



**Kurji & another v Mohammed & 3 others (Environment & Land Case 500 of 2016) [2024] KEELC 3471 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 500 OF 2016**

**AA OMOLLO, J  
APRIL 18, 2024**

**BETWEEN**

**ZAHERALI KARIM KURJI ALIAS ABDULLA KARIM KURJI  
JIWANI ..... 1<sup>ST</sup> PLAINTIFF**

**ZAHERALI KARIM KURJI ALIAS ABDULLA KARIM (SUING AS LEGAL  
REPRESENTATIVE OF THE ESTATE OF THE LATE NUNU SAUD SALIM  
ALIAS NUNU ZAHERALI KURJI JIWANI) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AMIRA SALIM MOHAMMED ..... 1<sup>ST</sup> DEFENDANT**

**SAMILA SALIM MOHAMMED ..... 2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT**

**ABDULKADIR ALI IBRAHIM ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs filed a suit against the 1<sup>st</sup> - 4<sup>th</sup> Defendants vide a plaint dated 10<sup>th</sup> May 2016 and amended on 14<sup>th</sup> November 2016 seeking for the following orders;
  - a. A declaration that the 1<sup>st</sup> Plaintiff being the surviving spouse of the deceased registered proprietor of the suit property has a legal interest in the suit property.
  - b. A declaration that the transfer and or any dealing relating to the suit property L.R No. 1870/V/174 made on or before 22<sup>nd</sup> November 2015 are null and void.
  - c. A permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants (and/or any other person claiming under them) restraining them from evicting the 1<sup>st</sup> Plaintiff from Land Reference Number 1870/V/174.



- d. The Land Registrar at Nairobi Land Registry be ordered to rectify the lands records by cancelling any transfer and/or dealings relating to the Land Reference 1870/V/174.
  - e. The Land Registrar at Nairobi do enter the 1<sup>st</sup> Plaintiff's name as the proprietor of the suit property
  - f. The Honourable Court do grant any such relief that it may deem fit and just under the circumstances.
  - g. Costs of the suit.
2. The 1<sup>st</sup> Plaintiff averred that he got married to the deceased Miss Nunu Said Salim in 1982 whereupon her name changed to Nunu Zaherali Kurji Jiwani and together they purchased LR.No. 1870/V/174 located at Mangu Gardens off Church Road, Westlands Court Number 18 within Nairobi County herein after referred to as "the suit property" and registered in the name of the deceased.
  3. He pleaded that they made the suit property their home, where they lived for over thirty years and after the death of the wife, he continued living there. The 1<sup>st</sup> Plaintiff explained that his deceased wife was sick for a long time and was under treatment for various conditions such as mental illness which caused her to be forgetful thus necessitated employment of a maid to take care of her at home. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants often visited the suit property and spent time with the deceased without supervision and on one occasion in early 2015, by false misrepresentation and fraud they caused her to transfer the suit property into their names making them the registered proprietors of the suit property.
  4. The 1<sup>st</sup> Plaintiff outlined the particulars of misrepresentation/fraud by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as follows;
    - h. misrepresenting to the deceased that the suit property was being auctioned by the County Government due to rate arrears,
    - i. fraudulently obtaining signature/transfer for dealing in the land in their favour from a mentally challenged person,
    - j. representing documents obtained by misrepresentation /fraud to the 3<sup>rd</sup> Defendant thus causing transfer and entry of their names against the title of the suit property,
    - k. fraudulently concealing the fact of transfer from the 1<sup>st</sup> Plaintiff,
    - l. fraudulently causing the registration of a transfer in their favour without providing the necessary evidence regarding the deceased's marital status and
    - m. failing to obtain the 1<sup>st</sup> Plaintiff's consent as is required by the law in both the *Land Registration Act* and *Matrimonial Property Act*.
  5. The Plaintiff further stated that the 1<sup>st</sup> and 4<sup>th</sup> Defendants have on various occasions attempted to evict or cause his eviction from the suit property yet he is entitle to the suit property as the surviving spouse of the deceased under the provisions of the *Matrimonial Property Act* and the Succession Act Cap 160 laws of Kenya. The 1<sup>st</sup> Plaintiff contend that the 3<sup>rd</sup> Defendant registered the transfer presented by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without having sight of any evidence of the deceased's marital status contrary to the *Land Registration Act*. Further that the 3<sup>rd</sup> Defendant has refused to register a caution prohibiting dealings in the suit property despite receiving formal application in the prescribed form from the 2<sup>nd</sup> Plaintiff thus in breach of the Plaintiff's right as guaranteed in Article 40 of *the Constitution*.



