



Abuto & another v Gitau alias Peter Kambo Gitau & 2 others (Environment & Land Case 144 of 2018) [2024] KEELC 4671 (KLR) (12 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 144 OF 2018**

**NA MATHEKA, J
JUNE 12, 2024**

BETWEEN

LILIAN AKINYI ABUTO 1ST PLAINTIFF

WILLY STUCKI 2ND PLAINTIFF

AND

PETER KINYAMJUI GITAU ALIAS PETER KAMBO GITAU 1ST RESPONDENT

FREDRICK OTIENO OYUGI 2ND RESPONDENT

LANDS REGISTRAR MOMBASA 3RD RESPONDENT

JUDGMENT

1. The plaintiffs aver that they are the bonafide owners and proprietors of the suit property: Subdivision Number 13078/3, Original Number 13030/50 as delineated on Land Survey Plan Number 252039, being Title Number CR. 37340. That sometimes during the month of February, 2018, the 1st plaintiff who resides outside the jurisdiction of this Court, realized that the suit property had been invaded by the 1st defendant, his agents, servants, or employees and commenced construction and development thereon without the knowledge consent or approval of the plaintiffs. The 1st and 2nd plaintiffs legally purchased this property on the 23rd January, 2004 from Warehousing Investment Limited vide a sale agreement dated 23rd January 2004. The plaintiffs contend that the defendant unlawfully and irregularly altered the ownership details of the suit property to that of the 2nd defendant, Fredrick Otieno Oyugi, and later on names of several persons unknown to both the plaintiffs, ending upon with the 1st defendant, to the benefit of 1st defendant and to the detriment of the plaintiffs.
2. The Plaintiffs believe that the defendants worked in collusion to fraudulently change the ownership of the suit property and take it away from the Plaintiffs for their own benefit. The construction on the suit property is at a very advanced stage and there are approvals from various authorities concerned



and that the defendant is progressively proceeding and continuing with the said construction. The plaintiffs pray for judgement against the Defendants for:

- a. A declaration that the 1st and 2nd plaintiffs are the bonafide owners of the suit property Title No. CR. 37340;
- b. An order to be directed to the Land Registrar Mombasa to rectify the register by cancellation of the illegal entries relating to the issuance of fresh title and registration to the defendant, Fredrick Otieno Oyugi and subsequently several other unknown persons ending with the defendant Kinyanjui Gitao over the Eared described as Subdivision No. E079 (Orig. No.13030/50 Number C.R. 373400T and register the plaintiffs as the rightful owners;
- c. A permanent injunction restricting the defendant, his agents, servants, employees, friends, relatives, proxies, cronies or whatsoever from continuing with construction on the suit property;
- d. General damages;
- e. Costs of and incidental to this suit;

SUBPARA f.

Interest on (d) above at court rates.

3. The 1st defendant states in response that he is actually the current registered owner of the suit property. The 1st defendant states that he is the legitimate registered owner and proprietor of all that property known as Subdivision Number 13079(Original Number 13030/50) Section I Mainland North C.R. 37340 (Suit Property) having appropriated the rights thereto from one Hassan Abdullahi Hassan through a Sale Agreement on 20th April 2016. The defendant states that he is undertaking developments on his property save to add that the said approvals are statutory requirements for developments in the subject property and the Plaintiffs do not have the remotest capacity to question and or challenge what he does in his private property.
4. The 3rd defendant denies that it altered details of the suit property to that of the 2nd defendant, and finally to the benefit of the 1st defendant at the detriment of the plaintiffs. The 3rd defendant denies any fraud and that it colluded with the 1st defendant to change ownership of the suit property.
5. This court has considered the evidence and the submissions therein. It is not disputed the 1st defendant is the registered owner of the suit property. 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:

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, unprocedurally or through a corrupt scheme.”
6. The law is clear that, 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 – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of *Elijah Makeri Nyangw’ra v Stephen Mungai Njuguna & Another* [2013] eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows;

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

Section 80 of the *Land Registration Act* provides as follows;

80.

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
7. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
8. PW1 testified that the 1st and 2nd plaintiffs legally purchased the suit property on the 23rd January, 2004 from Warehousing Investment Limited vide a sale agreement dated 23rd January 2004. That sometimes during the month of February, 2018, the 1st plaintiff who resides outside the jurisdiction of this Court, realized that the suit property had been invaded by the 1st defendant, his agents, servants, or employees and commenced construction and development thereon without the knowledge consent or approval of the plaintiffs. The plaintiffs state that the defendant unlawfully and irregularly altered the ownership details of the suit property to that of the 2nd defendant Fredrick Otieno Oyugi, and later on names of several persons unknown to both the plaintiffs, ending upon with the 1st defendant. The burden of proving fraud lies on the plaintiff. Fraud has been defined in Blacks Laws Dictionary as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further, Black’s Law Dictionary Ninth Edition at Page 731 also defines ‘fraud’ as;



A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

L. Gacheru J. in *Teresia Wangari Mbugua vs Jane Njeri Nduati & another* [2020] eKLR held as follows;

When a person’s ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, where the Court held that;

“/A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

9. In the case of *Munyu Maina v Hiram Gathiha Maina*, Civil Appeal No.239 of 2009, the Appeal Court held that;

We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

10. The appropriate act in use at all material times was the Registration of Titles Act Cap 281 and section 24 stated that a title is conclusive evidence of title unless there is fraud, misinterpretation, or procedure was not followed. PW1 produced a sale agreement stating that they bought the suit property in 2004 and never sold it to anyone. In 2018 they noticed it had been invaded by the 1st defendant who had started developing the same leading to the filing of this suit. PW1 stated that Juma Pamba is her cousin and he wanted to buy the property but she refused. That there was a caveat on the land in 2007 which was later removed and she does not know about any other court case.
11. The 1st defendant testified that he was a bonafide purchaser and that he bought the property from one Hassan Abdullahi Hassan and it was vacant. One month later as he started developing it someone came and informed him that ownership was disputed. He produced the sale agreement dated 20th April 2016 DEx1, certificate of title and the transfer documents DEx 2 and 4. DW2 the Land Registrar Mombasa gave evidence in court. She testified that the suit property was initially owned by the plaintiffs as seen in entry 2 registered on the 22nd December 2006. There were various transactions that finally led the suit to be vested upon the 1st defendant as per entry 11 which is registered on 27th April 2016.
12. When ownership is being question as is the case in this matter the court needs to look carefully at the root of the title. I have perused the title document and observed that the suit property was initially owned by the plaintiffs as seen in entry 2 registered on the 22nd December 2006. Entry 3 is a caveat placed by Joab Juma Pambo and entry 6 is an order from Civil Suit No. 260 of 2008 lifting the same.



The suit property was then transferred to Fredrick Otieno Oyugi entry 7 in 2008, to Milfan Developers Ltd entry 8 in 2009, to Hans Peter Stahl and Shirley Belinda Omondi entry 9 in 2010, to Hassan Abdullahi Hassan entry 10 in 2011 and finally the 1st defendant entry 11 in 2016. I find that the plaintiffs have failed to establish fraud on the part of the defendants. The 1st defendant confirms he holds the original title. The plaintiff has not explained how she is not in possession of the original title if she never intended and/or sold the same. I am guided by the Court of Appeal in 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.”

Section 108 of the *Evidence Act* Cap 80 states as follows:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

13. I find that the plaintiffs have failed to prove that their property was fraudulently transferred to the 1st defendant. I find the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

