



**Wambua & 2 others v Kavivya (Environment & Land Case  
21 of 2020) [2024] KEELC 503 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 503 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 21 OF 2020**

**TW MURIGI, J  
JANUARY 24, 2024**

**BETWEEN**

**ELIZABETH MWIKALI WAMBUA ..... 1<sup>ST</sup> PLAINTIFF**

**FREDRICK MUTETI MUTISYA ..... 2<sup>ND</sup> PLAINTIFF**

**PATRICK MUT ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ELIJAH KAVIVYA ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 11<sup>th</sup> August, 2020 the Plaintiffs pray for judgment against the Defendant for: -
  - a. A declaration that the title L.R. No. Kathonzweni/Kwa Kavisi/454 belongs to the estate of Mutisya Kavivya Katama alias Kavivya Katama and the same be subjected to succession and shared equally in P & A No. 249 of 2016.
  - b. The Defendant to bear the costs of this suit.
2. The Defendant filed a Statement of defence on 30<sup>th</sup> November, 2020 in which he denied the Plaintiffs' claim and prayed for the dismissal of the suit with costs.

**The Plaintiffs Case**

3. The Plaintiffs called three witnesses in support of their case.  
PW1, Elizabeth Mwikali Wambua, adopted her statement filed in Court on 13/08/2020 as her evidence in chief. She also produced a list and bundle of documents dated 11/08/2020 as PEX Nos. 1 – 4 in support of her case



4. She testified that she is the daughter of Mutisya Kavivya (Deceased) and that her Co-plaintiffs are her brothers. She stated that her deceased father was married to two wives, namely Syokwaa the first wife and mother to the Defendant and Maria Kiasyo her mother. She informed the court that her late father sold his ancestral land in Ndukuma and purchased two parcels of land namely L.R. No. Kathonzweni/Mubau/91 and L.R. No. Kathonzweni/Kwa Kavisi/454 (the suit property herein) in the early 1960s. That their eldest brother Patrick Mutie processed the title for L.R. No Kathonzweni/Mubau/91 on behalf of their late father while the title for the suit property was not registered until recently.

She went on to state that her father made a will and bequeathed the suit property to the children of the first wife while those of the second wife were given land parcel No. Makueni/Mubau/91. It was her testimony that her father was buried on land parcel No. Makueni/Mubau/91 while the 1<sup>st</sup> Defendant's mother was buried on the suit property.

That in the year 2016, the Defendant filed Succession Cause No.249 of 2016 and included her mother as one of the Petitioners notwithstanding the fact that she was very old and sickly. She went on to state that none of the children from the second house participated in the succession proceeding until sometime when she filed an objection on the grounds that the Defendant's share of land was in the suit property. She testified that after the grant was confirmed, the Defendant sold the entire portion of L.R. No. Makueni/Mubau/91 to a neighbor who has threatened to evict them from the property. She testified that the Defendant and his siblings have all along lived on the suit property which belongs to their late father.

According the Plaintiff, the Defendant was fraudulently registered as the proprietor of the suit property in order to exclude them from inheriting half the portion of the property. She urged the court to grant the orders sought in the Plaintiff.

5. In cross-examination, she stated that Succession Cause No. 249 of 2016 was filed by Maria Kiasyo Mutisya. She went on to state that she filed an objection on the grounds that the family of the first wife had sold their father's land namely land parcel No. Kathonzweni/Mubau/91 which had been assigned to her mother. It was her testimony that the Defendant's family members had never resided on Parcel No. 91 and that they had always been residing on the suit property which was omitted in the succession proceedings.
6. She further testified that she had not produced any document either in the succession proceedings or in the present case to show that her late father purchased the two parcels of land. She stated that the Defendant was issued with the Title deed for the suit property in the year 2006 when their late father was still alive. In addition, she testified that she did not have any documents to show how the Defendant fraudulently transferred the suit property in his name. She added that she did not produce her late father's written will in the succession proceedings. Again, she stated that she did not sign her name as a beneficiary in the succession proceedings and that the pleadings which showed her signature were incorrect.
7. In re-examination, she reiterated that the suit property was not the subject matter in the succession proceedings. She testified that she did not know how the title documents for the suit property were issued and only came to learn about it in Court.
8. PW2, Katama Kavivya, adopted his statement dated 11/02/2021 as his evidence in chief. He testified that the late Mutisya Kavivya was his elder brother and the owner of land parcel No. Makueni/Mubau/91 and the suit property herein. That initially, his late brother lived with his two wives in his ancestral land in Mumbuni before he purchased the two parcels of land. He went on to state that his late brother distributed his land amongst his two wives before he passed on and gave the suit property



