



**Ponda v Trinity Developers Limited & another (Environment & Land Case E049 of 2022) [2024] KEELC 980 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 980 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E049 OF 2022  
NA MATHEKA, J  
FEBRUARY 27, 2024**

**BETWEEN**

**JOSEPH KARISA PONDA ..... PLAINTIFF**

**AND**

**TRINITY DEVELOPERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that he has been and was the registered proprietor of all that parcel of land known as Plot No. 326/1 /MN - Utange Area Mombasa County containing by measurement nought decimal five six (0.56) Acres or thereabout, hereinafter referred to as the suit property. The Plaintiff states that sometimes in August, 2019 he discovered that on 13<sup>th</sup> July, 2012 the suit property was fraudulently, unprocedurally and through a corrupt scheme transferred to Trinity Developers Limited the Defendants herein without the Knowledge of the Plaintiff as the registered owner of the suit property. Upon discovery of these illegal acts by the Defendant the Plaintiff immediately registered a Caveat against the suit property to secure his interest over the suit property. The Plaintiff avers that he has never entered into an agreement for sale of the suit property to anyone and has also not signed any Transfer forms to the Defendant for the sale of Plot No. 326/1 /MN – Utange Area Mombasa County.
2. The Plaintiff has since discovered that the Defendant fraudulently, unprocedurally and through a corrupt scheme and without any color or right or authority forged transfer documents purporting that the Plaintiff had transferred and/or conveyed the suit property in the Defendants favour. The Plaintiff further states that sometimes in 2018 the Defendant purported to sell the suit property to 3<sup>rd</sup> Parties which act/purported sale was tainted with fraud and illegality and was downright null and void ab initio. Despite the aforementioned, the Defendants have now irregularly by themselves, their agents, servants and/or employees illegally without any color of reason, iota of right, and/or scintilla of justification trespassed and moved/ encroached into the suit property without the Plaintiff's consent,



approval nor permission and started putting up a wall thereon and in the event vandalized, destroyed and/or misused the Plaintiff's property. By reason of the matters, the Plaintiff has been deprived of the use and enjoyment of the suit property and has thereby suffered loss and damage. The Plaintiff prays for judgment against the Defendants for;

1. A declaration that the Plaintiff herein is the proprietor and/or owner of Plot No. 326/1/MN - Utange Area -Mombasa County.
  2. A declaration that the transfer of Plot No. 326/1/MN - Utange Area Mombasa County from Joseph Karisa Ponda to the 1<sup>st</sup> Defendant's name was fraudulent, illegal and void.
  3. The land title deed to Plot No. 326/1/MN - Utange Area -Mombasa County as currently held be revoked and the title to the said suit property revert back to Joseph Karisa Ponda and the Registrar of Lands Mombasa does rectify the same accordingly.
  4. That the Register of the land parcel Plot No. 326/1 /MN - Utange Area — Mombasa County be rectified so as to remove the entries in favour of the 1<sup>st</sup> Defendant and title to revert back to the proprietorship of Joseph Karisa Ponda.
  5. A permanent Injunction be issued restraining the 1<sup>st</sup> Defendant and/or any other third party whether by themselves, their servants, agents or otherwise howsoever from entering upon, occupying, constructing on, selling, transferring, charging, mortgaging or in any other manner whatsoever and howsoever interfering with property known as Plot No. 326/1 /MN - Utange Area -Mombasa County.
  6. Costs of this suit and interests at Court rates.
3. The 1<sup>st</sup> defendant was served through newspaper advertisement but failed to attend court or file any response. That the 2<sup>nd</sup> defendant pleads without any admission thereof, that the 2<sup>nd</sup> defendant exercised their statutory duty of care in good faith by receiving documents lodged in the registry Plot 326/1/ MN Utange Area and registering and issuing titles over suit property. That the 2<sup>nd</sup> defendants pleads that the suit herein is time barred pursuant to Public Authorities Limitation Act cap 39 hence a nullity in law and equity.
4. It is not disputed the 1<sup>st</sup> defendant is the registered owner of the suit property. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:
- "Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."
5. Section 26 (1) of the Land Registration Act states as follows:
- The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
6. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
7. This court in considering this matter referred to the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows;

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

9. Section 80 of the *Land Registration Act* provides as follows;

80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
10. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
11. Having read and understood the pleadings, testimony and documents filed the main issue is whether there was fraudulent transfer to the 1<sup>st</sup> defendant. I am guided by the Court of Appeal in case of *Kuria Kiarie & 2 Others v Sammy Magera* (2018) eKLR where it was held;

The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria -v- Nansingh Madbusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



Section 108 of the *Evidence Act* Cap 80 states as follows:

- (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.

12. The burden of proving fraud lies on the plaintiff. PW1 testified that he knew the 1<sup>st</sup> defendant and that he had an agreement with them in that they loaned him Kshs.700,000/- and he paid back Kshs.100,000/-. He confirmed giving them his documents but that they were to discuss the purchase price after he concluded his adverse possession case. That they used the same advocate and he pursued the matter late as he was sick. He has not produced any evidence that he refunded the money loaned to him by the 1<sup>st</sup> defendant. The plaintiff states that he does not know where the defendant is and hence served them through advertisement. I find this curious since the plaintiff states the 1<sup>st</sup> defendant has trespassed and moved/ encroached into the suit property without the Plaintiff's consent, approval nor permission and started putting up a wall thereon and in the event vandalized, destroyed and/or misused the Plaintiff's property, meaning that the 1<sup>st</sup> defendant had taken possession. Indeed, the surveyor's report produced shows that there is a building under construction. I find the plaintiff changed his mind after selling the same to the 1<sup>st</sup> defendant. I find that the plaintiff has failed to prove that his property was fraudulently transferred to the 1<sup>st</sup> defendant. I find the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs to the 2<sup>nd</sup> defendant.

13. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

