



Patel Through His Power of Attorney to Sahul Patel v Patel (Administrator of the Estate of Ghanshyambhai Bhailalbhαι – Deceased) (Environment & Land Case 155 of 2014) [2024] KEELC 4977 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4977 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 155 OF 2014**

A OMBWAYO, J

JUNE 27, 2024

BETWEEN

**JITENDRA RAMANBHAI PATEL THROUGH HIS POWER OF ATTORNEY
TO SAHUL PATEL PLAINTIFF**

AND

**RAKESH VINODRAI PATEL (ADMINISTRATOR OF THE ESTATE OF
GHANSHYAMBHAI BHAILALBHAI – DECEASED) DEFENDANT**

JUDGMENT

1. Jitendra Ramanbhai Patel suing through his power of attorney Sahul Patel (hereinafter referred to as the plaintiff) sued Ghanshyambhai Bhailalbhαι Patel (hereinafter referred to as the deceased) through Plaintiff dated 3/6/2014 and amended on 5th December 2019 to bring Rakesh Vinodrai Patel as the administrator of the Estate of Ghanshyambhai Bhailalbhαι (hereinafter referred to as the defendant) claiming to be the registered owner in equal shares with the deceased of suit properties known as Nakuru Mun/Block 6/121 and Nakuru Mun/Block6/63. The plaintiff states that both the plaintiff and the deceased Ghanshyambhai Bhailalbhαι had erected permanent structures on the properties which are currently occupied by tenants who are paying monthly rent to the defendant herein
2. According to the plaintiff, on or about 19th December 2001, he relocated to the united Kingdom and left the properties under the management of the deceased with the undertaking that the deceased was to run the properties efficiently and whatever income received was to be shared equally once all the expense's had been deducted .
3. That in the year 2013, the plaintiff got interested in selling his 50% shares of the properties and got in touch with his agents in Kenya but to his surprise when the said agents carried out an official search of the land registry, it was discovered that the deceased had fraudtently transferred the plaintiffs 50% shares into his name and hence he is now the registered absolute proprietor of both properties.



4. The plaintiff has particularized fraud on the part of the deceased as follows:-
 - a. Executing the transfer of documents without authority from the plaintiff
 - b. Forging the plaintiffs signature
 - c. Transferring the plaintiff's shares without any written agreement and without making any considerations.
 - d. Colluding with the third parties to deprive the plaintiffs his property rights in the properties
 - e. Presenting to the registrar of lands transfer documents purporting the same to have been executed by the plaintiff.
5. The plaintiff has made efforts to have the dispute amicably settled but his efforts have been utterly frustrated by the deceased who totally refused to meet with the plaintiff and/or have any discussion touching on the suit properties. Demand and notice of intention to sue have been served on the deceased who failed, refused and or/neglected to make good the plaintiffs claim.
6. The plaintiff prays for Judgment against the Defendants for an order of the permanent injunction to restrain the Defendant by himself, authorized agents and servants from selling, transferring, charging and /or disposing off and/or interfering in any way with the ownership of the properties known as Nakuru/Municipality Block 6/121 and Nakuru Municipality Block 6/63. Moreover, an order of inhibition restraining any dealings of any nature whatsoever on properties known as Nakuru/Municipality Block 6/121 and Nakuru/Municipality Block 6/63 without the express approval and consent of the plaintiff.
7. Last but not least, an order directed to the registrar of Titles or any person with requisite for the cancellation of any certificate of Title in respect of Nakuru /Municipality Block 6/64 to the deceased and re-issue of new certificate in the joint names of the plaintiff and Defendant herein
8. The Defendant filed amended defence stating that Ghansyambhai Bhailalbai (deceased) is the sole registered owner of the suit property and the averments of ownership in equal shares does not arise at all.
9. The defendant while admitting that the subject property was previously owned jointly between parties hereto, avers that pursuant to an arrangement particulars whereof are known to the plaintiff, the plaintiff divested his interest in the property to the Defendant who thereby became the sole registered owner thereof ,thereafter, the issue of sharing income does not and has never arisen.
10. The defendant denies the allegations of the purported intent to sell what had already been divested by the plaintiff to the Defendant and/or of fraud on the part of the Defendant. The defendant therefore denies each and all of the particulars of the fraud alleged and puts the plaintiff to strict proof thereof.
11. The Defendant asserts that the plaintiff executed the transfer documents thereby transferring his share of ownership of the suit property solely to the deceased Defendant and the plaintiff cannot plead ignorance and that the plaintiff's signature was never forged as alleged therein or at all. He alleges that the plaintiff transferred his share to the deceased voluntarily with considerations in the sum Kshs 1,000,000/= equal shares does not arise at all.
12. When the matter came up for hearing PWI Jitendra Ramanbhai Patel testified that the dispute herein involves two properties in Nakuru town known as Nakuru Municipality Block 6/121 measuring approximately 0.2302 hectares and Nakuru Municipality Block 6/63 measuring approximately 0.1104 hectares



