



**Ekulo v Makokha (Environment & Land Case 66 of 2019)
[2024] KEELC 5309 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5309 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 66 OF 2019**

BN OLAO, J

JULY 17, 2024

BETWEEN

ANDERA OMANYO EKULO PLAINTIFF

AND

INNOCENT MASIGA MAKOKHA DEFENDANT

JUDGMENT

1. Andera Omany Ekulo (the Plaintiff herein) is the Uncle to Innocent Masiga Makokha (the Defendant herein). He moved to this Court vide his plaint dated 26th September 2019 and filed on 16th October 2019 seeking judgment as follows with respect to the land parcel No South Teso/Angoromo/7713;
 1. Cancellation of the Defendant's name as the registered owner of the land parcel No South Teso/Angoromo/7713.
 2. Restoration of the Plaintiff's name as the registered owner of the land parcel No South Teso/Angoromo/7713.
 3. A permanent injunction restraining the Defendant from transferring, charging developing or in any manner dealing with the land parcel No South Teso/Angoromo/7713.
 4. Costs.
2. The basis of the Plaintiff's case is that at all material time, he was the registered proprietor of the land parcel No South Teso/Angoromo/7713 measuring 0.045 Hectares (the suit land). That in November 2008, the Defendant obtained from him the title to the suit land under false pretence and fraudulently on the ground that he needed it as security for a bank loan. However, the Defendant proceeded to fraudulently transfer the suit land to himself. Particulars of fraud here have been pleaded in paragraph 5 (i) to (v) as follows:



- i. Obtaining the title deed of South Teso/angoromo/7713 from the Plaintiff under false pretences.
- ii. Obtaining the Plaintiff's National Identification Card from the Plaintiff under false pretences.
- iii. Obtaining the Plaintiff's particulars from the Plaintiffs family under false pretences.
- iv. Transferring the ownership of the land parcel No South Teso/Angoromo/7713 from the Plaintiff to himself without consent or authority.
- v. Stealing the Plaintiff's land.

The Plaintiff also filed his statement dated 26th September 2019 in which he confirmed that the Defendant is the son to his deceased brother one Dismas Makokha and therefore his nephew. That he inherited the suit land from his late father while Dismas Makokha sold his inheritance and moved to Angorom. That he supported the Defendant by paying his school fees following the demise of his father but he dropped out of school and got a job with the customs. The Plaintiff accommodated the Defendant at his home and even allowed him to put up three (3) rental rooms on the suit land.

3. In November 2008, the Defendant requested for the title deed to the suit land to use as security for a loan from Family Bank but instead transferred it into his name thus necessitating this suit.
4. The Plaintiff filed a list of documents dated 26th September 2019 to which he annexed the following documents:

1. Certificate of Official Search for the land parcel No South Teso/Angoromo/7713.
2. Green Card for the land parcel No South Teso/Angoromo/7713.

By a further list of documents dated 29th June 2021, the Plaintiff filed the following documents:

1. Copy of his National Identity Card.
2. Copy of Green Card for the land parcel No South Teso/Angoromo/7713.

The Defendant filed his defence dated 25th November 2019 in which he denied having obtained registration of the suit land in his names under false pretences. He pleaded that it had been registered in his names after he had acquired it at a consideration and wondered how he could have used a title registered in a third party's name as security in a Bank. He added that the remedies sought by the Plaintiff are not available to him and put him to strict proof thereof.

5. The Defendant filed the following documents vide his list of documents dated 20th January 2019:
 1. Copy of title deed to the land parcel No South Teso/Angoromo/7713.
 2. Copy of certificate of Official Search for the land parcel No South Teso/Angoromo/7713.
 3. Copy of land sale agreement dated 12th November 2008 in respect of a portion measuring 50 x 100 out of the land No South Teso/Angoromo/6485.

I must point out that the item NO 1 being the copy of the title deed to the land parcel No South Teso/Angoromo/7713 though listed, was not infact among the documents filed.

6. By a further list of documents dated 25th June 2021, the Defendant filed a copy of a letter dated 21st June 2021 from the Chief Angoromo Location addressed to whom it may concern.
7. In his un-dated statement and filed on 20th January 2020, the Defendant states that the Plaintiff is indeed his uncle but adds that the suit land is his property which the Plaintiff sold to him vide a sale



agreement dated 12th November 2008 at a consideration of kshs.150,000 being a sub-division of the land parcel No South Teso/Angoromo/6485. That upon execution of the sale agreement, the original land parcel No South Teso/Angoromo/6485 was sub-divided to create land parcels No South Teso/Angoromo/7712 and 7713 the latter being the suit land. The Defendant then obtained the title deed to the suit land and started developing it before the Plaintiff went to the lands office and placed a restriction on the title alleging that the Defendant had obtained it fraudulently and through forgery and threatened to take him to Court.

