



**Abdulrahman v Mungai & 4 others (Environment & Land Case
117 of 2018) [2024] KEELC 7192 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7192 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 117 OF 2018
MN GICHERU, J
OCTOBER 28, 2024**

BETWEEN

ABDULRAHMAN ALI ABDULRAHMAN PLAINTIFF

AND

ROLAH WANJIRU MUNGAI 1ST DEFENDANT

THE LAND REGISTRAR, KAJIADO 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

PANAI TULITO 5TH DEFENDANT

JUDGMENT

1. The plaintiff seeks the following reliefs against the five (5) defendants jointly and severally.
 - a. A declaration that the transfer of L.R. Kajiado/Kaputiei - North/2663, suit land, to the 1st defendant and/or her nominee and/or the 5th defendant was fraudulent.
 - b. In the alternative, a declaration that the transfer of the suit land to the 5th defendant and/or his nominee and/or transferee was fraudulent.
 - c. An order that the title deed issued to Rolah Wanjiru Mungai and or Panai Tulito in respect of the suit land be cancelled and the lands register be rectified for the proprietor of the land to read Abdulrahman Ali Abdulrahman.
 - d. In the alternative, an order that the title issued to Panai Tulito in respect of the suit land be cancelled and the land register be rectified for the proprietor of the land to read Abdulrahman Ali Abdidrahman.



- e. A declaration that the defendant, their servants, agents and/or any other person claiming through them are trespassers on the suit property and they should be evicted and/or an order to demolish illegal structures standing thereon do issue.
 - f. An order of injunction do issue restraining the defendants by themselves or through their agents, servants, employees, and/or persons claiming under them from transferring, developing or in an other manner dealing with the suit land.
 - g. The OCPD Kajiado Police division to provide security to ensure that the eviction and demolition is done smoothly.
 - h. Damages for trespass and mesne profits at the rate of Kshs. 10,000/- per month from the date of filing of the suit.
 - i. Costs of the suit.
 - j. Any other relief the court may deem fit and just to grant.
2. The plaintiff's case is as follows. He is the registered owner of the suit land which he purchased from Michael Thuo Chege on 13/8/1997. He was issued with a title deed on 21/11/1997. Soon after he got registered as the owner of the suit land, he introduced his cousins Rukiya Abdalla Idarus and Yussuf Abdalla Idarus to the same seller, Michael Thuo Chege, who sold them L.R. Nos. Kajiado/Kiaputiei-North/2749 and 2750 respectively which were registered in their names on 12/2/1988. This Michael Thuo Chege had subdivided a large parcel of land and it is the subdivisions that he sold to the plaintiff, his cousins and other people. The land which the plaintiff's cousins bought is in the vicinity of the suit land. From 1997 to 2016, all was well with the land. However, in April 2016, the plaintiff received information that someone was depositing building materials on the suit land and digging a trench for a building foundation. On inquiry through his advocates, the plaintiff discovered that the suit land had been transferred to the 1st defendant. This came with utter shock to the plaintiff because the 1st defendant was a total stranger to him. He had never met her let alone transact with her over the suit land. He never signed a sale agreement with her, never attended a land control board meeting, never signed any application for the consent of the Land Control Board or transfer form in respect of the suit land. He is still in possession of the original title deed issued to him in the year 1997. In the course of the hearing of this case, the plaintiff received a copy of a sale agreement purported to be between the plaintiff and the 1st defendant and dated 9/2/2011. There was also an acknowledgement voucher for Kshs. 250,000/- purported to have been signed by the plaintiff. The signatures in the two documents were compared by a documents examiner with the known signatures of the plaintiff and they were found to be dissimilar. They are not from a common source.

It is the plaintiff's case that fraud and misrepresentation were committed by the defendants in obtaining registration of his land. He prays that the unlawful transactions relating to his land be nullified by this court. The plaintiff has pleaded several particulars of fraud which include the following.

