



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**  
**ELC CASE NO. 601 OF 2017**  
**(Formerly Nairobi ELC 536 of 2015 & ELC No. 725 of 2015)**

**PHILIP SAOINA**  
**ESTHER SAENIK**  
**JONATAN SHANKA MASHULU**  
**RUTH TUPEITA**  
**CECILIA SISIAN**  
**TOMAS RUNKE**  
**SILVIA PILASO (Suing on their own behalf**  
**and as next friend of M N**  
**and E P – minors).....APPLICANTS**

**VERSUS**

**NASSER ABDULHAMID AHMED.....1<sup>ST</sup> RESPONDENT**  
**THE DISTRICT LAND REGISTRAR, KAJIADO.....2<sup>ND</sup> RESPONDENT**  
**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

By an Originating Summons dated the 16<sup>th</sup> June, 2015, the Applicants are seeking for the following orders:

1. THAT it be declared that the property known as KAJIADO/ KITENGELA/ 2696 which is illegally, irregularly, wrongfully and/ or erroneously registered in the name of NASSER ABDULHAMID AHMED; lawfully and indefeasibly belongs exclusively only to the Applicants herein as bona fide beneficiaries which parcel of land devolved to them upon the death of their father and upon successful petitioning for Grant of Letters of Administration vide HC Succession Cause No. 2555 of 2014.
2. THAT the register at the Kajiado Lands Registry be rectified by deleting, expunging, and/ or cancelling the registration of one NASSER ABDULHAMID AHMED as the alleged proprietor of all that parcel of land known as KAJIADO/ KITENGELA/2696 and the resultant Certificate of Title to the said parcel of land in the name of NASSER ABDULHAMID AHMED be cancelled.
3. THAT an inhibition be placed on all that parcel of land known as KAJIADO/ KITENGELA/2696 pending the hearing of this matter.

The 1<sup>st</sup> Respondent NASSER ABDULHAMID AHMED opposed the originating summons and filed a replying affidavit where he deposed that he is the registered proprietor of land parcel number KAJIADO/ KITENGELA/ 2696 hereinafter referred to as the 'suit land'. He confirmed that he purchased the suit land from SIAITA MASHULU RUNKE and ALICE MASHULU ISSA who were the administrators of

the estate of MASHULU ISA RUNKE hereinafter referred to as the 'deceased', who had been the proprietor of the suit land. He claims by a letter dated the 15<sup>th</sup> August, 2008, the vendors who are the mothers to the Applicants' herein, offered to sell to him, and he agreed to purchase the suit land at Kshs. 10 million. Further, that upon signing the Letter of Offer on 15<sup>th</sup> August, 2018, he paid a cash deposit of Kshs. 1,000, 000. He confirms the consent of the Land Control Board dated the 6<sup>th</sup> August, 2008 to transfer the suit land was procured by the Vendors in accordance with the special conditions contained in the Sale Agreement dated the 19<sup>th</sup> August, 2008 which he executed together with them in the presence of Phillip Saoina, Issa Maku and the Applicants' paternal uncle. He states that it is the vendors who transferred the suit land to him and he was thereafter issued with a title deed on 22<sup>nd</sup> September, 2008. He insists since the vendors had been appointed administrators to the deceased estate, they were empowered by virtue of section 79 of the Law of Succession Act to deal with the deceased assets as his personal representatives and hence had capacity to sell the suit land herein. Further, there was no requirement for him to approach the Probate and Administration Court, for any orders since the Certificate of Confirmation for Confirmation of Grant had already been issued and he was neither a beneficiary nor a creditor to the deceased estate. He denies disinheritance of the applicants and insists the transfer of the suit land to him was done within the law and it is the vendors' who owe a fiduciary duty to them. Further, the Applicants should request the vendors' to account for the Kshs. 10 million that he paid as purchase price. He disputes the allegations that he forged the documents to transfer the suit land to himself and insists it is the vendors who signed the transfer documents by thumb printing and the same was duly witnessed by an advocate. He contends that the applicants were well aware he was purchasing the suit land and as a result of their cordial relationship, he has employed Esther Saenik, Jonathan Shanka Mashulu and two of their friends, in his businesses. He reiterates that the instant suit is an attempt by the Applicants' to unjustly enrich themselves, since he has made improvements on the suit land whose value stands at Kshs. 110, 000, 000 as per valuation report by messrs Land Realtors Limited dated the 27<sup>th</sup> May, 2014. He further confirms that vide an order dated the 17<sup>th</sup> July, 2014 in the Nairobi Misc. Civil Application No. 273 of 2014, the Court stayed any further proceedings in respect of the suit property pending the hearing and determination of the matter which is now before court. He states that there is no justifiable ground for an inhibition order to issue against his title and the application herein is an afterthought and is an attempt to rescind the Sale Agreement. He explains that in the Nairobi Misc. Civil Application No. 273 of 2014 he has challenged the Kajiado Land Disputes' Tribunal jurisdiction to make an order to revoke his title over the suit property so that the same can revert to the Vendors' names. He claims that there is a multi – faceted fraudulent scheme by the Applicants including the Vendors to try to dispossess him of his proprietary right over the suit land and they are using the Court to violate his Constitutional right to own suit land.