13. That on the said properties there are currently developed two separate warehouses which are occupied by tenants who are paying monthly rent to the defendant herein.
14. That his father Mr Ramanbhai Narshibhai Patel and the Defendant herein purchased the above properties in 1988 and each owned 50% of both the properties. That his father Mr Ramanbhai Narshinhai Patel passed away in the year 2000 and 50% ownership of the property passed on to Kusumben Ramandhai patel who on 27th September 2001 transferred her 50% interest in the properties to the plaintiff and certificate of lease for both properties were issued on the 27th September ,2001 clearly indicating that Mr Ghanshyambai Bhailalbai Patel(the Defendant herein) and the plaintiff were the registered proprietors of both the properties each owning 50% of the shares. That the plaintiff (himself) herein left Kenya for United Kingdom on 19th December 2001 and has not returned since then. That in the year 2013, the claimant got interested in selling his 50% shares of the properties and got in touch with his agents in Kenya but to his surprise when the official search was carried out at land registry in Nakuru in the month of July 2013 and it showed that the Defendant herein had fraudulently transferred the plaintiffs 50% shares into his name and hence he is now the absolute proprietor of both properties.
15. The plaintiff herein states that he has never signed any forms or consent to transfer his 50% shares to the Defendant neither has ever received any considerations from the Defendant for the same.
16. His investigations at the Land registry Nakuru, does not disclose or reveal any legal documentation to support the transfer of the plaintiffs 50% shares to the Defendant.
17. That his efforts to meet with the Defendant and get information on how his 50% shares in the properties were transferred to him have not borne any fruits as the Defendant does not wish to discuss anything touching on the two properties. That's it's the claimants contention that the transfer of his 50% shares must have been done fraudulently as such the certificates of lease on the properties currently showing the defendant as the absolute proprietors should be cancelled.
18. DW1, Rakesh Vinodrai Patel on his part testified that the deceased Defendant was registered proprietor of the property known as Nakuru /Municipality Block 6/63 and property Known as Nakuru/ Municipality Block 6/121 measuring 0.1104 hectares and 0.2302 hectares respectively. That the suit properties were previously jointly owned between the original plaintiff and the original Defendant now deceased and thus initially the certificate of lease was issued in the joint names accordingly. That the plaintiff executed the transfer documents in favour of the deceased Defendant thereby transferring ownership of the suit properties solely to the deceased Defendant.
19. That the transfer of lease in respect of the property known as Nakuru /Municipality Block 6/63 and property known as Nakuru/Municipality Block 6/121 was presented for registration on 23/04/2003. That upon registration of the transfer of leases on 23/04/2003 the deceased Defendant automatically became the sole registered owner and the plaintiff has no claim over the same. That the certificate of lease in respect of Nakuru /Municipality Block 6/63 and certificate of lease in respect of as Nakuru/ Municipality Block 6/121 both reflect deceased defendant as sole registered owners.
20. That the certificate of lease in respect of Nakuru /Municipality Block 6/63 and certificate of lease in respect of Nakuru/Municipality Block 6/121 were both issued on 22/04/2003. That a search was conducted in respect of property known as Nakuru /Municipality Block 6/63 and property Known as Nakuru/Municipality Block 6/121 on 12/03/2020 and the certificate of official search confirms the registered proprietor as the deceased Defendant.



