



**Ziriwan & another (Suing as Administrator of the Estate of Omar Riziwan Mohamed) v Ridhwani & another (Land Case 157 of 2018) [2024] KEELC 6176 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6176 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 157 OF 2018  
FM NJOROGE, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**FATUMA OMAR ZIRIWAN ..... 1<sup>ST</sup> PLAINTIFF**

**KHADIJA OMAR ZIRWAN ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS ADMINISTRATOR OF THE ESTATE OF OMAR RIZIWAN  
MOHAMED**

**AND**

**ABUBAKAR OMAR RIDHWANI ..... 1<sup>ST</sup> DEFENDANT**

**ABDULLAHI BARRE FARAH ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In their Further Amended Complaint dated 28<sup>th</sup> June, 2019 the Plaintiffs sought the following orders;
  - a. A declaration that the registration of the suit property Lamu/Pate Scheme /95 in the name of the 1<sup>st</sup> Defendant and the subsequent sale and transfer of Plot No. Lamu/Pate Scheme /95 thereof by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> Defendant is illegal, fraudulent, unlawful, null and void;
  - b. Cancellation of the title deed registered in the name of the 2<sup>nd</sup> defendant;
  - c. Any other and or further order this Honourable Court may deem just and fit to grant;
  - d. Costs of this suit and interest thereon at court rates.
2. The Plaintiffs averred that their claim against the Defendants is for unlawful sale and transfer of Plot No. Lamu/Pate Scheme /95 which was unlawfully sold and transferred to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant without the consent and/or express authority from the them. They also averred that the



suit property was initially registered in the name of Omar Ridwani who is their father together with the 1<sup>st</sup> Defendant herein.

3. They also asserted that the 1<sup>st</sup> Defendant without taking out letters of administration secretly had the suit property registered in his own name, sold it and transferred it to the 2<sup>nd</sup> defendant. They also pleaded fraud, malice, illegality and irregularities in their Pleint.

#### **1<sup>st</sup> Defendant's Defence.**

4. The 1<sup>st</sup> defendant filed a defence on 27/8/2018. He stated in that defence as follows: that the suit property was lawfully allocated to him by the government under a land settlement scheme and he subsequently sold his interest to the 2<sup>nd</sup> defendant; that as at the time it was allocated to the 1<sup>st</sup> defendant the suit land had not been allocated to or registered in the name of his father who had by then died, and for those reasons, there was no need for him to take out any letters of administration to his late father's estate.

#### **2<sup>nd</sup> Defendant's Defence.**

5. The 2<sup>nd</sup> defendant in response filed an Amended Defence and a Counterclaim dated 15<sup>th</sup> November, 2016. He stated in his defence that prior to purchasing the suit property, he did carry out all due diligence by conducting a search to ascertain ownership of the 1<sup>st</sup> defendant and that the land was unencumbered making him bona fide purchaser for value without notice of any third parties. In the Counterclaim, he averred that he is the legal and lawfully registered owner of all that parcel of land known as Plot No. Lamu/ Pate Scheme /95 having lawfully purchased the same from the defendant who was initially the sole registered owner of the said parcel of land. He sought the following prayers in the counterclaim:
  - a. A declaration that the Plaintiff is the rightful, legal, beneficial and bona fide owner of all that parcel of land known as Plot No. Lamu/Pate Scheme /95 having paid the full purchase price to the defendant agreed upon towards the acquisition of the suit property;
  - b. In the alternative an order against the defendant for the refund of the monies received by the defendant as purchase price towards the acquisition of all parcel of land known as Plot No. Lamu/ Pate Scheme /95 together with interest at 25% bank rates as from 4<sup>th</sup> April, 2018;
  - c. Costs and interests of this suit.

#### **Evidence**

6. PW1, Fatma Omar Zirwan, adopted as her evidence-in-chief her written witness statement dated 30<sup>th</sup> July, 2018. She further told the court that their late father Omar Riziwani was the owner of Plot No. Lamu/Pate Scheme /95; that upon his demise, their brother Abubakar Omar Mohamed had the title deed registered in his name, sold and transferred the suit property to the 2<sup>nd</sup> defendant without their knowledge, consent and or express authority from any of the beneficiaries of the deceased.
7. It was her testimony that the registration of the title deed from the deceased to their brother's name and, after that, the transfer of the same to the 2<sup>nd</sup> defendant was illegal, fraudulent and unlawful since all that was done without the land control board consent and/or letters of administration as no one had been appointed as the administrator of the Estate.
8. She stated that they were called by relatives in Pate informing them that the defendant had sold the suit property and that they went to the lands office and lodged a caution. The letter to the Registrar and



