



Mugalla & another (Both Suing as Legal Representatives and on Behalf of the Estate of the Late Joseph Jolly Mugalla a.k.a Joseph J. Mugalla) v Shivachi (Environment & Land Case 3 of 2017) [2024] KEELC 3738 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 3 OF 2017**

DO OHUNGO, J

MAY 9, 2024

BETWEEN

ANTHONY MWABISHI MUGALLA 1ST PLAINTIFF

CASTRO FELIX MUSIYIKHU MUGALLA 2ND PLAINTIFF

**BOTH SUING AS LEGAL REPRESENTATIVES AND ON BEHALF OF THE
ESTATE OF THE LATE JOSEPH JOLLY MUGALLA A.K.A JOSEPH J. MUGALLA**

AND

LABAN LIJODI SHIVACHI DEFENDANT

JUDGMENT

1. The plaintiffs jointly brought this suit through plaint dated 3rd January 2017 as legal representatives and on behalf of the estate of Joseph Jolly Mugalla (deceased). They averred that the deceased was the registered proprietor of the parcel of land known as Kakamega/Iguhu/1932 (the suit property) which the deceased purchased from the defendant. They further stated that the defendant had gone about claiming that the deceased did not complete paying the purchase price and that he intended to recover the suit property.
2. The plaintiffs therefore prayed for judgement against the defendant for a permanent injunction to restrain the defendant and his agents or any other person claiming under him from accessing or interfering with their use and occupation of the suit property. They also prayed for costs of the suit.
3. The defendant failed a statement of defence in which he stated that he entered into a sale agreement with the deceased in respect of the suit property, but the deceased failed to pay the purchase price in full and that the deceased used political influence to fraudulently obtain title to the suit property. He prayed that the plaintiffs' case be dismissed, and that judgement be entered in his favour against the plaintiffs jointly and severally for an order of cancellation of the title issued to the deceased and



that a fresh title be issued in his name. He further the prayed for a permanent injunction to restrain the plaintiffs, their agents, servants, representatives, assigns or anybody claiming through them from entering, fencing, alienating, cultivating, constructing upon or trespassing on or interfering with their peaceful use and occupation of the suit property.

4. At the hearing, Antony Mwabishi Mugalla (PW1) adopted his witness statement dated 3rd January 2017 and produced the documents listed as item numbers 1 and 2 in plaintiffs' list of documents dated 3rd January 2017 as well the document listed as item number 1 in in plaintiffs' further list of documents dated 10th April 2017. PW1 stated in the witness statement that he and the second plaintiff are sons of the deceased, and that the deceased purchased the suit property from the defendant on 17th August 1993. That the suit property was subsequently registered in the deceased's name and title deed issued to him on 8th May 1995. That the defendant had recently gone about claiming that the deceased did not complete paying the purchase price and that for that reason, he intended to recover the suit property.
5. PW1 further testified that on one occasion when his brother went to plough the suit property using a tractor, the defendant lay on the ground to stop the tractor. He also stated that the balance of KShs 160,000 indicated in the sale agreement was paid and that title was issued to the deceased procedurally. He did not however produce evidence of payment. The plaintiff's case was then closed.
6. Laban Lijodi Shivachi (DW1) adopted his witness statement dated 18th March 2022. He stated in the statement that he was the proprietor of a parcel of land known as Kakamega/Iguhu/195 and that he sold five acres of the said parcel to the deceased at a consideration of KShs 52,000 per acre. That the deceased engaged his own surveyor who surveyed the land in DW1's absence and gave the deceased 4.7 hectares instead of the 5 acres that DW1 sold. He added that he would like the deceased's title cancelled and a new title be issued to the deceased for only the 5 acres and the rest of the land to revert to him.
7. During cross examination, DW1 stated that the deceased paid him KShs 100,000 leaving a balance of KShs 160,000 and that he never wrote any demand for the balance but only asked for it verbally. He also stated that he did not attend any Land Control Board in respect of the transaction. During re-examination, he stated that although the land was not surveyed, he believed that he about 4 to 5 acres to the deceased. Defence case was then closed.
8. Thereafter, parties filed and exchanged written submissions. The Plaintiffs cited Section 26 (1) of the [Land Registration Act](#) and argued that the title in favour of the estate of the deceased cannot be impeached since the defendant did not present any evidence of an acquisition contrary to the law. They further relied on the cases of *Mary Anyango Onyango v South Nyanza Sugar Co Ltd* [2020] eKLR and *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR and argued that the defendant did not adduce evidence to support his counterclaim. The plaintiffs also argued that to the extent that the defendant pleaded in his counterclaim that the deceased was to complete payment by 31st May 1994, his counterclaim, being a claim for recovery of land, was barred by virtue of Section 7 of the [Limitation of Actions Act](#).
9. On his part, the defendant argued that the deceased's title was obtained fraudulently and should therefore be cancelled. That the deceased took advantage of him to obtain title before completing payment of the purchase price. Further, that the plaintiffs are not entitled to an injunction since the deceased obtained title to a bigger portion than what he purchased.
10. I have considered the parties pleadings, evidence and submissions. The issues that arise for determination are whether the defendant established fraud and whether the parties are entitled to the reliefs sought.