21. That in view of the afforesting the plaintiffs claim in frivolous, vexation and abuse of court process and it ought to be dismissed with costs to the Defendant.
22. That the plaintiff submits that it is plain and obvious from the evidence tendered that the plaintiff was a joint owner to the suit property to the suit properties with the deceased until the year 2001 when he relocated to the United Kingdom and later when he wanted to divest his shares in both properties he discovered that the defendant had divested the plaintiffs share of 50% to himself in 2003. The defendant claims that the plaintiff had sold the deceased his 50% shares at a consideration set out in the transfer forms. The plaintiff submits that at the time of execution of the transfer forms. He had left the country and had never returned. The plaintiff further submits that the defendant did not produce the evidence of payment of the purchase price and agreement of sale.
23. The Defendant submits that the plaintiff has not proved fraud as the plaintiff signed the impugned transfer of lease and that the plaintiff has not demonstrated that the transfer of lease was signed by the deceased. According to the plaintiff, the burden of proof that the documents were forged lie with the plaintiff and beyond a balance of probability but not beyond a shadow of doubt. The defendant submits that the onus was upon the plaintiff to prove that fraud had been actuated at the behest of the deceased defendant. Though the plaintiff distinctly pleaded the particulars of fraud the plaintiff failed to distinctly prove any of them. The plaintiff did not call any expert opinion in the matter in order to ascertain the authenticity of the signatures appearing on the stated documents. No document examiner or other expert was called to shed light on the issue. The defendant insists that in the absence of a handwriting expert opinion, the plaintiff has in essence failed to prove that his signatures were forged by the deceased defendant.
24. The defendant contends that in the instant case, the questioned documents were signed by Olola Advocate. The signature and stamp is affixed therewith. The plaintiff did not find it necessary to call the owner of the signature and the stamp who would have confirmed the proper position and effectively guiding the court as to whether or not the signature was forged as alleged therein or at all. In conclusion the defendant submits that the title should not be disturbed.
25. I have considered the rival submissions and evidence on record and do find that there is no evidence that the plaintiff disposed of his half share in the two properties as required by section 3(3) of the Law of Contract Act Cap 26 Laws of Kenya which provides that a contract for sale of land must be in writing. In Civil Appeal Number 22 of 2013, Peter Mbiru Michuki v Samuel Mugo Michuki [2014] eKLR, this Court held;

Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows: -

- (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;



Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (1) Has in part performance of the contract taken possession of the property or any part thereof; or
- (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

26. There is no evidence that the deceased took possession of the half shares in performance of the agreement and there is no evidence of payment of consideration for the half shares by the deceased. Moreover, other than certificates of lease, none of the parties has produced the white-cards in respect of the two properties in dispute. The available evidence from the land registry is that Nakuru Municipality Block 6/63 and Nakuru Municipality Block 6/121 were created on 13th July 1987 and 19th August 1988 respectively. The entries between 13th July 1987 to 26th September 2001 for parcel number 6/63 are not disclosed and the same applies to parcel number 6/121. However, it is clear that for both parcels, the plaintiff and the deceased were registered as proprietors and certificates of lease were issued in both parcels on the same date on the 27th September 2001. The certificates of lease do not show whether the plaintiff and the deceased were registered as joint tenants or as tenants in common with equal shares.

27. The suit properties were registered under the [Registered Land Act](#), Chapter 300, Laws of Kenya (now repealed). They were registered in the names of the Plaintiff and the deceased but it is not indicated in the registers and the certificates of lease whether it was joint tenancy or tenancy in common. Registration of land in the names of more than one person was provided for in sections 101, 102 and 103 of the [Registered Land Act](#) the relevant provisions of which state as follows:

101.

- (1) An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-
 - (a) whether those persons are joint proprietors or proprietors in common; and
 - (b) where they are proprietors in common, the share of each proprietor.

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- (1). Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –
 - (a) dispositions may be made only by all the joint proprietors; and
 - (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly...

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- (1). Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate. ...”



Section 118 of the RLA provides that:

If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.”

