



REPUBLIC OF KENYA



KENYA LAW
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**Nyambune v Ngaye (Environment & Land Case 5 of 2022)
[2024] KEELC 1409 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 5 OF 2022**

E ASATI, J

MARCH 14, 2024

BETWEEN

LOYCE YANDUNYI NYAMBUNE PLAINTIFF

AND

TITUS AYODI NGAYE DEFENDANT

JUDGMENT

1. Vide the plaint dated 3rd October 2022 Loyce Yandunyi Nyambune, the Plaintiff herein sued Titus Ayodi Ngaye, the Defendant for;
 - a. The cancellation of the land parcel No. North Maragoli/Chavakali/1235 in the names of the defendant and the reversion of the same in the names of Saphan Sammy Kibuchi Musera (deceased).
 - b. The Defendant pays the Plaintiff mesne profits and provide account of all the proceeds collected from the said premises on the suit property.
 - c. Costs of the suit.
 - d. Any other or further orders the court deems just and fit to grant.
2. The Plaintiff's case is that land parcel known as North Maragoli/Chavakali/1235 (the suit land) was the property of her late husband by the name Saphan Sammy Kibuchi Musera, deceased who was the registered owner thereof. That registration of the suit land in the name of the Defendant was fraudulent, irregular and hence the orders sought.
3. In response to the Plaintiff's Claim, the Defendant filed a Defendant's Written Statement of Defence dated 7th July 2023, denied the Plaintiff's claim and averred that he obtained title to the suit land after following all the procedures.



The Evidence

4. The Plaintiff's evidence comprised of her testimony, the documents she tendered as exhibits and the testimony of the two witnesses she called. The Plaintiff who testified as PW1 adopted her witness statement recorded and filed earlier dated 22nd July 2023 as her evidence in chief. She stated that in 1976 she was married to Saphan Musera Kibuchi Sammy who died in 2009. That she had 4 children with her late husband 2 of whom are deceased. That her husband had 2 wives namely; Truphosa Kadenya and herself. That the suit land was registered to a stranger called TITUS AYODI, the Defendant herein, through succession. That the Defendant inherited the estate illegally. That registration of the suit land in the names of the Defendant was fraudulent and irregular.
5. PW1 produced exhibits namely; Grant of Letters of Administration dated 17th June 2022, Certificate of Official Search for the 4 pieces of land belonging to her late husband namely Kakamega/Buyonga/198, South Maragoli/buyondi/2146, Maragoli/BuyongA/1494 and North Maragoli/Chavakali/1235, a Green Card, Certificate of confirmation of Grant, Grant of Letters of Administration in Kakamega High Court Succession Cause No. 156 of 2011 dated 24th May 2022, Petition in the same Succession Cause, Chief's letter in the Succession Cause, letter dated 12th November 2019 from the Chief Central Maragoli and copy of ruling in Vihiga Succession Cause No. 207 of 2018 which was irregularly Kakamega High Court Succession Cause No. 156 of 2011.
6. On Cross Examination PW1 stated that the suit land belonged to her late husband who bought it. That the land has shops and rental houses.
7. PW2, Saphan Kagasi testified through his witness statement dated 27th July 2023 that the deceased had several parcels of land. That the deceased was his brother. That the suit land is registered in the name of an unknown person by the name Titus Ayodi. That the land should revert back to the name of the deceased so that his family can legally inherit it. That the houses on the suit land were built by the deceased.
8. PW3 was the son of the deceased, his testimony was similar to that of PW2.
9. The Defendant testified as DW1 and produced documents as exhibits. He adopted his witness statement dated 6th October 2023 as his evidence in chief and stated that he is the sole registered proprietor of the suit land. That his sister now deceased by the name Tebra Musimbi Ngaye bought the suit parcel of land through Saphan Sammy Kibuchi Musera. That he got the title through Succession Cause No. 207 of 2018 (Formerly Kakamega High Court Succession Cause No 141 of 2013). That attempts by the Plaintiff's agent and or son to revoke the grant was declined by the court. That he never obtained title to the suit land fraudulently or irregularly as all due process was followed. That the Plaintiff has no right over the suit land
10. He produced as exhibits Grant of Letters of Administration dated 24th February 2016, copy of Kenya Gazette, Objection to making Grant, Rectified Certificate of Confirmation of Grant and Title Deed.
11. On Cross – examination he stated that the green card showed that the 1st registered owner of the suit land was Manasseh and the second Shaphan who bought it at Kshs. 40,000/= . That the succession Cause at Kakamega was filed by Tebra that he only replaced Tebra upon her death. That he is not the one who collects rent from the suit land.