11. There is no dispute that the plaintiffs are the administrators of the estate of Joseph Jolly Mugalla alias Joseph J. Mugalla (deceased) who passed away on 19th October 2003 and that the deceased is the registered proprietor of the suit property, having been so registered on 8th May 1995.
12. As a registered proprietor of land, the deceased's estate is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Further, Section 26 of the Act obligates the court to accept the deceased's 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.
13. Unless the defendant successfully impeaches the deceased's title, there would be no basis to keep the deceased's estate from enjoying the full benefits of proprietorship. The defendant has not dislodged the plaintiffs' claims that he stopped them from ploughing the suit property, that he has been claiming that the deceased did not complete paying the purchase price and that he intends to recover the suit property. If anything, his counterclaim is a confirmation of the plaintiffs' claims.
14. The defendant has attacked the deceased's title on allegations of fraud. As the courts have consistently stated, 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.
15. The defendant's basis for his allegations of fraudulent acquisition is that he was not paid the full purchase price. The transaction pursuant to which the deceased acquired the suit property was encapsulated in the sale agreement dated 17th August 1993. Thus, failure to fully pay the agreed consideration, if there was such a failure, would be breach of contract as opposed to a fraudulent act.
16. The defendant also claimed that he did not appear before the Land Control Board in respect of the transaction. I take it that his contention is that the deceased's title was issued without regard to Section 6 of the *Land Control Act* which requires consent of the Land Control Board. The said section does not however apply in a vacuum. The defendant needed to adduce evidence to show that the transaction concerned agricultural land and that the Land Control Board for the land control area or division in which the suit property is situated did not give a valid consent. The defendant did not offer any evidence to support his allegations to the standard required of a party alleging fraud.
17. As stated earlier, the sale agreement was entered into on 17th August 1993 and the deceased who became the registered proprietor 8th May 1995 remained alive until 19th October 2003. The defendant did not file any claim or suit against the deceased during his lifetime claiming that he was not paid the purchase price.
18. I find that the defendant did not prove fraud to the required standard and did not prove his counterclaim. In those circumstances, the estate of the deceased, which remains the registered proprietor of the suit property, must have its way. I find merit in the plaintiffs' case.
19. In the result, I dismiss the defendant's counterclaim. I enter judgement in favour of the plaintiffs and issue a permanent injunction restraining the defendant, his agents or any other person claiming under him from accessing or interfering with the plaintiffs' use and occupation of the parcel of land known as Kakamega/Iguhu/1932. The plaintiffs shall have costs of the suit.



DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF MAY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Ikhumba for the Plaintiffs

The Defendant present in person

Court Assistant: E. Juma

