



REPUBLIC OF KENYA



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**Khamati & another v Shimanyula & 2 others (Environment and Land Appeal
E056 of 2022) [2024] KEELC 3407 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E056 OF 2022**

DO OHUNGO, J

APRIL 25, 2024

BETWEEN

ELIZABETH MUKOYA KHAMATI 1ST APPELLANT

CHARLES LUMULA KHAMATI 2ND APPELLANT

AND

DINAH MICHAEL SHIMANYULA 1ST RESPONDENT

BEKI ANTIPAS SHIMANYULA 2ND RESPONDENT

WILLIAM SHIMANYULA 3RD RESPONDENT

*(Being an appeal from the judgment and decree of the Chief Magistrate's
Court at Kakamega (Hon. J R Ndururi, Principal Magistrate) delivered
on 10th November 2022 in Kakamega MCELC No. E095 of 2021)*

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court on 23rd June 2021 when the respondents filed plaint dated 8th January 2021 against one Joel Shimanyula as first defendant and the first and second appellants herein as second and third defendants, respectively. The respondents brought the suit as personal representatives of the estate of Michael Shimanyula Shihemi alias Michael Ingosi Shimanyula (deceased) and averred in the plaint that the deceased was the registered proprietor of land parcel number Isulu Market Plot No. 9B (the suit property) until the defendants acquired the title thereto fraudulently. They further averred that the first appellant's occupation of the suit property was illegal and that they had suffered loss as a result of being denied peaceful enjoyment of the suit property.
2. The respondents therefore prayed for judgment against all the defendants in the suit for:



- a. Cancellation of title in Isulu Market Plot No. 9B and revert back in the names of the deceased Michael Shimanyula Shihemi.
 - b. Permanent orders of injunction restraining the defendants jointly or severally from any further interference with Isulu Market Plot No. 9B.
 - c. Costs
 - d. Interest.
3. A joint statement of defence was filed on behalf of all the defendants on 27th July 2021 by M/s Oscar Wachilonga & Associates. The defendants denied the respondents' averments and prayed that the suit be dismissed. Subsequently, Joel Shimanyula, the first defendant, filed a separate statement of defence on 13th August 2021.
 4. Upon hearing the matter, the Subordinate Court (Hon. J R Ndururi, Principal Magistrate) delivered judgment on 10th November 2022. The learned Magistrate dismissed the prayer for cancellation of title, issued a declaration that any dealings on the suit property between Joel Shimanyula and the appellants were illegal, null and void ab initio, ordered that the appellants' occupation and use of the suit property without the respondents' consent was illegal, granted the permanent injunction and awarded the respondents costs.
 5. Dissatisfied with that outcome, the appellants filed this appeal on 16th November 2022 through Memorandum of Appeal dated 15th November 2022. They prayed that the judgment be set aside.
 6. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. The learned Magistrate erred in law finding in favour of the Respondent in issuing orders of permanent injunction against the appellants on the suit property that is legally owned by the 1st appellant.
 2. The learned Magistrate erred in law and misdirected himself in applying the wrong standard of proof in shifting the burden of proof to the appellants.
 3. The learned Magistrate, despite making the finding that there was no title to be cancelled erroneously proceeded to issue injunctive orders against the owners of the suit property.
 4. The learned Magistrate erred by failing to determine the issues that he framed himself for determination by the court.
 5. The Learned Magistrate erred in law and in fact by failing to rely on the appellants list of documents that proved that the suit property was registered in the 1st appellants names and that she is the rightful owner thereof.
 6. The Learned Magistrate erred in law by relying on the subject stock sheets when an overwhelming challenge had been mounted on their preparation, evidential as well as probative value.
 7. The Learned Magistrate erred entering judgment for the respondent by restraining the appellants whereas the 1st appellant is the current registered owner.
 8. The Learned Magistrate erred in failing to appreciate that it was absolutely necessary for the Respondents to have called a third party to clear the issue of the current ownership of the suit property.



