



**Okara v Mwanzia & another (Environment & Land Case
967 of 2017) [2024] KEELC 4935 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 967 OF 2017
MN GICHERU, J
JUNE 24, 2024**

BETWEEN

PETER RIECHI OKARA PLAINTIFF

AND

FRANCIS NYAMAI MWANZIA 1ST DEFENDANT

**THE LAND REGISTRAR, KAJIADO NORTH SUB-COUNTY 2ND
DEFENDANT**

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendants both jointly and severally.
 - a. A declaration that LR No. Kajiado/Olchoro- Onyore/3272 suit land, belongs to the plaintiff, Peter Riechi Okara.
 - b. An order be and is hereby issued directing the 2nd defendant to recall and revoke the title deed issued in favour of the 1st defendant on the 27/9/2001 on the suit land and issue it in favour of the plaintiff.
 - c. An order do issue directing the 2nd defendant to issue title to the suit land to the plaintiff.
 - d. An order of permanent injunction is hereby issued against the defendants or their agents from in any any way trespassing, selling, mortgaging or in any manner interfering with the quiet possession of the suit land by the plaintiff.
 - e. Costs of the suit be provided for. This is as per the amended plaint dated 3/7/2020.
2. The plaintiff's case is as follows. He is the owner of the suit land which he bought from Mpoyo Ole Sakuda on 2/4/1991. On 11/2/1998 the plaintiff charged the suit land with the National Bank of Kenya which advanced him a loan of Kshs. 1 Million. On 21/8/2001, the plaintiff approached the 1st



defendant to pay the loan to the bank on his behalf. In return, the 1st defendant would keep the title deed which the bank would release to him. He would keep it until the plaintiff refunded to him the money paid to the bank. The agreement between the plaintiff and the 1st defendant was entered into on 27/9/2001. At first things went according to plan.

3. The plaintiff later realized that the defendant had transferred the suit land to himself even before the period agreed for his refund of the money paid to the bank on his behalf. It is for this reason that he filed this suit to recover his land. The plaintiff pleads many instances of fraud which include the transfer of the suit land without payment of any consideration, without the consent of the land control board, refusal to avail the transfer documents to the plaintiffs' advocates and advancing a friendly loan to the plaintiff with intent to defraud him among other particulars of fraud.
4. In support of his case, the plaintiff filed the following evidence.
 - i. His witness statement dated 29/2/2020.
 - ii. Copy of register for the suit land.
 - iii. Copies of title deed in the plaintiff's name dated 2/4/1991.
 - iv. Copy of sale agreement dated 21/8/2001.
 - v. Copy of discharge of charge dated 24/8/2021.
 - vi. Copy of loan agreement dated 27/9/2001.
 - vii. Copy of demand letter dated 25/9/2002.
 - viii. Copy of demand letter dated 8/10/2002.
 - ix. Copies of alleged application for consent of the land control board dated 17/8/2000, consent dated 5/12/2000 and transfer form dated 3/9/2001.
 - x. Copy of OB dated 18/2/2014.
 - xi. Two photographs showing what looks like three houses built close to each other.
5. The 1st defendant, in an amended defence dated 1/7/2020 states as follows. Firstly, the plaintiff's claim is denied generally. Secondly, he avers that the plaintiff approached him earlier than 27/9/2001 and requested for a loan of Kshs. 1, 025, 000 which was used to clear an earlier loan the plaintiff had obtained from the National Bank of Kenya. The plaintiff had deposited the title for the suit land as security for the debt that he owned the bank. Thirdly, the defendant agreed to pay the loan on behalf of the plaintiff. Fourthly, it was a fundamental term of the loan agreement that the plaintiff would transfer the suit land to the 1st defendant as a continuing security for the loan and all interest and other costs on the loan. Fifthly, the bank was to release the original title deed, the discharge of charge and transfer instruments directly to the 1st defendant once it received the Kshs. 1 million from him. Sixthly, the plaintiff was to pay the loan to the 1st defendant before 30/9/2002 but interest was to be paid on the last day of every month commencing with 31/10/2001. The plaintiff has never paid the principal amount or interest to the 1st defendant to date. Finally, the 1st defendant contends that the suit land was transferred to him with the full consent and knowledge of the plaintiff as the plaintiff executed the transfer form and it is only after the plaintiff failed to pay that he exercised his statutory power of sale as per clause 8:1 of the loan agreement.

It is for the above stated and other reasons that the 1st defendant prays for the dismissal of the plaintiff's suit.