8. The Defendant also filed the following documents annexed to his replying affidavit dated 17th February 2020:
 1. Copy of sale agreement dated 12th November 2008 between him and the Plaintiff for a portion measuring 50 x 100 out of the land parcel No South Teso/Angoromo/6485.
 2. Transfer of Land Form.
 3. Application for consent of Land Control Board – un-dated.
 4. Letter of consent dated 25th March 2010.
9. In support of his defence, the Defendant filed the statements of his following witnesses i.e. Margaret Nyongesa Olike (DW2), Consolata Otaka Ouma (DW3). He also called as his witnesses MR Ouma Okutta an Advocate of this Court but who did not record any statement.
10. In her un-dated statement but filed herein on 22nd July 2020, Margaret Nyongesa Olike (DW2) and who is a step-sister to the Plaintiff states that their father sub-divided his land and gave each of his three (3) sons their portions. That Dismas Makokha her brother and father to the Plaintiff sold his portion and moved elsewhere. So her mother accommodated the Plaintiff on her land and when she noticed her brother selling the land which had been left for the homestead, she decided to visit the Lands Office and it was then that she discovered that the Plaintiff had already processed the title in his names and refused to share their late father's Estate with her.
11. Then in 2008, the Plaintiff agreed to sell a portion of the land to the Defendant. That same portion had already been sold to another person and when the owner came, the Defendant was forced to demolish the structures which he had already put up on the land. A family meeting was held and the Plaintiff was forced to give the Defendant an alternative portion of land and the Defendant gave his aunts Kshs.60,000 as benefit to their family Estate. She adds that the Plaintiff never took part in the up-bringing of the Defendant as he had no money to do so. That the Plaintiff even demolished their parents' house without involving them and sold the iron-sheets. That it is the Defendant who has been helping the Plaintiff in his many criminal cases and whenever they have a family meetings, they use the house which the Defendant put up on the suit land and there has never been any complaint until recently when the Plaintiff instituted this suit. That the case is baseless and filed in bad faith just to disrupt the existing peace in the family.
12. Consolata Otaka Ouma (DW3) is also a sister to the Plaintiff and an aunt to the Defendant. Her un-dated statement is a replica of her sister's (DW2). She narrates how her late father had three (3) sons including the Plaintiff and Dismas Makokha the father to the Defendant. That their late father gave each of his sons their portions of land but retained the portion where the homestead is. That she and her sister DOFRIDA APIYO are the ones who took care of the Defendant upon the demise of his father by educating him and his other siblings and at no time did the Plaintiff pay the Defendant's school fees or meet his other basic needs.



13. Then in 2008, the Plaintiff sold a portion of land to the Defendant at a consideration of Kshs.150,000. The Defendant started developing the land but to their dismay, a third party surfaced and laid claim to that portion of land. The Defendant was forced to demolish the structures which he had put up. And due to pressure from the family, the Plaintiff had to give the Defendant an alternative portion land which the Defendant started developing immediately and thereafter in 2014, all the family had a get together including the Plaintiff. During that occasion, they requested the Plaintiff to consider them while sharing their late father's Estate but he refused. The Defendant then decided to give the witness and her sisters Kshs.60,000 as a share of their late father's Estate.
14. That the Defendant has been helping the Plaintiff in his many criminal cases and she was therefore surprised to learn that the Plaintiff had instituted this case against the Defendant. A family meeting organised to resolve the issue with the assistance of the area chief did not yield much. It is her testimony that the Plaintiff's claim is false.
15. The hearing commenced before Omollo J on 30th June 2021 when the Plaintiff testified but Defendant sought an adjournment to engage another counsel. The hearing then resumed on 28th February 2022 before Omollo J who also heard the Defendant's case.
16. Thereafter, I heard the evidence of the Defendant's witnesses Maragret Nyongesa Olike (DW2), Consolata Otaka Ouma (DW3) and MR Ouma Okutta (DW4) an advocate of this Court. The witnesses all adopted as their evidence the contents of their statements which I have already referred to above. MR Ouma Okutta (DW4) who did not record any statement simply stated in his oral testimony that he is an Advocate practising in Busia town. He then produced the land sale agreement dated 12th November 2008 between the Plaintiff and the Defendant as part of the Defendant's documentary evidence.
17. At the end of the plenary hearing, submissions were filed both by MR. J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Plaintiff and by MR Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Defendant.
18. I have considered the evidence by the parties including the documents filed as well as the submissions by counsel.
19. The Plaintiff's case is premised on fraud on the part of the Defendant in the manner in which he transferred the suit land to himself. The particulars of that fraud are pleaded in paragraph 5 (i) to (v) of the plaint and they include transferring the suit land to himself without the Plaintiff's consent. The Defendant's case is that he obtained title to the suit land after paying full consideration of Kshs.150,000 to the Plaintiff. In paragraphs 2 and 3 of his defence, the Defendant states as follows:
 - 2: "That on 12th November 2008, I entered into a land sale agreement with the Plaintiff herein whereby I bought a portion of land curved out of land parcel No South Teso/Angoromo/6485.
 - 3: "That I paid the Plaintiff Kshs.150,000 which was the total amount agreed in settlement of the said agreement."



