



**Mukonyi v Nurmohamed & 3 others (Environment & Land Case
341 of 2017) [2024] KEELC 1742 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1742 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 341 OF 2017
DO OHUNGO, J
APRIL 11, 2024**

BETWEEN

RAMADHAN ASMAN MUKONYI PLAINTIFF

AND

MOHAMED HUSSEIN NURMOHAMED 1ST DEFENDANT

ANTHONY OKELLO OLOO 2ND DEFENDANT

LANDS REGISTRAR, KAKAMEGA 3RD DEFENDANT

BROWNTONIC COMPANY LTD 4TH DEFENDANT

JUDGMENT

1. The plaintiff moved the court through plaint dated 26th September 2017, wherein he averred that the first defendant was the registered proprietor of the parcel of land known as South/Wanga/Lureko/2821 (the suit property) measuring approximately 12.05 hectares and that on 22nd August 2013, the plaintiff purchased the suit property from the first defendant at a consideration of KShs 10,800,000, took possession and commenced improvements. That despite the plaintiff paying KShs 5,710,000 towards the purchase price through the fourth defendant's bank account, the first defendant failed to avail the original of the title and to transfer the property to the plaintiff as a result of which the plaintiff placed a caution against the suit property on 16th September 2014.
2. The plaintiff further averred that despite the caution, the suit property was fraudulently and illegally transferred to the second defendant on 1st August 2017 and title deed issued on 3rd August 2017. The plaintiff therefore prayed for judgment against the defendant for a declaration that entries made in the register of the suit property on 1st August 2017 and 3rd August 2017 as well as the title deed issued were illegal, null and void. He further sought an order that the suit property be registered in his name and for an award of costs and interest.



3. The first defendant filed statement of defence dated 23rd October 2017 in which he admitted transferring the suit property to the second defendant and denied entering into any sale agreement with the plaintiff or receiving any part of the purchase price. He further averred that he lawfully removed the caution and prayed that the suit be dismissed with costs.
4. On his part, the second defendant filed statement of defence and counterclaim dated 23rd October 2017 wherein he conceded that the first defendant transferred the suit property to him. He averred in the counterclaim that he acquired the suit property at a consideration of KShs 9,100,000 which he paid in full and that one Zainabu Ateli who claimed ownership of the suit property had leased portions thereof to third parties. He therefore prayed for judgment against the plaintiff and Zainabu Ateli for a permanent injunction restraining them, their agents, and servants from trespassing on or accessing the suit property. He further prayed for costs of the counterclaim.
5. The plaintiff passed away on 4th January 2019 and was substituted with Zainabu Ateli Hussein who obtained Grant of Letters of Administration Ad Litem in respect of the plaintiff's estate. Subsequently, the first defendant also passed away on 10th June 2021 and was substituted with Mohamood Hussein who obtained Grant of Letters of Administration Ad Litem in respect of his estate.
6. The third and fourth defendants neither responded to the suit nor participated in its hearing.
7. At the hearing, Zainabu Ateli Hussein testified as PW1 and adopted a witness statement signed and filed by the plaintiff (Ramadhan Asman Mukonyi) on 26th September 2017 wherein the plaintiff reiterated that he entered into a sale agreement on 22nd August 2013 through which he purchased the suit property from the first defendant at a consideration of KShs 10,800,000. That he paid a total of KShs 5,710,000 to the first defendant in three instalments by way of transfers to the first defendant's bank account on 22nd August 2013, 17th September 2013, and 6th February 2014. That he was ready and willing to pay the purchase price in full, but when he asked the first defendant to hand the original title deed to him, the first defendant became evasive. That as a precaution and to safeguard his interests, he placed a caution in the register of the suit property on 16th September 2014 and that he conducted search on the suit property on 21st September 2017 and was shocked to discover that the suit property had been transferred to the second defendant on 1st August 2017 and title deed issued to him on 3rd August 2017.
8. The plaintiff further stated that he obtained a copy of the register which revealed that the caution he had placed was lifted on 1st August 2017 through a court order issued in Kakamega CMC Civil Application No. 27 of 2017. He added that he was never notified of the intended lifting of the caution and that subsequent enquiries at the Kakamega Law Courts Registry revealed that the cited order and case were fictitious. The plaintiff also stated that he suspected that the first, second and third defendants may have colluded to fraudulently and illegally have the suit property transferred to the second defendant to defeat his claim to the land. That he wanted the court to compel the first, second and third defendants to facilitate transfer of the suit property to his name and that he was ready and willing to pay the balance of the agreed purchase price to the first defendant.
9. PW1 produced copies of certificate of official search dated 21st September 2017, sale agreement dated 22nd August 2013, title deed dated 20th April 2007, green card, and bank slips. She further stated that although the sale agreement stated that KShs 10,800,000 had been paid, only KShs 5,710,000 was paid. Under cross-examination, PW1 stated that she knew the first defendant and that he lived in Mombasa. That the agreement was signed in Mumias in Mr Namatsi Advocate's office and that she also signed it. That they did not go to the Land Control Board and that there were other buyers besides the plaintiff. That the second defendant purchased 2 acres.