### **Applicants' Evidence**

PW1 PHILIP SAOINA who is the 1<sup>st</sup> Respondent herein testified that his father Mashulu Isa runke died on 19<sup>th</sup> May, 2004 and vide the Nairobi HCSuc Cause No. 2555 of 2004, his mothers' Siaisa Mashulu Isa and Alice Mashulu were appointed administrators of his estate. The Certificate for Confirmation of Grant was issued on 31<sup>st</sup> July, 2006. It was his testimony that land parcel number Kajiado/ Kitengela/ 2696 (suit land) were entrusted upon their mothers to hold in trust for the deceased children. He contended that the suit land was registered in the 1<sup>st</sup> Respondent's name on 22<sup>nd</sup> September, 2008, after his father's death, yet as at 15<sup>th</sup> August, 2008, the suit land was still registered in their father's name. He highlighted the documents that conferred ownership of the suit land to the 1<sup>st</sup> Respondent and explained that the title deed, Application for Consent of Land Control Board; Consent of the Land Control Board; and Transfer Form were purportedly executed by their father, and yet the transaction in respect of the suit land was done when he was deceased. He stated that the Sale Agreement between the vendors and the 1<sup>st</sup> Respondent was not done in accordance with the Certificate for Confirmation of Grant as beneficiaries did not transfer the suit land and neither did they know what was going on. It was his evidence that his two mothers were illiterate and did not know what was going on but only signed where they were directed to. He insisted their mothers were not owners of the suit land but only holding the same in trust for them. Further, that in 2008, most of the beneficiaries as per the Certificate for Confirmation of Grant were below 18 years. He averred that the documents used for transfer of the suit land were a forgery.

In cross-examination he stated that the Certificate for confirmation of Grant was issued in 2006 but the title deed to the 1<sup>st</sup> Respondent was issued in 2008. It was his testimony that the 1<sup>st</sup> Respondent and brokers applied for the reissuance of a fresh title deed to the suit land and they were not privy to it. He denied being a party to the agreement dated the 19<sup>th</sup> August, 2008 and that his mothers' entered into the same to settle some liabilities that had accrued to the father's estate and did not know what they were doing. He was aware his mothers' received some money as purchase price but did not know the full amount as he was away. He explained that his mother told him, they never appeared before the Land Control Board and have not refunded any money to the 1<sup>st</sup> Respondent. He said he first met the 1<sup>st</sup> Respondent in 2010 and that he had granted consent to Jonathan to swear an affidavit on their behalf in respect of the Nairobi Miscellaneous Civil Application No. 273 of 2014. He further confirmed that his father obtained a loan from a third party and used the title of the suit land as guarantee. Further, that his mothers' sold the suit land to the 1<sup>st</sup> Respondent for Kshs. 10 million and it was their lawyer who prepared a Sale Agreement. He denied being present when the transaction was being completed but on being shown a photograph of parties who were presented during the transaction, he confirmed that his two mothers, and Benson Mako were presented while the other person in the photograph resembled him. He insisted his mothers were only given a maximum of Kshs. 4 million yet he was not present when the transaction was completed. He did not know who gave the 1<sup>st</sup> Respondent the original title deed and it was his contention that the transaction was done fraudulently because as per the documents attached to wit Consent of Land Control Board; it indicated it was his late father who transferred the land to the 1<sup>st</sup> Respondent, yet this was not possible as he was dead.