Basically therefore, the fulcrum upon which the Defendant's title to the suit land is hinged in the sale agreement dated 12th November 2008 which, by paragraph 5 (iv) of his plaint, the Plaintiff has alleged fraud and pleaded thus:

“Transferring the ownership of land parcel number South Teso/angoromo/7713 from the Plaintiff to himself without consent or authority.”

20. The following are the issues which call for my determination in this dispute:
- a. Whether the transfer of the suit land to the Defendant was fraudulent.
 - b. Whether the Defendant's title to the suit land should be cancelled and revert to the Plaintiff.
 - c. Whether the Defendant should be enjoined from the suit land.
 - d. Who bears the costs of the suit.

a. Whether The Transfer Of The Suit Land To The Defendant Was Procured Fraudulently:

21. The term “fraud” is defined in Black's Law Dictionary 10th Edition as:

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

The Plaintiff, as per paragraph 5 (i) to (v) of his plaint is essentially pleading that the Defendant took his Identity documents, title deed to the suit land and photographs ostensibly to secure a loan but ended up transferring the suit land to himself, what he is pleading therefore is forgery which is a criminal offence and the same is defined in Section 345 of the Penal Code thus:

“Forgery is the making of a false document with intent to defraud or deceive.”

To determine whether there was any fraud in the acquisition of the suit land, this Court must scrutinize the documents filed herein especially the sale agreement dated 12th November 2008. I have done so and noticed that the said agreement has a signature against the name of the Plaintiff. I have compared it with the pleading of the Plaintiff herein and noticed that the Plaintiff's verifying affidavit and statement dated 26th September 2019 are both thumb-printed. They are not signed. Similarly, the Plaintiff's Identity Card NO 7511897 filed vide his further list of documents dated 29th June 2021 is also thumb-printed against the holder's signature. It is also curious that although the sale agreement dated 12th November 2008 and by which the Defendant purports to have purchased the suit land was drawn by the firm of Ouma-okutta & Associates Advocates and bears the stamp of Wycliffe Ouma-okutta Advocate, it does not bear the signature of any counsel. When MR Ouma-okutta was cross-examined on this lapse by MR Juma, he said:

“It is me who drew the agreement. I executed it by stamping it. It does not have my signature but it is stamped and dated. I do not have to sign it. But I confirm that it has my stamp on it. It is the Plaintiff as the seller who gave me all the particulars which are in the agreement. He gave me a copy of the Certificate of Search for the land. I cannot recall the size of the land. The sale agreement says it was land parcel No South Teso/Angoromo/6485. I had known the Plaintiff before. He signed the date 12th November 2008 between the parties in this matter. I confirm that I prepared it.”



On his part, the Plaintiff stated as follows when he testified before Omollo J on 28th February 2022:

“I have never been to MR Okutta’S office, never attended before the L.C.B.”

Taking all that into account, I am persuaded that the failure by MR Ouma-okutta to sign the sale agreement is a mere lapse. The fact that the said agreement bears a signature purported to belong to the Plaintiff yet his Identity Card, statement and verifying affidavit are thumb-printed taken together with the Plaintiff’s testimony that he has “never been to MR Okutt’s office” can only lead to the irresistible conclusion that the Plaintiff did not execute the sale agreement dated 12th November 2008 through which he is purported to have sold the suit land to the Defendant. The sale agreement is the fundamental document upon which the Defendant’s title is supported and once it’s validity is impeached, as is now obvious, the title deed to the suit land as held by the Defendant has no limbs upon which to stand and it must be cancelled. It matters not that the Defendant has filed as part of his documentary evidence, the transfer of Land Form, the Application for counsel of the Land Control Board and the letter of consent. Those documents were all founded on a fraudulent transaction and cannot stand on their own. In the case of *Munyu Maina -v- Hiram Gathiha Maina* 2013 eKLR, the Court of Appeal stated thus:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

As is now clear, the Defendant is also dangling the title to the suit land, (the same was actually not produced but the Green Card and Certificate of Search confirms he is the proprietor thereof), as proof of ownership. That title is a product of a fraudulent process because the purported land sale agreement is a forgery which was not executed by the Plaintiff and which could therefore not be used in aid of transferring any valid interest in the suit land to the Defendant.

