



**Nyamita & 2 others v Tuju (Environment & Land Case 288 of 2016)
[2024] KEELC 1163 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 288 OF 2016**

E ASATI, J

FEBRUARY 29, 2024

BETWEEN

CAROLINE ANYANGO NYAMITA 1ST PLAINTIFF

TOM ABOK NYAMITA 2ND PLAINTIFF

NYAMITA DULO GERSHOM 3RD PLAINTIFF

AND

SHEM ODEGI TUJU DEFENDANT

JUDGMENT

1. At the center of the dispute in this case are 2 parcels of land known as LR No. Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 (herein called the suit lands). The suit lands are currently registered in the name of the Defendant. The Plaintiffs, claiming that transfer and registration of the suit lands in favour of the Defendant was illegal and therefore null and void, vide the amended plaint dated 22nd May, 2023, sought for judgment against the Defendant for: -
 - a. a permanent injunction restraining the Defendant, his agents, servants, representatives and/or assigns from trespassing, encroaching, interfering or erecting illegal structures thereon in any way and not to interfere with the Plaintiff's quiet and peaceful occupation and enjoyment of the plots or parcels of land known as LR No. Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County and the OCS, Chemelil police station to enforce or supervise the enforcement of the order of this honourable court.
 - (a)(i) A declaration that the suit plots or parcels of land known as Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County belong to the late Joash Nyamita Madote - deceased and the same be reverted back to his name.



- (b) a declaration that the transfer was illegal and unlawful null and void and that the 3rd Plaintiff be declared the beneficial and/or rightful owner, legal occupant of plots of parcels of land known as LR Numbers Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County.
 - (c) a declaration that the 3rd Plaintiff is the beneficiary and/or legal owner or occupant of part portion of the suit plots or parcels of land known as Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County as of right and by way of adverse possession as he has been using, tilling, ploughing and lived there for the last 16 years.
 - (c)(i) an order to the Registrar of Lands Kisumu County to cancel the title deeds already issued to the Defendant for plots known as LR No. Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County be issued in the name of the 3rd Plaintiff as according to the confirmation of grant of the deceased estate in NAIROBI HCP&A NO.3055 OF 2012 (ESTATE OF JOASH NYAMITA MADOTE (NOW DECEASED)).
 - (c)(ii) a nullification and/or cancellation of the title deed already issued in the name of the Defendant and fresh title deeds of plots or parcels known as LR NUMBERS Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County be issued in the name of the 3rd Plaintiff as according to confirmation of grant of the deceased estate in Nairobi HCP&A NO.3055 OF 2012 (ESTATE OF JOASH NYAMITA MADOTE (NOW DECEASED)).
 - (d) the Defendant be barred from the suit parcels of land known as Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County and the OCS Chemilil police station to enforce the orders of the Honourable court.
 - (e) costs and interest of this suit.
2. In response to the plaintiffs' claim the Defendant filed a Memorandum of Appearance dated 22nd December, 2016, and defence and Counter-claim dated 14th February 2017. He denied the plaintiffs' claim and averred that he is the registered and lawful owner of the suit lands which he at all material times had exclusive possession of save for trespass there onto by the plaintiffs which trespass commenced about May 2012. He averred further that he bought the suit lands from Joash Nyamita Madote, deceased, and that he has been doing farming on the suit lands. The Defendant, through the counterclaim, prayed for:
- a. a declaration that the Defendant, Shem Odegi Tuju, is the registered and lawful owner of the suit property.
 - b. a permanent injunction be issued to restrain the plaintiff by himself his agents, servants, employees or otherwise howsoever from entering, occupying, destroying, erecting structures, selling, transferring, alienating or in any way dealing with or interfering with the proprietary rights, interests and possession enjoyed by the Respondent/Defendant over the suit property within Kisumu county.
 - c. general damages for trespass.
 - d. mesne profits at the rate of Kshs.30, 000/= per month from May 2012 to present.
 - e. interest and costs of the suit.
 - f. any other or further relief as this Honourable Court may deem fit and just to grant.



The Evidence.

