



**Saha & 2 others v Tsama (Environment & Land Case 181 of 2018)
[2024] KEELC 4264 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 181 OF 2018**

FM NJOROGE, J

MAY 23, 2024

BETWEEN

JONATHAN SAHA 1ST PLAINTIFF

JOHA MKUZI 2ND PLAINTIFF

TSUMA KANGO 3RD PLAINTIFF

AND

JULIUS MKAUMA TSAMA DEFENDANT

JUDGMENT

Plaint

1. In a further amended plaint dated 7th October 2021, the Plaintiffs sought that judgment be entered against the Defendant for: -
 - a. A declaration that the parcel of land known as Mgumo Patsa/Mazeras/113 and the subsequent subdivisions being Mgumo Patsa/Mazeras/1253 and 1254 belong to the larger Mkuzi family;
 - b. A declaration that title No. Mgumo Patsa/Mazeras/113 and all its subdivisions were fraudulently acquired;
 - c. A permanent injunction restraining the defendant, his servants, agents and or any other person whomsoever and whatsoever from encroaching, subdividing, selling off, building, wasting, evicting the plaintiffs from suit property and or any other manner whatsoever carrying out activities or at all over the suit land Mgumo Patsa/Mazeras/113 and its subsequent subdivisions;
 - d. Costs and interest of the suit at court rates;
 - e. Damages;



- f. Any other reliefs the court may think fit and just to meet the ends of justice.
2. The gist of the Plaintiffs' case is that the parties herein are all members of one family. The family patriarch was one Mkauma Mkuzi, deceased who had six sons. These were Tsuma Mkuzi, Kango Mkuzi, Saha Mkuzi, Bembwiya Mkuzi, Saha Mkuzi and Mlijwa Saha. The 1st and 3rd Plaintiffs are Saha Mkuzi and Tsuma Mkuzi's sons respectively and the 2nd Plaintiff is their nephew.
 3. The Plaintiffs averred that their late grandfather Mkauma Mkuzi owned a parcel of land known as Mgumo Patsa/Mazeras/113 (the "suit property") which was allegedly registered in the name of Tsama Mkuzi Saha as the first son to hold in trust for his five brothers.
 4. The said Tsama Mkuzi passed on sometime in 1984 and the suit property's status quo was maintained until on 7th November 2013 when the Defendant, through a demand letter, asked the Plaintiffs to vacate the suit property. The Defendant and his mother fraudulently also registered the suit property in their names and subsequently sub-divided the same into Mgumo Patsa/Mazeras/1253 and 1254 to the exclusion of the other heirs.

Defence

5. The Defendant filed a further amended statement of defence dated 8th November 2021, wherein he averred that the suit property was purchased by his late father, Tsama Mkuzi Saha, from one Mekeka Tututu, and that after demarcation it was registered in the defendant's father's name. The defendant denied the allegations that the suit property was held by Tsama Mkuzi in trust for the other brothers.

Evidence

Plaintiff's Evidence

6. The 1st Plaintiff testified as PW1. He adopted his written statement filed on 19th September 2018 as part of his evidence-in-chief and produced the documents in the list of documents dated 30th July 2018 as Pexh 1-3. He told the court that he has lived on the suit property for over 30 years and that it was agreed that the same be adjudicated and registered in the name of Tsama Mkuzi. PW1 testified that the Plaintiffs vacated the suit property and the Defendant has continued to lease the same to third parties.
7. On cross-examination by Ms. Kayatta, counsel for the Defendant, the Plaintiff told the court that the Defendant's father was issued with the title to the suit property on 12th September 2005. He added that he did not have any evidence that the suit property belonged to their grandfather or that the said Tsama Mkuzi was the eldest son. The witness stated that the suit property was part of a settlement scheme and that the family only farmed thereon. He added that their claim is under their respective fathers' names but they did not have any grant of representation. On further cross-examination, the Plaintiff first stated that he lived on another plot together with the Defendant. He later contradicted himself by stating that there are more than seven houses on the suit property, one which belongs to him and graves for some of their family members.

