



**Mbai & another (Both Suing as the Representatives of the Estate of the Late John Mbai Kavoi – Deceased) v Mbai & 2 others (Environment & Land Case 54 of 2021) [2024] KEELC 5531 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5531 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 54 OF 2021**

**A NYUKURI, J  
JULY 25, 2024**

**BETWEEN**

**ESTHER MBINYA MBAI ..... 1<sup>ST</sup> PLAINTIFF  
THOMAS MUTUKU MBAI ..... 2<sup>ND</sup> PLAINTIFF  
BOTH SUING AS THE REPRESENTATIVES OF THE ESTATE OF THE LATE  
JOHN MBAI KAVOI – DECEASED**

**AND**

**GLADYS NDUKU MBAI ..... 1<sup>ST</sup> DEFENDANT  
MWITO HOUSING COOPERATIVE SOCIETY LIMITED ..... 2<sup>ND</sup> DEFENDANT  
LAND REGISTRAR OF MACHAKOS COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. Vide a plaint dated 6<sup>th</sup> April 2021, the plaintiffs who are administrators of the estate of the late John Mbai Kavoi, sought against the defendants, the following orders;
  - a. A declaration that the agreement herein dated 14<sup>th</sup> July 2017 purportedly executed by the deceased herein over land parcel No. Donyo Sabuk Komarock Block 1/77854, a subdivision of land over land parcel No. Donyo/Sabuk/Komarock Block 1/77650, was fraudulent, lacked the deceased’s authority and is therefore invalid, null and void.
  - b. A declaration that the that the process of subdivision, transfer, registration and acquisition of titles for land parcel No. Donyo Sabuk/Komarock Block 1/77650 and any of its subdivisions of Donyo Sabuk/Komarock Block 1/77853, 77854 and 77855 by the 2<sup>nd</sup> defendant were



fraudulent and unprocedural, and as such the same be nullified and/or cancelled by this honourable court, and restoration of the same to its original title Donyo Sabuk/Komarock Block 1/77650 by the 3<sup>rd</sup> defendant.

- c. A permanent injunction against the 2<sup>nd</sup> defendants, their agents, employees, servants and any other person acting on their behest from subdividing, selling, transferring, fencing, building and in any way interfering with the suit property herein.
  - d. Costs of this suit.
  - e. Any other suitable relief this honourable court may deem fit and suitable to grant in the circumstances.
2. The plaintiffs' case was that their deceased husband and father, John Mbai Kavoi, was the registered owner of the parcel of land, being Donyo Sabuk/Komarock Block 1/77650 which was later subdivided into three portions namely Donyo Sabuk/Komarock Block 1/77853, 77854 and 77855 (suit property). They argued that from the year 2011, the deceased had started suffering from a multiplicity of ailments which caused him memory loss and/or affected his mental capacity to make decisions, which position was aggravated by his advancing age. It was their case that the 1<sup>st</sup> and 2<sup>nd</sup> defendants took advantage of the deceased's old age and ailments and fraudulently and without the deceased's knowledge or consent, prepared and executed a fictitious agreement purporting the same to have been signed by the deceased and that the same purported to sell the entire parcel of land known as Donyo Sabuk/Komarock Block 1/77650. They termed the subsequent subdivision into parcels Donyo Sabuk/Komarock Block 1/77853, 77854 and 77855 as fraudulent and unlawful. It was hence their claim that the entire sale, transfer and subdivision was a nullity as it was based on a fraudulent transaction as no spousal consent and consent of the deceased's other beneficiaries was sought. Particulars of fraud on all the defendants were stipulated in the plaint.
  3. The suit was opposed. The 2<sup>nd</sup> defendant filed a statement of defence dated 16<sup>th</sup> November 2021. It denied all the allegations by the plaintiff and stated that the deceased had full capacity to carry out the transfer of the suit property and that the letter dated 11<sup>th</sup> December 2019 lacks evidentiary strength as it was not supported by verifiable medical tests. It was also their defence that the suit property did not form part of the estate of the deceased since it had been disposed off during the lifetime of the deceased.
  4. In response to the defence by the 2<sup>nd</sup> defendant, the plaintiff filed a reply thereof dated 11<sup>th</sup> February 2022. They reiterated that the doctor's report dated 11<sup>th</sup> December 2019 clearly confirmed that the deceased suffered from a multiplicity of ailments which led to his memory loss thus affecting his mental capacity to make decisions thus any transaction he entered into that period until his demise were void ab initio. Further, it was stated that the parties never sought spousal consent of the first plaintiff hence the same ought to be nullified. They concluded by reiterating that the titles held by the defendants were fraudulently obtained hence the same should be cancelled.
  5. The matter proceeded by way of viva voce evidence. The plaintiffs' case was supported by one witness whereas the 2<sup>nd</sup> defendant also had one witness.

