



Shah & another (Suing as Executors and Legal Representatives of the Estate of Pritam Singh Panesar (Deceased)) v Liphutsu & another (Environment & Land Case 31 of 2023) [2024] KEELC 7429 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 31 OF 2023
AE DENA, J
OCTOBER 31, 2024**

BETWEEN

NILESHKUMAR MOHANLAL SHAH 1ST PLAINTIFF

GUY SPENCER ELMS 2ND PLAINTIFF

**SUING AS EXECUTORS AND LEGAL REPRESENTATIVES OF THE ESTATE
OF PRITAM SINGH PANESAR (DECEASED)**

AND

MUTUA NJAMA LIPHUTSU 1ST DEFENDANT

THE LAND REGISTRAR KWALE 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this suit as Legal Representatives or Executors and of the Estate of Pritam Singh Panesar who died testate. The Plaintiffs aver that Grant of probate of the written will of the deceased was confirmed by the High Court on 17/7/2019. The subject of the suit is property known as Kwale/Shimoni Adj/758 (suit property) measuring 34.95 hectares. It is averred that the property is a consolidation of Plot Number Kwale/Shimoni/406 and 412 which the deceased acquired separately. That the deceased and his estate still hold the original title to the suit property and have never sold, leased or encumbered.
2. It is pleaded that at all material times the property has been in the possession of the deceased and upon his demise the Plaintiff deployed a caretaker. That sometimes in July/August 2022 the Plaintiffs were informed by an informer in Kwale Land Registry that there was transfer being lodged against the suit property. The Plaintiffs investigated and contacted the advocates for the proposed transferee for copies of title, green cards and official search of the suit property which they have todate not supplied and have refused to disclose the particulars of the vendors.



3. That certified copies of the documents were supplied by the Land Registrar on 3/03/23 among them a green card and an undated transfer from the deceased to the 1st Defendant. It was discovered from the green card that on 29/2/2016 the 1st Defendant was registered as the owner of the suit property and title issued. The said registration is termed as suspect, irregular and unprocedural for lack of the requisite legal supporting documents as listed in paragraph 19 of the Plaintiff. That the said registration is impeachable based on the said irregularities and fraud as particularised under paragraph 21 of the Plaintiff.
- 4 The Plaintiff seeks the following reliefs;-
 - i. A declaration that the registration of a transfer and the Title Deed for the property known as LR No. Kwale/Shimoni Adj/758 situate in Shimoni, Kwale County measuring 34.95 hectares to the 1st Defendant was fraudulent, unprocedural, irregular, illegal and obtained through corrupt scheme and hence illegal, unlawful, null and void ab initio.
 - ii. An order of cancellation of all entries relating to registration of Transfer and Title Deed for the property known LR. No. Kwale/Shimoni Adj/758 situate in Shimoni, Kwale County measuring 34.95 hectares to the 1st Defendant and registration a transmission thereof to the Plaintiffs as Executors of the Estate of Pritam Panesah(deceased) free from encumbrances.
 - iii. An order of permanent injunction to restrain the 1st Defendant, their servants agents, employees, proxies or anyone claiming under them and any other person from entering upon, occupying, constructing on, developing, selling, transferring, encumbering and or in any other manner dealing or interfering with the Plaintiffs ownership or use of the known LR No. Kwale/Shimoni Adj/758 situate in Shimoni, Kwale County measuring 34.95 hectares.
 - iv. Costs of the suit.
5. The 1st Defendant did not enter appearance despite being served by way of substituted service pursuant to the leave of the court granted on 2/05/2023.
6. The 2nd Defendants responded by statement of Defence dated 13th July 2023 filed on the same day. Denying the averments in the Plaintiff save for the descriptive paragraphs, the 2nd Defendants case is that it does not know what transpired between the Plaintiffs and the 1st Defendants and that it carried out its functions legally within the confines of the constitution and statutory law.

Hearing

7. The suit was heard virtually on 14/5/24.
8. PW1 was Guy Spencer Elms. He adopted the witness statement dated 28/4/23 as his evidence in chief and produced the documents in the Plaintiffs list of documents of even date. Reiterating the averments in the Plaintiff the witness testified that the fraudulent transfer they discovered at the lands registry had not been signed by the deceased. That the witness had been the deceased (herein Pritam) lawyer at the law firm of Raffman Dhanji Elms & Dally. The deceased never instructed the firm on such transfer. They have always had a caretaker on the property and had also established the beacons. That other than the said transfer the registrar had no other documents that ordinarily accompany a transfer for registration. That the estate was in possession of the original title to date. The witness urged the court to allow the prayers sought.
9. Cross examined by Ms. Rukiya state counsel appearing for the Land Registrar, the witness conceded that Certificate of Confirmation of grant, Certificate of death, the title deed were all uncertified copies.



