



Macharia (Suing as the Administrator of the Estate of Macharia Ikua - Deceased) v Macharia & another (Environment & Land Case E079 of 2021) [2024] KEELC 14116 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E079 OF 2021
A OMBWAYO, J
DECEMBER 20, 2024**

BETWEEN

PATRICK J. NGEI MACHARIA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MACHARIA IKUA - DECEASED) APPLICANT

AND

MARTHA MACHARIA 1ST RESPONDENT

DISTRICT LAND REGISTRAR NAKURU 2ND RESPONDENT

JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 19th October, 2021 against the Defendants seeking the following orders:
 - a. A permanent injunction restraining the 1st Defendant by herself, servants, agents, employees and any person claiming under her from subdividing, developing constructing, alienating, selling, transferring, charging or in any other way dealing with parcel of land number L.R Kiambogo/Kiambogo Block 2/94 (Mwariki).
 - b. A declaration that the Defendants actions are illegal and fraudulent and that the title deed obtained by the 1st Defendant was acquired illegally is rooted in fraud and is null and void.
 - c. A declaration that the estate of Macharia Ikua (Deceased) is the sole bona fide owner of the parcel of land number L.R Kiambogo/Kiambogo Block 2/94 (Mwariki) and that the 1st Defendant has no legitimate proprietary rights or interest over the suit property.
 - d. An order cancelling and/or revoking the title deed for L.R KIAMBOGO/KIAMBOGO BLOCK 2/94(MWARIKI) issued on 17 December 1997 to the 1st Defendant.



- e. An order revoking and/or cancelling any subdivision of L.R KIAMBOGO/KIAMBOGO BLOCK 2/94(MWARIKI) and the resultant title deeds.
 - f. A declaration that the title deed issued for L.R Kiambogo/Kiambogo Block 2/94 (Mwariki) issued on 11th October 1989 to MACHARIA IKUA is the valid and the legitimate title deed for L.R Kiambogo/Kiambogo Block 2/94 (Mwariki).
 - g. Eviction of the 1st Defendant and anyone claiming under her from L.R Kiambogo/Kiambogo Block 2/94 (Mwariki).
 - h) Damages for trespass.
 - i) Costs of the suit and interest.
2. The 1st Defendant entered appearance and filed her statement of defence and counter claim dated 10th November, 2023 where she denied the allegations in the plaint. In her counterclaim, she sought for the following orders:
- a. A declaration that the property LR Kiambogo/Kiambogo Block 2/94 (Mwariki) does not form part of the Macharia Ikua (Deceased) Estate.
 - b. A declaration that the property L.R Kiambogo/Kiambogo Block 2/94 (Mwariki) was a gift inter vivos to the Defendant having been gifted and transferred to her name during the life time of the Macharia [Ikua (deceased).
 - c. An order of permanent injunction restraining the plaintiff by himself, his agents, servants or representatives or whomsoever acting on his behalf from entering, trespassing, occupying or in any manner interfering with the defendant's use and occupation of L.R Kiambogo/Kiambogo Block 2/94 (Mwariki).
 - d. Order of costs against the Plaintiff.
3. The 2nd Defendant entered appearance on 2nd November, 2021.