- caution were produced and marked as P. Exh. No. 1 (a) and (b); that they later went to the chief who gave them a letter dated 4<sup>th</sup> May, 2018 (PMFI 2). The grant of letters of administration was produced as P. Exh. No. 3.
9. On cross-examination by Mr. Abubakar, she told the court that the land did not have a title but they were given a letter from the chief. She also stated that she did not know to whom the title was issued to. She confirmed that they had not gone to the Kadhi for succession proceedings.
  10. On cross-examination by Ms. Minyazi, she stated that upon their father's demise, they had a meeting and agreed to appoint Abubakar as their representative; that her brother was the one occupying the suit land. She also stated that the 2<sup>nd</sup> defendant has not developed the suit property and that the land was sold in 2018.
  11. PW2, Khadija Omar, adopted her written witness statement dated 30<sup>th</sup> July, 2018 as her evidence-in-chief. She also told the court that she had sued her brother, the 1<sup>st</sup> defendant who sold their father's land. She confirmed that the land was not issued to anyone; that they later registered a caution to the suit land. She produced the search certificate as P. Exh. No. 4, the death certificate was produced as P. Exh. No. 5.
  12. On cross-examination by Mr. Abubakar, she stated that the suit land had no title deed when they filed a caution; that they had indicated in the caution that the land had been registered in the name of Omar Riziwani; that presently, the official search indicates that the land belongs to Abdullahi Barre Farah.
  13. On re-examination by Mr. Atiang, she told the court that they did not give false information to the Registrar on the caution, that they have not filed for succession cause because they have not agreed on a number of issues. She further told the court that they did not appoint Abubakar as the family representative.
  14. PW3, Bwanarehema Ali, adopted his witness statement dated 5/5/2019 as his evidence in chief. His evidence is that he is a senior chief in charge of Pate in Lamu County and that the late Mzee Omar Ridhwan Mohamed being one of his subjects was known to him; that Mzee Omar occupied Pate Settlement Scheme Plot No. 95 that covered 1.23 hectares; that he in his capacity as the chief and also the committee that was tasked with adjudication were aware Mzee Omar owned of Plot No.95; that the deceased had only four children and the 1<sup>st</sup> defendant was his only son; that the 1<sup>st</sup> defendant confirmed to him that he was the representative of the sisters and they had authorized him to have the title registered in his name; that later on after the suit property had been registered in the name of the 1<sup>st</sup> defendant, the two plaintiffs informed him that they had not given consent to their brother to register the entire property in his name as he was not the sole beneficiary of the estate. It was also his further testimony that they have invited the 1<sup>st</sup> defendant to have an amicable settlement but the 1<sup>st</sup> defendant has remained adamant that the property belongs to him and that he had already sold it.
  15. On cross-examination by Ms. Marubu, he stated that he had not produced any document to show that the plaintiff was a member of the Pate Scheme. He asserted that nobody stays on the suit land. He also told the court that he was not aware that a title deed had already been issued to a third party.
  16. DW1, Abdullahi Barre Farah, adopted his written witness statement dated 11<sup>th</sup> April, 2019 as his evidence in chief. His list of documents dated 11<sup>th</sup> April, 2019 was produced and marked as defence D. Exh. No. 1 - 5. He further testified that he is the lawfully registered owner of all that parcel of land known as Plot No. Lamu/ Pate Scheme /95 having lawfully purchased it from the 1<sup>st</sup> defendant vide a sale agreement dated 4<sup>th</sup> April, 2018. According to him, at the time of purchase, the 1<sup>st</sup> defendant was the sole registered owner of the said parcel of land thus having an indefeasible title. It was his testimony that prior to entering into the sale transaction for the purchase of the suit property, he conducted a



search to ascertain that the land was free from any encumbrances; that he also conducted a ground visit to ascertain the position and that pursuant to the due diligence he conducted, he was satisfied that the land was unencumbered.