- That it was possible he was not privy to all the deceased transactions. That the other lawyer S.S. Jowhal who handled the deceased transactions confirmed to the witness though verbally that he had never acted for the deceased in the transaction.
10. The witness clarified on re-examination that the transfer did not show it was drawn by a law firm. That there has been no objection to his being executor of the deceased estate. That he was not aware of any other competing interests in the suit property.
 11. With the above evidence the Plaintiffs close was closed.
 12. The 2nd Defendant did not call any witness and the case was marked as closed.

Submissions

Plaintiffs' submissions

13. Referring the provisions of section 26(1) of the *Land Registration Act* it is submitted that while the certificate of title shall be taken by all courts as prima facie evidence that the person named therein is the absolute owner, there are instances where such title may be challenged such as fraud and irregularities in the acquisition of the same. That the Defendant failed to file any documents and call evidence and therefore the defence remains mere statement of fact and of no evidential value.
14. The Plaintiff identified two issues for determination, Whether the transfer of the suit property to the 1st Defendant was regular and legal. It is submitted that there being two titles each holder of the title is to demonstrate their title has a good foundation and was properly passed to them. Reliance is placed on Hubert L.Martin & 2 Others Vs. Margaret J Kamar & 5 Others (2016)eKLR and Munyu Maina Vs Hiram Gathiha Maina (2013)eKLR. That it was evident from the green card that that the deceased was the registered owner of the suit property on 10/6/2011 after consolidation of Plot Number Kwale/Shimoni/406 and 412. That the Plaintiff has since been in possession of the property and still holds the original title. That the defendants did not produce any evidence to impeach the Plaintiffs title. The Plaintiffs claim having not been challenged the Plaintiff has sufficiently demonstrated the root of the title they hold.
15. Referring to section 37 (2) (a) and 46 of the *Land Registration Act* it is submitted that failure to pay stamp duty on the transfer by the 1st Defendant was irregular and unprocedural. That both the transfer form and stamp duty receipt/acknowledgement were not presented. That the court should not allow such irregularity considering that the provisions of the law as to stamp duty are couched in mandatory terms.
16. As to whether the reliefs sought are merited it is submitted that having established the root of his title the Plaintiff is entitled to the reliefs sought. The Plaintiff has come to court with clean hands making a full disclosure with regard to the property. That the 1st Defendant has stayed away from the proceedings. That the Land Registrar has failed to recall the title issued to the 1st Defendant. The title being marred with irregularities the court must exercise its discretion in favor of the Plaintiff.
17. The 2nd Defendant filed submissions dated 28th June 2024 and identified one issue for determination, whether the 2nd Defendant engaged in fraudulent activities to transfer the property from the deceased to the 1st Defendant. It is submitted that to the extent that the Land Registrar as admitted by PW1 was not in the Plaintiffs list of witnesses, the Plaintiffs evidence that they were informed by the Land Registrar of an undated transfer from the deceased to the 1st Defendant remained hearsay evidence in the absence of corroboration. That while the Plaintiffs pleaded fraud and the main proof being the undated transfer there was no evidence that the 2nd Defendant signed the transfer or issued certificate



of title pursuant thereto. The court was referred to the Court of Appeal case of Kuria Kiarie & 2 Others Vs. Sammy Magera (2018) eKLR and Kinyanjui Kamau Vs. George Kamau (2015) eKLR on the position that fraud must be specifically pleaded and proved. It cannot be inferred from the facts since its standard of proof is slightly higher.

