



Lusala v Mutumbi & 2 others (All sued as administrators of the Estate of the Late Isaac Lijoodi Mutumbi) (Environment & Land Case 641 of 2014) [2024] KEELC 3908 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 641 OF 2014**

DO OHUNGO, J

APRIL 30, 2024

BETWEEN

ISAAC MBIMWA LUSALA PLAINTIFF

AND

PENINAH MUTUMBI 1ST DEFENDANT

JULIA MUTUMBI 2ND DEFENDANT

GLADYS MORAA 3RD DEFENDANT

ALL SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE ISAAC LIJOODI MUTUMBI

JUDGMENT

1. The plaintiff filed this suit through plaint dated 19th November 2014 in which he averred that the defendants were sued in their capacities as administrators of the estate of ILM (deceased) and that the deceased was the registered proprietor of the parcel of land known as Kakamega Town Block B/III/2X within Milimani area of Kakamega (the suit property). That he purchased the suit property from the deceased before the deceased's demise, but the deceased never completed transfer of the suit property to him. He further averred that the defendants illegally and fraudulently transferred the suit property to the third defendant to defeat his claim.
2. The plaintiff therefore prayed for judgment against the defendants for:
 - a. A declaration that the Plaintiff is the lawful owner of all that property known as Kakamega Town Block B/III/2X within the Milimani area of Kakamega.
 - b. A declaration that the purported transfer of all that parcel of land known as Kakamega Town Block B/III/2X within the Milimani area of Kakamega was illegal, null and void.



- c. An order directing the Land Registrar Kakamega to rectify the register and register the Plaintiff as the registered proprietor of all that land known as Kakamega Town Block B/III/2X within the Milimani area of Kakamega.
 - d. An order of injunction be issued restraining the Defendants or any of them either in person or through their agents, servants, hireling or in any other manner howsoever and whatsoever from trespassing into, using or interfering with the Plaintiff's use and quiet enjoyment of all that property known as Kakamega Town Block B/III/2X within the Milimani area of Kakamega.
 - e. An order of eviction be issued against the Defendants or any of them or any person claiming under them from all that parcel of land known as Kakamega Town Block B/III/2X within the Milimani area of Kakamega.
 - f. General damages for trespass and interference with the Plaintiff's right of use of all that property known as Kakamega Town Block B/III/2X within the Milimani area of Kakamega.
 - g. Costs of this suit.
 - h. Such other or further orders as the court may deem just and expedient to grant.
3. The defendants filed a joint statement of defence through which they averred that the deceased land parcel number Kakamega Town Block /111/27 and not the suit property. They averred that the deceased transferred land parcel number Kakamega Town Block /111/27 to the third defendant on 18th February 2004 during his lifetime. The defendants further generally denied the plaintiff's other averments and urged the court to dismiss the plaintiff's suit with costs.
 4. The plaintiff testified as PW1 and adopted his witness statement which he filed on 5th December 2014. He also produced copies of the documents listed as item numbers 1 to 9 and 11 to 14 in his list of documents dated 19th November 2014 as well as a copy of the document listed as item number 1 in his supplementary list of documents dated 21st August 2017, as his exhibits. He further testified that succession proceedings were filed in respect of the deceased's estate and that he applied in the succession cause to establish his interest in the suit property. That the suit property was not included as part of the deceased's assets and that as of the date of his testimony, the suit property remained registered in the deceased's name.
 5. PW1 further stated that he conducted a search before purchasing the suit property and that the search showed that the registered proprietors were the deceased and a minor called DN. That the minor was not party to the sale agreement and that the properties purchased in the sale agreement were plot numbers BIII/2X Milimani and Bl/551 Scheme as opposed to the suit property.
 6. The plaintiff went on to testify that he knew the deceased prior to the sale agreement which was executed in January 2004 prior to the deceased's demise in 2009. He added that he purchased the two plots and paid KShs 3 million for the suit property and KShs. 1.4 million for Bl/551. That as of the date of his testimony, the suit property was occupied by the deceased's tenants and that he (plaintiff) had never occupied it. That he was aware that the suit property was registered in the third defendants' name as at the time he filed this case.
 7. Aggrey Mufwolovo (PW2), stated that he was an Administrative Officer working for the County Government of Kakamega and based in Kakamega Township. That he received a letter dated 18th March 2015 requesting for confirmation of whether there were two rateable properties within his jurisdiction known as Kakamega Town Block B/III/2X and Kakamega Town Block /III/2X and what the initial 'B' stood for. That he responded through letter dated 10th June 2015 and reported his finding



was that Kakamega Town Block B/III/2X and Kakamega Town Block /III/2X is one and the same parcel which belonged to Isaac Mutumbi Lijoodi who remained the rate payer. He produced a copy of his letter dated 10th June 2015. He further stated that he did not have any document from Land Registrar showing the nature of the plots or that showing that they were one and the same and added that he relied on the valuation roll to reach his conclusion that they were one and the same.