Defendant's Evidence

8. In support of the defence case, the defendant testified as DW1. He adopted his written statement filed on 5th October 2018 as part of his evidence-in-chief, and produced documents in the list of documents evenly dated as D. exh 1-7.
9. According to the Defendant, his father was the 2nd born son and not the first as alleged by the Plaintiffs. He testified that the Plaintiffs' fathers sought his father's permission to farm on the suit property,



which was granted. He told the court that the only people living on the suit property are some relatives who had also sought his father's permission to settle thereon since their houses were demolished in a different area. He added that the only grave on the suit property belonged to one of the relatives living on the suit property.

10. On cross-examination by Ms. Memia counsel for the Plaintiffs, the defendant informed the court that the 1st Plaintiff stayed on the suit property for about 10 years before the dispute arose. He was however not aware whether the 1st Plaintiff was on the suit property before the year 2005. The Defendant testified that the sale between his late father and the said Mekeka was done in the presence of the area chief; he explained that he did not have the relevant documents because they were stolen at a night vigil when his father died.
11. Erick Nelson Mkuzi (DW2) equally adopted his written statement dated 28th February 2020 as part of his evidence-in-chief. He told the court that he was a former elder within the area. He testified that the suit property belonged to the defendant's father and that he has lived thereon since 1973 when his house was demolished in a different area. He explained that he sought the defendant's father's consent to build on the suit property, which he did. He stated that the only graves on the suit property belong to members of his family and not the 1st Plaintiff. On cross-examination, DW2 told the court that he found the Plaintiffs farming on a portion of the suit property when he moved in.

Submissions

Plaintiffs' Submissions

12. In their submissions filed on 7th December 2023, counsel for the Plaintiffs identified two issues for determination namely whether the plaintiffs are entitled to claim adverse possession over the suit property and who should bear costs of the suit.
13. In relation to the first issue, counsel submitted that Sections 7, 17 and 38 of the *Limitation of Actions Act* extinguish the rights of a registered owner where there is a successful claim for adverse possession. To counsel, the Plaintiffs had demonstrated that they had been in actual possession of the suit property for over 20 years, therefore entitled to the prayers sought. Counsel relied on the following cases: *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR; *Samuel Kihamba v Mary Mbaisi* [2015] eKLR and *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR. Counsel added that costs should follow the event.

Defendant's Submissions

14. On his part, the Defendant relied on submissions filed by his counsel on 22nd December 2023, wherein the issues for determination were listed as – who is the legal owner of the suit property and its subsequent subdivisions; whether the title to the suit property was fraudulently acquired, and who is entitled to costs.
15. Concerning the first issue, counsel reiterated the Defendant's evidence and urged the court to find that ownership belongs to the defendant. He argued that the Plaintiffs failed to prove their allegation that the defendant's father held the suit property in trust or that the same belonged to their grandfather. Counsel added that the allegations of fraud were also not proved as is required and as stated in the case of *Mohandra Shah v Barclays Bank International Limited and Another* [1979] KLR 76. Counsel further submitted that the issue of adverse possession introduced by the Plaintiffs at the submission stage was never pleaded and should be ignored by the court, since parties are bound by their pleadings. Counsel was guided by the case of *Abdirashid Adan Hassan v The Estate of Wheedgley* ELC Case No. 013 of 2021 (OS).