Preliminaries

18. During the preparation of this judgement the court recalled the existence of suit No. ELC 319 of 2021 Arnold Mbaabu Vs. Pritam Singh Panesar deceased) & Others. The suit was ongoing for hearing before this court as late as 27th September 2024 and revolved around the same property. I found it imperative that counsel should address the court on the import of these proceedings on the other suit. This was to avoid any embarrassment to the court. I directed that counsels file submissions in this regard. Mr. Litoro complied and filed submissions dated 18th October 2024. The 2nd Defendant did not.
19. In its submissions the Plaintiff admitted that the deceased estate has been sued in ELC 319/2021 by Mr. Arnold Mbaabu the Attorney of Gerald Githinji Mwirichia for fraudulent acquisition of title number Kwale/Shimoni Adj/ 406. That five parties are sued being, Sheikh Mahmoud Adulrahman , Nleshkumar N. Shah & Guy Spenccer Elms (Legal Representatives of the Estate of Pritam Singh Panesah), District Land Adjudication & Settlement Officer Kwale, District Land Registrar Kwale and the National Land Commission. Outlining the history of the proceedings in ELC 319/ 2021 and the cause of action it was submitted that the parties and claims are different. That the two suits can proceed and be determined separately. The court is also referred to the provisions of section 5 of the [Civil Procedure Act](#).
20. Further citing the provisions of sections 6,7, and 8 of the [Civil Procedure Act](#) it is submitted that there is no bar to this court rendering a judgement herein . That in the present suit the Plaintiff is challenging the title of Matua Njama Liphusu the 1st defendant or claim to the consolidated Kwale/ Shimoni Adj/758 and seeks to impeach his registration thereof. That Matua Njama Liphusu is not a party in ELC 319/ 2021. The Land Registrar in the present suit has not counterclaimed or sought to impeach the Plaintiffs title Kwale/Shimoni Adj/758. That on the other hand the Plaintiff in ELC 319/ 2021 claims Kwale/Shimoni Adj/406 and not Kwale/Shimoni Adj/412. That the only claim on Kwale/Shimoni Adj/758 is deconsolidation.
21. Referring to the principles of consolidation and the provisions of section 80 of the [Civil Procedure Act](#) as enunciated in the case of Abdalla Vs. Hassan & 15 Others (2022) KEELC 13582) KLR it is urged that consolidation will convulate and confuse issues between the two plaintiffs. That it is only just and fair the issues between the Plaintiff and the 1st defendant in this suit are resolved before determination of the issues in ELC 319/ 2021.
22. Having considered the foregoing submissions, the pleadings in the present suit and ELC 319/ 2021 this court is persuaded that there is no prejudice in making a determination in this matter for the following reasons;-
23. Firstly this is a claim strictly between the Plaintiff and the 1st defendant and revolves around the registration of the 1st defendant as proprietor of Kwale/Shimoni Adj/758. I also noted that in the present proceedings that a restriction placed by Mr Gerald Githinji Mwirichia and who is the substantive Plaintiff in ELC 319/ 2021 is alleged to have been removed unprocedurally. This does not therefore prejudice Mr. Mwirichia who for purposes of this suit is not any of the registered owners as per the register. Infact it is to his benefit. Since the contest is between the Plaintiff and the 1st Defendant I would agree there would be no bar against the court to proceed with rendering this judgement. Further the finding would be limited to the register as between Panesar and Mr. Liphutsu and no more.



The Plaintiff in ELC 319/ 2021 and the parties therein will still have his day in court to litigate on his claim for the ownership of part of the suit property as between him and the Plaintiff in the present suit in the other forum that is ELC 319 of 2021 including the other defendants.

24. It is upon the foregoing background that I will proceed with the discussions on the merit of the present suit and render my judgement.

Analysis and Determination

25. Having considered the pleadings, the evidence led and the submissions filed I agree with the issues as framed by Counsel for the Plaintiff.

Whether the transfer of the suit property to the 1st Defendant was regular and legal.

26. The Plaintiffs case is that at all material times the deceased was the bonafide owner of the suit property which he acquired free of any encumbrance and was issued with a title and has remained in possession of the same. The property was however fraudulently and unprocedurally transferred to the 1st Defendant by the 2nd defendant in February 2016. The Plaintiffs want the court to declare the registration of the 1st Defendant null and void.
27. The court is faced with two titles on the same suit property. Under section 32 of the Registered [Land Act](#) (repealed) and which applies by dint of section 107 of the [Land Registration Act](#) there can only be one title in respect of a suit property. Also see Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura Vs Attorney General & 4 others (2013) eKLR.
28. Section 26 (1) of the [Land Registration Act](#) provides: -
- 26 (1) 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.
29. The above legal provisions embody the principle and doctrine of indefeasibility of title to the effect that the title of a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation to which the title holder is proved to have been a party to. It is important to state at this juncture that the title that is targeted for impeachment by the Plaintiff is the 1st Defendants title. But having stated this, the Plaintiff cannot impeach the 1st defendants title over the suit property unless they establish the deceased had a valid interest in the suit property. Additionally it is not enough to just dangle the deceased title. The burden of proof lay on the Plaintiff to also prove that the 1st defendant registration was acquired through fraud instigated by the 1st Defendant. Alternatively, that the 1st Defendants registration was procured irregularly or by mistake. In essence the burden of proof lay on the Plaintiff.



30. But how should the court proceed to determine which title is legal. This has been a subject of many decided cases where guidance has been enumerated. In *Daudi Kiptugen Vs. Commissioner of Lands & 4 Others* (2015) eKLR where he stated; -

‘In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.’

PW1 produced in support of the plaintiffs claim a copy of a title deed dated 10/6/2011 showing Dr. Pritam Singh Panesar as the absolute proprietor for Kwale/Shimoni.Adj/758. The title also showed him as the 1st registered owner of the suit property following the opening of the register on 10/6/2011. The title bore the words ‘Not valid for any transaction which upon inquiry by the court PW1 informed the court that the same was the deceased way of ensuring copies issued would not be abused.

