



**Kiora (Administrator to the Estate of Joseph Kitogho Tumuna) v Adan & 4 others (Environment & Land Case 108 of 2021) [2024] KEELC 116 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 116 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 108 OF 2021**

**NA MATHEKA, J  
JANUARY 25, 2024**

**BETWEEN**

**PERIS MJOMBA KIORA (ADMINISTRATOR TO THE ESTATE OF JOSEPH KITOGHO TUMUNA) ..... PLAINTIFF**

**AND**

**YUSUF DAUD ADAN ..... 1<sup>ST</sup> DEFENDANT  
MESHAK KIMUTAI KETER ..... 2<sup>ND</sup> DEFENDANT  
CHEPCHUMA BETT ..... 3<sup>RD</sup> DEFENDANT  
LANDS REGISTRY-MOMBASA ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL-MOMBASA ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that she is the widow to Joseph Kitogho Tumuna now deceased and who was the real owner of the suit land C.R NO.45369 being Sub Division No.16313 (Original Number 65591/1) measuring approximately 0.1073 Hectares and C.R No.45370 being Sub Division No.16314 (Original Number 6559/2) measuring approximately 0.1073 Hectares. The Plaintiff avers that her late husband was the real owner of the property and a Certificate of Title was issued to him before his demise in the year 2005. The Plaintiff further avers that together with her family are the beneficiary owners of the suit land situated at Nyali and have all along been desirous to complete succession process in court vide HCC 419/2013 in order to claim their inheritance. The Plaintiffs avers that after the demise of her husband, together with her family they went to Mombasa Lands Registry the 4<sup>th</sup> Defendant to find out on the information of the suit property since they wanted to proceed with the succession process.
2. The Plaintiff avers that they were shocked to learn that the land they have called home for more than 8 years on as C.R NO.45369 being Sub Division No.16313 (Original Number 65591/1) measuring



approximately 0.1073 Hectares and C.R NO.45370 being Sub Division No.16314 (Original Number 6559/2) measuring approximately 0.1073 Hectares was fraudulently transferred to Yusuf Daud Adan, Meshak Kimutai Keter and Chepchumba Bett who are complete strangers to the estate. The Plaintiff avers that the said property known as C.R No.45369 being Sub Division NO.16313 (Original Number 65591/1) measuring approximately 0.1073 Hectares and C.R No.45370 being Sub Division No.16314 (Original Number 6559/2) measuring approximately 0.1073 Hectares has belonged to her family for decades and for many generations and have occupied the same peacefully without any interruptions. The Plaintiff avers that up to date, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have neglected/ignored/refused to transferred back the property to its rightful owners. The Plaintiff further avers the said Yusuf Daud Adan, Meshak Kimutai Keter and Chepchumba Bett are stranger to her and have never resided in the disputed Plot known as C.R No.45369 being Sub Division No.16313 (Original Number 65591/1) measuring approximately 0.1073 Hectares and C.R No.45370 being Sub Division No.16314 (Original Number 6559/2) measuring approximately 0.1073 Hectares. The Plaintiff avers that unless this Court grants an injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the Plaintiff stands to suffer irreparable loss and damages.

3. This court has carefully considered the evidence. In this matter, the plaintiff is the widow to the late Joseph Kitogho Timuna and also the administrator to his estate through a certificate of confirmation of grant issued on 22/9/2017 by M. Thande J. She claims that L.R No. 16313 (Original No. 65591/1) and 16314 (Original No. 6559/2) hereafter referred to as the suit properties belonged to her late husband. Somehow after the death of her late husband the properties were transferred to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and she contends that this was done through fraud. In her plaint, the plaintiff is seeking the following:
  - a. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants by themselves, agents, employees, servants and/or other persons action on her behalf from developing alienation, subdividing, transferring, selling and /or dealing with suit parcel of land in any manner whatsoever.
  - b. A declaration that the Plaintiff is the legal/beneficial owner of plot no. CR No. 45369 Being Subdivision No 16313 (Original Number 65591/1) Measuring Approximately 0.1073 Hectares And CR No. 45370 Being Subdivision No. 16314 (Original Number 6559/2) Measuring Approximately 0.1073 Hectares.
  - c. That the register for CR No. 45369 Being Subdivision No 16313 (Original Number 65591/1) Measuring Approximately 0.1073 Hectares And CR No. 45370 Being Subdivision No. 16314 (Original Number 6559/2) Measuring Approximately 0.1073 Hectares issued be amended to reflect the Plaintiff Peris Mjomba Kiora as the registered owner of the plot and title deed so issued.
  - d. That the previous title deed issued to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants be revoked without its production.
  - e. An order to the Lands Registrar Mombasa without gazettment do proceed and issued a title document for the parcel of land known as CR No. 45369 Being Subdivision No 16313 (Original Number 65591/1) Measuring Approximately 0.1073 Hectares And CR No. 45370 Being Subdivision No. 16314 (Original Number 6559/2) situated in Mainland North of Mombasa Municipality in the Mombasa County containing by measurement Nought decimal point one Nought Seven Three (0.1073) in the names of the Applicant Peris Mjomba Kiora (administrator to the estate of Joseph Kitogho Tumuna)