Analysis and Determination

16. The Court has carefully read and considered the pleadings by the parties, the evidence adduced, the rivals written submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are: -
- a. Whether the Plaintiff has made a case for existence of a trust over the suit property.
 - b. Whether the suit property was fraudulently registered in favour of the defendant and or his father.
 - c. Whether the prayers sought in the Plaint are merited.
17. On whether a trust was established over the suit property, the Plaintiffs contend that the suit property originally belonged to their grandfather Mkauma Mkuzi, who registered the same to the defendant's father Tsama Mkuzi, to hold it in trust for his other brothers hence the registration in the name of Tsama Mkuzi Saha. The Plaintiffs' contention was corroborated by the evidence of PW1, the 1st Plaintiff herein. In addition, the Plaintiffs annexed a copy of the title deed issued to Tsama Mkuzi Saha on 12th September 2005 (Pexh.1), copy of official search dated 2nd April 2012 (PExh.2) and a copy of a handwritten document (Pexh.3) with list of names clustered into three under the heads Mgumo wa Patsa/Mazeras/135; Mgumo wa Patsa/Mazeras/113; and "*Walimao shamba bili*".
18. The Defendant on the other hand concurs that the suit property was registered in the name of Tsama Mkuzi Saha but contends that it was registered as such because the said Tsama Mkuzi Saha purchased the same from one Mekeka Tututu before land adjudication; that upon his father's demise, and administration of his estate, the suit property was subsequently transferred to him and his mother. To support his case, the Defendant relied on his own testimony and that of DW2. He equally annexed copies of the grant of letters of administration (Dexh. -6) and certificate of confirmation of grant (Dexh.7).
19. The rights of a registered owner of property are set out under Section 24 of the [Land Registration Act 2012](#) as follows: -
- “Subject to this [Act](#)
- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
20. Section 25 (1) of the same [Act](#) provides that The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the [Act](#). The rights of a registered owner are however subject to overriding interests declared by Section 28 thereon which provides: -
- “28. Overriding interests
- Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- (a) ...
 - (b) trusts including customary trusts;”



21. The Supreme Court in the case of *Isack Kieba M'inanga v Isaaya Theuri M'Lintari & another* [2018] eKLR, held as follows: -

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

22. The legal burden to prove the existence of a trust rests with the one who is asserting a right under customary trust. In the case of *Njenga Chogera v Maria Wanjira Kimani & 2 Others* [2005] eKLR, which quoted with approval the holding in the case of *Muthuita -vs- Muthuita* [1982 – 88] 1 KLR 42, the Court of Appeal held that a customary trust is proved by leading evidence. Trust is a question of fact, which must be proved by whoever is claiming a right under customary trust. A trust can never be implied by the Court, unless in cases of absolute necessity.

23. In the present case, the Plaintiffs had duty to discharge this burden. It was upon the Plaintiffs to show that the suit property was ancestral clan land, that during adjudication and consolidation one member of the family was designated to hold the suit property on behalf of the family, or brothers in this case, and that the designated person was registered to hold the suit property in trust. From the evidence laid by the Plaintiffs, no such attempt was done. There was no proof that the suit property was ancestral land. There was even no evidence of the adjudication process. Indeed, this court recalls the 1st Plaintiff's testimony. He testified on cross-examination that the government never measured the suit property. It was not substantiated as to how the Plaintiffs' grandfather acquired the suit property. In the circumstances, I find that the Plaintiffs have failed to establish a case for existence of a trust over the suit property.

24. A certificate of title is conclusive evidence of ownership and is *prima facie* evidence that the registered proprietor is the owner. Section 26 of the *Land Registration Act*, Cap 300 provides: -

“Certificate of title to be held as conclusive evidence of proprietorship

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed



in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

25. In the present case, the Plaintiffs claimed that the Defendant’s title is a result of some illegal or fraudulent acts. It is trite law that fraud must be specifically pleaded and strictly proved. I am guided by the Court of Appeal in the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states 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.”

26. The Plaintiffs have failed to support their case or tender any evidence to show how the defendant acted fraudulently. The suit property was registered in the defendant’s father’s name and was therefore well within his rights to subject the suit property under the laws of succession as evidenced by DExh-6 and 7. In the absence of any contrary evidence, I am inclined to uphold the defendant’s title. The outcome is that the Plaintiffs’ suit is unmerited. It is hereby dismissed.

27. Section 27 of the *Civil Procedure Act* requires that costs to follow event but the Court have the discretion to rule otherwise. The court notes that the dispute herein is a family dispute and considering the circumstances of this case, I direct that parties bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE

ELC, MALINDI