In reexamination he clarified that they were to sell 50 acres from land parcel number 14074 to offset some debts that had accrued to the deceased estate and not the suit land. He reiterated that as beneficiaries, they were not in agreement that the suit land, which was held in trust for them, was to be sold.

Applicants' thereafter closed their case.

### **1<sup>st</sup> Respondent's evidence.**

DW1 NASSER ABDULHAMED AHMED confirmed he is the registered proprietor of the suit land which he purchased from SAITA MASHULU ISA and ALICE MASHULU ISA who were the administrators of the estate of MASHULU ISA RUNKE. He testified that before he purchased the suit land in 2008, he was brought the Letter of Offer by Phillip Saoina, Paul Nkina, Saita Mashulu Isa and Alice Mashulu Isa. He was not aware the vendors were holding property in trust for the Applicants. He confirmed entering into a Sale Agreement

dated the 19<sup>th</sup> August, 2008 and paid a total of Kshs. 10 million as purchase price. Further that it is the vendors' advocates who prepared the Sale Agreement. He took a photograph of Benson Mako Isa, Alice Mashulu Isa, Saita Mashulu Isa, Paul Nkina, Philip Saoina, another male member of the family including an uncle. It was his testimony that the 1<sup>st</sup> Applicant was present in his office during the transaction and none of the people present raised any objection. He confirmed signing the transfer forms and returning them to the vendors' who later brought him his title deed. He contended that he has made improvements on the suit land where he keeps dairy cows, camels, chicken, goats etc and grows onions. Further, that the value of the suit land has appreciated in excess of Kshs. 250 million.

In cross-examination, he clarified that although he was given the letter of offer dated the 15<sup>th</sup> August, 2008, he had been in negotiation with the vendors. Further, the Letter of offer was prepared by messrs M. Ndwigwa & Company Advocates upon instructions from the vendors. He paid Kshs. 1, 000, 000 upon signing the Letter of Offer. He insisted he never went to the Land Control Board but it is the Vendors' who obtained the Consent from the Land Control Board for transfer, and after finalizing the payment of the purchase price, he returned the completion documents including his passport photo to the 1<sup>st</sup> Applicant including the vendors' for purposes of registration. He confirmed that the vendors had informed him that they were administrators of the deceased estate and shared a copy of the Certificate for Confirmation of Grant. Further, that while signing the transfer form, the vendors showed him the original title deed to the suit land.

In re-examination it was his testimony that consent to transfer suit land was obtained by the vendors and the transfer was from the vendors as administrators to him.

## 2<sup>nd</sup> Respondent's evidence

DW2 Mr. Nyandoro who was the Principal Land Registrar Kajiado confirmed that as per his records, the suit land was owned by the 1<sup>st</sup> Respondent. He explained that the property was transferred from Mashulu Isa Runke to the 1<sup>st</sup> Respondent. He produced the presentation register under Daybook entry No. 806 dated 22<sup>nd</sup> September, 2008 which confirmed the transaction over the suit land. He further stated that the title to the suit land was surrendered upon transfer of the suit land to the 1<sup>st</sup> Respondent. He insisted that entry to the presentation book could not have been made without the transfer being presented to the registry but he did not find the transfer documents. He confirmed that the transfer over the suit property was presented and registered.