### **Evidence by the plaintiffs**

6. PW1 was Thomas Mutua Mbai, the 2<sup>nd</sup> plaintiff. He adopted his statement filed on 26<sup>th</sup> May 2021 as his evidence in chief. He confirmed to have authority to plead from the 1<sup>st</sup> plaintiff. It was his testimony that he was the son of the late John Mbai Kavoi, while the 1<sup>st</sup> Plaintiff was the deceased's widow. He further stated that the deceased owned the suit property before his demise. That from the year 2011, his late father had started suffering from a multiplicity of ailments and that during



that time, the 1<sup>st</sup> defendant in collusion with the 2<sup>nd</sup> defendant signed documents purporting to have been signed by the deceased, selling and transferring the suit property to the 2<sup>nd</sup> defendant. It was his testimony that the alleged sale was a forgery and fraudulent since the deceased had no knowledge of the same. He challenged the subsequent subdivision and the absence of a spousal consent in the alleged transaction. He prayed that the entire transaction be declared a nullity and sought an injunction against the defendants.

7. He produced the following documents in support of the plaintiffs' case;
  - a. A copy of death certificate of the late John Mbai Kavoi
  - b. A copy of limited Grant letters of administration ad-litem dated 27<sup>th</sup> January 2021
  - c. A copy of the chief's letter identifying the beneficiaries of the late John Mbai Kavoi
  - d. A copy of the purported land sale agreement dated 14<sup>th</sup> July 2017
  - e. A copy of the medical report dated 11<sup>th</sup> December 2019 of the state of the deceased owner of the suit property herein
  - f. Copies of documents by the deceased owner of the suit property herein showing his personal and usual signature
  - g. Copies of official searches for the suit properties herein
  - h. Copies of part payment cheques to the 1<sup>st</sup> defendant
8. Upon cross-examination, he averred that he was the son of the late John Mbai from the 1<sup>st</sup> wife and that the suit property was sold in 2017 by one of his sisters, when the deceased was still alive. It was his testimony that his father signed the impugned agreement but that he did not know what he was doing. That the deceased used to sign not by thumbprinting. He also stated that he was not aware of the Kangundo case, CMCC No. 55 of 2018 allegedly filed by his late father.
9. On re-examination, he stated that his father died in May 2018 and that at the time of the transaction, he had lost his memory as per the medical reports. He also stated that he was aware of the Kangundo case CMCC No. 55 of 2018 and that he could not tell if it was his father who filed the case. That marked the close of the plaintiffs' case.

### **Evidence by the 2<sup>nd</sup> defendant**

10. DW1 was Ephantus Githu, the chairman of the 2<sup>nd</sup> defendant. He adopted his statement dated 23<sup>rd</sup> January 2023 as his evidence in chief. It was his testimony that he was the Chief Executive Officer of the 2<sup>nd</sup> defendant company and that the suit was an abuse of the court process since the processes that are challenged happened during the lifetime of the deceased. He stated that in the year 2017, the late John Mbai Kavoi entered into a sale agreement with the 2<sup>nd</sup> defendant for the sale of the suit property. It was also his testimony that the parties sought the consent of the land control board vide an application duly executed by the deceased using his thumbprint. He also stated that the property was then transferred and registered in the name of the 2<sup>nd</sup> defendant vide transfer instruments duly executed by the deceased using his thumbprint.
11. DW1 further testified that at no point was there collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and that the plaintiffs had failed to disclose to this court that the 1<sup>st</sup> defendant was the one taking care of the deceased, hence they also deemed it right that she receives the funds for medical expenses. He also argued that during the transfer process, the deceased was of sound mind and unequivocally understood