3. The 1st and 3rd Plaintiffs testified in the case. The 1st Plaintiff testified as PW1. She testified that the all the 3 Plaintiffs are the Administrators of the estate of Joash Nyamita Madote, deceased. That she does not know the Defendant and whether the deceased sold land to him (Defendant). That it is the 3rd Plaintiff who lives on the suit lands and that after succession, the land was given to the 3rd Plaintiff. She produced certificate of official search, copy of the Grant of Letters of Administration, payment receipts, copy of Certificate of Confirmation of Grant, Certificate of Official Search for Kisumu/God-abuoro/295, receipt for payment of Kshs.49,480 and copy of Kenya gazette.
4. The 3rd Defendant was PW2. He stated that after they had concluded the succession in respect of his father's estate and paid the arrears at the Settlement Fund Trustee, they discovered that the suit lands had been transferred to another person. That he stays on the suit lands because his father Joash Nyamita Madote had allocated a portion of the land to him in the year 2007 and he built his house thereon where he resides. That while land parcel No.Kisumu/God-abuoro/351 is for subsistence farming and residence, parcel No.Kisumu/God-abuoro/295 is for sugarcane farming. He testified that his father died in the year 2003 and that it is him (3rd Plaintiff) who paid and cleared the loan with the Settlement Fund Trustee in the year 2020. That after he had paid the loan, the Defendant got the land registered in his (Defendant's) name in the year 2016. That he owns land parcel No.Kisumu/God-abuoro/351 in its entirety and a portion measuring 1.27 Hectares of parcel No.Kisumu/God-abuoro/295. That he has his home on parcel No.Kisumu/God-abuoro/351.
5. The Defendant adduced no evidence. Affidavit of serve sworn by Susan Nyang' Advocate on 13th September, 2023 shows that the Defendant's Advocate Ms. Wambasi & Co. Advocates were served with both the amended plaint and hearing notice on 26th May, 2023. But on 18th September, 2023 when the matter came up for hearing there was no attendance by or on behalf of the Defendant.

Submissions

6. At the close of the evidence, written submissions dated 29th September 2023 were filed by the firm of S.J. Nyang' & Company Advocates on behalf of the Plaintiffs. Counsel submitted that the Plaintiffs through their evidence proved their case beyond the required standard of proof. That the Defendant failed to demonstrate to the court how he acquired the title deeds noting that he did not exhibit a copy of the alleged sale agreement entered into in the year 1984. That the Letters of Consent and Application for Consent of the Land Control Board form filed by the defendant relate to a different land parcel. That at no time had the Defendant had possession, occupation and/or laid any claim in or on part of the suit lands till the year 2012.
7. Counsel submitted further that under section 26 of the *Land Registration Act*, certificate of title can be challenged where the same was acquired fraudulently, un-procedurally or through a corrupt scheme. Counsel relied on the case of Gerald Mutua Mutea vs Gakii M'Mwitari & another [2022]eKLR where it was held that the law is that anyone claiming ownership to land has to provide an unbroken chain of events tracing his roots of title to the land.
8. Counsel further relied on the case of Samuel Odhiambo Oludhe & 2 others vs Jubilee Jumbo Hardware limited & another [2018]eKLR where the court held that the court is empowered under section 80 of the *Land Registration Act* to order rectification of title. And the case of Alice Chemuati Too vs Nickson Kipkurui Korir & 3 others [2015]eKLR where it was held that although title is protected by law, the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation



to which the person is proved to be a party or where it is procured illegally, un-procedurally or through a corrupt scheme.

9. Counsel submitted that the titles to the suit lands were transferred and registered in the name of the Defendant illegally and as such the court has power to nullify the same and order the properties to be registered in the name of the 3rd plaintiff in line with the Certificate of Confirmation of Grant.
10. No submissions were filed by or on behalf of the Defendant.

Issues for Determination

11. From the pleadings filed, the evidence adduced and submissions made, the following emerge as the issues for determination;
 - a. Whether or not transfer and registration of the suit lands in the name of the Defendant was fraudulent and illegal.
 - b. Whether or not the Plaintiffs are entitled to the prayers sought.
 - c. Whether or not the Defendant is entitled to the prayers sought in the counterclaim.
 - d. Who pays the costs of the suit?