8. The plaintiff's case was then closed.
9. The first defendant Penina Mutumbi (DW1) adopted her witness statement dated 10th December 2021 and produced the documents listed as items 1 and 2 in her list of documents dated 7th December 2021, as her exhibits. She stated that she knew the plaintiff and added that her grandson was married to the plaintiff's daughter. That she could not remember if the plaintiff and the deceased signed any agreement. She also stated that the joint registered proprietors of Kakamega Town Block B/III/2X were the deceased and his son DM. That DM pre-deceased his father. She added that she filed succession proceedings in respect of the estate of Isaac Lijoodi and that they did not include plot number BIII/2X Milimani among his assets.
10. The first defendant's case was then closed. The second defendant did not attend court during the hearing despite evidence of service being availed. Her case was closed.
11. The third defendant Gladys Moraa Nyaanga (DW2) adopted her witness statement dated 9/2/2015. She stated that she was the registered proprietor of land parcel number Kakamega Town Block /III/2X and that the said property was previously owned by the deceased who was her husband and her son Duncan who also passed away in the year 2002. She produced a copy of the register in respect of Kakamega Town Block /III/2X and added that she did not have documents through which the land was transferred to her.
12. Lastly, David Masila Kimauro (DW3), the Deputy County Land Registrar Kakamega County produced a certified copy of the register for Kakamega Town Block III/2X and stated that the property is a leasehold with the lessor as Kakamega County Council. That pursuant to entry number 5 in part B dated 27th May 1993, the registered proprietors were Isaac Mutumbi Lijoodi and DN who were issued with a certificate of lease on 27th May 1993. That pursuant to entry number 7 dated 18th February 2004, Gladys Moraa Nyanga became the proprietor and she issued with a certificate of lease on the same date.
13. On being shown the sale agreement that the plaintiff had produced, DW3 stated that what was stated therein as plot number B III/2X Milimani was a different parcel from Kakamega Town Block III/2X and that no such plot as plot number B III/2X Milimani existed in the records at the land registry. He added that under the Torrens System of Land Registration, each parcel is identified using a unique number. He produced a copy of transfer form dated 16th February 2004 which effected transfer from Isaac Lijoodi to Gladys Moraa together with other documents and added that he would not have registered the transfer in favour of Gladys Moraa Nyanga solely on the strength of the transfer form.
14. The third defendant's case was then closed, after which directions were given that parties file and exchange written submissions. All parties save for the second defendant filed submissions.
15. I have considered the pleadings, evidence, and submissions. The issues that arise for determination are whether illegality and fraud have been established and whether the reliefs sought should issue.
16. The plaintiff's case as pleaded and prosecuted is that ILM (deceased) was the registered proprietor of the parcel of land known as Kakamega Town Block B/III/2X (the suit property) and he purchased the suit property from the deceased before the deceased's demise, and that the defendants illegally and fraudulently transferred the suit property to the third defendant to defeat his claim.



17. The law relating to proof of fraud in civil proceedings is settled. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
18. The foundation of the plaintiff's case is the sale agreement which he produced as his Exhibit 1. The document bears the date 3/1/2004 at its top right hand corner. It is headed "Plot No: B III/2X Milimani& Plot No. B I/551 Scheme." The body of the document states that it is a sale agreement between Isaac M. Lijoodi as seller and Isaac Mbimwa as buyer. It is the plaintiff's stance that the deceased and him contracted freely in terms of the agreement.
19. The courts have always upheld parties' freedom of contract. In that regard, Sir George Jezzell, Master of Rolls, stated in *Printing & Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq. 462, 465:

...if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.
20. And so, we head back to the contract in this matter. It will be noted that it concerns "Plot No: B III/2X Milimani." If the parties wanted to refer to Kakamega Town Block B/III/2X, nothing would have been easier than to state so. They did not, and their freedom must be respected, especially in this case where one of the parties to the contract is since deceased.
21. The particulars of fraud pleaded by the plaintiff all concern Kakamega Town Block B/III/2X, a property that is not mentioned in the agreement. The plaintiff accuses the defendants of transferring the property to the third defendant even before the death of the deceased. The land registrar testified and stated that there is no parcel of land known as Kakamega Town Block B/III/2X. The plaintiff did not produce any copy of title, certificate of search or certified copy of register in respect of Kakamega Town Block B/III/2X. PW2 who testified Kakamega Town Block B/III/2X and Kakamega Town Block /III/2X is one and the same parcel was not a land registrar and did not work at the land registry. His testimony on that matter is of little use. Even if we were to say that Kakamega Town Block B/ III/2X and Kakamega Town Block /III/2X is one and the same parcel, it does not change the fact that the parties contracted on "Plot No: B III/2X Milimani" and not Kakamega Town Block B/III/2X and Kakamega Town Block /III/2X.
22. The plaintiff further accused the defendants, in the particulars of fraud, of refusing to transfer Kakamega Town Block B/III/2X to him. Having failed to show that he purchased Kakamega Town Block B/III/2X from the deceased, he cannot lawfully demand that the said parcel be transferred to him by the defendants as administrators of the deceased's estate. Even if one were to assume that the plaintiff was referring to Kakamega Town Block /III/2X, I note from the certified copy of the register as well as the testimony of the land registrar that the third defendant became the registered proprietor of Kakamega Town Block /III/2X on 18th February 2004, long before the death of the deceased.
23. The plaintiff has failed to establish illegality or fraud. It follows that the reliefs sought cannot issue.



24. I find no merit in the plaintiff's case, and I therefore dismiss it with costs to the first and third defendants. I do not award any costs to the second defendant since she did not participate in the hearing.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Ogonji holding brief for Mr Magina for the Plaintiff

Mr Nandwa for the First Defendant

No appearance for the Second Defendant

No appearance for the Third Defendant

Court Assistant: M Nguyayi