to the first house while the second house was given land parcel No. Makueni/Mubau/91. He stated that each wife is buried on the land that they were residing on.

9. In cross-examination, he confirmed that his late brother was alive in the year 2006. He told the court that he never heard his late brother demanding for the suit property. He went on to state that he had no document to show that Mutisya Kavivya was ever registered as the owner of the suit property. He stated that there must have been a mistake or fraud if at all the suit property was registered in the name of the Defendant.
10. In re-examination, he insisted that his late brother acquired the suit property in the year 1946.
11. PW3, King'oo Kavivya, adopted his statement filed in Court on 11/02/2021 as his evidence in chief. He testified that the late Mutisya Kavivya was his step brother and that he was married to two wives namely Syokwaa Mutisya(deceased) and Maria Mutisya(deceased). He further testified that his late brother distributed his parcels of land amongst his two wives before he passed on. He stated that the first house was given the suit property while the second house was given Land Parcel No. Makuueni/Mubau/91.
12. In cross-examination, he testified that his late brother purchased land for his first wife at Kathonzweni, Kwa Kavisi from one Musau though he did not have any document to confirm the same. According to PW3, the Defendant fraudulently obtained the Title deed for the suit property.

### **The Defence Case**

13. The Defendant called three witnesses in support of his case.

DW1, Elijah Kavivya Mutisya, adopted his statement dated 26/11/2020 as his evidence in chief. He also produced the list and bundle of documents of even date as DEX 1–3 respectively.
14. He testified that he is the registered owner of the suit property. He told the court that his late father, Mutisya Kavivya, had two wives and that he was the son of the late Syokwaa Mutisya, his father's first wife. It was his testimony that he purchased the suit property in the year 1965 from one Daniel Maithya Musau which was unsurveyed by then. That in the same year, his late father chased away his mother and she followed him together with his siblings and settled on the suit property. It was his testimony that when the land adjudication process was carried out, his land was allocated plot number 454. He stated that his late father never claimed or settled on the suit property and remained on his land known as Parcel No. 91 with his second wife. According to the Defendant, his father did not write any will.
15. In cross-examination, he reiterated that he purchased the suit property in the year 1965 and insisted that his late father did not write a will. He informed the court that the clan subdivided Parcel No.Makueni/Mubau/91 into two halves and that the Defendant's family disposed of their portion to their neighbour, one Daniel Kakui.
16. DW2, Muthini Maithya Musau, adopted her statement dated 26/11/2020 as her evidence in chief. She informed the court that her husband, Daniel Maithya Musau, sold the suit property to the Defendant herein and not to his late father.
17. In cross-examination, she testified that she was present when the parties signed the sale agreement and even saw her husband receiving the purchase price of Kshs 1500/= from the Defendant herein. She went on to state that the Defendant's mother used reside on the suit property and was buried thereon.
18. In re-examination, she stated that at the time of the sale, the suit property had not been surveyed. She added that the Defendant's father was not residing on the suit property at the time of the sale.



