concluding his submissions, Counsel urged the court to dismiss the suit with costs.

THE RESPONSE

29. The Plaintiff filed supplementary submissions dated 6th June 2024. Counsel submitted that the Defendants never raised the issue of fraud or misrepresentation in their Defence, which should have been explicitly stated and proved. To buttress this argument, reliance was placed on the case of **Munyu Maina vs Hiram Gathia Maina (2013) KLR.**

ANALYSIS AND DETERMINATION

30. Having considered the pleadings, the evidence on record, and the submissions by the parties, the issue that arises for determination is whether the Plaintiff is entitled to the orders sought in the Plaintiff.

31. It is not in dispute that the parties herein are siblings. The dispute herein revolves around the ownership of the suit property. The Plaintiff seeks a declaration that he is the rightful owner of the suit property and, therefore, the Defendants should vacate.
32. In this regard, the Plaintiff produced a copy of the Title for the suit property and a certificate of official search, which shows that he is the registered proprietor of the suit property.

Section 26 (1) of the Land Registration Act provides that:-

...

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.”

These provisions specify the circumstances under which a registered title can be revoked.

33. The Defendants challenged the Plaintiff’s title on the grounds that it was obtained fraudulently.
34. It is trite law that allegations of fraud must be specifically pleaded and proved.

In the case of **Vijay Morjaria vs Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000)**, the court held that:

“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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

35. Similarly, in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** the Court of Appeal held that; -

“...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...”

36. Although the standard of proof is not beyond a reasonable doubt, it is higher than proof on a balance of probabilities

37. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the Evidence Act provides that: -

(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.

38. It is clear from the above provisions that the burden of proof lies with the party asserting the existence of a fact that they want the Court to accept.
39. Although the Defendants did not plead fraud in their defence, they alleged that the Plaintiff fraudulently obtained the title since he did not produce any documents to show how he acquired the suit property.
40. It was the Plaintiff's evidence that their late father subdivided his land amongst his sons before his death. He claimed that he was allocated the suit property, whereas the 1st Defendant received parcel No. Nzai/Mumbuni/678. He confirmed that he did not purchase the suit property from his father.
41. The title deed produced by both parties, along with the green card, shows that the suit property was registered on 23rd March 2011 in favour of the Plaintiff for a consideration of Kshs. 900,000/=.
42. In the case of **Munyu vs Hiram(supra)**, the court held that:-
"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge, and the registered proprietor must go beyond the instrument and prove legality on how he acquired the title and show that the acquisition was legal, formal, and free from encumbrances, including any and all legal

interests which would not have been noted in the register.”

43. The Plaintiff denied purchasing the suit property from his father. Although the Plaintiff stated that he had documents to show how the suit property was registered in his name, he did not produce the same in support of his claim. The Plaintiff did not adduce any evidence to show that he paid Kshs 900,000/= as consideration for the suit land.
44. Based on the foregoing, I find that the Plaintiff has not proved the root of his title to warrant the grant of the orders sought. In the end, I find that the Plaintiff has not proved his case on a balance of probabilities against the Defendants as required.
45. The upshot of the foregoing is that the Plaintiff's suit is hereby dismissed. As the parties are closely related, each part to bear its own costs.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2025.

.....
HON. T. MURIGI
JUDGE

IN THE PRESENCE OF: -

P.M Mutuku for the Plaintiff

Muthiani for the Defendants

Ahmed – Court Assistant

ORIGINAL