Plaintiffs' Case

4. Patrick Ngei Macharia testified as PW1 where his witness statement filed on 25th October, 2021 was adopted as his evidence in chief. He testified that he went to America in March 2024 and that he filed the case on behalf of his late father, Macharia Ngei. It was his testimony that his father died in 1998. He testified that the land was Kiambogo/Kiambogo/Block 2/94. He produced his list of documents dated 19th November, 2021 which documents were produced as PEX 1- PEX 17. He testified that the 1st Defendant was not the deceased daughter and that he never knew her. He further testified that she never lived with his father. It was his testimony that his late father used to stay with his late mother Mary Wanjiru Macharia who died on 8th September, 2011. He testified that after his father died, he did searches on the suit property on 4th February, 2022, 29th September, 2006 and 2nd August, 2013 which confirmed his father as the owner. He testified that there was an original title deed in his father's name a fact that was not disputed. He also testified that the transfer could not have happened without the original title having been surrendered. He added that the suit property was occupied by Jackson Macharia Njenga his cousin. He testified that the 1st Defendant never sought to have the Plaintiff vacate the land. He also testified that his parents were buried on the said land. He testified that the title ought to revert to his late father's name and the one in the 1st Defendant's name be cancelled.
5. Upon cross examination by Gichuhi for the 1st Defendant, he confirmed that the 1st Defendant was not his sister. He further confirmed that there was a succession cause where the 1st Defendant never



objected. He stated that there was no case that disputed the burial of his father on the suit land. He further stated that his late mother was in possession of the title before his father died. He stated that his father could have done transfers without contacting him. He stated that Jackson Njenga did the searches and that he placed Macharia Ngundo. He further stated that he reported to DCI in 2021 and no action was taken. He stated that he gave the title in 1997. He added that he had left an employee on the land in March 2024.

6. Upon cross examination by Wanjeri he stated that he had never complained to the land Registrar until when he did the search.
7. Upon re-examination, he stated that the title deed was kept by his father after which it was given to Jackson Macharia after his death. He added that he did not know how the 1st Defendant got the title. He further stated that the Land Registrar had not given him the green card and search. This marked the close of the Plaintiffs case.

1st Defendant's case

8. Martha Macharia testified DW1 where her witness statement dated 10th November, 2023 was adopted as her evidence in chief. She testified that she lives in Langa langa. She further testified that they usually do business with the Plaintiff. She produced her documents as DEX 1- DEX 2. It was her testimony that Macharia Ikua was his father and his mother Wanjiru Macharia. She testified that her mother was the 3rd wife. It was her testimony that there was a succession case number 146 of 2002 which confirmed that she was the deceased's daughter. She testified that her father gave her the land and that the transfer was done in 1997. She testified that her father requested for her ID after which he transferred the land to her. She also testified that his father gave her the land as a gift. It was her testimony that she lived with his father in Langalanga and that he became sick in 1997. She testified that in 2020, the title was in her name. She testified that the property belonged to Macharia Ikua and that she was the one cultivating it. She added that Jackson Macharia was their nephew. She testified that when his father died, it was ordered that they do not bury him on the land but they proceeded to bury him.
9. Upon cross examination by Kangethe, she confirmed that she was the daughter of Macharia Ikua (deceased). She stated that the deceased was sick but she also admitted that she did not have the hospital documents. She admitted that the deceased did not sign any document or accompany her to the land board. She also admitted that she did not pay anything at the land office. She stated that her father only requested for her ID after which he went and came back with the title and gave it to her. She stated that she was in possession of the land since his father died. She stated that there was a consent order was on 17th September, 2021. DW1 added that her mother was buried at Engashura.
10. Upon cross examination by Wanderi for the 2nd Defendant, she stated that the documents were taken to the Land Registrar by her father.
11. Upon re-examination, DW1 stated that her father looked at her as his last-born and the only girl. She added that she took care of his father as a young girl and that he went and transferred the land to her. She stated that his father undertook the whole process without her participation. This marked the close of the 1st Defendant's case.