The RLA was repealed by the Land Registration Act, 2012 which has similar provisions in sections 91, which states as follows in subsection (4):

If land is occupied jointly, no tenant is entitled to any separate share in the land and consequently –

- (a) a dispositions may be made only by all the joint tenants;
- (b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or
- (c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”

28. The distinction between joint tenancy and tenancy in common was made in Isabel Chelangat v Samuel Tiro Rotich & 5 others [2012] eKLR, as follows:

At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts, Megary & Wade, The Law of Real Property 6th Edition and Cheshire & Burn’s, Modern Law of Real Property, 16th Edition. According to Burn, at P242 “...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...” Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”

29. A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

- (i) The unity of possession.
- (ii) The unity of interest.
- (iii) The unity of title.
- (iv) The unity of time.

30. On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. (P477) One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint



tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

31. Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.
32. A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.”
33. In this matter, the parties’ intention was to create a tenancy in common and therefore the court will presume that they held the land as tenants in common with equal shares because the transfers of the undivided shares in both parcels were executed on 4th September 2001 clearly indicated that Kusumen Ramanbhai Patel transferred her shares in both parcels to the plaintiff and that the deceased consented to the transfer of the undivided shares. The transfer instruments in both parcels were registered on 27th September 2001. The defendant alleges that the plaintiff transferred his half share of both properties to the deceased, an allegation that the plaintiff denies. The plaintiff states that on the date of the alleged execution of the transfer instruments by himself, he was not in Kenya and has produced his passport as evidence.
34. I have perused the passport and do find that the plaintiff was not in Kenya on the date of execution of the transfer instrument by the deceased. It is not clear when the plaintiff executed the transfer instrument because it is not dated on his part. Moreover, the transfer instruments produced in court were not registered hence of no legal value. Furthermore, the documents appear suspect as the transfer of lease instruments were received on 23rd April 2003 one day after the deceased is alleged to have been registered as the proprietor of both parcels. This demonstrates irregularity and procedural impropriety.
35. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:
36. The Certificate of Title issued by the Registrar upon registration ... 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... 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, un-procedurally or through a corrupt scheme.”
37. The plaintiff allege that his 50% share was transferred to the deceased fraudulently as he was not in the country when the transfer was done. This court finds that the plaintiff has proved that the transfer of



his share in both properties was shrouded in fraud, illegalities and irregularities as he was not in the country when it happened.

38. Fraud has been defined in *Black's Law Dictionary* 11th Edition as "A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment. "It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. Fraud was specifically pleaded in paragraph 8 of the Joint Statement of Claim and the particulars thereof itemised. The Court of Appeal in *Vijay Morjaria v Nansingh, Madhusingh Darbar & another* [2000]eKLR held that:

"It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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."

39. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others v Charles Karuga Koinange* 1986 KLR at page 23 the court held that:

"When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required."

Also in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

"It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo v Ndolo* [2008]1KLR (G & F) 742 wherein the court stated that:

".. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the 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..."

In case where fraud is alleged it is not enough to simply infer fraud from the facts. Under the provisions of sections 107 to 109 of the *Evidence Act*, the burden of proof is on the Plaintiff to prove that the transactions were fraudulent.

40. The plaintiff has proved his allegations on fraud against the deceased beyond a balance of probabilities and I do allow the suit and do grant judgment against the Defendants in terms of a permanent injunction to restrain the Defendant by himself, authorized agents and servants from selling, transferring, charging and /or disposing off and/or interfering in any way with the ownership of the properties known as Nakuru/Municipality Block 6/121 and Nakuru Municipality Block 6/63. Moreover, I do grant an order of inhibition restraining any dealings of any nature whatsoever on properties known as Nakuru/Municipality Block 6/121 and Nakuru/Municipality Block 6/63 without the express approval and consent of the plaintiff.



41. Last but not least, I do grant an order directed to the Registrar of Titles or any person with requisite for the cancellation of any certificate of Title in respect of Nakuru /Municipality Block 6/64 to the deceased and reissue of new certificate in the joint names of the plaintiff and Defendant herein. Costs of the suit to the plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU ON 27TH JUNE 2024.

A.O.OMBWAYO

JUDGE