Submission

12. At the close of the evidence directions were taken by consent that parties file written submission on the case.



13. Written submissions dated 17th January 2024 were filed by the firm of D.C Chitwah and Company Advocates on behalf of the Plaintiff. Counsel framed the issues for determination to be:
 - a. Whether or not land parcel No. North Maragoli/Chavakali/1235 was the property of the late Saphan Sammy Kibuchi Musera.
 - b. Whether or not the suit land was held by Saphan Sammy Kibuchi Musera in trust for Tebra Musimbi.
 - c. Whether the Transmission of the suit land into the name of Tebra Musimbi and later Titus Ayodi Ngeye was fraudulent and irregular.
 - d. Whether the Plaintiff is entitled to mesne profits and rental income accruing from the suit land.
 - e. Whether the name of the Defendant should be cancelled from the suit land and the land revert back to Saphan Sammy Kibuchi Musera.
 - f. Whether or not the Plaintiff is entitled to cost of the suit.
14. Counsel submitted that in addition to the suit land the deceased owned other parcels of land. That Tebra Musimbi lodged a restriction on the grounds that the registered owner of the land was deceased. That there was no trust element whatsoever in regard to the real beneficiaries of the estate. That the transmission of the suit land from Saphan Sammy Kibuchi was irregular and fraudulent. That it is only fair that the total sum of rent since 2009 be apportioned as it was admitted that it is the Defendant who has been collecting the rent.
15. Written submissions dated 18th January 2024 were filed on behalf of the Defendant by the firm of A.B.L Musiega and Company Advocates Counsel framed the following as the issues for determination in the suit:
 - a. Whether there is fraud on the part of the Defendant
 - b. Whether title deed to the suit land should be cancelled and reversed in the names of Sephan Sammy Kibuchi Musera
 - c. Mesne Profits
 - d. Costs
16. Counsel submitted that the green card shows that Tebra Musimbi Ngaye deceased, defendants' sister became administrator of the estate of vide Kakamega High Court Succession Cause No. 156 of 2011 and was issued with a title deed on 4th May 2012. That the Defendant being the brother of the deceased Tebra Musimbi lodged Kakamega Succession No 141 of 2013 and lawfully followed all procedures and got the title transmitted to his name.
17. Counsel relied on section 112 of the *Evidence Act* that the burden of proof lay with the plaintiff and that the Plaintiff had not discharged the burden of proof in respect of the issue of fraud. Counsel relied on the case of Arthi Highway Developers Limited vs West End Butchery Limited and 6 others [2015] eKLR where the court held that it is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond a reasonable doubt.



18. On whether the title should be cancelled Counsel relied on the case of Alice Chemtai Toa vs Nickson Kipkurui Korir And 2 Others (2015) eKLR where it was held that;

“.....where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation then he needs to prove that the title holder was party to the fraud or misrepresentation.”

That the Plaintiff has not proved the acts of fraud on the part of the Defendant in respect of the suit land to warrant cancellation.

19. In respect of mesne profits Counsel relied on the case of Kenya Hotel Properties Limited vs Willsden Investment Limited (2009) eKLR where the Court of Appeal stated that for a claim for mesne to succeed there has to be evidence that the Plaintiff is the owner of the property upon which the claim is based. That the plaintiff has not proved that the property is hers hence the claim for mesne profits has no basis. Counsel prayed that the suit be dismissed with costs.

Issues for Determination

20. From the pleadings, evidence and submissions the issues for determination are;
- a. Whether or not registration of the suit land in the name of the Defendant was fraudulent
 - b. Whether the Plaintiff is entitled to the prayers sought
 - c. What orders to make on costs