- what he was doing. He also stated that signatures could only be challenged by a document examiner's evidence, which the plaintiffs had not produced. On spousal consent, he argued that the same can only be given by a legitimate wife and the plaintiffs did not give any evidence to that effect or to prove marriage.
12. The witness produced documents attached on the list of documents dated 23<sup>rd</sup> January 2023. He produced;
    - a. Copy of the sale agreement
    - b. Transfer documents
    - c. Application to the land control board
    - d. Land control board consent for transfer
    - e. Evidence of payment of agreed purchase price
    - f. Evidence of payment of stamp duty
    - g. Registration form
    - h. Application orders and acknowledgment receipt of transfer documents
  13. Upon cross examination, he stated that when they met the owner of the land, who was in the company of his daughter and an uncle called Boniface, at a residential building in Nguluni. He stated that they had only met to negotiate and that the man's faculties were well but he could not walk properly and that they asked of a spouse but did not get a good answer about the spouse. He further stated that they met the man in the house and they left him there, and that the sister stated that the ailing man needed cash. He stated that the vendor was an old man and that they negotiated the sale with him. He also confirmed that the spouse did not sign any document and that the lawyers handled the rest of the matters.
  14. DW1 also confirmed that the payments were made in the name of Gladys Mbai as per the vendor's instructions, the first cheque being of about Kshs. 2,300,000 as 10% of the purchase price. He also averred that they acted under the vendor's instructions since he said she is the one who was taking of him. He also stated that the vendor had successfully filed a case to remove the caution over the land, which went on successfully. He also stated that they had been shown a portion of land which belonged to the family and that the piece of land they were buying was separate, being 1/77854.
  15. On re-examination, he stated that the agreement indicated that they make the payments to the 1<sup>st</sup> defendant. He averred that they did not have any reason to doubt what the vendor was saying and that Gladys is the one who was taking care of the vendor. He stated that he did not see either Esther or Thomas at the time of the transaction.
  16. Parties filed submissions in support of their respective cases. On record are the plaintiffs' submissions dated 3<sup>rd</sup> May 2023 and the 2<sup>nd</sup> defendant's submissions dated 24<sup>th</sup> May 2023.

### **Submissions by the plaintiffs**

17. Counsel for the plaintiff first gave a synopsis of the case and set down three issues for determination by the court. The first issue was whether the subdivision of land parcel number No. Donyo Sabuk Komarock Block 1/77650, and the subsequent sale and transfer of parcel No. Donyo/Sabuk/ Komarock Block 1/77854, was fraudulent, and as such null and void. On this, reliance was placed on section 26 of the [Land Registration Act](#) as well as sections 6 and 14 of the [Matrimonial Property Act](#),



with the arguments that the titles were fraudulently obtained and that spousal consent was not sought. The letter from the chief indicating that the 1<sup>st</sup> plaintiff was the wife to the deceased was also relied upon, as well as the cases of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another* [2013] eKLR and *EKN v AS & 2 Others* [2019] eKLR.

18. On their second issue of whether the court has power to cancel the defendant's transfer if fraud was proved to have existed, reliance was placed on Section 80 of the *Land Registration Act* and counsel submitted that the 3<sup>rd</sup> defendant's failure to enter appearance was an admission on their part and that the title ought to revert to the deceased owner's name to pave way for the succession cause over the same.
19. Regarding the issue as to who should bear the costs of the suit, reliance was placed on Section 27 of the *Civil Procedure Act* and the case of *R v Rosemary Wairimu Munene, Ex parte Applicant v Ihururu Dairy Farmers Co-operative Society Limited* to argue that the plaintiffs were entitled to costs.