22. In his effort to protect the Defendant’s title to the suit land, his counsel MR OUMA has submitted as follows on the issue of fraud:

“The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was caused of the loss complained of ... it is not allowable to leave fraud to be inferred from the facts pleaded and accordingly fraudulent conduct must be distinctly alleged and distinctly proved ...”

Counsel then goes on to cite the case of *Davy -v- Garrett* 1878 7 Ch D 473 of 489 that:

“General allegations, however may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

From the pleadings and evidence above, it is obvious that not only did the Plaintiff specifically plead the allegations of fraud. He went further to lead evidence which has demonstrated, to the required standard, that the Defendant did not obtain a valid title to the suit land and which this Court can recognise. I have no hesitation in declaring that the transfer of the suit land to the Defendant was fraudulent.



b) Whether The Deed's Title Should Be Cancelled:

23. Section 26 (1) of the [Land Registration Act](#) provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”

Article 40 (1) of [the Constitution](#) protects every person's right to acquire and own property. It adds under sub-article (6), however, that:

- (6) “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

The law is clear, therefore, that whereas a title to land is sacrosanct and protected, it can be impeached if found to have been acquired fraudulently or illegally. This Court has already found from the preceding paragraphs of this judgment that the Defendant acquired the title to the suit land fraudulently. That has already been proved to the required standard as set out in precedents which are binding to this Court. They include *Koinange & 13 Others -v- Koinange* 1986 KLR 23, *Kinyanjui Kamau -v- George Kamau* 2015 eKLR and *Ndolo -v- Ndolo* 2008 I KLR (G & F) 742 among others.

24. Fraud having been proved, it follows that the Defendant did not acquire any title to the suit land which this Court can protect. His title must be cancelled and Section 80 (1) of the [Land Registration Act](#) empowers this Court to do so. It provides that:

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- (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.”

There is nothing to suggest that the Defendant was an innocent purchaser with no knowledge of the fraud. The taking and using of the Plaintiff's official documents to register the suit land in his names puts him at the centre of the fraud. His title to the suit land is clearly for cancellation and the title to revert to the Plaintiff.

c) Whether The Defendant Should Be Injuncted From Interfering With The Suit Land.

25. Having cancelled the Defendant's title to the suit land and reverted the same to the Plaintiff, it follows as a matter of course that an order of permanent injunction restraining the Defendant from interfering with the same is well merited. I grant it.



d) Who Shall Bear The Costs Of This Suit.

26. As is clear from Section 27 of the Civil Procedure Act, costs follow the event unless the Court, for good reasons, decides otherwise.
27. The parties herein are family. This Court takes the view that the most prudent order to make in the circumstances is for each party to meet their own costs of this suit.
28. While still on the issue of family, Article 45 (1) of the Constitution provides that:

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- (1) “The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.”

The parties are a man and his nephew. In our African context, a man and his son. Notwithstanding what this Court has already found to be transgressions on the part of the Defendant and in the spirit of promoting family unity and, most importantly, despite the final disposal orders which I am about to make, I think it would be remiss of this Court to look the other way and not encourage the parties to find in their hearts room to forgive, forget and continue, as is clear from the evidence of Margaret Nyongesa Olike (DW2) and Consolata Otaka Ouma (DW3) the family to get together and find an amicable lasting solution with respect to any other pending issues over ownership of the suit land. This should actually have been pursued from the date this suit was filed but there is no time limitation prescribed either in law or practise for the pursuit of the noble principles of peace, love, unity and reconciliation. I encourage the parties to embrace them even as they leave this Court and the dust of this litigation settles down.

29. Ultimately however, and having considered all the evidence in this case, there shall be judgment for the Plaintiff in the following terms:
1. The Defendant’s title to the land parcel No South Teso/Angoromo/7713 is hereby cancelled and the same shall revert to the Plaintiff.
 2. The Defendant shall within 45 days of this judgment surrender to the Land Registrar Busia the original title deed to the land parcel No South Teso/Angoromo/7713 for purposes of cancellation and execute all the relevant documents to facilitate the issuance of a title deed thereto in the name of the Plaintiff.
 3. In default of (2) above, the Deputy Registrar shall execute all such documents on behalf of the Defendant.
 4. An order of permanent injunction is issued restraining the Defendant his servants or any other persons from interfering with the land parcel No South Teso/Angoromo/7713.
 5. Each party shall meet their own costs.

BOAZ N. OLAO

JUDGE

17TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 17TH DAY OF JULY 2024 WITH NOTICE TO THE PARTIES.

Right of Appeal.



BOAZ N. OLAO

JUDGE

17TH JULY 2024

Explanatory notes:

This judgment was due for delivery on 23rd April 2024. However, it was not delivered then following my bereavement on 14th March 2024 and my subsequent pre-scheduled leave from May to July 2024. That explains the delay which is regretted.

BOAZ N. OLAO

JUDGE

17TH JULY 2024

