



Wabwire (Suing as the Legal Representative of The Estate of Wabwire Mang’oli Wekesa) v Wabwire & 3 others (Environment & Land Case 22 of 2019) [2024] KEELC 4941 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4941 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 22 OF 2019**

**DO OHUNGO, J
JUNE 27, 2024**

BETWEEN

PANCRAS WABWIRE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WABWIRE MANG’OLI WEKESA) PLAINTIFF

AND

JOHN OMUMIA WABWIRE 1ST DEFENDANT

GODFREY MUNYENDO ONYALA 2ND DEFENDANT

JUSTUS NABANGI WASIKE 3RD DEFENDANT

LAND REGISTRAR KAKAMEGA DISTRICT LAND REGSITRY 4TH DEFENDANT

JUDGMENT

1. The Plaintiff moved the court through plaint dated 13th March 2019, wherein he averred that he was the legal representative of the estate of Wabwire Mang’oli Wekesa (deceased) and that the deceased was the registered proprietor of the parcel of land known as N/Wanga/Kholera/1537 (the suit property). That the First Defendant who is a son of the deceased fraudulently and un-procedurally transferred the suit property to himself and to the Second and Third Defendants with the aid of the Fourth Defendant.
2. The Plaintiff therefore prayed for judgment against the Defendants jointly and severally for:
 1. That the plaintiff’s claim is for an order directing the district land registry, Kakamega to revoke (sic) the tittles to land parcel numbers N/Wanga/Kholera/3806 and 3807 and restore the parent No. N/Wanga/Kholera/1537.
 2. That the plaintiff further seeks an order cancelling the entries transferring the land parcel number N/Wanga/Kholera/1537 to the 1st defendant John



Omumia Wabwire and to the 2nd defendant Godfrey Munyendo Onyalla and the revert ownership to the original owner Wabwire Mang'oli Wekesa (deceased) for a full grant of letters of representation to the estate of the deceased to be taken out.

3. Costs and interest.

3. The First to Third Defendants filed defences through which they denied the Plaintiff's averments and urged the court to dismiss the suit with costs.
4. The Plaintiff adopted his witness statement dated 16th June 2021 and also produced copies of the documents listed as item numbers a) to d) in his list of documents dated 13th March 2019 as his exhibits. He testified that the deceased was his father, and that succession was not conducted in respect of the suit property. That he only learnt that the First Defendant had transferred the suit property to himself when one Christopher Opaka who had purchased a plot was evicted on allegations that the land belonged to the Second Defendant.
5. The Plaintiff further testified that in 1999 the deceased gave each of his six sons a plot for farming and another for commercial use. That the Second and Third Defendants purchased land from Benjamin Oduori Wabwire, the Plaintiff's brother and that the agreement was witnessed by the Plaintiff and his brothers. He further stated that the deceased subdivided his land to his children and completed the process of transfer while he was alive without any succession proceedings being filed. The Plaintiff further testified that the deceased was a witness when the Third Defendant bought and paid for his plot. He however added that the First Defendant became registered owner of the suit property irregularly since the deceased had sold the suit property to someone else. He added that he had filed this suit on behalf of the buyer.
6. The Plaintiff then closed his case.
7. John Omumia Wabwire (DW1) adopted his witness statement dated 11th October 2019 and produced copies of registers in respect of the suit property and parcel number N/Wanga/Kholera/1532 as well as mutation in respect of N/Wanga/Kholera/452 as his exhibits.
8. DW1 further testified that while he was the registered proprietor, he transferred parcel number N/Wanga/Kholera/3806 to the Second Defendant and parcel number N/Wanga/Kholera/3804 to the Third Defendant. He added that there is no dispute between him and that the Second and Third Defendants in respect of the transaction. He also stated that no succession proceedings were filed in respect of his father's estate and that his father signed all documents to transfer land to his children prior to his death.
9. Next on the stand was Godfrey Munyendo Onyalla (DW2) who adopted his witness statement 14th October 2019 and produced copies of the documents listed as item numbers 1 and 2 in the Second Defendant's List of Documents dated 14th October 2019 as his exhibits.
10. DW2 stated in his witness statement that he purchased land parcel number N/Wanga/Kholera/3806 from the First Defendant through a sale agreement dated 12th January 2010, paid the purchase price in full and that the parcel was transferred to him. He added that the agreement was witnessed by Simon Wabwire and Maurice Wabwire who are the Plaintiff's brothers and that he was not involved in any fraud.