6. The 4<sup>th</sup> Defendant is impleaded for purportedly purchasing the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pursuant to a sale agreement dated 10<sup>th</sup> December 2015. It is the Plaintiff's assertion that the 4<sup>th</sup> Defendant colluded with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to make false and fraudulent misrepresentations to the 3<sup>rd</sup> Defendant in obtaining the registration of the transfer in favor of the 4<sup>th</sup> Defendant. That the 4<sup>th</sup> Respondent ought to have known that the suit property is matrimonial property and should have insisted on seeing a spousal consent of the alleged transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
7. That on 25<sup>th</sup> May 2016, the 4<sup>th</sup> Defendant through his agent purported to levy distress for rent pursuant to orders obtained from the Chief Magistrate's court in Misc. application No. 383 of 2016 by withholding and/or concealing material facts. The Plaintiff avers that his interest in the suit property overrides change of ownership.
8. None of the Defendants filed any statement of defence. However, the 4<sup>th</sup> Defendant in his replying affidavit sworn by Abdikadir Ali Ibrahim on 23rd June 2016, deposed that he purchased the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants vide sale agreement dated 10<sup>th</sup> December 2015 at a consideration of Kshs.18,000,000 and the same was transferred to him on 2<sup>nd</sup> March 2016.
9. He explained that in conducting their due diligence, the root of the title was traced with the deceased having purchased the same from one Mehmout Uz Zaman Ahmed Quraishi. That the deceased executed a Power of Attorney instrument on 4<sup>th</sup> May 2010 to her daughters, Amira Salim Mohamed Al Busaidi, Nawal Salim Mohamed Al Busaidi and Samila Mohamd Ali Busaidi in respect of her properties, including the suit property. Subsequently, the suit property was transferred to them by a transfer made on 12<sup>th</sup> November 2014 and registered on 24<sup>th</sup> April 2015 in consideration of Love and Affection as tenants in common and in equal shares.

### **Evidence**

10. The matter was heard on 19.10.2023 when PW1 testified by adopting his written statement filed in court on 11<sup>th</sup> May 2016 as evidence in chief. He also produced documents dated 16.05.2016 as PExh 1-5. He stated that he got married to his deceased wife in 1982 and at that time she had four daughters from her previous marriage while he had two sons. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are his step daughters and both are citizens and residents of Oman.
11. It is his evidence that in 1982 he entered into a sale agreement with Mr. Qureshi who was the owner of the suit property and after paying the agreed purchase price, the property was registered in the name of the deceased wife. He added that they lived in the suit property for over thirty years with his younger son and at some point, the wife became very sick treated for various conditions including loss of mental capacity which position required constant supervision thus a retired nurse was hired to take care of her.
12. He explained that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants visited their deceased mother from time to time and a couple of days before her death they visited in the company of an unknown man who he later came to know was an Advocate. That they took a long time with her in her room and her nurse overheard them talking about rates due to the City Council and one of the daughters tell her that she was to sign some documents to avoid the property being sold by the Nairobi City County Government due to the rates arrears.
13. PW1 stated that he inquired from the wife if she had signed any documents but she had no recollection of having such a conversation or signing any document. That thereafter the 1<sup>st</sup> and 2<sup>nd</sup> Defendants started to insist on taking their mother to the hospital abroad but her primary doctor refused to grant



them a letter for the trip owing to her condition and subsequently they changed the doctor who changed the medication she was using and soon thereafter she passed on.