19. DW3, Boniface Kunga King'ondy, adopted his statement dated 26/11/2020 as his evidence in chief. He testified that he knew the late Mutisya Kavivya and his family. He testified that the late Mutisya Kavivya sold his ancestral land in Ndukuma and chased away his 1<sup>st</sup> wife. He informed the court that the Defendant was working in Kenya Railways, purchased the suit property and settled his mother together with his siblings thereon.
20. In cross-examination, he testified that the suit property belongs to the Defendant though he would not know the exact year when he purchased the same. He testified that the late Mutisya Kavivya and his second wife are buried in Mubau where they used to reside while the 1<sup>st</sup> wife is buried on the suit property where she had lived for many years. He testified that the children of the 1<sup>st</sup> wife were not residing with their father since he had separated with his first wife.
21. He stated that he was not a witness in the sale agreement in respect of the suit property between the Defendant and Maithya Musau.
22. After the close of the hearing, the Parties agreed to file and exchanged their written submissions.

### **The Plaintiffs Submissions**

23. The Plaintiffs' submissions were filed on 2/5/2023. On their behalf, Counsel submitted that the suit property forms part of the Estate of the late Mutisya Kavivya. Counsel further submitted that the Defendant fraudulently transferred the suit property in his name when his father was very old and unwell. It was submitted that the said fraudulent transfer and registration ought to be cancelled so that the Suit property can form part of the Estate Mutisya Kavivya Katana in Makueni SPM Succession Cause No. 249 of 2016.
24. To buttress his submissions, Counsel relied on the case of Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & another [2018] eKLR.

### **The Defendant's Submissions**

25. The Defendant's submissions were filed on 4/5/2023.  
On his behalf, Counsel outlined the following issues for the court's determination: -
  - i. Whether there was fraud in the registration of the subject land in the Defendant's name;
  - ii. Whether the Plaintiffs are entitled to the prayers sought in the Plaint; and
  - iii. Who bears the costs of the suit.
26. On the first issue, Counsel submitted that the Plaintiffs did not adduce any evidence to show that the suit property was previously registered in the name of Mutisya Kavivya deceased. Counsel further submitted that the Defendant's certificate of title is conclusive proof of his absolute and indefeasible ownership of the suit property. To buttress this point, reliance was placed on Section 26 (1) of the [Land Registration Act](#), 2012.
27. On the second issue, Counsel submitted that the Plaintiffs have not discharged their burden of proof in accordance with Section 107 (1) and (2) of the [Evidence Act](#). Counsel contended that there was no evidence to support the allegations of fraud on the registration of the suit property in the Defendant's name.
28. On the third and fourth issues, Counsel submitted that the Plaintiffs have not proved their case on a balance of probabilities. That the written will that was heavily relied on by the Plaintiffs was not



properly attested and there was no evidence to show that the deceased had ownership documents for the suit property. Having failed to prove their case to the required standard, Counsel urged the Court to dismiss the suit with costs to the Defendant.

### **Analysis And Determination**

29. Having considered the pleadings, the evidence on record and the written submissions, the issue that arises for determination is whether the Plaintiffs are entitled to the orders sought.

From the evidence on record, the following facts are not in dispute:

- i. That the Defendant is the registered proprietor of the suit property;
  - ii. That the parties herein are the children of Mutisya Kavivya (Deceased) from his two wives i.e. Syokwaa Mutisya for the Defendant and Maria Kiasyo Mutisya for the Plaintiffs;
  - iii. That the suit property was not listed as part of the Estate of Mutisya Kavivya (Deceased) in Makueni SPM Succession Cause No. 249 of 2016.
30. The Plaintiffs are seeking for a declaration that the suit property belongs to the Estate of their late father and as such it should be subjected to succession and shared equally amongst the beneficiaries. They are challenging the Defendant's title to the suit property on the grounds that it was fraudulently obtained.
31. It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of *Vijay Morjaria vs Nansing Madhusingh Darbar & Others* [2000] eKLR (Civil Appeal No 106 of 2000) Tunoi JA observed 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.”

32. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the Court of Appeal held that;-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

33. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.

Section 107 (1) and (2) of the [Evidence Act](#) provides as follows:-

107

- (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.

34. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.

Section 26 of the *Land Registration Act*, 2012 provides for instances when a registered proprietor's title can be challenged. It provides as follows: -

26.