In cross examination, he confirmed he could not trace the transfer documents and that where a transfer was effected in regard to a deceased person, the same was through transmission by way of forms RL. 7 and RL. 19. He explained that there was no transfer by way of transmission in respect of the suit land. He stated that from the entries in the Green Card and Presentation Register, he confirmed the suit land was registered in the name of the 1<sup>st</sup> Respondent.

In reexamination he stated that the family of the deceased should have produced a Death Certificate for the suit land to be encumbered, but this was not done. Further, that transfer of the suit land was granted to the 1<sup>st</sup> Respondent, as previously there had been no prior transfer by transmission.

The Applicants and the Respondents filed their submissions that I have considered.

## Analysis and Determination

Upon perusal of the Originating Summons including the supporting and replying affidavits including the exhibits produced and submissions filed as well as hearing testimonies of the witnesses, the following are the issues for determination:

- Whether the Sale Agreement between the 1<sup>st</sup> Respondent and SIAITA MASHULU ISA and ALICE MASHULU ISSA in respect of the Suit land is valid.
- Whether the 1<sup>st</sup> Respondent got fraudulently registered as the proprietor of the suit land.
- Whether the Applicants who are beneficiaries of the estate of MASHULU RUNKE who was the proprietor of the suit land were aware of the transaction and have a remedy against SIAITA MASHULU ISA and ALICE MASHULU ISA.
- Whether the 1<sup>st</sup> Respondent's title to land should be cancelled and register rectified
- Who should bear the costs of the suit?

As to whether the Sale Agreement between the 1<sup>st</sup> Respondent and SIAITA RUNKE and ALICE RUNKE in respect of the Suit land is valid. At the preamble of the Sale Agreement it states as follows: ' **The vendors are the lawful and legal administrators of the estate of the late Mashulu Isa Runke (Deceased) (vide A Certificate of Confirmation of Grant issued by the High Court of Kenya in Succession cause No. 2555 of 2004 dated the 31<sup>st</sup> July, 2006) and he being the registered owner of ALL THAT piece or parcel of land known as KAJIADO/ KITENGELA/ 2696 ( hereinafter referred to as ' property') containing by measurement Twenty Decimal Two Three Hectares or thereabouts and are desirous of selling the same to the PURCHASER and WHEREAS the VENDORS have agreed to sell to the PURCHASER and the PURCHASER has agreed to purchase from the VENDORS the property subject to the terms and conditions more specifically provided herein below:**'

From the said Preamble cited above, it is evident that the vendors were selling the suit land as administrators of the deceased estate, after the

Certificate of Confirmation of Grant had been issued. The said Sale Agreement was duly executed by the Vendors as well as the Purchaser and witnessed by Muthoni Ndwiga Advocate. It was DW1's evidence that the said advocate was for the Vendors and the same was not controverted by the Applicants'. I note the Sale Agreement, contained the purchase price as well as the terms and conditions of the transaction herein. PW1 contended that their mothers' who were the vendors did not know what they were signing and only signed the sections where they were directed to. PW1 further disputed the amount of purchase price paid and stated that it was only Kshs. 4 million yet DW1 confirmed that after signing the Sale Agreement, he paid Kshs. 1 million, and he later paid the Kshs. 9 million being balance of the purchase price. However, since the Vendors who entered into the said agreement have not denied receipt of the purchase price of Kshs 10 million, gas well as sworn an affidavit to confirm they were coerced to enter into the aforementioned Sale Agreement, I find that the said Agreement is valid as it was done in accordance with the law.