10. James Namatsi, an advocate practicing in the name and style of Namatsi & Co. Advocates, testified as PW2. He stated that the sale agreement was taken to him by the plaintiff who was his client and that it had been drafted and printed by the time it was taken to him. That others present when it was taken to him were Jerry O. Odhiambo, and PW1 who was a witness. That he was informed that the first defendant who was the vendor was very ill in Mombasa and unable to travel to his office in Mumias. He added that the first defendant did not sign in his presence and that the plaintiff told him that the first defendant was being represented by Jerry O. Odhiambo of the fourth defendant company. He also testified that he did not witness payment of the consideration and that he did not know who drafted the agreement. That the suit property was agricultural land and that there was need for consent of the Land Control Board, which consent ought to have been obtained by 23rd February 2014. PW2 also testified that he was not involved in the conveyance.
11. The plaintiff's case was thus closed.
12. Nur Mohamed Hussein (DW1) testified that the first defendant was his father and that pursuant to judgment dated 18th February 2022 in Mombasa Khadhi's Court Succession Case No. E316 of 2021, he (DW1) was granted authority to act on behalf of the first defendant's estate. He produced a copy of the judgment and a copy of certificate of search dated 21st September 2017. DW1 also adopted his witness statement dated 16th January 2023. I have read the witness statement and I note that DW1 makes several assertions therein on behalf of the first defendant but without stating the source of his knowledge. Under cross-examination, DW1 conceded that this case was not mentioned in the judgment in Mombasa Khadhi's Court Succession Case No. E316 of 2021 and added that the first defendant was sick both before and during the month of August 2013. The first defendant's case was then closed.
13. Anthony Okello Oloo testified next as DW2 and adopted his witness statement dated 23rd October 2017. He also produced the documents listed as number 1 to 8 in the second defendant's list of documents as his exhibits. He stated in his above witness statement that he was the proprietor of St. Joseph's Secondary School situated within Shibale area in the outskirts of Mumias town and that the land upon which the School rests was sold to him by the first defendant in the year 2006 after he was introduced to him by Zainabu Ateli who was then the caretaker of the land. That sale agreement between him and the first defendant was signed in Mombasa after which the first defendant travelled to Mumias town to personally supervise the survey which gave rise to the suit property. That he purchased the suit property on 9th March 2017 at a consideration of KShs 9,100,000. That the suit property was registered in his name on 1st August 2017 and a title deed issued to him on 3rd August 2017. He further stated that the suit property abuts the school and is ideal for growing food for the School. That since Zainabu Ateli had been in the habit of leasing out portions of the suit property to third parties, he served her with a demand notice warning her to cease any dealings with the property from month November 2017. He further stated that during all the years that he had run the School from the year 2006, the plaintiff never claimed the suit property and that instead, it was Zainabu Ateli who consistently held herself out as the owner of the suit property.
14. Under cross-examination, DW2 stated that he did not conduct any search prior executing the sale agreement between him and the first defendant and that upon obtaining title, he wrote to the plaintiff and warned the plaintiff that he was on DW2's land. He added that he purchased 12.05 hectares and that he had not taken possession of the suit property as of the date of his testimony because the plaintiff and Zainabu Ateli had stopped him from taking possession. He also stated that there was no caution in the register when he was buying the suit property since the caution had been removed by the first defendant.