- (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.

35. It is clear from the above provision that a title can be impeached if it is proved that it was fraudulently acquired. According to the Plaintiffs, the Defendant instituted Succession Cause No. 249 of 2016 in respect of the Estate of their late father. It is the Plaintiff's case that land parcel No. 91 was the subject matter in the succession proceedings. The Plaintiffs insisted that the suit property forms part of the Estate of their late father and as such it should be subjected to succession.

36. According to the Plaintiffs evidence, their late father sold his ancestral land and purchased L.R N. Makueni/Mubau/91 and L.R. No.Kathonzweni/Kwa Kavisi/454, in the early 1960s. That before he passed on, he distributed his land amongst his two wives and gave land parcel No. Makueni/Mubau/91 to the first house while the second house was given the suit property. The Plaintiffs alleged that the Defendant fraudulently obtained the suit property. In paragraph 13 and 14 of the Plaint, the Plaintiffs pleaded that the registration of land Parcel No. Kathonzweni/Kwa Kavisi/454 in the Defendant's name was done fraudulently as it belongs to their deceased father. They argued that the suit property should be shared equally between the two families.

37. In order to determine whether the Defendant fraudulently obtained the title to the suit property, this court is called upon to determine the root of the title. In so finding I am persuaded by the holding in the case of *Munyu Maina - v - Hiram Gathiha Maina* where the court held that:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and 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.

38. The Defendant testified that he purchased the suit property from one Daniel Maithya Musau vide a sale agreement dated 5/6/1965. In this regard he produced the sale agreement dated 5/6/1965 and the translation thereof as (DEX 1). He stated that at the time of the sale, the suit property was unsurveyed.



He told the court that when land adjudication was carried out, his land was allocated Plot No. 454 by the Adjudication Office. He produced a note from the adjudication office as (DEX3). His evidence was corroborated by DW3 who confirmed that her husband sold the suit property to the Defendant and that she was present when the parties signed the sale agreement. She further confirmed that the land had not been adjudicated at the time of the sale.

39. The Plaintiffs on the other hand insisted that the suit property belongs to their father and forms part of his Estate. Her witnesses who were brothers to their late father testified that the suit property belongs to Mutisya Kaviviya. According to the evidence and certificate of title(DEX 2) the Defendant was registered as the proprietor of the suit property on 22/09/2006. The Defendant's registration on the suit property was done during the lifetime of their late father. The Plaintiffs witnesses confirmed that the late Kaviviya Mutisya did not demand for the suit property during his lifetime. A perusal of the Plaintiffs' exhibits herein does not corroborate the oral testimony of the Plaintiffs and their witnesses that the suit property belonged to their deceased father. In fact, without going into the validity of the written will and testament of Mutisya Kaviviya that was produced as PEX No. 4, no single declaration therein goes to show that the Deceased was the owner of L.R. No. Kathonzweni/Kwa Kavisi/452 the suit property herein. There was no plausible evidence to support the Plaintiffs' assertion that the late Mutisya Kaviviya purchased the suit property in the 1960s or that the Defendant fraudulently transferred the land to his name when it was part of the estate of the Deceased.
40. By contrast, the Defendant produced a copy of the sale agreement as DEX No. 1, to demonstrate that he purchased the suit property from Daniel Maithya Musau on 5<sup>th</sup> June, 1965. His evidence was corroborated by his two witnesses.

It is crystal clear that the Defendant has satisfactorily explained the root of his title for the suit property. From the oral and documentary evidence on record, the court can safely conclude that the Defendant is the legal owner of the suit property.

41. In the end, I find that the Plaintiffs have failed to prove their case against the Defendant on a balance of probabilities. The upshot of the foregoing is that the Plaintiffs suit is hereby dismissed. As the parties herein are closely related, I direct that each party bears its own

.....  
**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF JANUARY, 2024.**

In the presence of:-

Court assistant Mr. Kwemboi.

Ogeto for the Plaintiff.