As to whether the 1<sup>st</sup> Respondent got fraudulently registered as the proprietor of the suit land, I have already referred to the Sale Agreement above. According to the Special Conditions section of the Sale Agreement, it states as follows: **' On the completion date and upon receipt of the balance of the purchase price, the VENDORS shall have deliver to the PURCHASER the following Completion Documents in the respect of the property:-**

**Title to the Property – Original Title Deed**

**A certified copy of the Rent Clearance Certificate for the current year;**

**A Certified Copy of the Commissioner of the Lands Consent to Transfer the property;**

**A Certified Copy of the rates Clearance Certificate for the Property'**

Further in the Costs and Fees it states the following: **' The vendor shall bear the costs of all Registration Fees, Stamp Duty and other disbursements payable in respect of the Transfer.'**

It was PW1's testimony that the purported transfer of the suit land showed the same was transferred from his father directly to the 1<sup>st</sup> Respondent and yet he had been dead. He challenged the Application for Consent of Land Control Board; the Transfer Form, Consent of Land Control which all showed that the suit land was being transferred from his late father to the 1<sup>st</sup> Applicant. He insisted the same was hence fraudulently done as the vendors were only holding land in trust for them and did not have capacity to sell it. In his testimony he alluded to the fact that it is the 1<sup>st</sup> Respondent who fraudulently got registered as proprietor of the suit land by using land agents. DW1 on the other hand insisted it is the vendors who obtained the consent of the Land Control Board, facilitated the transfer of the suit land to him when he had finalized the payment of the purchase price as well as delivered to him his title deed. The question we need to ponder is whether the 1<sup>st</sup> Respondent after duly executing the Sale Agreement could have proceeded to be fraudulently registered as the owner of the suit land without participation of the vendors. I opine that this could not be the case as he had nothing to hide after executing the sale agreement before an advocate as well as paid the purchase price. I note from the picture produced by DW1 as exhibit, it showed the vendors as well as their family members including the 1<sup>st</sup> Applicant present at the transaction. In the instant suit, I note the vendors were also not enjoined in the suit yet they are the ones who extended an offer to the 1<sup>st</sup> Respondent as well as executed the Sale Agreement. In the case of **Bruce Joseph Bockle v Coquero Limited [2014] eKLR** the Court of Appeal held that: **' It is clear to this Court just as the trial court that the appellant had looked to get away with merely alleging the issues of illegality or irregularity without showing any particulars as of fraud and misrepresentation and how the respondent perpetrated or had actual knowledge of the same, a trend which he seeks to carry forward to this Court. The Courts of justice have been very hesitant to let a party who pleads fraud or misrepresentation to benefit from their lack of diligence and have normally held that the defendant must build a structure showing that there was fraud, construct a *prima facie* case of fraud or illegality. The court acts on it and gives leave to defend only after a defendant has presented a *prima facie* case of fraud or illegality. The Judge acted on the material placed before him as well as the law as he understood. He cannot be faulted in his conclusions. In view of that we have said and as correctly held by the learned Judge, the resultant titles were neither irregular, illegal, fraudulent nor even a nullity. The appellant has failed to create a *prima facie* case as against the respondent thus the MACFOY principle cannot be said to apply as against the respondent. With general allegations and bare denials that have failed to meet the legal threshold of proper pleadings, lack of particularity in the appellant's allegations of fraud or illegality to infer liability on the part of the respondent who is alleged to have committed the alleged fraudulent actions and the appellant looking to raise issues that were never pleaded in the trial court, we are satisfied that the trial court did indeed enter an appropriate judgment based on the weight of evidence and law placed before it.'**

