



REPUBLIC OF KENYA



**Sabala & 2 others v Isutsa & 3 others (Environment & Land Case E003 of 2022) [2024] KEELC 275 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 275 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE E003 OF 2022**

**DO OHUNGO, J  
JANUARY 30, 2024**

**BETWEEN**

**IRENE SHIPICHIRA SABALA ..... 1<sup>ST</sup> PLAINTIFF  
ALLAN SHITOLWA ..... 2<sup>ND</sup> PLAINTIFF  
MELEGY TENDWA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**EMMY WANGILA ISUTSA ..... 1<sup>ST</sup> DEFENDANT  
ROSE CHIMWA ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR, KAKAMEGA ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs moved the court through plaint dated 8<sup>th</sup> February 2022 wherein they averred that they were joint registered proprietor of the parcel of land known as Butsotso/Shikoti/2461 together Truphena Afandi Stephen (deceased) who was their maternal grandmother. That the said parcel was closed in the year 2020 upon subdivision into Butsotso/Shikoti/20470 and Butsotso/Shikoti/20471 and that at the time of the subdivision, the plaintiffs sought to place restrictions against the two subdivisions owing to imminent risk of grabbing. They further averred that the third defendant did not register the restriction against Butsotso/Shikoti/20471 and that the first and second defendants became aware of the situation and fraudulently acquired title to Butsotso/Shikoti/20471 in November 2021, evicted tenants, erected fences and commenced construction on the parcel. They also averred that the first and second defendants were illegally collecting rent from tenants on Butsotso/Shikoti/20470.
2. The plaintiffs therefore prayed for judgment against the defendants for:



- a. A declaration that the Defendants actions are illegal and unlawful and amount to trespass to property.
  - b. A permanent order cancelling the title deed issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in November, 2021.
  - c. A permanent injunction restraining the Defendants from selling, interfering, entering, subdividing, transferring, collecting rents, constructing, erecting fences or in any other way dealing with the property known Butsotso/Shikoti/20470 and Butsotso/Shikoti/20471.
  - d. General damages.
  - e. Costs of this suit.
  - f. Interest on (d) and (e) as at the date of filing this suit; and
  - g. Such further or other relief as this Honorable Court may deem fit and just to grant.
3. The first and second defendants reacted to the plaint by filing a statement of defence in which they averred that first defendant is the registered proprietor of land parcel number Butsotso/Shikoti/20471 and that she acquired it after subdivision of land parcel number Butsotso/Shikoti/2461 by Truphena Afandi Stephen (deceased) during her lifetime. They denied the plaintiffs' other averments and urged the court to dismiss the case against them with costs.
  4. The third and fourth defendants also filed a statement of defence in which they denied the plaintiffs and added that a restriction could not be registered on Butsotso/Shikoti/20471 because the said parcel had been sold by the registered proprietor during her lifetime. They therefore urged the court to dismiss the case against them with costs.
  5. At the hearing, the first plaintiff testified as PW1 and adopted her witness statement dated 8<sup>th</sup> February 2022 and reiterated the averments in the plaint. She also produced as exhibits the documents listed as numbers 1 to 5 in the plaintiffs' list of documents dated 8<sup>th</sup> February 2022 and added that as plaintiffs, they are concerned as to how and by whom parcel Butsotso/Shikoti/2461 was subdivided since they did not give consent for the subdivision, did not participate in any sale agreement, and did not sign any transfer form. She further stated that besides lodging the restriction, she made a report to the police through OB No 29/21/12/2020 concerning illegal subdivision and forgery of documents and that investigations were ongoing as of the date of her testimony but with no one charged in court.
  6. The first plaintiff went on to testify that parcel Butsotso/Shikoti/2461 belonged to her maternal great grandmother and that it was inherited by her grandmother Truphena Afandi Stephen who later included the plaintiffs as joint registered owners. That prior to her death, Truphena was in custody of the original of the title document for parcel Butsotso/Shikoti/2461. She added that she did not know where the title document went after Truphena's death or whether Truphena presented it to the Land Registrar.
  7. The plaintiff's case was then closed.
  8. Next, the first defendant opened defence case by testifying as DW1. She adopted her witness statement dated 12<sup>th</sup> April 2022 and also produced the documents numbered 1 to 5 in the first and second defendants' list of documents dated 14<sup>th</sup> April 2022, as exhibits. She conceded that the plaintiffs were joint registered proprietor of the parcel of land known as Butsotso/Shikoti/2461 together with Truphena Afandi Stephen and that the said parcel was subdivided into Butsotso/Shikoti/20470 and Butsotso/Shikoti/20471. She further stated that she is the registered proprietor of Butsotso/