11. Justus Nabangi Wasike (DW3) adopted his witness statement 14th October 2019 and produced copies of the documents listed as item numbers 1 and 2 in his list of documents dated 14th October 2019 as his exhibits. He also produced the documents in his Further List of Documents dated 25th February 2021.
12. DW3 stated in the statement that he entered into sale agreements dated 13th October 1999 and 15th November 1999 with Benjamin Odwori Wabwire, a son to the deceased, pursuant to which he purchased 0.02 hectares of the suit property. That the deceased who was then alive witnessed the agreements and executed transfer documents in favour of Benjamin Odwori Wabwire since he had distributed and demarcated his land to his children. He also stated that he processed his title in respect of land parcel number N/Wanga/Kholera/3807 upon the First Defendant obtaining title in respect of the suit property and that her obtained his title lawfully.
13. Benjamin Odwori Wabwire (DW4) adopted his witness statement dated 14th October 2019. He stated in the statement that he entered into sale agreements dated 13th October 1999 and 15th November 1999 pursuant to which he sold 0.02 hectares of the suit property to the Third Defendant. That at the time of the agreements, his father Wabwire Mang'oli Wekesa who was the registered proprietor of the suit property was still alive and had allocated to him the portion as his inheritance. That he had his father's consent to sell the portion and that his father witnessed the agreement while the Plaintiff witnessed the agreement dated 15th November 1999.
14. The First to Third Defendants' cases were closed. Since the Fourth Defendant did not attend despite evidence of service of hearing notice being availed, his case was also closed.
15. Directions were thereafter given that parties file and exchange written submissions. The Plaintiff and the First to Third Defendants filed submissions. The Fourth Defendant did not file any.
16. I have considered the pleadings, evidence, and submissions. The issues that arise for determination are whether fraud and want of procedure have been established and whether the reliefs sought should issue.
17. The Plaintiff's case is that that the First Defendant fraudulently and un-procedurally transferred the suit property to himself after the deceased's death without any succession proceedings and that he then fraudulently and un-procedurally transferred the resulting land parcel numbers N/Wanga/Kholera/3806 and N/Wanga/Kholera/3807 to the Second and Third Defendants respectively with the aid of the Fourth Defendant.
18. From the material on record, there is no dispute that the registered proprietors of land parcel numbers N/Wanga/Kholera/3806 and N/Wanga/Kholera/3807 are the Second and Third Defendants, respectively. They became registered proprietors in the year 2012. The said parcels are subdivisions of the suit property. From the copy of the register in respect of the suit property, Wabwire Mang'oli Wekesa was registered as proprietor of the suit property on 16th September 1999 while the First Defendant became the registered proprietor of the suit property on 25th January 2012. On the same 25th January 2012, the Second Defendant became the registered proprietor after which the title was closed on 11th May 2012, upon subdivision into N/Wanga/Kholera/3806 and N/Wanga/Kholera/3807.
19. The law is that a registered proprietor of land is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Additionally, Section 26 of the Act obligates the court to accept the certificates of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. In other words, 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.



20. The Plaintiff has chosen to attack the Defendants' titles on allegations of fraud and failure to follow procedure as regards the need to deal with property forming part of the estate of a deceased person through the procedure under the [Law of Succession Act](#).
21. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to a 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.
22. The Plaintiff has argued that the transfer of the suit property from the estate of Wabwire Mang'oli Wekesa was illegal since it took place on 25th January 2012 without any succession, yet Wabwire Mang'oli Wekesa passed away in the year 2002.
23. Even as he argued so, the Plaintiff testified that Wabwire Mang'oli Wekesa who was their father subdivided his land to his children in 1999 and completed the process of transfer while he was alive without any succession proceedings being filed. The Plaintiff himself conceded that he obtained title to his own two parcels through the same process and that he even sold two commercial plots to buyers. I have perused certified copies of registers in respect of land parcel numbers N/Wanga/Kholera/3082 and 3084. Wabwire Mang'oli Wekesa was the registered proprietor of both parcels until the Plaintiff became registered proprietor of N/Wanga/Kholera/3082 on 30th August 2010 and of N/Wanga/Kholera/3084 on 2nd February 2012. Both dates of change of proprietorship occurred long after Wabwire Mang'oli Wekesa had passed away. The changes were by way of transfer.
24. If the Plaintiff was able to obtain titles from his father long after his father's death, I do not see any valid reason why he would dispute the First Defendant's title as well as the Second and Third Defendants' titles, which were derived from the same process and procedure. Fraud cannot be inferred but must be specifically proven to the required standard.
25. The Plaintiff has placed a lot of emphasis on the date of registration of the First Defendant's title compared to the date of his father's death. A transfer can be validly registered even after death of the transferor. While addressing a similar situation, the Court of Appeal stated in the case of [Kagina v Kagina & 2 others \(Civil Appeal 21 of 2017\)](#) [2021] KECA 242 (KLR) (3 December 2021) (Judgment) thus:
 33. We have revisited that rival position on the record and agree with the position taken by the Judge that a deceased person has capacity to divest himself of property during his lifetime known in law as gifts inter vivos which in the Judge's opinion and correctly so in our view are not only protected under the Act but are also sanctionable by a court of law irrespective of whether they are perfect or imperfect. By perfect is meant, complete, meaning the transfer of the gift inter vivos in favour of the beneficiary was effected and completed during the lifetime of the deceased while by imperfect is meant the transfer of the gift in favour of the recipient was incomplete as at the time of the demise of the deceased. As correctly observed by the Judge, lack of completion of the process of transfer does not of itself render the gift inter vivos invalid. It can be perfected by the grant holder if there is no contest over it, or alternatively sanctioned by a court where proven.



34. Our take on the above rival position is that we find no mis-appreciation or misapplication of the law on intermeddling. The position taken by Tanui, J. in the *Gitau & 2 Others vs. Wandai & 5 Others* case [supra] is the correct threshold to be applied by a court addressing a complaint of alleged intermeddling in a deceased person's estate and which we find from the record the Judge properly appreciated and applied.
26. If Wabwire Mang'oli Wekesa subdivided his land to his children and completed the process of transfer while he was alive, as the Plaintiff himself testified, there would be nothing wrong, un-procedural or fraudulent if the First Defendant, and by extension the Second and Third Defendants, registered their transfers after Wabwire Mang'oli Wekesa's death.
27. In view of the foregoing discourse, the Plaintiff has failed to prove fraud and want of procedure to the required standard. It follows therefore that the reliefs sought cannot issue to the Plaintiff.
28. I find no merit in the Plaintiff's case, and I therefore dismiss it with costs to the First to Third Defendants.

Dated, signed, and delivered at Kakamega this 27th day of June 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

The First and Third Defendants present in person

No appearance for the Second and Fourth Defendants

Court Assistant: M Nguyayi

ELCC No. 22 of 2019 (Kakamega) Page 3 of 3