### **Submissions by the 2<sup>nd</sup> defendant**

20. Counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff had failed to discharge the responsibility of proving their allegations. To support this, they laid down 4 issues for determination by the court.
21. Their first issue was whether the plaintiffs possess the locus standi to raise the issues alleged in the matter. On this, it was submitted that the powers held by the plaintiffs as personal representatives did not include initiating a fresh suit on behalf of the deceased by dint of Section 82(a) of the *Law of Succession Act*. It was their contention that their powers were limited to prosecuting suit instituted before the deceased's death or defending a suit where the deceased was a defendant. Reliance was placed on the case of *Roman Karl Hintz v Mangombe Mwakima* [1984] eKLR for the proposition that a grant ad litem is applied under the *Law Reform Act* for the benefit of the estate, but that in this case the claim was for the plaintiff's for self-aggrandizement and not as prescribed in law, thus misusing the grant. Further, attention was drawn to the averments by the 2<sup>nd</sup> plaintiff during cross-examination, that her complaint was that the property was sold in 2017 by her sister, who was then alive. In their argument, counsel opined that the plaintiffs were challenging decisions made by the deceased during his lifetime and hence the cause of action was available during the lifetime of the deceased. They argued that the claim was a challenge on the deceased's decisions when he was alive, and ought to have been challenged by the deceased when he was alive and not by third parties. Counsel prayed that the court assists in preserving the repose of the deceased by disallowing the claim.
22. Their 2<sup>nd</sup> issue was whether the transfer of the suit property was conducted in accordance with proper procedures. On this, it was submitted that the plaintiffs had not demonstrated any flaw in the transfer of the suit property, placing reliance on Article 40 (6) of the *Constitution* and the case of *Mohansons (Kenya) Limited v Registrar of Titles & 2 Others* [2017] eKLR. Further it was submitted that the allegations of the deceased being 'taken and compelled to sign' the transfer of documents had not been substantiated, neither was the medical report produced by its maker. Reliance was also placed on provisions of section 35(1) of the *Evidence Act*. It was further submitted that the intentions of the deceased were contained under clause 2 of the sale agreement, that the balance was to be paid to Gladys Nduku Mbai, his daughter who had taken care of him during his sunset days.
23. Their third issue was whether spousal consent was necessary for the transfer of the suit property. On this, it was submitted that the deceased was in a polygamous marriage and that there was no evidence to show that the property was jointly owned, hence the suit land could not be categorised as matrimonial property. Reliance was placed on the case of *TNM v BMK* [2020] eKLR and section 12 of the *Matrimony Property Act*, No. 49 of 2013.



24. Their 4<sup>th</sup> issue was whether costs ought to issue against the accused. On this, reliance was placed on section 27 of the *Civil Procedure Act* and the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR in arguing that the plaintiffs ought to bear the costs since they instituted the suit.

### Analysis and determination

25. The court has carefully considered the pleadings, evidence and rival submissions. Although the 2<sup>nd</sup> defendant in their submissions raised an issue regarding the plaintiffs' capacity to sue on the basis of the limited grant obtained by the plaintiffs, that issue was not raised in the defence and in fact, in paragraph 3 of the defence, they admitted that the plaintiffs are administrators of the estate of the deceased herein. I hold the view that parties are bound by their pleadings and issues for the court's determination flow from pleadings and not submissions, as submissions are mere persuasions and not a substitute for pleadings or evidence. In the premises I find and hold that the question of the plaintiffs' locus to institute this suit as administrators of the estate of the deceased herein does not arise. Therefore, the only issue that arise for determination is whether the plaintiffs proved that the 2<sup>nd</sup> defendant obtained title to the suit property by fraudulent and unlawful means.
26. Article 40 (1) and (6) of the *Constitution* of Kenya 2010 limits legal protection for the right to acquire and own property to property that is lawfully acquired. Regarding registered property, section 26 of the *Land Registration Act* provides for conclusiveness of title as follows;
- The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is 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."
27. Therefore where a person is registered as proprietor of a title, they are absolute and indefeasible owners thereof unless it is proved that they acquired that title by fraud, misrepresentation, illegality, want of procedure or through a corrupt scheme.
28. In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No. 239 of 2009, the Court of Appeal 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.
29. Where a party alleges fraud, they must specifically plead the particulars thereof and strictly prove the same. Proof of fraud is on a standard slightly above proof in ordinary civil cases of the balance of probability but below the standard of proof in criminal cases of beyond reasonable doubt. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR the court expressed itself as follows:-

...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008]1 KLR (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 that



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...