- Shikoti/20471 and that she purchased the parcel from Truphena Afandi Stephen through a sale agreement dated 28<sup>th</sup> May 2020. That at the time of the sale, Truphena was the sole registered proprietor of Butso/so/Shikoti/20471 and that all procedures including attending Land Control Board and signing of transfer form were followed. She also stated that she subsequently sold the parcel to Brian Ambani Chimwa who is the second defendant's son through a sale agreement dated 7<sup>th</sup> September 2021 and that he left the parcel under the management of the second defendant. That both her and Brian Ambani Chimwa are therefore innocent purchasers for value and that sale of Butso/so/Shikoti/20471 to her by Truphena was without the plaintiffs' knowledge. She also stated that she attended Land Control Board with Truphena who also signed the transfer.
9. Rose Akinyi Chimwa testified as DW2 and adopted her witness statement dated 14<sup>th</sup> April 2022. She stated that her son Brian purchased a 0.07 hectare portion of parcel number Butso/so/Shikoti/20471 on 7<sup>th</sup> September 2021 at a consideration of KShs 1,600,000.
  10. Lastly, David Masila Kimauro, the Deputy County Land Registrar, Kakamega County testified as DW3. He stated that according to his records, the registered proprietors of parcel number Butso/so/Shikoti/20470 are Truphena and the plaintiffs. He produced a copy of the transfer form that was used to transfer parcel number Butso/so/Shikoti/20471 from Truphena and the plaintiffs to the first defendant and stated the form was signed by Truphena and not the plaintiffs. He conceded that the proper procedure is that all registered proprietors must sign a transfer form.
  11. The first and second defendants' case was thus closed. The third and fourth defendants' case was also closed, without offering any evidence. Parties thereafter filed and exchanged written submissions.
  12. I have carefully considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether fraud and illegality have been established and whether the reliefs sought should issue.
  13. There is no dispute that the first defendant is the registered proprietor of land parcel number Butso/so/Shikoti/20471. By virtue of her registration, the first defendant is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept the first defendant's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The upshot of the provisos is that the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
  14. A painstaking reading of the plaint and particularly paragraphs 13 to 16 thereof reveals that the plaintiffs' grouse is that the transfer to the first defendant and the first defendant's ensuing title were tainted by fraud and illegality. I say painstaking deliberately: the plaint could have benefitted from better drafting.
  15. Pursuant to Order 2 rule 10 of the *Civil Procedure Rules 2010*, it is mandatory that particulars of fraud be specifically pleaded. To the extent that no particulars were pleaded, the plaintiffs did not comply with those provisions. Having chosen to attack the first defendant's title on allegations of fraud, the plaintiffs were bound to not only prove fraud but to additionally show that the first defendant was party to the fraud.
  16. Having said the foregoing, it is important to reiterate that fraud is a serious allegation and the party alleging it must, beyond pleading and particularising it, strictly prove it to a standard higher than that of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon*



*Parkoyiet Mokare & 4 others* [2017] eKLR. Further, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.

17. I agree with the defendants that the plaintiffs' allegation of fraud is generalised and feeble. No particulars of fraud were pleaded, and no specific evidence of fraud was led. In sum, fraud has not been established.
18. The other question is whether illegality has been established. The plaintiffs stated that they neither signed any sale agreement nor a transfer form to effect transfer of land parcel number Butso/ Shikoti/20471 to the first defendant. On the other hand, the first defendant contended that she purchased the parcel solely from Truphena Afandi Stephen through a sale agreement dated 28<sup>th</sup> May 2020. A perusal of the certificate of search that the plaintiffs produced as well as the evidence of the land registrar all confirm that as of that date, the registered proprietors of parcel number Butso/ Shikoti/20471 were Truphena and the plaintiffs. A perusal of the sale agreement that first defendant produced shows that it was between Truphena and the first defendant, to the exclusion of the plaintiffs. No valid reason was offered as to why the plaintiffs' signatures and participation were not obtained.
19. Further, the copy of transfer form that the land registrar produced shows that although the transferees were indicated therein as Truphena and the plaintiffs, only Truphena signed it. The land registrar, who was the first and second defendants' witness, conceded as much and added that the proper procedure is that all registered proprietors must sign a transfer form. That is in line with Sections 44 and 91 of the *Land Registration Act*. If the third defendant had scrupulously discharged his mandate, the said transfer would not have been registered.
20. Pursuant to Section 36 (1) of the *Land Registration Act*, no interest in land shall be disposed of or dealt with except in accordance with the Act, and any attempt to dispose of any interest in land otherwise than in accordance with the Act shall not transfer, vary, or affect any right or interest in that land. It follows therefore that the transfer form herein did not transfer any interest to the first defendant since only one out of the four co-tenants signed it. I am satisfied that the plaintiffs demonstrated that there was illegality in the process through which the first defendant became the registered proprietor of parcel number Butso/ Shikoti/20471. Consequently, a ground for nullification of the first defendant's title has been established.
21. In the result, I enter judgment against the defendants jointly and severally and make the following orders:
  - a. The first defendant's title in respect of the parcel of land known as Butso/ Shikoti/20471 is hereby cancelled.
  - b. A permanent injunction is hereby granted restraining the first and second defendants from selling, interfering with, entering, subdividing, transferring, collecting rents, constructing, erecting fences or in any other way dealing with the parcels of land known as Butso/ Shikoti/20470 and Butso/ Shikoti/20471.
  - c. The plaintiffs shall have costs of the suit and interest thereon. The said costs shall be paid by the first and third defendants.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF JANUARY 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:



Mr Masiga holding brief for Mr Wekesa for the Plaintiffs

Mr Balusi holding brief for Mr Kombwayo for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr Juma for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Court Assistant: E. Juma