- a. Misrepresentation that the plaintiff had executed a transfer in favour of the 1st defendant.
- b. Transferring the suit land from the plaintiff to the 1st defendant without the consent of the Land Control Board.
- c. Transferring the suit land without a sale agreement.
- d. Fraudulently tampering with the land records.



3. In support of his case, the plaintiff filed the following evidence.
 - i. Plaintiff's witness statement.
 - ii. Witness statement by Yusuf Idarus dated 9/11/2022.
 - iii. Special power of attorney dated 25/2/2016.
 - iv. Copy of title deed for the suit land dated 21/11/1997.
 - v. Copies of title deeds for Yussuf Abdalla Idarus and Rukiya Abdalla Idarus dated 12/2/1998 and sale agreements dated 13/8/1997.
 - vi. Copy of forensic examination reported dated 16/3/2022.
 - vii. Copies of the plaintiff's passports numbers A0025575 and AB071456.
 - viii. Photographs of buildings on the suit land.
 - ix. Copy of letter dated 2/2/201709 for the Law Society of Kenya showing that Mwihia Charles Kagai passed away on 18/2/2012.
4. The 1st defendant in a written statement of defence dated 22/12/2016 replies as follows. Firstly, the plaintiff's claim is denied in its entirety. Secondly, the 1st defendant is the lawful owner of the suit land after having bought it from the plaintiff who transferred it to her and she now holds the legitimate title thereto. Thirdly, the plaintiff is being hypocritical because the whole transaction of sale of the suit land was handled by C.K. Mwihia advocates who acted for both the plaintiff and the 1st defendant. Fourthly, the 1st defendant had the suit land in her name for more than five (5) years before selling the same to the 5th defendant for valuable consideration. Fifthly, the 1st defendant sold the suit land on 8/12/2015 to the 5th defendant for Kshs. 7 million and the 5th defendant confirmed from the Land Registry that the 1st defendant was the lawful owner. Finally, the filing of this suit by the plaintiff is an attempt to renege on the sale agreement that he willingly entered into.

For the above and other reasons, she prays for the dismissal of the plaintiff's suit.
5. In support of her case, the 1st defendant filed the following evidence.
 - a. Witness statement by the 1st defendant.
 - b. Copy of sale agreement dated 9/2/2011 between her and the plaintiff.
 - c. Copy of acknowledgment voucher dated 9/2/2011 signed by the plaintiff.
 - d. Copy of title deed for the suit land in her name dated 17/12/2012.
 - e. Copy of certificate of official search dated 31/10/2015 showing the 1st defendant as the owner of the suit land.
 - f. Copy of the green card for the suit land.
 - g. Copy of forensic report by Daniel Gutu.
6. The 2nd, 3rd and 4th defendants filed a written statement of defence dated 11/10/2016 in which they aver as follows. Firstly, they deny all the averments in the plaint generally. Secondly, they state that if the suit land was registered in the names of the 1st and 5th defendants, then this was on the basis of documents presented to them which they believed to be genuine. Finally, they deny ever having been served with notice of intention to sue as required by law.



7. In support of their defence, the 2nd, 3rd and 4th defendants filed the following evidence.

- i. Witness statement by Rosemary W. Mwangi, Land Registrar dated 19/5/2023.
- ii. Copy of green card for the suit land from 30/6/1993 to 16/6/2016.

In summary, the witness's evidence is that the register for the suit parcel was opened on 30/6/1993 when a title deed was issued to Michael Thuo Chege. On 27/1/1994 it was transferred to Harris N. Njuguna and a title deed issued to him the same day. On 21/11/1997, the land was transferred to the plaintiff and a title deed issued to him the same day. On 17/12/2012, it was again transferred to the 1st defendant and a title deed issued to her the same day. On 21/4/2016, it was transferred to the 5th plaintiff and a title deed issued to him. Finally, on 16/6/2016 an inhibition was registered against the suit land vide an order issued in ELC Case No. 378 of 2016 at Nairobi.

