

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. 17 OF 2015

EMMANUEL CHRISTOPHER CHENGIMBWE

FLORENCE MITCHEL CHIMWENE (Suing as the administrators of the estate of the late ELIZABETH MITCHEL ANDERSON alias ELIZABETH CHRISTIAN DOUGLAS)
..... PLAINTIFFS

VERSUS

HALIMA MOHAMED ABDIRAHMAN 1ST
DEFENDANT

OMAR SHEIKH ABDI IBRAHIM 2ND
DEFENDANT

HABIBA HASSAN HASHI 3RD
DEFENDANT

REGISTRAR OF LANDS, COAST REGISTRY 4TH
DEFENDANT

THE ATTORNEY GENERAL 5TH
DEFENDANT

JUDGEMENT

1. The plaintiffs commence this suit through the plaint dated 11th February 2015, and amended plaint dated 18th January 2018. The plaintiffs averred inter alia that Elizabeth Mitchel Anderson alias Elizabeth Douglas was one of the registered owners of plot No. 438 (Original 233/3) 1/MN, the suit property; that through a purported transfer dated 22nd September 1999, the 1st to 3rd defendants fraudulently transferred the suit property

to their names with the connivance of the 4th defendant; that the said transfer purported to have been signed by the late Elizabeth Christian Anderson alias Christian Douglas, the deceased, who had died on the 25th April 1999; that the 4th defendant fraudulently, illegally and without their consent issued the 1st to 3rd defendants with title deed over the suit property. the plaintiffs therefore prays for:

- a. *“Cancellation of the registration of 1st, 2nd and 3rd defendants as proprietors of the subject property and an entry be made in the register effecting registration of the subject property in the name of original owners.*
- b. *Permanent injunction against the 1st, 2nd and 3rd defendants whether by themselves, servants and/or their agents from disposing of selling and/or dealing with the subject property.*
- c. *Costs and interest incidental to the suit at court rates.*
- d. *Any other relief the court may deem fit to grant.”*

2. The plaintiff's claim is opposed by the 1st to 3rd defendants through their statement of defence dated 24th March 2015, inter alia denying the particulars of fraud and averring that they bought the suit property from Nathan Cornelious Douglas,

Joseph Christopher Douglas, Esther Douglas, Maria Douglas, Violet Douglas and Elizabeth Douglas, who were then the registered owners being heirs of the estate of their late mother, Florence Douglas; that they bought the suit property for valuable consideration of Kshs.2,640,000 without notice of any irregularity, fraud, forgery or illegality and it was then free of any encumbrances; that the transfer document dated 22nd September 1999 was drawn by Hassan Abdi Advocate & Commissioner for Oaths, who represented them; that the plaintiffs were among those who sold the suit property to them and they will refer to the sale agreement dated 20th November 2007 and transfer document dated 22nd September 2009; that the plaintiffs have no locus to sue on behalf of the other heirs, and sought for the suit to be dismissed with costs. In their reply to the defence dated the 17th April 2015, the plaintiffs averred that the transfer document does not indicate the transferors had signed in their capacity as heirs to their deceased mother, Florence Douglas, but in their individual capacities; that the plaintiffs have valid letters of administration for the estate of Elizabeth Douglas, and no transfer could have been made without their consent; that transferring the suit property, which

belonged to a deceased person, amounted to a criminal act, and the 1st to 3rd defendants cannot be innocent purchasers without notice of irregularities; that the plaintiffs have locus as they are suing as administrators of the estate of Elizabeth Douglas, and are not acting on behalf of any other heirs of Florence Douglas as alleged.

3. The 4th defendant filed the statement of defence dated 25th May 2020 through the Litigation Counsel for the Attorney General, inter alia denying the particulars of alleged fraud, and averring that if it issued the title deed to the 1st to 3rd defendants, then it did so in good faith after being satisfied by the documents presented by the said defendants.
4. The 4th defendant also issued Notice of Claim against the 1st to 3rd defendants, dated 25th May 2020, seeking full indemnity in respect of all claims made by the plaintiffs against it, costs and interest of the suit.
5. During the hearing, Emmanuel Christopher Chengimbwe and Florence Mitchel Chimwene, the plaintiffs, testified as PW1 and PW2 respectively. PW1 adopted the contents of his statement as his evidence in chief, and corrected the year on the transfer at paragraph 3 to read 2009 instead of 1999. He later changed