- f. OCS Mombasa to effect
  - g. Cost and interest at court rates
  - h. Any other relief that the court deem fit to grant.
4. Immediately thereafter, the plaintiff filed an application dated 10<sup>th</sup> June 2021 seeking temporary injunctive reliefs followed by a second application dated 5<sup>th</sup> October 2021 seeking service of pleadings and the said first application through a newspaper of daily nation-wide circulation which the court granted and the plaintiff advertised on the 'Saturday Nation' of 23<sup>rd</sup> April 2022. An affidavit of service filed on 9<sup>th</sup> May 2022 was filed to that effect. Despite the above said service, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendant failed to enter appearance which prompted the plaintiff to file a request for judgment under order 10 rule 6 of the Civil Procedure Rules on 25<sup>th</sup> August 2022. However, the state on behalf of the 4<sup>th</sup> & 5<sup>th</sup> defendant filed a defence on 7<sup>th</sup> March 2023 and have been actively participating in proceedings from 5<sup>th</sup> December 2023.
  5. During formal proof hearing, PW1, the plaintiff relied on her statement dated June 10, 2021 and the list of documents dated the same. It was her argument that her late husband was the registered proprietor of the suit properties and she has been unable to administer the suit properties subject to the afore said grant because the suit properties were transferred to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant and it was done in a fraudulent manner. No further witness was produced and also no witness was produced for the defendants.
  6. In Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia (2021) eKLR Edward M. Muriithi J. held as follows when it comes to matters of formal proof;

“This Court thus does not find that failure by the Respondent to file a defence amounted to an admission of the claim against him. It only permitted the Court to enter interlocutory judgment against the Respondent with respect to the claim for pecuniary damages as per the provisions of order 10 rule 6 of the Civil Procedure Rules.

Whether or not the entry of the interlocutory judgment against the Respondent absolved the Appellants from the requirement of proving liability.”

7. Emukule J in Samson S. Maitai & another v African Safari Club Ltd & another (2010) eKLR and approved by Havelock J in Rosaline Mary Kabumbu v National Bank of Kenya Ltd (2014) eKLR considered the term formal proof as follows;

“.....In light of the absence of a Defence on the file, it follows logically, that the matter would proceed to formal proof. What therefore is hearing by formal proof? In the case of Samson S. Maitai & Another v African Safari Club Ltd & another [2010] eKLR, Emukule, J observed thus;

“ ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to *Halsbury's Laws of England*, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed



is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

8. Can hearing therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

8. Going by the words of Havelock J. in the above case, the plaintiff in this case has the onus of adducing evidence that satisfies the truth or rather the fraud threshold. In her plaint dated 10<sup>th</sup> June 2021 the particulars of fraud was that she possessed the original title deed and that the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendant changed the names of the owner at the County Government department for rates payment. Fraud has been defined in *Blacks Laws Dictionary* as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further, *Black’s Law Dictionary* Ninth Edition at Page 731 also defines ‘fraud’ as;

“knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

L. Gacheru J. in *Teresia Wangari Mbugua v Jane Njeri Nduati & another* (2020) eKLR held as follows;

“When a person’s ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of Hubert L. *Martin & 2 others v Margaret J. Kamar & 5 others* [2016] eKLR, where the Court held that;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’



In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, the Appeal Court held that;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

9. The appropriate act in use at all material times was the Registration of Titles Act Cap 281 and section 24 stated that a title is conclusive evidence of title unless there is fraud, misinterpretation, or procedure was not followed. PW1 produced PEx1 a certificate of title grant no CR 22174 and L.R No 6559/I/MN measuring decimal two one four five hectares (0.2145 ha) that was issued to the deceased on 1<sup>st</sup> August 1990 for a term of 99 years. It was later transferred on January 15, 2007 to Washington O. Owese and Sarah Atieno Owese. The suit properties were then created on an unknown date and transferred to the 2<sup>nd</sup> & 3<sup>rd</sup> defendant and a company named Delta Connections Limited. The onus of the burden of proving that the titles to the suit properties were acquired legally and procedurally shifted to the defendants.
10. The plaintiff did not produce any documents to show the involvement 1<sup>st</sup> defendant The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were absent to prove their title was valid and I cannot find fault with the 4<sup>th</sup> defendant as there was no evidence produced by the plaintiff to show his/her involvement in the fraud and consequently I dismiss the suit against the 4<sup>th</sup> and 5<sup>th</sup> defendant. A reading of section 36 of the same act provides that during a transfer of title, instead of cancellation of tile, the registrar may endorse on the transfer a memorandum of transfer and issue the said grant to the new transferee. The plaintiff only produced a copy of the title and not the real title. How can I be sure that the plaintiff still holds the real title because the copy produced as PEx1 already has endorsements of transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
11. In *James Muigai Thungu v County Government of Trans-Nzoia & 2 others* (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

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.

Also, further, section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again section 109 of *Act* refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



12. The plaintiff has pleaded fraud however, she has failed to clearly and distinctly prove it. Fraud cannot be inferred from facts pleaded, instead fraud must be distinctly alleged and distinctly proved. The plaintiff has made general allegations of fraud which are insufficient to amount to averments of fraud. She has failed to establish to the court how the defendants acquired the suit premises illegally or even how the registration of the defendants as the registered proprietors was done fraudulently.

13. The Court of Appeal in *Jose Estates Limited v Mutumbu Farm Limited & 2 others* (2019) eKLR held that;

“In *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* (1979) eKLR, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” Emphasis ours.

14. Given the seriousness of the allegations, the onus was on the 1st and 2nd respondents who alleged fraud to provide evidence in court that meets the standard of proof which was underscored by this Court in *Central Bank of Kenya Limited v Trust Bank Limited & 40 others* [1996] eKLR as being beyond that of a balance of probabilities but below beyond reasonable doubt. In that case, the Court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

15. For these reasons I find that the plaintiff has failed to prove her case on a balance of probabilities and it is dismissed with costs to the 4<sup>th</sup> and 5<sup>th</sup> defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