30. In this case, the plaintiffs alleged fraud on the part of the defendants and particularized the same as collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants using forged signatures of the deceased; that the 2<sup>nd</sup> defendant dispossessed the beneficiaries of the deceased's estate; forging transfer documents purporting them to have been signed by the deceased; and transferring the suit property without the deceased's authority.
31. On the question of forging the deceased's signature, there was no forensic expert evidence to demonstrate this allegation. But most importantly, PW1 conceded in cross examination that the documents regarding sale and transfer of the suit property were signed by the deceased, but that he did not know what he was doing. On whether the 2<sup>nd</sup> defendant dispossessed the suit property from the beneficiaries of the deceased's estate, it is not in dispute that the sale agreement and transfer were effected during the lifetime of the deceased, who in fact filed a case at Kangundo Law Courts, being Kangundo CMCC No. 55 of 2018, seeking for removal of the caution on the suit property, which orders were granted, allowing him to transfer the same to the 2<sup>nd</sup> defendant. Therefore, the issue of dispossessing the beneficiaries of the deceased's estate does not arise as the sale and transfer of the suit property occurred during the lifetime of John Mbai Kavoi and his estate then did not exist because he was not dead yet. In the premises, I find and hold that documents regarding sale and transfer of the suit property were executed by the late John Mbai Kavoi.
32. Everyone is presumed to be of sound mind unless the contrary is proved. The issue that the deceased had memory loss and had no capacity to transact in regard to the suit property is based on a letter dated 11<sup>th</sup> December 2019 from one Doctor Nderitu of Wellness Health Services who stated that the deceased had been under his care since January 2011 and that from the time he started attending to him, he had hypertension, diabetes and dementia and that his capacity to make decisions was impaired. That letter is not supported by any documents demonstrating any medical examination to justify the conclusion arrived at by the said doctor. In my view, the same is not an expert opinion to demonstrate the deceased's mental capacity. In addition, the letter generally refers to the period between 2011 and 2019 without specifying the capacity of the deceased as at the time of the sale transaction. Therefore, I am not convinced that at the time of the sale and transfer transactions herein, the deceased was without mental capacity to transact. In the premises, I find and hold that at the time of sale and transfer of the suit property, John Mbai Kavoi was of sound mind with the requisite capacity to enter into the impugned sale agreement and execute the transfer in favour of the 2<sup>nd</sup> defendant.
33. On the question of spousal consent, while the plaintiff's evidence as seen from the chief's letter, was that the deceased was a polygamous man, it was upon the 1<sup>st</sup> plaintiff to show that a consent was necessary. She ought to have demonstrated that the suit property was her matrimonial property, acquired and owned exclusively between the deceased and the 1<sup>st</sup> plaintiff who was one of the deceased's wives.
34. Section 8 of the *Matrimonial Property Act* stipulates property rights in a polygamous marriage as follows;

Property rights in polygamous marriages

1. If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—



- a. Matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and
  - b. Matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.
2. Despite subsection (1)(b), where it is clear by agreement of the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives.

35. Matrimonial property is defined in section 6 of the [matrimonial Property Act](#) as follows;

Meaning of matrimonial property

1. For the purposes of this Act, matrimonial property means—
    - a. The matrimonial home or homes;
    - b. Household goods and effects in the matrimonial home or homes;  
or
    - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
36. Having considered the evidence by the plaintiffs, there is no evidence to show that the suit property was matrimonial property exclusively acquired and owned by the deceased and 1<sup>st</sup> plaintiff that would require spousal consent from the 1<sup>st</sup> plaintiff before disposal of the same by the deceased. Simply put, there is no evidence of contribution by the 1<sup>st</sup> plaintiff in the acquisition of the suit property. In any event, the 1<sup>st</sup> plaintiff never sued the deceased during his lifetime to challenge the sale on the basis of lack of spousal consent. In the premises, I am not satisfied that the evidence by the plaintiff demonstrated that the deceased needed spousal consent to transact on the suit property.
37. The 2<sup>nd</sup> defendant produced a sale agreement, application for consent to the Land Control Board and the attendant consent, transfer documents, evidence of payment of the consideration and the stamp duty, application for registration and the order of the court in Kangundo CMCC No. 55 of 2018 where the deceased obtained orders for removal of a caution on the suit property on 5<sup>th</sup> April 2018. Having considered the 2<sup>nd</sup> defendant's documents it is clear that the agreement, application for land control board and transfer documents were executed by the deceased, and all the due processes complied with in the acquisition of the 2<sup>nd</sup> defendant's title, contrary to what is alleged by the plaintiff. There is no evidence proving want of capacity on the part of the deceased, or fraud, misrepresentation, illegality, want of procedure or corruption against the 2<sup>nd</sup> defendant; or that the suit property was acquired by the deceased with contribution of the 1<sup>st</sup> plaintiff and therefore the plaintiffs have failed to adduce evidence that would impeach the 2<sup>nd</sup> defendant's title.
38. For the above reasons, I find and hold that the plaintiffs have failed to prove their claim on the required standard and therefore their suit is hereby dismissed with costs to the 2<sup>nd</sup> defendant.
39. It is so ordered.



**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Odhiambo for plaintiff

Mr. Kyalo holding brief for Mr. Omonyolo for 2<sup>nd</sup> defendant

No appearance for 1<sup>st</sup> and 3<sup>rd</sup> defendants

Court assistant – Josephine