17. On cross-examination by Mr. Khamisi, he stated that he conducted due diligence before buying the property and that the 1<sup>st</sup> defendant was the owner of the suit property; that later the property was transferred to his name.
18. DW2, Abubakar Omar Ridhwani, the 1<sup>st</sup> defendant reiterated the contents of his defence and told the court that it was untrue that the land was ever initially registered in their father's name. According to him, the suit land has never been family land.
19. While under cross-examination by Mr Atiang DW2 acknowledged that PW3 was the chief of their area at the time his father was alive but maintained that his father was already deceased by the time the settlement scheme was being established. He denied that it was not the chief who listed him as allotted of the suit land but the Committee. He stated that no letters of allotment were issued. The committee simply made a list and titles were issued upon survey. Adjudication began in 2012. Titles issued in 2013.

## **Submissions.**

### **1<sup>st</sup> Defendant's Submissions.**

20. Counsel submitted that the Plaintiffs have failed to prove their case against the 1<sup>st</sup> defendant on a balance of probabilities. He relied on Sections 107, 108 and 109 of the Evidence Act in submitting that it was incumbent upon the Plaintiffs to prove the allegations made in the pleadings and more particularly that the suit property was originally registered in the name of their father Omar Ridhwan and that the 1<sup>st</sup> Defendant fraudulently transferred the suit property to himself and subsequently transferred to the 2<sup>nd</sup> defendant.
21. He also submitted that the Plaintiffs did not produce in court a title deed proving that the suit property had initially been registered in the name of their father. It was his submission that the 1<sup>st</sup> defendant was the first registered owner of the suit property and that by virtue of Section 24 (a) of the Land Registration Act, he was vested with absolute ownership of the land together with all rights and privileges. He also relied on Sections 25 and 26 of the same Act and Sections 12 and 134 of the Land Act.
22. The 2<sup>nd</sup> defendant in his submissions identified 2 issues for determination, whether the 2<sup>nd</sup> defendant was a bona fide purchaser for value without notice and whether the 2<sup>nd</sup> defendant is the legal and beneficial owner of the suit property. Counsel submitted that the 2<sup>nd</sup> defendant conducted due diligence before purchasing the suit property and that a bona fide purchaser of a legal estate without notice has absolute unqualified and unanswerable defence against claim of any prior equitable owner hence this court ought to dismiss the Plaint dated 28<sup>th</sup> June, 2019. He relied on the case of *Katende v Haridar & Company Limited* (2008) 2 EA 173.
23. On the counterclaim, he submitted that he is the legal owner of the suit property for being the bona fide purchaser for value without notice. He further relied on the case of *Samuel Kamere v Land Registrar (Kajiado)* Civil Appeal No. 28 of 2005 (2015) eKLR, submitting that he as plaintiff in the counterclaim has satisfied the required standard of proof established in the quoted case.

### **Analysis and Determination.**

24. I have considered the pleadings, evidence as well as the submissions by the parties. The Plaintiffs' claim against the Defendants is for unlawful sale and transfer of Plot No. Lamu/Pate Scheme /95, alleged



- to have been unlawfully sold and transferred to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant without their express authority or consent. It is also their claim that the suit property was initially registered in the name of Omar Ridwani who is their father together with the 1<sup>st</sup> Defendant herein.
25. The 2<sup>nd</sup> Defendant on the other hand asserts that he is the legal and lawfully registered owner of all that parcel of land known as Plot No. Lamu/ Pate Scheme /95 having lawfully purchased the same from the 1<sup>st</sup> defendant, who was initially the sole registered owner of the said parcel of land, vide a sale agreement dated 4<sup>th</sup> April, 2018. According to him, prior to purchasing the suit property, he did carry out all due diligence by conducting a search to ascertain ownership of the 1<sup>st</sup> defendant and that the land was unencumbered making him bona fide purchaser for value without notice of any 3<sup>rd</sup> parties. According to the 2<sup>nd</sup> defendant, at the time of purchase, the 1<sup>st</sup> defendant was the sole registered owner of the said parcel of land and thus had an indefeasible title.
26. The Plaintiffs on the other hand contend that the registration of the title deed from the deceased to their brother's name and the transfer the same to the 2<sup>nd</sup> defendant was illegal, fraudulent and unlawful since all that was done without the land control board consent and/or letters of administration as no one had been appointed as the administrator of the Estate.
27. In my view what lies for determination before this court is whether the 2<sup>nd</sup> defendant has a valid claim to parcel Plot No. Lamu/Pate Scheme/95 as a purchaser and whether the counter claim can succeed as against the Plaintiffs' claim.
28. The evidence of the plaintiffs strongly demonstrates that the suit land was family land. The evidence of PW3 was especially crucial. He was an administrator in the area. He knew the deceased father of the plaintiffs. He asserted that he was the allottee of the suit land. No evidence of the defendants controverted PW3's evidence. The conclusion that this court arrives at on the basis of the available evidence is that the suit land belonged to the plaintiff's father by the time the same was registered in the name of the 1<sup>st</sup> defendant and that the registration was therefore irregular.
29. The provisions of Section 45 of the *Law of Succession Act* read as follows:
- “No intermeddling with property of deceased person.
- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”
30. Section 55 (1) of *Cap 160* states:
- “55. No distribution of capital before confirmation of grant
- (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.”
31. Section 82 of the *Law of Succession Act* states as follows:
- “82. Powers of personal representatives
- Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—



- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;”

32. In Machakos HCC 256 of 2007 *In re Estate of John Gakunga Njoroge (deceased)* [2015] eKLR, the court dealt with similar facts in which property was claimed by persons who had bought land from the deceased prior to his death and by persons who had bought land from beneficiaries to the estate of the deceased. In that case, Muriithi J stated:

“ 15. For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the *Law of Succession Act*. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

- (ii) no immovable property shall be sold before confirmation of the grant”

7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this *Act*, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”

33. Courts have thus previously held that transactions for land conducted before confirmation of a grant were void *ab initio*. The 1<sup>st</sup> defendant with full knowledge that the suit land belonged to his late father sold it to the 2<sup>nd</sup> defendant before obtaining a grant of letters of administration and without involving all the other beneficiaries to the deceased’s estate. What occurred between the defendants was a fraudulent transaction and the transfer that resulted therefrom was clearly illegal and can not bind the other beneficiaries to the estate such as the plaintiffs.

34. Having determined that the sale agreement between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant is fraudulent and invalid to bind the plaintiffs the plaintiffs’ claim against the defendants succeeds.



35. The 2<sup>nd</sup> defendant has counterclaimed against the defendants for a declaration that he is the rightful owner of the suit land and in the alternative an order against the defendants for a refund of the monies received as consideration for the suit land together with interest at 25% bank rates with effect from 4<sup>th</sup> April 2018. From a perusal of the record, there is documentary evidence that the 1<sup>st</sup> and 2<sup>nd</sup> entered into an agreement for the sale of the suit property.
36. The plaintiffs filed a reply to defence and defence to counterclaim dated 15/2/2021 and deflected the 2<sup>nd</sup> defendant's claim towards the 1<sup>st</sup> defendant on account of the fact that the 1<sup>st</sup> defendant was liable therefor on the ground that he had acted fraudulently. In this court's view, the plaintiffs' submission is correct; such an agreement having no force to transfer legally the suit property can only bind the 1<sup>st</sup> defendant to reinstatement of the 2<sup>nd</sup> defendant to the situation he was in before he paid the purchase price. The sole remedy for the 2<sup>nd</sup> defendant therefore is a refund by the 1<sup>st</sup> defendant only of the purchase price advanced to the 1<sup>st</sup> defendant who ought to have sought the plaintiff's consent and/or approval and complied with the appropriate legal procedures as to succession before resorting to selling the suit property.
37. In the upshot the plaintiff's suit against both defendants succeeds and the 2<sup>nd</sup> defendant's claim succeeds only as against the 1<sup>st</sup> defendant. I therefore issue the following final orders:
- a. A declaration is hereby issued declaring that the registration of the suit property Lamu/Pate Scheme/95 in the name of the 1<sup>st</sup> Defendant and the subsequent sale and transfer of Plot No. Lamu/Pate Scheme/95 by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> Defendant is illegal, fraudulent, unlawful, null and void;
  - b. The title deed registered issued and held by and in the name of the 2<sup>nd</sup> defendant in respect of the suit property Lamu/Pate Scheme/95 is hereby cancelled forthwith;
  - c. The Land Registrar of the registry where the suit land Lamu/Pate Scheme/95 is registered shall effect the rectification of the register by expunging the registration of the 2<sup>nd</sup> defendant as proprietor of the suit land and by registering the appointed administrators of the estate of the deceased Omar Riziwan Mohamed to hold on behalf of the beneficiaries of that estate;
  - d. The 1<sup>st</sup> defendant shall refund the 2<sup>nd</sup> defendant the sum of Kshs 900,000/= being the consideration he had illegally received from him within 90 days of this judgment;
  - e. The amount awarded in limb no (d) herein above shall attract interest at court rates from 5/4/2018 until completion of payment in full;
  - f. The costs of this suit shall be solely borne by the 1<sup>st</sup> defendant.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