Analysis and Determination

21. It is not disputed that the suit land was at one time registered in the name of Saphan Sammy Kibuchi Musera. The green card shows that the land was registered in his name on 19th June 2001. It is also not disputed that the land was transmitted from the deceased to one Tebra Musimbi Ngaye through succession cause No. 156 of 2011, Kakamega High Court. The green card shows that the land was registered in the name of Tebra Musimbi Ngaye on 4th May 2012 vide Succession Cause No. 156 of 2011 High Court Kenya at Kakamega through registration of form R.L 7. The green card further shows that on 12th June 2019 the land was transmitted from the said Tebra Musimbi Ngaye to the Defendant herein vide Succession Cause No 207 of 2018 formerly Kakamega Succession 141 of 2018 through registration of form R.L 7 and that title deed was issued to the Defendant on the same date.
22. The Plaintiff's complaint is that the process of the transmission and registration of the suit land in the name of the Defendant was irregular and fraudulent. The particulars of the fraud pleaded in the plaint are: -
- a. Proceeding with secret succession proceedings in respect of the deceased person while failing to disclose his other properties and beneficiaries.
 - b. Causing the registration of land parcel NO.North Maragoli/Chavakali/1235 into the name of the Defendant while knowing that he had no nexus with one Saphan Sammy Kibuchi Musera.
 - c. Irregularly causing the property to be registered in his sole name while excluding the true beneficiaries of the same.
 - d. Causing the registration of the suit land into his names without disclosing the deceased had a family.



- e. Otherwise defrauding the estate from its rightful owners.
23. The Defendants contention is that the suit land was part of the estate of his late sister by the name Tebra Musimbi Ngaye and upon her death, he succeeded her estate and had the suit land registered in his name. The green card supports this narration. Although it is admitted that the Defendant is a brother to Tebra Musimbi Ngaye, he has been sued in his personal capacity herein and not as a personal representative of the deceased. The particulars of fraud pleaded in the plaint are attributed to him. Yet it is clear that the person who transmitted the suit land from the deceased was Tebra Musimbi Ngaye. Tebra Musimbi Ngaye did this through a Succession Cause in the High Court at Kakamega wherein the court issued an order in the form of Certificate of Confirmation of Grant and distributed the suit land to the said Tebra Musimbi Ngaye. She caused the land to be transmitted in her favour on 11/8/2011.
24. The Plaintiff's case is that the Grant of Letters of Administration was unlawfully obtained by Tebra Musimbi Ngaye. However, there is no evidence that any step has been taken to challenge the decision of the High Court in the succession cause. This court sitting as an Environment and Land Court cannot to review and set aside an order that was issued in the Succession matter. A court order is valid until set aside. There is no evidence connecting the present Defendant with the particulars of fraud pleaded. The court in Vihiga SPM Succession Cause No.207 of 2018 in its ruling, produced as exhibit herein in respect of an objection lodged by the Plaintiff correctly held that: -

“in my view it would have been proper for the Objector/Applicant to make such an application before the High Court which is dealing with the estate of Saphan.”

It appears the plaintiff did not take cue from this.

25. It is trite law that the standard of proof in claims based on fraud is higher than a balance of probabilities. This burden of proof has not been discharged herein.
26. The limitation period for filing a claim based on fraud under the *Limitation of Actions Act* is 3 years. Section 4 (2) of the *Limitation of actions Act* provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. The cause of action herein which is founded on the tort of fraud, accrued to the estate of the deceased on 11/8/2011 when the suit land was transmitted from the deceased to Tebra Musimbi Ngaye. The green card shows that as at 8/11/2012, the plaintiff herein was aware of the transmission of the land from the deceased to Tebra Musimbi Ngaye because she (the plaintiff), the green card shows, placed a restriction on the land on the said date. This suit filed in October 2022 based on a claim of fraud was filed outside the limitation period of 3 years.
27. The court finds that it has not been proved that registration of the suit land in the name of the Defendant was fraudulent.
28. On whether or not the Plaintiff is entitled to the orders sought, the first relief sought is that the title in the name of the Defendant be cancelled and revert back to Saphan Sammy Kibuchi Musera, deceased. The grounds for cancellation of title under sections 80 and 26 of the *Land Registration Act* include if the title was obtained through fraud to which the registered owner was party and on grounds of misrepresentation. None of these grounds have been proved as against the Defendant as sued.
29. The next relief sought is mesne profits. This too has not been proved as ownership of the suit land still remains with the Defendant. The Plaintiff was not clear as to who developed the suit land and who collects the rent from the premises on the suit land, and how much it is. No evidence on mesne



profits was adduced. A person claiming mesne profit must prove that he has better rights over the land as compared to the person from whom the mesne profit is sought.

30. For the foregoing reasons, the court finds that the plaintiff has not proved her case on a balance of probabilities. The suit is hereby dismissed. Each party to bear own costs of the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

.....

E. ASATI

JUDGE

In the presence of:

Ajevi: Court Assistant.

Plaintiff present in person.

Malanda Advocate for the Defendant.