8. The 5th defendant, through counsel on record filed a written statement of defence dated 2/12/2016 in which he avers as follows. Firstly, he denies all the averments in the plaint generally. Secondly, he avers that he is the registered owner of the suit land to which he holds a genuine and legitimate title deed. Thirdly, the green card acknowledges that at one time the plaintiff was the registered owner of the land before it was transferred to the 1st defendant on 17/12/2012 who later transferred it to the 5th defendant. Fourthly, the 5th defendant stands to suffer great prejudice since he is an innocent purchaser for value without notice of any defect in title. He has obtained several approvals for development of the suit land from County Government and NEMA and the plaintiff's suit should be dismissed.

9. In support of his case, the 5th defendant filed the following evidence.

- i. Witness statement by the 5th defendant dated 1/12/2016.
- ii. Copies of title deed for the suit land and official search.
- iii. Copy of sale agreement between the 1st and 5th defendant dated 8/12/2015.
- iv. 13 Copies of payment slips to the bank.
- v. Copies of title deed and official search for the suit land.
- vi. Copies of approved applications for development and receipts.
- vii. Copy of valuation report.
- viii. Other documents similar to those already filed by the other parties in this suit.

10. At the trial on 25/5/2023, 29/2/2024 and 11/6/2024 the plaintiff's witness Yussuf Abdallah Idarus, the 1st and 5th defendants, two expert witnesses and the land registrar testified. All these witnesses testified by adopting the evidence that they had already filed and which was on record. They were then cross-examined by counsel for the adverse parties. None of these witnesses deviated from what they had filed.

11. Counsel for the parties filed written submissions dated 31/7/2024 (5th defendant), 14th October (1st defendant) and 4th October (plaintiff). The 1st defendant's counsel did not comply with the timeline set for the defendants submissions. The Honourable the Attorney General did not file any submissions. The issues identified by the defendants are as follows.

- i. Who is the lawful owner of the suit land and whether the allegations of fraud were proved.
- ii. Whether the plaintiff is entitled to the orders sought in the plaint.



- iii. Who bears the costs.
- On the other hand, the plaintiff identified the following issues.
- i. Whether the plaintiff executed the sale agreement and acknowledgement voucher dated 9/2/2011.
 - ii. Whether the mandatory documents required to effect a transfer were availed on 9/2/2011 at the Land Registry so that the suit land could be transferred to the 1st defendant.
 - iii. The effect of using an expired passport to effect a transfer.
 - iv. The legal effect of freehold land held by a foreigner post promulgation of *the Constitution* of Kenya 2010 and can a foreigner transfer the said property.
 - v. The doctrine of lis pendens in Kenya and its effect to the 5th defendant after service of the court procedures.
 - vi. Whether the defendants acted illegally or in a fraudulent scheme to defeat the plaintiff's right to own the suit property.
 - vii. Whether the court should allow the plaintiffs prayers.
12. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and testimony at the trial. I have also considered the written submissions by learned counsel for the parties and the law cited therein. I have also borne in mind the burden on the plaintiff to establish his case to a standard higher than the ordinary standard of balance of probabilities this being a case where fraud is pleaded. See the case of Elizabeth Kamene Ndolo –versus- George Matata Ndolo Civil Appeal No. 128 of 1995.
13. On the first issue, I find that it is the plaintiff who is the lawful owner of the suit land. I make this finding for the following reasons. Firstly, the plaintiff retains the original title deed issued to him on 21/11/1997. This title deed would have been surrendered to the Land Registry at Kajiado at the time of transfer of the suit land to the 1st defendant. None of the defendants especially the 1st defendant and the 2nd defendant can explain why the plaintiff retained the original title deed if it is true that he sold the suit land. Secondly, the 1st defendant says that she got the title deed from C.K. Mwihiya advocate in December 2012 when we have evidence from the Law Society of Kenya that the said advocate had died by then having died on 18/2/2012. The 1st defendant does not appear to have first hand information on how the title deed in her name was acquired. She left everything to C.K. Mwihiya who cannot now be called as witness as he is deceased. Thirdly, the passion with which the plaintiff has pursued this case is proof of an aggrieved person and not one who is out to deny a sale that he participated in. Finally, it is the defendants who benefit from the lack of the mandatory conveyancing documents at the land registry and not the plaintiff. These documents include the application for the consent and the consent of the Land Control Board, the valuation form and the payment receipts, the transfer form and other necessary forms. These defendants include the Land Registrar who is by Section 9 of the *Land Registration Act* required to maintain the register for each parcel. Such register must by law have all the documents we have mentioned above together with many others. The plaintiff was not even the resident in Kenya had no access to the register at the Land Registry. It is fraud to remove those records from the register. The removal was meant to disadvantage the plaintiff who fortunately had the original title deed issued to him in 1997.
14. On the issue of the sale agreement and the acknowledgment voucher dated 9/2/2011, I find that since the two experts have differed on the signatures alleged to be the plaintiff's, the court should look at