the year to 2011. He told the court he is an administrator of the estate of his late mother, Elizabeth Mitchel aka Elizabeth Mitchel Anderson aka Elizabeth Christian Douglas. He produced the documents on the lists of documents as exhibits, and they included the deceased's death certificate, grant obtained on 8th March 2012 and copy of the title to the suit property showing his late mother as one of the six registered proprietors. It was his testimony that the transfer document indicated the transferor as Rahab Kina Nchusuya who was not the owner of the suit property and the transferees as the 1st to 3rd defendants. During cross-examination, PW1 stated that he did not know the other owners of the suit property had sold their interests to the 1st to 3rd defendants. He added that he did not know that the plot had been subdivided, but when he was shown a transfer dated 24th January 2013 from his bundle of documents, he agreed it demonstrated the land had been subdivided and parcels thereof transferred. He conceded that they had not sued those transferees, and Rahab. That though he got to know of the transfer in 2009, he did not report to the police.

6. PW2 adopted the contents of her statement filed on 11th February 2015, and produced the documents listed in the lists of documents filed on 11th February 2015 and the one dated 24th September 2024 as her evidence in chief. She corrected the date of the transfer mentioned at paragraph 3 of her statement to read 22nd September 2009 instead of 22nd September 1999. During cross-examination, PW2 testified that her mother died on 25th April 1999, and the other co-owners of the suit property had passed on by the time the land was transferred to the 1st to 3rd defendants, on 22nd September 2009. She added that the suit property had been transferred to her mother and the other co-owners vide the transfer document dated 10th March 1947.

7. Though the 1st to 3rd defendants had filed statement of defence, and their counsel attended the court a few times, including the 2nd February 2021, when PW1 testified, they did not present any witness in the defence and their defence was marked closed, on 10th July 2025. The counsel for the 4th defendant closed their defence on 10th July 2025 without calling any witness.

8. The learned counsel for the plaintiffs and 4th defendant filed their submissions dated the 3rd October 2025 and 15th October 2025 respectively, which the court has considered.

9. The issues arising from the main suit and counterclaim for the court's determinations are as follows:

a. Whether the transfer of the suit property to, and registration in the names of the 1st to 3rd defendants was fraudulently done, and if so, whether the 4th defendant was involved in the fraud.

b. Who pays the costs?

10. The court has carefully considered the pleadings by the parties, oral and documentary evidence tendered by PW1 and PW2, submissions by the learned counsel for plaintiffs and 4th defendant, superior court decisions cited thereon, and come to the following determinations:

a. From the evidence tendered, especially the copy of certificate of title produced as exhibit, plot number 438 (Original No. 233/3) Section 1/MN, the suit property, was registered in the names of Nathan Cornelious Douglas, Joseph Christopher Douglas, Esther Douglas, Maria Douglas, Violet Douglas and Elizabeth Douglas as tenants

in common in equal shares under entry 3 of 19th March 1947. Indeed the certificate of postal search confirmed the six named persons above were the registered owners of the said property as of 2nd September 2009.

- b. The plaintiffs herein have testified that they are siblings and children of Elizabeth Douglas, one of the six registered proprietors of the suit who died on the 25th April 1999. They have produced a copy of the certificate of death No. 324479 issued on 22nd September 2009 confirming that Elizabeth Mitchel died on 25th April 1999, aged 83 years. They have also produced a copy of Grant of letters of Administration intestate, issued on 8th March 2012, in Mombasa HC Succession Cause No. 36 of 2011, indicating that Emmanuel Christopher Chengwimbwe and Florence Mitchell Chimwene were administrators of the estate of the late Elizabeth Mitchel also known as Elizabeth Mitchell Anderson and Elizabeth Christian Douglas, deceased. The facts contained in the above referred to certificate of title, certificate of postal search, certificate of death and grant have not been disputed by any of the defendants, and the court therefore finds that

the plaintiffs, as administrators of the estate of the said deceased, who was one of the six registered proprietors of the suit property are with *locus standi*/capacity to sue and sustain this suit.

