



Shah (Suing in his Own Capacity and as the Administrator Ad Litem of the Estate of the Late Zaverchand Nangpar Maru akà Zaverchand Nangpar Shah) v Kamau & 2 others (Environment & Land Case 198 of 2016) [2024] KEELC 307 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2016**

**NA MATHEKA, J
JANUARY 31, 2024**

BETWEEN

GULABCHAND AMRATLAL SHAH (SUING IN HIS OWN CAPACITY AND AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE ZAVERCHAND NANGPAR MARU AKÀ ZAVERCHAND NANGPAR SHAH) PLAINTIFF

AND

**SAMWEL MWATHA KAMAU 1ST DEFENDANT
REHAN RIAZ MALIK 2ND DEFENDANT
LAND REGISTRAR MOMBASA COUNTY 3RD DEFENDANT**

JUDGMENT

1. The Plaintiff is the holder of a Limited Grant of Letters of Administration ad litem issued by the High Court of Mombasa in Probate and Administration Cause Number 78 of 2016 being in the matter of the Estate of Zaverchand Nangpar Maru also known as Zaverchand Nangpar Shah for the purposes of filing a civil suit thereby entitling the Plaintiff to bring this on his own behalf and on behalf of the estate of the Deceased. At all material times to this suit, the Plaintiff and the Deceased are and were registered as leasehold owners as tenants in common in equal shares of all that parcel of land situate in Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal Two Nought Three Two (0.2032) hectares or thereabouts and being Subdivision Number 5450 (original number 5217/4) Section I Mainland North. The Certificate was misplaced by the Plaintiff and a provisional Certificate of Title ("the Provisional Certificate") was procured and issued on the 10th of July 2009 by the then Registrar of Titles in lieu of the lost Certificate pursuant to the publication of the Gazette Notice Number 3525 dated 9th April 2009.



2. In or about December 2015, the Plaintiff visited the Mombasa County Government offices, rates department located at Treasury Square, Mombasa to pay the rates in respect of the Suit Property for the year 2016. The attendant at the rates department printed out the rates statement which indicated the name of the 1st Defendant as the registered owner of the Suit Property. Upon making enquiries at the Lands Registry, Mombasa the Plaintiff discovered that the 1st Defendant had fraudulently caused to be registered a Transfer of the Suit Property at the Lands Registry dated 24th January 2014 purporting to be a transfer of the leasehold interest in the Suit Property in favour from the Plaintiff and the Deceased. A further Transfer in respect of the Suit Property dated 2nd March 2015 had been registered as entry number 4 in the register at the Land Titles Registry in favour of the 2nd Defendant.
3. The Plaintiff has never had any dealings, contractual or otherwise with the 1st Defendant nor has the Plaintiff ever executed any transfer in favour of the 1st Defendant in respect of the Suit Property. The Deceased had never approached the Plaintiff to request his consent to any dealing, contractual or otherwise with the 1st Defendant nor has the Plaintiff ever executed any consent to any transfer in favour of the 1st Defendant in respect of the Suit Property. The photographs and signatures of the persons posing as the Deceased and the Plaintiff on the forged transfer are photographs and signatures of persons unknown to the Plaintiff. The original Provisional Certificate of Title since its issuance has been and is in the possession of the Plaintiff.
4. The 1st Defendant states that the Plaintiff sold the suit property to the 1st Defendant and subsequently effected a transfer in his favour. The 1st Defendant states that following the Transfer of the suit property in his name the rates statement did reflect him as the registered owner thereof. The 2nd Defendant admits to having executed and causing to be registered in his favor a Transfer executed by the 2nd Defendant on 2nd March, 2015 and registered in the Lands Registry, Coast Registry on 4th March, 2015 over all that parcel of land situate in Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal Two Nought Three Two (0.2032) of a hectare or thereabouts and being Subdivision Number 5450(Original Number 5217/4) Section 1 Malindi North C.R 20020/1. The 2nd Defendant was never a party to any dealings, contracts or otherwise between the Plaintiff, deceased and 1st Defendant and/or never executed the alleged forged transfer dated 22nd January, 2014 between the aforementioned parties.
5. The 2nd Defendant avers that by a Transfer dated 2nd March 2015 the 1st Defendant transferred to the 2nd Defendant the leasehold property known as all that parcel of land situate in Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal Two Nought Three Two (0.2032) of a hectare or thereabouts and being Subdivision Number 5450(Original Number 5217/4) Section I Malindi North C.R 20020/1 and registered at the Land Titles Registry (Coast Registry) under C.R. 20020/4 for valuable consideration paid by the 2nd Defendant to the 1st Defendant. The Transfer was expressed to be made with full title guarantee. The 2nd Defendant exercised all due diligence reasonably required before purchasing the suit property from the 1st Defendant.
6. The 3rd Defendant denies all the particulars of fraud as indicated in the Plaintiff. That according to the records held at the Lands office, Mombasa; The parcel of Land known as sub division 5450 (suit property herein) was first registered in the names of Zaverchand Naghpar Shah and Gulabchand Amratlal Shah on 16th December, 1988 pursuant to a Transfer registered as Cr. 18480/5 and was given Title Number CR, 20020. That on 10th July, 2009 a Provisional Certificate was issued vide Kenyan Gazette Notice 3525 of 9th April, 2009. On 24th July, 2014 a Transfer dated 24th January 2004 Transferring the Parcel from Zaverchand Naghpar Shah and Gulabchand Amratlal Shah to



Samuel Mwatha Kamau for Kshs. 10, 000,000/= was registered. On 4th March, 2014, a Transfer dated 2nd March, 2015 transferring the property from Samuel Mwatha Kamau to Rehan Riaz Malik was registered.