Analysis and Determination

12. The first issue for determination is whether or not transfer and registration of the suit lands in favour of the Defendant was fraudulent and illegal. The Plaintiff pleaded in paragraph 9 of the amended plaint that the transfer and registration of the suit lands in favour of the Defendant was fraudulent. The Plaintiff pleaded that the particulars of fraud and misrepresentation of facts by the Defendant include; fraudulently signing and/or making to be signed the transfer forms in the name of the deceased using a time-barred consent which was allegedly signed in the year 1984 and being used to transfer land in the year 2016, fraudulently transferring the deceased's parcels of land known as LR No.s Kisumu/God-abuoro/295 and Kisumu/God-abuoro/351 situated within Kisumu County in his name, fraudulently making an illegal agreement of sale between him and the deceased which sale agreement was never witnessed or consented to by the deceased or his family, alleging a sale of land without any consideration, transferring the lands in his name 15 years after the deceased's death, transferring the land to himself without making any statutory payments due to the lands Ministry, making all the alleged documents and laying claim of the suit parcels without a right to do so.
13. It was the Plaintiff's evidence that after they had done succession to the estate of his deceased father and had paid the outstanding loan with the Settlement Fund Trustee, the suit lands were transferred in favour of the Defendant in the year 2016 fraudulently. The Plaintiffs produced receipts to show that it is the 3rd plaintiff who paid the outstanding loan. They also produced certificate of official search to show that the suit lands were transferred in favour of the Defendant in the year 2016 and Certificate of confirmation of Grant to show distribution of the suit lands as part of the estate of the deceased.
14. Certificate of official search dated 15/8/2001 in respect of parcel No. Kisumu/God-abuoro/295 produced as exhibit shows that as at 15/8/2001, that land was registered as a first registration in the name of the Settlement Fund Trustee. Certificate of official search dated 3/3/2009 in respect of the same parcel shows that as at 3/3/2009 the status remained the same. The land was still registered in the name of the Settlement Fund Trustee as the 1st registered owner.



15. The receipts produced show that payments were made by Joash Nyamita Madote to the District Land Adjudication and settlement office Nyando as follows; Kshs.49,480 vide receipt No 4959427 dated 24. 6. 2014 and Kshs.58,000 vide receipt no. 7013692 dated 7. 4. 2014.
16. The Certificate of Confirmation of Grant shows that only land parcel No. Kisumu/God-abuoro/295 was subject of succession proceedings in NAIROBI H.C SUCC. CAUSE NO. 3055 OF 2012 ESTATE OF JOASH NYAMITA MADOTE (deceased). That the land parcel No. Kisumu/God-abuoro/295 measuring 10 acres was distributed to the beneficiaries of the deceased as per the Certificate of Confirmation of Grant with the 3rd Plaintiff getting only 3.77 acres thereof.
17. The Defendant claimed in the Counterclaim that he bought the suit land in the year 1984 from the deceased, that the deceased executed the transfer documents before he died, that he got consent of the Land Control Board, and the land was transferred to him in a valid way. That parcel No. Kisumu/God-abuoro/351 was transferred to him in the lifetime of the deceased.
18. In paragraph 8 of the amended plaint, the plaintiff pleaded fraud and the particulars thereof. As per the certificate of official search dated 15. 8.2001, the suit land parcel No. Kisumu/God-abuoro/295 was registered in the name of Settlement Fund Trustee on 9. 9.1976. The evidence produced shows that the land remained in the name of Settlement Fund Trustee till the year 2016 when it was transferred in favour of the Defendant. The plaintiffs contend that it was fraudulent for the Defendant to cause transfer of the lands into his name 15 years after the death of the deceased. There is no explanation as to why the Defendant did not cause the transfer in his name immediately after purchase if indeed the deceased signed the transfer documents in the year 1984. No evidence was led that the deceased signed the transfer form in favour of the Defendant. In any event as at the year 1984, the land was still in the name of the Settlement Fund Trustee so that if any valid transfer documents were to be signed then, then they could only be signed by the Settlement Fund Trustee.
19. Fraud has been defined in Black's Law Dictionary 11th Edition as

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000]eKLR held that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.”

20. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”



And in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo vs Ndolo (2008)1KLR (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 the 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. In case where fraud is alleged it is not enough to simply infer fraud from the facts.”

21. In this case fraud was pleaded and the particulars thereof itemized in the amended plaint and evidence led to demonstrate the fraud. It is clear from the evidence that the suit land parcel No.KISUMU/GOD ABUORO/295 had not been transferred to the deceased for him to be able to execute a transfer form in favour of the Defendant in the year 1984 and that the land was transferred to the Defendant many years after the deceased had died.
22. The Defendant did not respond or produce evidence to controvert the evidence of the plaintiffs.
23. The court finds that the transfer and registration of the suit land parcel No. Kisumu/God-abuoro/295 in the name of the Defendant was fraudulent. As regards parcel No. Kisumu/God-abuoro/351, there is no evidence that the land belonged to the deceased, that payment of any loan arrears in respect thereof was made. It was not listed as part of the estate of the deceased in the Certificate of Confirmation of Grant. The court finds that fraud in respect of parcel No. Kisumu/God-abuoro/351 has not been proved.
24. The second issue for determination is whether or not the plaintiffs are entitled to the relief sought. The court finds that the plaintiffs have proved that the 3rd defendant is one of the beneficiaries of the estate of Joash Nyamita Madote entitled to a portion of land parcel Kisumu/God-abuoro/ 295 according to the Certificate of Confirmation of Grant. He is entitled to the 3.77 acres distributed to him under the Grant. The rest of the land belongs to the other beneficiaries named in the Certificate of Confirmation of Grant.
25. Further, having found that transfer and registration of the suit land No.Kisumu/God-abuoro/295 in favour of the Defendant was fraudulent and that the land has already been distributed by a court order as contained in the Certificate of Confirmation of Grant, the order of cancellation of the title held by the Defendant in respect of parcel No. Kisumu/God-abuoro/295 is justified. The grounds for cancellation of title as stated in Section 80 of the *Land Registration Act* include instances where the registration was obtained by fraud to which the person registered was a party and on grounds of misrepresentation.
26. The next issue is whether or not the Defendant is entitled to the prayers in the counterclaim. Having found that the suit land No. Kisumu/God-abuoro/295 was registered in the name of the defendant by fraud and in view of the fact that the Defendant did not adduce any evidence in support of the counterclaim, the court finds no basis to award the prayers sought in the counterclaim.
27. For the foregoing reasons the court finds that the Defendant has not proved his counterclaim and hereby dismiss it with no order as to costs. The court finds further that the plaintiffs have partly proved their case on a balance of probabilities and enters judgement in their favour for:



- i. A declaration that the suit parcel of land known as Kisumu/God-abuoro/295 situated within Kisumu County belongs to Joash Nyamita Madote, deceased.
- ii. a declaration that transfer and registration of land parcel No. Kisumu/God-abuoro/ 295 in favour of the Defendant was fraudulent and unlawful.
- iii. an order for cancellation of the title held by the Defendant in respect of LR No. Kisumu/God-abuoro/295 situated within Kisumu County.
- iv. a permanent injunction restraining the Defendant, his agents, servants, representatives and/or assigns from trespassing, encroaching, interfering or erecting illegal structures on or in any way interfering with the 3rd Plaintiff's quiet and peaceful occupation and enjoyment of his portion of the parcel of land known as LR No. Kisumu/God-abuoro/295
- v. An order for rectification of the register in respect of LR Kisumu/God-abuoro/295 so as to replace the name of the Defendant with that of the deceased, Joash Nyamita Madote to enable distribution as per the Certificate of Confirmation of Grant of the deceased estate in NAIROBI HCP&A NO.3055 OF 2012 (Estate of Joash Nyamita Madote, Deceased).
- vi. Costs of the suit to the Plaintiffs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 29TH FEBRUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

S. Nyang' Advocate for the Plaintiffs.

No appearance for the Defendant.