- c. The plaintiffs' pleadings and evidence that their mother and the other registered co-owners of the suit property had died before the suit property was transferred to the names of the 1st to 3rd defendants through the transfer document dated 22nd September 2011, has not been disputed or challenged. Indeed their mother having died on the 25th April 1999 as confirmed from the certificate of death referred to herein above could not have participated and or authorised the disposition of the suit property that occurred over twelve (12) years after her death. The fact that there was no grant issued in respect of her estate until Grant of letters of Administration intestate, issued on 8th March 2012, in Mombasa HC Succession Cause No. 36 of 2011, to the plaintiffs means that no other person(s) had legal authority to transfer her share of the suit property as of 22nd September 2009 and or 22nd September 2011.

d. The 1st to 3rd defendants did not call any evidence to defend the source of their title to the suit property, while knowing very well that it was under challenge in this suit. While *Article 40* of the Constitution protects the right to property, *sub-article (6)* thereof contains a qualification to that right by stating that it does not extend to any property that has been found to have been unlawfully acquired. Likewise, *section 26* of the Land Registration Act chapter 300 of Laws of Kenya, provides that a certificate of title is to be conclusive evidence of proprietorship, but proceeds to provide when it can be challenged to include-

“(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.”

In the case of Munyu Maina versus Hiram Gathiha Maina [2013] eKLR, the Court of Appeal held inter alia that where the registered proprietor's root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and

therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register. In the case of Dina Management Ltd versus County Government of Mombasa & 5 Others [2023] KESC 30 (KLR), the Supreme Court held that “...*the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such title cannot be held as indefeasible.*” It follows therefore, that the failure by the 1st to 3rd defendants to call evidence in support of their pleadings/defence means the averments thereon are mere allegations, which are incapable of amounting to any rebuttal or challenge to the plaintiffs’ pleadings and evidence, that the transfer of the suit property, upon which they obtained registration was not signed by their late mother or administrator of her estate. The transfer document dated 22nd September 2011 indicated the person who transferred the suit property to the 1st to 3rd defendants was Rahab Kina Nchushuya, transferor. The

said transferor was not the registered proprietor of the suit property and could not give what she did not have/own. The transfer was therefore unlawful, illegal and fraudulently procured.

e. Having found that the transfer of the suit property to the 1st to 3rd defendants was unlawful, illegal and fraudulent, it follows that they did not get good title and therefore were incapable of passing on any good title through subsequent subdivisions and transfers. See the case of Macfoy versus United Africa Company Limited [1961] 3 ALL ER 1169, that held that you cannot put something on nothing and expect it to stay there, as it will collapse. The 1st to 3rd defendants title to the suit property and the subdivisions thereof have just collapsed as they were based on nothing.

f. Though the plaintiffs sued the 4th defendant ostensibly for the role that office played in processing the transfer of the suit property, registration and issuance of title thereof in favour of the 1st to 3rd defendants, they have not adduced any evidence that showed their complicity in the illegalities or fraudulent activities leading to the execution

of the transfer document. Even though no evidence was tendered by the 4th defendant to explain its role, the burden of proving the case against that office was all along with the plaintiffs and I find they have failed to discharge that burden. The plaintiffs claim against the 4th and 5th defendants therefore failed. The court does not need to address itself to the 4th defendant's notice of claim against the 1st to 3rd defendants in view of the court's findings in (d) & (e) above.

g. In terms of *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya that provides that costs ordinarily follow the event unless where the court directs otherwise on good cause, the 1st to 3rd defendants will meet the plaintiffs' costs.

11. Having come to the foregoing conclusions, the court finds the plaintiffs have proved their claim against the 1st to 3rd defendants on a balance of probabilities. The court therefore enters judgement for the plaintiffs against the 1st to 3rd defendants and orders as follows:

a. That the registration of 1st, 2nd and 3rd defendants as proprietors of Plot No. 438[Original 233/3]1/MN, the suit

property, be and is hereby cancelled, and ownership of the said land reverted to status registered on 19th March 1947 under entry 3.

- b. The 1st, 2nd and 3rd defendants whether by themselves, servants and/or their agents, are hereby permanently restrained from disposing of, selling and/or dealing with the subject property, otherwise than by reverting it back as ordered in (a) above.*
- c. The 1st to 3rd defendants to meet the plaintiffs' costs.*
- d. The plaintiffs' claim against the 4th & 5th defendants is dismissed with no orders as to costs.*

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

Kibunja, J.

MOMBASA.

S. M.

ELC

IN THE PRESENCE OF:

PLAINTIFFS : Mr. Mgupu

DEFENDANTS : Mr Kemei for 4th & 5th Defendant

KALEKYE-COURT ASSISTANT.

Kibunja, J.
MOMBASA.

S. M.
ELC

Original