the totality of the case. In the case of Shah and another –versus- Shah and others (2003) 290 it was held as follows.

“The opinion of the expert witness is not binding on the court, but is considered with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so”

I find that the plaintiff did not sign the sale agreement and the acknowledgment. The only witness who would have given direct evidence in this regard is CIC Mwiha Advocate but we have been told that he passed away. I am not convinced by the 1st defendant’s evidence that the plaintiff signed the documents. She was not an eye witness to the signing of the agreement. Her evidence is to the effect that she left everything to C.K. Mwiha Advocate.

15. As for the issue regarding the mandatory documents required to effect a transfer, I find that it would be speculative to say whether they were presented on 9/2/2011 or not. In the absence of the day book and the presentation book both from the Land Registry at Kajjado, there is no guarantee that the title deed issued to the 1st defendant was issued in 2011. It could have been issued on a later date including 2016. It was incumbent upon the 1st and 2nd defendants to avail all the records required to be maintained under Section 9 of the *Land Registration Act* to rebut the presumption that the plaintiff who holds the title deed dated 21/11/1997 is the lawful owner. No such records have been availed. I find the plaintiff’s title deed to be the authentic one.
16. On the issue of the use of an expired Passport No. A0025575, since I have already found that the plaintiff did not sell the suit land to the 1st defendant, I need not delve much into it. I am persuaded by the submissions by the plaintiff’s counsel in this regard that such a passport is not a valid document.
17. By dint of Article 65 (2) of *the Constitution* and in regard to the issue of ownership of land in Kenya by a non-citizen, the best that can happen in the circumstances of this case is for the plaintiff’s freehold tenure to be converted to a ninety – nine year lease.
18. I will combine the issue of lis pendens with the one of what order to give in relation to the rectification of the register. The moment the court finds that the plaintiff did not sell the suit land to the 1st defendant, the order of the rectification of the register becomes automatic and obvious. Article 40(6) of *the Constitution* provides as follows.

“The rights under this Article do not extend to any property tht has been found to have been unlawfully acquired”.

In the case of Dina Management Limited –versus- County Government of Mombasa and 5 others, Petition No. 8 (E010 of 2021), the Supreme Court of Kenya held as follows at paragraph 111 of the judgment.

Article 40 of *the Constitution* entitles every person to the right to property, subject to limitations set out therein. Article 40 (6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquired title regularly, the ownership of the suit property by the appellant thereafter cannot be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we have already noted above the appellant could not benefit from the doctrine of bona fide purchaser”.



Since the 5th defendant is claiming through the 1st defendant whose title to the suit land has been found to be unlawful, he cannot benefit from the doctrine of innocent purchaser for value without notice of any defect in the 1st defendant's article in view of Article 40 (6) of *the Constitution*.

For the above stated reasons, I find that the plaintiff has proved his case against the five (5) defendants jointly and severally. I enter judgment for him as per prayers (a), (c), (e), (h) and (j) of the amended plaint dated 20/6/2016.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 28TH DAY OF OCTOBER 2024.

M.N. GICHERU

JUDGE