9. The Learned Magistrate erred in dismissing the Appellant's claim on invoice 4510n the basis of provisions of the [Stamp Duty Act](#) after the documents had already been produced and pretrial procedure closed.
 10. The Learned Magistrate erred in failing to properly consider the Appellant's case, the Appellant's Defence to the Counterclaim, the evidential material and submission made by the parties.
 11. The Learned Magistrate erred in allowing for costs to the respondents.
7. The appeal was canvassed through written submissions. The appellants argued that pursuant to Section 26 of the [Land Registration Act](#), a person can only be termed as an absolute and indefeasible proprietor of land upon the issuance of a certificate of title by the Registrar. That the respondents did not have any title but only a letter of allotment and further that they did not comply with the letter of allotment with the result that the suit property still belongs to the County Government of Kakamega. The appellants further relied on the cases of [Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor](#) [2012] eKLR and of [Joseph N.K. Arap Ng'ok v Mojjo Ole Keiwua & 4 others](#) [1997] eKLR and argued that an allotment letter does not automatically confer the right of ownership to the respondents. That the deceased failed to comply with the letter of allotment and that as the absolute owner of the suit property, the County Government of Kakamega consented to the change of ownership from the deceased to the appellants on 19th August 2009. The appellants also argued that the respondents failed to prove fraud to the required standard. They relied on the cases of [Lucy Nchebeere v Rose Ndululu Musee & another](#) [2021] eKLR, [Jennifer Nyambura Kamau vs Hamberey Nandi](#) [2013] eKLR and [Vijay Morjaria vs. Nansingh Maddhusing Darbar & another](#) [2000] eKLR in support of those submissions. The appellants argued that they lawfully acquired the suit property and that the decision of the trial court to issue a permanent injunction against them was prejudicial to their right to property as provided for under Article 40 of [the Constitution](#) 2010. They therefore urged this court to allow the appeal with costs.
8. In reply, the respondents argued that the appellants' claim that they acquired the suit property through repossession and reallocation by the County Government does not hold since there was no proof of repossession and reallocation. That, similarly, the appellants' claim of acquisition through sale agreement dated 24th July 2009 is untenable since the seller did not have any capacity to deal with the deceased person's property. They further queried how the appellants could get allotment in the year 2008 and then purport to purchase the same property in 2009. Relying on [Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others](#) [2016] eKLR and [Munyu Maina v Hiram Gathiba Maina](#) [2013] eKLR, they contended that none of the ways through which the appellants claim to have acquired the suit property were beyond reproach. That in those circumstances, the injunctive orders were properly issued and that the learned Magistrate did not shift the burden of proof to the appellants.
9. The respondents further argued that the appellants neither testified before the trial court nor produced any documents and that they cannot therefore fault the learned magistrate for not relying on non-existent documents. Lastly, they contended that the award of costs was proper since by virtue of Section 27 of the [Civil Procedure Act](#), costs are discretionary and follow the event. They relied on the case of [Morgan Air Cargo Limited v Everest Enterprises Limited](#) [2014] eKLR and urged this court to dismiss the appeal with costs.



10. This being a first appeal, this court's mandate is as stated by the Court of Appeal in [*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*](#) [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.

11. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the deceased was the registered proprietor of the suit property, whether the respondents established fraud and whether the reliefs sought ought to have issued.
12. The dispute between the parties revolves around the parcel of land which they all describe as number Isulu Market Plot No. 9B. They all agree that no title document had been issued to any person in respect of the suit property. According to the parties, the suit property was held on the basis of a letter of allotment or letter of offer issued to the deceased by the County Government of Kakamega. None of the parties produced the letter of allotment or letter of offer.
13. It is important to restate that a letter of allotment or letter of offer is not title to land. The allottee has to follow it up, comply with all the conditions of the offer before she gets issued with a title document. The Court of Appeal reaffirmed that position in [*Wreck Motor Enterprises v Commissioner of Lands & 3 others*](#) [1997] eKLR, where it stated:

... Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.

14. The Supreme Court affirmed that position in [*Torino Enterprises Limited v Attorney General*](#) (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) where it stated:

So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In [*Dr Joseph NK Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others*](#) CA 60/1997 [unreported]; and in [*Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others*](#) HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

"It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all" [Emphasis added].

15. The respondents have not demonstrated the existence of any letter of allotment or letter of offer in respect of the suit property in favour of the deceased. Even if they did, that would not be enough in the absence of complying with the conditions of the allotment resting with issuance of a certificate title under the [*Land Registration Act*](#) or any of its predecessor statutes. Thus, the simple answer to the first issue for determination is that the deceased was not the registered proprietor of the suit property. Suffice it to say that the appellants do not have any better title since they too peg their claim to the suit property on a letter of allotment or letter of offer.
16. The respondents built their case against the appellants on the allegation that the appellants acquired title to the suit property fraudulently. The Court of Appeal restated the law relating to fraud in [*Adam*](#)



v Adam & 3 others (Civil Appeal 103 of 2019) [2022] KECA 501 (KLR) (1 April 2022) (Judgment) as follows:

In Vijay Morjaria vs. Nansingh Maddhusing Darbar & another [2000] eKLR, Tunoi, JA stated: “It is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleading. It is also settled law that fraudulent conduct must be distinctly alleged and distinctively proved and it is not allowable to leave fraud to be inferred from the facts.”

19. In Kinyanjui Kamau vs. George Kamau [2015] eKLR, the Court restated the principle that allegations of fraud must not only be pleaded but must be strictly proved. The Court cited with approval the earlier statement by the Court in Ndolo v Ndolo (2008) 1 KLR (G&F) 742 as follows: “...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...”.
17. Among others, the particulars of fraud pleaded by the respondents were that the appellants transferred the suit property to their names, using forged documents and that the appellants transferred the property of a deceased person without filing succession proceedings. All those claims are based on the supposition that the deceased was the registered proprietor of the suit property, a claim that we have already found to be unfounded. In those circumstances, the allegations of fraud are equally not established since they are based on a foundation that is factually wanting.
18. I find that the respondents failed to establish fraud. In those circumstances, the respondents were not entitled to the reliefs that they had sought. The learned magistrate erred in entering judgment in their favour.
19. In view of the foregoing discourse, I find merit in this appeal, and I therefore allow it. In doing so, I restate that the appellants do not have any better title to the suit property since they too peg their claim to the suit property on a non-existent letter of allotment or letter of offer.
20. In the result, I set aside the judgment of the Subordinate Court and replace it with an order dismissing the respondents’ case with no order as to costs. I make no order as to costs of this appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Appellants

No appearance for the Respondents

Court Assistant: M Nguyayi