15. The second defendant's case was then closed. Since there was no appearance by the third and fourth defendants, their cases were closed upon the request of counsels for the plaintiff and the first and second defendants.
16. Directions were given that parties file and exchange written submissions. Save for the third and fourth defendants, all parties filed submissions. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether fraud and illegality have been established and whether the reliefs sought should issue.
17. The plaintiff's case is that the first defendant was the registered proprietor of the suit property and that he purchased the suit property from the first defendant on 22nd August 2013 at a purchase price of KShs 10,800,000 out of which he paid KShs 5,710,000. According to the plaintiff's own account, there is an outstanding balance of KShs 5,090,000 in respect of the purchase price. The plaintiff further contended that the first defendant fraudulently and illegally transferred the suit property to the second defendant on 1st August 2017. Both the plaintiff and the second defendant agree that the second defendant is the current registered proprietor of the suit property. Indeed, the copies of the title deed, certificate of search dated 21st September 2017 and register all confirm that the second defendant was registered as proprietor 1st August 2017.
18. As a registered proprietor of land, the second defendant is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Section 26 of the Act obligates the court to accept his certificate of title as conclusive evidence of proprietorship unless the provisos under Section 26 (1) (a) or (b) are established. The grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
19. As has often been restated by the courts, 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.
20. The plaintiff's claim that he is entitled to the suit property is grounded on the sale agreement dated 22nd August 2013. As already noted, the plaintiff is yet to fully pay the purchase price. Almost half of the purchase price remains unpaid. Clause 2 of the agreement is specific that the plaintiff would only be entitled to completion upon fully paying the purchase price.
21. Serious doubt was cast on whether the first defendant signed the sale agreement. He maintained that he was sick in Mombasa and that he neither signed the agreement nor received the purchase price. Both PW1 and PW2 confirmed that the agreement was signed in Mumias in the absence of the first defendant who was away in Mombasa. I have perused the agreement and I note the vendor's signature was not attested by any advocate. Jerry O. Odhiambo who is alleged to have witnessed the vendor's signature was not called to testify.
22. I further note that the agreement has two clauses numbered 4. The first clause 4 at the bottom of page 1 seems to have been inserted separately since it bears a different font from that used in the rest of the document. The said clause states that payment of purchase price was to be made to a bank account held by Browntonic Company Ltd, an entity that was not party to the agreement. I further note that the clause 4 at the top of page 2 of the agreement seems to be the genuine clause 4 since its font is the same as that used in the rest of the agreement.



23. The plaintiff also contended that a caution which he registered against the suit property was lifted through a fictitious court order issued in an equally fictitious case. In response, the second defendant produced a copy of an order made on 18th July 2017 in Kakamega CM Misc. Civil Application No. 27 of 2017. A perusal of the order shows that it ordered removal of the caution. If the plaintiff wanted to verify his claims that both the case and the order were non-existent, all he needed to do was to call an office from the Chief Magistrate's Court Kakamega to testify and verify his claims. He did not do so. The plaintiff also claimed that he was never notified of the intended lifting of the caution. That is an argument that should have been raised in Kakamega CM Misc. Civil Application No. 27 of 2017.
24. In view of the foregoing, the plaintiff failed to prove any fraud or illegality. It follows therefore that he is not entitled to the reliefs sought.
25. The second defendant filed a counterclaim in which he averred that Zainabu Ateli who substituted the plaintiff claimed ownership of the suit property had leased portions thereof to third parties. He also testified that the plaintiff and Zainabu Ateli had stopped him from taking possession of the suit property. I reiterate that a registered proprietor of land is entitled to the rights, privileges, and benefits of his proprietorship. I am persuaded that the second defendant is entitled to the reliefs that he sought.
26. In the result, I find no merit in the plaintiff's case. I dismiss it with costs. I further grant a permanent injunction restraining Zainabu Ateli Hussein, the estate of Ramadhan Asman Mukonyi, their agents, servants and persons claiming under them from trespassing on or accessing the parcel of land known as South/Wanga/Lureko/2821. The first and second defendants shall have the costs of the suit.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Omar for the Plaintiff

Mr Omwenga for the First Defendant

Ms Ikhumba for the Second Defendant

No appearance for the Third and Fourth Defendants

Court Assistant: M Nguayai