In the current scenario, the Applicants allege that the 1<sup>st</sup> Respondent acquired the suit land fraudulently. From the evidence presented, the Applicants failed to demonstrate how the 1<sup>st</sup> Respondent fraudulently got registered as proprietor of the suit land after he had jointly executed the abovementioned Sale Agreement with their mothers who were administrators of the deceased estate. Insofar as they claim, they did not consent to the said transaction some of the applicants especially the 1<sup>st</sup> Applicant was well aware of the sale of the suit land and even confirmed in court that the same was being sold to offset certain liabilities. This makes me wonder why they did not object at the time their mothers were entering into the said transaction and when they witnessed them receiving the purchase price. Apart from highlighting the anomaly in the transfer form, application for consent form as well as the consent form, they seem to only blame the 1<sup>st</sup> Respondent and yet DW1 testified in Court that it is the vendors who provided the said documents and brought him his title. The burden of proof was upon the Applicants to prove their allegations of fraud against the 1<sup>st</sup> Respondent and if the same was undertaken with third parties. DW2 who was the Land Registrar confirmed in his evidence that although he was unable to get the transfer documents in respect of the suit land, the same was recorded in the Presentation Register which in essence means, the documents were presented to the Land Registry for registration. In relying on the above cited Court of Appeal decision, I find that the Applicants failed to infer liability on the part of the 1<sup>st</sup> Respondent who purchased the suit land from their mothers. I opine that the Applicants wanted to protect their mothers from liability and that is perhaps the reason they failed to sue them yet they were the vendors. I hence find that the 1<sup>st</sup> Respondent did not acquire the suit land fraudulently as claimed by the Applicants.

Whether the Applicants who are beneficiaries of the estate of MASHULU RUNKE who was the proprietor of the suit land were aware of the

transaction and have a remedy against SIAITA MASHULU ISA and ALICE MASHULU ISSA.

From the evidence presented, the 1<sup>st</sup> Applicant was present in one of the meetings when the Vendors' were transacting over the suit land and never lodged an objection. Section 82 (b) of the Law of Succession Act provides that " **Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:**

**Provided that—**

**(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**

**(ii) no immovable property shall be sold before confirmation of the grant;**

In the instant case, I note the personal representatives/ administrators were the mothers' of the Applicants. PW1 confirmed in court that their father had used the title deed to the suit land as security over a debt owed to a third party, which title was held by the said person at the time of their father's demise. He did not however indicate whether the said debt was paid up. PW1 confirmed that their mothers' were selling the land to offset some debt but as beneficiaries, they did not consent to it.

In the case of **the estate of TNN (Deceased) (2014) eKLR, the court held that ' a trustee stands in a fiduciary position with regard to trust property and the beneficiaries. He holds the property for the benefit of the beneficiaries rather than for his own benefit. He should not act in a manner which prejudices the interest of the beneficiaries.'**

In being persuaded with this judicial authority and relying on the aforementioned legal provisions, I opine that if the Applicants' felt prejudiced by their mothers' actions, their remedy lay within the Succession Cause where the said widows had been appointed administrators as well as trustees of the deceased estate. I hence advise the Applicants' to proceed and lodge an application within the said Succession Cause to compel their mothers' to account for the purchase price that had been paid by the 1<sup>st</sup> Respondent.

I further find that this suit as filed, cannot stand on its own against a purchaser who purchased the suit land from the administrators of the deceased estate, without making the said administrators as parties to it. As to whether the 1<sup>st</sup> Respondent's title to land should be cancelled and register rectified.

The Applicants' claim the title deed to the suit land was acquired illegally as well as irregularly and should hence be cancelled and rectified. DW1 insists he acquired his title deed procedurally and as a registered proprietor, he is the indefeasible owner of the suit land. I note the 1<sup>st</sup> Respondent produced evidence of the developments on the suit land which were not controverted by the Applicants. Section 26 of the Land Registration Act provides as follows:

**(1) 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.'**

In the instant case, I have already held above that the 1<sup>st</sup> Respondent did not acquire the title to the suit land illegally since it is the vendors' who are administrators' of the deceased estate that effected the transfer of the said land to him. As to why the vendors blatantly disregarded the procedure to be adhered to in transferring the suit land by transmission is a question that requires answers but this should be dealt with, within the succession cause when accounts in respect of the deceased estate are being undertaken. It is against the foregoing that I decline to cancel the 1<sup>st</sup> Respondent's title to the suit land.

In the circumstances, I find that the Applicants have failed to prove their case on a balance of probability and will proceed to dismiss it. Since the Respondents' have been inconvenienced, I award them the costs of the suit.

**Dated signed and delivered in open court at Kajiado this 19th day of November, 2018**

**CHRISTINE OCHIENG**

**JUDGE**