31. Being satisfied that the inscription was not an endorsement of the Land Registrar it was necessary to ensure the title was supported by the register that is to say there ought to be a corresponding entry to show that a title was issued to the deceased. PW1 also produced a copy of the green card for the suit property. The same is certified a true copy of the original by the Land Registrar Kwale on 3/3/23. Entry No. 1 and 2 of 10/6/2011 show Pritam Singh Panesar as having been entered in the register and title deed issued the same day. The green card also corroborated PW1 evidence that titles 496 and 412 were closed on consolidation. I note that PW1 conceded in cross examination that some of the documents are not certified. However the court has not been led to any evidence that the grant may not be authentic.
32. Based on the above and emboldened by the Green card I was convinced that the deceased Pritam Singh Panesar was on the 10/6/2011 entered as the 1st registered owner of the suit property.
33. Having noted that the deceased was entered as the registered owner of the suit property it was incumbent upon the Plaintiffs to prove that the registration of the suit property into the names of the 1st Defendant was undertaken fraudulently, through misrepresentation and or irregularly. It is trite that fraud must be specifically pleaded particularised and proved. The particulars of fraud , illegalities, unlawfulness, irregularities against both defendants are set out under paragraph 21 of the Plaint dated 28/4/23.
34. The above include, that the 1st defendant colluded with the 2nd defendant to register an undated and unexecuted transfer without verification from the deceased or that the deceased executes the transfer. That the defendants effected transfer without proof of payment of stamp duty, letter of consent. That



the 2nd defendant did not call for surrender of the deceased title for cancellation. Further that the land registrar registered a transfer when there was an existing caution.

35. The Plaintiffs presented before court a series of email correspondence these included letter from the firm of Raffman Dhanji Elms & Virdee Advocates and Hamilton Harrison & Mathews relating to the suit property and the alleged transfer highlighting gaps that were noted by the Chief Land Registrar Kwale. The correspondence also included emails from the firm of Litoro Omwebu & Company Advocates and Samrita Virdee of Raffman Dhanji Elms & Virdee Advocates on accessing of documents from the Land registry, filing suit to cancel transfer in respect of the alleged blank transfer culminating to registration of the 1st defendant as proprietor. A green card which I have already alluded to hereinbefore, the alleged blank transfer, ID card of Mwatua Njama Liphutsu were also attached.
36. I note that the blank transfer is certified by the Land Registrar Kwale on 3/3/23. No evidence was led by the Registrar disputing that this document did not emanate from the land registry. While it is submitted that there was no evidence that the Land registrar registered the transfer, no evidence was adduced to corroborate this. It is trite that submissions do not take the place of evidence see the Court of Appeal dictum in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR. The court file bears the record that indeed a transfer was registered. I did not have a register produced by the 2nd Defendant to displace the green card and showing that the register was intact in favor of the deceased. No documentary proof was presented by the 2nd Defendant to demonstrate that the requisite documentation for a transfer to be registered were submitted by the 1st Defendant.
37. I think I have said enough to support a finding that the registration of the 1st Defendant as proprietor of the suit property was marred with procedural impropriety. Does this warrant the prayers sought by the Plaintiff?

Is the Plaintiff entitled to the orders sought?

38. I have already enumerated at the beginning of this judgement the reliefs sought by the Plaintiffs. Having analysed the evidence herein I see no reason to decline the prayers sought in the Plaint on the basis of the green card and the irregularities pointed out. This court however does not find it necessary to make an order for registration to the administrators of the estate as this is an independent process. The substantive claim in my view is on the registration of the 1st defendant as proprietor and cancellation of the same.
39. The upshot of the foregoing is that I find the Plaintiffs have proved the deceased interest in the suit property by dint of the green card produced in evidence on a balance of probabilities and I enter judgement for the Plaintiff against the Defendants in the following terms:-
 - i. A declaration that the registration of a transfer and the Title Deed for the property known as LR No. Kwale/Shimoni Adj/758 situate in Shimoni, Kwale County measuring 34.95 hectares to the 1st Defendant was unprocedural, irregular, and obtained through corrupt scheme and hence illegal, unlawful, null and void ab initio.
 - ii. An order of cancellation of all entries relating to registration of Transfer and Title Deed for the property known LR. No. Kwale/Shimoni Adj/758 situate in Shimoni, Kwale County measuring 34.95 hectares to the 1st Defendant.
 - iii. The prayer for an order of permanent injunction is declined for the reason that orders 1 and 2 above will suffice.
 - iv. Costs of the suit are awarded to the Plaintiff.



JUDGEMENT DATED SIGNED AND DELIVERED THIS 31ST DAY OF OCTOBER 2024.

.....

A.E DENA

JUDGE

V.Olala holding brief for Mr. Litoro for Plaintiff

No appearance for 1st Defendant

Mr. Makuto for the 2nd Defendant

Asmaa Maftah – Court Assistant