14. That after the burial, the daughters requested to take some of their mother's clothes and belongings but took jewelry, money, cooking pots and her personal papers then came again on 28<sup>th</sup> November 2015 accompanied by strange men driving three pick up vans demanding to take other household items. He stated that the police from Kilimani Police Station intervened and after realizing that it was a family dispute, asked them to approach the courts for permanent solution.
15. PW1 stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants alleged to have a power of attorney granted to them by their late mother and had used the same to transfer the suit property to their names. That the Plaintiff could not register a caveat on the suit property as the same had been transferred to their names.
16. During cross examination PW1, stated that his son is currently staying on the suit property. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are his step daughters sold the same without his consent. He further stated that he had not done a search to confirm in whose name the title was currently in. He explained that it took him long to give evidence because he was unaware of what had taken place until the Defendants came to the property to evict him. PW1 confirmed that he had not produced the OB number when he reported the matter to the police. The Plaintiff closed his case and Defendants having not served the Plaintiffs with any documents, the defence case was closed.

#### **Analysis and determination:**

17. The Plaintiff's suit against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is premised on ownership of the suit property on the grounds that he is surviving spouse of the deceased under the provisions of the *Matrimonial Property Act* and the *Law of Succession Act* Cap 160. The presented show that the suit property was originally registered under the name of the Plaintiff's deceased wife and who is the mother to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. It is also not in dispute that the Plaintiff was married to the deceased on 1<sup>st</sup> May 1992 as evidenced by the marriage certificate serial- No.001736 produced.
18. Looking at Section 13 of the *Environment and Land Court Act* which outlines the jurisdiction of this Court does not include determination of what entails matrimonial matters. It provides thus;
  - “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162 (2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-
    - a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - b) Relating to compulsory acquisition of land;
    - c) Relating to land administration and management;
    - d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



e) Any other dispute relating to environment and land.”

19. This court’s jurisdiction emanates from *the Constitution* 2010 and thus shall not involve itself in determination of issues outside its scope of authority. This is in line with the decision in the celebrated case of Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1 where the Court of Appeal stated that:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. Be that as it may, I will consider that matter on merits in the event my holding on want of jurisdiction is wrong. The Plaintiff contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transferred the suit property to their names fraudulently and particularized the fraud set out in paragraph 4 hereinabove. Section 107 of the *Evidence Act* states as follows;

“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.”

21. In the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated 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.”

22. The fraud alleged by the Plaintiff as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are premised on the fact that the deceased wife was mentally challenged and was thus not capable of executing the power of attorney as she did. I have perused the exhibits produce by the Plaintiff which were; marriage certificate, copies of national identity card of the deceased, copy of title of the suit property, death certificate of his wife and letters of administration ad litem. The cause of death as given in the death certificate dated 31<sup>st</sup> December 2015 is stated to be heart failure. There is no evidence adduced in terms of a diagnosis or a medical report showing that the deceased wife was mentally challenged prior to her demise and in particular in the month when the impugned power of attorney was executed.

23. I also note from the copy of title of the suit property produced that the title was registered in the name of the deceased on 4<sup>th</sup> July 1983. In the marriage certificate, it is indicated that the deceased was the owner of the house where the marriage took place. Going by the evidence of the plaintiff that they stayed in suit property as their matrimonial home corroborates the details contained in entry no. 5 in the certificate of title and the certificate of marriage. To expect the Court to hold that he contributed to the purchase, he needed to show evidence of payment of the purchase price and none was presented.

24. Consequently, in the absence of evidence of lack of capacity of the deceased to executed the POA, there is no reason to invalidate the power of attorney that was issued in the year 2010 By the deceased wife to her daughters. As stated in the cases cited, fraud cannot be inferred and the fact of the Defendants



not defending the claim does not take the Plaintiff's obligation in law to prove his case. It is therefore my opinion and I so hold that the claim of fraud alleged by the Plaintiff is not proved and hence no basis to interfere with the title to the suit property. Thus, the suit is dismissed with no order on costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> APRIL 2024**

**A. OMOLLO**

**JUDGE**