6. In addition to the defence, we have Kajiado ELC No. 49 of 2020, *Kamuti Properties Limited v Peter Riechi Okara* where the plaintiff in the case seeks the following orders against the plaintiff in this case.
 - a. An order of eviction of the defendant, his servants, agents or employees from the suit land.
 - b. A permanent injunction restraining the defendant from trespassing onto the suit land or in any way interfering therewith.
 - c. An order for demolition of all permanent and temporary structures erected on the suit premises by the defendant.
 - d. A declaration that the defendant is a trespasser.
 - e. Damages.
 - f. Interest thereon.
 - g. Costs.
 - h. Any other relief which the court may deem fit to grant.
7. In support of the case, the 1st defendant filed the following evidence.
 - i. Copy of title deed for the suit land dated 27/9/2001.
 - ii. Copy of transfer form duly executed by the plaintiff and dated 3/9/2001.
 - iii. Copy of agreement for sale dated 21/8/2001 between the plaintiff and the 1st defendant.
 - iv. Copy of loan agreement dated 27/9/2001.
 - v. Copy of discharge of charge dated 24/8/2001.
 - vi. Copies of application for consent and letter of consent dated 17/8/2000 and 5/12/2000 respectively.
 - vii. Copies of letters between the 1st defendant's advocates, the plaintiff and John Mburu and Company Advocates.
 - viii. Witness statement by the 1st defendant in Case No. 49/2020.
 - ix. Copy of general power of Attorney dated 7/6/2021.
 - x. Witness statement by Cecile Kavutha Mwanzia.
 - xi. Copy of minutes of directors of the plaintiff in ELC Case No. 49 of 2020 dated 13/12/2022.
8. The second defendant in a written statement of defence dated 2/2/2018 denies the plaintiff's claim generally and avers that it is not privy to the contract between the plaintiff and the 1st defendant. It also denies the particulars of fraud and prays for the dismissal of the plaintiff's suit. No witness statement or documents were filed by the second defendant. The second defendant did not participate any further in the case.
9. At the trial on 21/11/2022 and 19/12/2022, the plaintiff testified by adopting his witness statement and documents before he was cross-examined by the 1st defendant's counsel. On the part of the 1st defendant Sheila Kasyoka Mwanzia and Cecile Kavutha Mwanzia testified by adopting the witness statements by the 1st defendant and Cecile as their evidence together with the documents filed. They were then cross examined by the plaintiff's counsel.



10. Counsel for the parties filed written submissions on 19/10/2023 and 13/12/2023 respectively. None of the learned counsel identified any issue for determination. I find that the following issues arise in this suit.
- i. Whether the 1st defendant paid consideration for the suit land.
 - ii. Whether the transfer of the suit land to the 1st defendant was fraudulent.
 - iii. Whether the consent of the Land Control Board was granted by the relevant board.
 - iv. Whether the plaintiff is entitled to the orders sought.
 - v. Whether the plaintiff in ELC 49 of 2020 is entitled to the orders sought.

11. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and testimony at the trial. I have also considered the written submissions by the learned counsel for the parties and the law cited therein. I make the following findings on the issues identified above.

12. On the first issue, I find that the 1st defendant paid the requisite consideration. That is why the bank released the title documents to the 1st defendant. The plaintiff admitted in cross-examination that he did not pay the Kshs. 1 million demanded from him by the bank. He said as follows.

“I can see the letters of 2002. I was being reminded to pay. I did not pay. I was already in default...I am still in default. I cannot pay the money”.

The plaintiff said these words on 21/11/2022, which is more than 20 years since he defaulted on his own payment. The bank does not demand any money from him. This is because the 1st defendant paid for him.

13. On the second issue, I find that the transfer of the suit land to the 1st defendant was lawful because I am satisfied that it is the plaintiff who signed the transfer form dated 3/9/2001 in front of an advocate. He is merely denying. It was incumbent upon the plaintiff to prove fraud on the part of the defendants to a standard higher than a balance of probabilities as enunciated in the case of *Ndolo v Ndolo* Civil Appeal No. 128 of 1995. The plaintiff did not file any evidence of a documents examiner to prove that the signature on the transfer form was not his. The loan agreement dated 27/9/2001 authorized the 1st defendant to sell the suit land in the event of default. It is expressly provided in clause 8 of the agreement.

14. Regarding the third issue, I find that the consent of the Land Control Board dated 5/12/2000 is one of the exhibits that the 1st defendant filed. The explanation given by the 1st defendant that the plaintiff approached him earlier than 27/9/2001 is credible and consistent with the documents filed by the 1st defendant. I believe him. In paragraph 6 of the amended plaint the plaintiff avers as follows,

“On or about 27/9/2001, the plaintiff approached the 1st defendant for a friendly loan of Kshs. 1, 025, 000/-...”

This means that the plaintiff and 1st defendant were friends and that is why many of the things they said and did are not in the agreement. I find the 1st defendant’s evidence more credible than that of the plaintiff when it comes to the unwritten part of the agreement.



15. Coming to the fourth issue, I find that the plaintiff is not entitled to any of the orders sought because he took a loan with the National Bank, never repaid it and he has the audacity to sue the person who paid the loan for him. He has no cause of action against the defendants.
16. In the ultimate issue, I find that the plaintiff in ELC Case No. 49 of 2020 is entitled to all the orders sought in the plaint dated 11/8/2020 because it is the legal owner of the suit land and the occupation of the land by the defendant on that suit is inconsistent with its rights as an absolute owner.
17. In conclusion, I dismiss the plaintiff's case in Suit No. 967/2017 with costs to the defendants. In case No. 49 of 2020, I enter judgment for the plaintiff against the defendant as prayed for in the plaint.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 24TH DAY OF JUNE 2024.

M.N. GICHERU

JUDGE