7. This court has considered the evidence and the submissions therein. The plaintiff is the administrator ad litem who came into the matter sometime in 2019 and he took over from the late Mr. Gulabchand Amratlal Shah who used to be the registered proprietor together with the late Mr. Zaverchand Nangpar Shah. Mr. Gulabchand discovered that the suit property had changed hands and was being owned by the 2nd defendant who bought it from the 1st defendant sometime in March 2015. Upon discovering the 2nd defendant was the registered owner of the suit property, Mr. Gulabchand filed this suit seeking several prayers.
8. PW1 the plaintiff testified that she is the daughter of Mr. Gulabchand and that Mr. Zaverchand is her uncle. She explained how she and her late father discovered sometime in 2016 that the land rates statement was in the name of the 1st defendant. They also did a search and discovered it was registered in the name of the 2nd defendant. She denied that her late father sold the suit property and even alleged that the transfer dated 24th January 2014 was a forgery as the photo in the transfer was not his late father and her uncle lived in the United Kingdom. She testified that she is in possession of the suit property. She concluded by saying that Avedi Advocate did not receive any money for the sale of the suit property and had denied that any transfer happened.
9. DW1, the 2nd defendant testified that he bought the suit property from the 1st defendant sometime in 2015 and he did his due diligence of search and he believed in good faith that the suit property belonged to the 1st defendant. He stated that he was an innocent purchaser for value without notice and he had bought the suit property for Kshs 25 million. He described the 1st defendant as a former client who made him believe he was a real estate agent and he trusted the 1st defendant. He alleged that he might have been defrauded because of this suit but has never filed any claim against the 1st defendant. He also explained that he never took possession because of the instant suit. He pleaded a counterclaim with no particulars except for the dismissal of the plaintiff's case. The 1st defendant never testified in court.
10. It is not disputed the 2nd defendant is the registered owner of the suit property. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the [Land Registration Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”



11. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
12. This court in considering this matter referred to the case of *Elijab Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows;

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

13. Having read and understood the pleadings, testimony and documents filed the main issue is whether there was fraudulent transfer from the late Gulabchand and Zaverchand to the 1st defendant and consequently from the 1st defendant to the 2nd defendant. I am guided by the Court of Appeal in case of *Kuria Kiarie & 2 Others vs 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) states 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.”

Section 108 of the *Evidence Act* Cap 80 states 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.
14. The burden of proving fraud lies on the plaintiff. PW1 testified that the passport photos in the alleged transfer were not of the 1st and 2nd deceased persons neither were the signatures. That the identification of the 2nd Deceased person was fictitious as he was not a Kenyan citizen and was never in Kenya at the material time. The said transfer appeared to have been drawn by Messrs. Oscar Avedi & Company Advocates in favour of the 1st defendant but the said Mr. Oscar Avedi by letters dated 11th and 28th November 2016 confirmed that he never drew up the said transfer. I find that the plaintiff has established that there was fraud in the transfer of the suit property to the 1st defendant whose defence was a mere denial.



15. The 1st defendant's defence dated 10th October 2016 avers that the late Gulabchand sold the suit property and subsequently effected the transfer. However, the fact that he did not testify in the hearing, the averments in the defence remain mere statements.

16. Section 80 of the [Land Registration Act](#) provides as follows;

“ 80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the 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 any act, neglect or default.”

17. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the plaintiff has proved that his property was fraudulently transferred to the 1st defendant and later to the 2nd defendant, however the claim for general damages have not been proved and the same will not be awarded. I find the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A permanent injunction restraining the 2nd Defendant, whether by himself, or by his employees, officers, servants, contractors, agents or licensees (or any one of them) or otherwise howsoever, from entering, occupying, erecting upon or in any way transferring, charging, leasing or otherwise alienating or dealing with or disposing of the whole or any part of the Suit Property, Subdivision Number 5450 (Original Number 5217/4) Section I Mainland North.
2. The 3rd defendant to rectify the register by cancelling the registration of the Transfer dated 22nd January 2014 (purportedly registered as having been dated 24th January 2014) on 24th January 2014 favour of the 1st Defendant; and to rectify the register by cancelling the registration of the Transfer dated 2nd March 2014 registered in favour of the Second Defendant.
3. The 3rd defendant is to restore the names of the Plaintiff and the Deceased as lawfully registered leasehold proprietors as tenants in common in equal shares of the Suit Property being Subdivision Number 5450 (original number 5217/4) Section I Mainland North.
4. Costs of this suit to be borne by the 1st and 2nd Defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 31ST DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