2nd Defendant's case

12. Emma Sitenei the Land Registrar at Nakuru Land Registry testified as DW1. She gave evidence in relation to Kiambogo/Kiambogo/2/Mwariki 94. She testified that she had a certified copy of green card and that she was yet to trace the parcel file. It was her testimony that the register was opened on 3rd December, 1988 and that it was first opened under government of Kenya and on 5th October,



- 1989 it was transferred to Macharia Ikua. She testified that Macharia Ikua was issued with a title deed on 11th October, 1989. She went on to testify that there was an entry made on 17th December, 1997 in two names of Macharia /Macharia and title deed issued on the same date.
13. She testified that on 19th April, 2021 the title was closed on subdivision to create land number 24942 and 24943 were opened. She added that on 6th May, 2021, subdivision was cancelled on suspicion of fraud vide DCI letter which was captured in the green card. She produced the green card 2nd DEX 1 and the letter dated 24th November, 2021 as 2nd DEX 2. She testified that they were not involved in any fraud.
 14. Upon cross examination by Githui, she stated that the extract of the registration showed the position. She also stated that before registration the land registrar certifies himself. She added that a transfer has to be registered and that there must be a copy of consent from the Land Control Board. She stated that if she had been able to trace the parcel file, she could have ascertained the position. She further testified that there was no evidence of irregularity or fraud. She also stated that there was no allegation of absence of the transfer, consent or stamp duty. She stated that the land belonged to the 1st Defendant. She admitted that she had the documents reflected in the green card reflects. She also admitted that she did not have the documents. That marked the close of the 2nd Defendant's case.

Submissions

15. The Plaintiff's counsel filed his submissions dated 8th November, 2024 where he identified four issues for determination. The first issue was whether the estate of Macharia Ikua (Deceased) is the bonafide owner of the suit property L.R Kiambogo/Kiambogo Block 2/94 (Mwariki). While submitting in the affirmative, counsel argues that it was not in dispute that the suit property was originally registered in the name of Macharia Ikua as evidenced from the searches dated 4th February, 2022, 29th September, 2006 and 2nd August, 2013. He submits that the said searches issued by the 2nd Defendant were never challenged by the Defendants. He further submits that there was no evidence that the suit property was transferred by Macharia Ikua to the 1st Defendant. He argues that the fact that the Plaintiff still has in his possession the original title issued to Ikua on 11th October, 1989 confirms that there was no transfer of the property.
16. The second issue was whether the 1st Defendant's title deed dated 17th December, 1987 for the suit property L.R Kiambogo/Kiambogo Block 2/94 (Mwariki) was acquired illegally and irregularly and therefore rooted in fraud and ought to be cancelled. Counsel submits in the affirmative and relied on Section 26(1) of the *Land Registration Act* and the case of Daudi Kiptugen V Commissioner of Lands & 4 Others (2015) eKLR. He submits that the 1st Defendant does not hold a good title since the same was not acquired through proper process. He cited the case of Munyu *V Hiram Gathiba Maina, Civil Appeal No. 239 of 2009* and submits that the Defendants failed to produce the instruments of transfer. He relied on Section 80 of the *Land Registration Act* and the case of Charles Adavachi Malenya V Stephen G. Kiarie & 4 Others and urged the court to order cancellation of the title deed issued in the 1st Defendant's name.
17. The third issue was whether the Plaintiff is entitled to the prayers sought. Counsel submits that the Plaintiff having proved trespass, he is entitled to the prayers sought. He cited the cases of David Kimugun Koskei V Benjamin Tuwei & Another [2019] eKLR and Park Towers Ltd V John Mithamo Njika & 7 Others (2014) eKLR.
18. Counsel for the 1st Defendant filed his submissions dated 27th November, 2024 where he submits that for a party to successfully impeach a registration and a title deed issued thereto, he must specifically plead and prove fraud, illegality and the corrupt practice that he relies upon. He relied on the case of



- Njoki Gicheru Ndiuni V Dadson Githenji Wahome & 3 others [2016] eKLR. Counsel further relied on the case of Evans Kidero V Speaker of Nairobi City County Assembly & another [20158] eKLR and submits that the court will not make a finding on matters which are not pleaded even where evidence has been tendered on unpleaded issues. He argues that such evidence goes to no issue and the court cannot enter into the arena of the dispute by making a finding on evidence directed at unpleaded issues.
19. It was counsel's submission that particulars of fraud, illegality and irregularity were pleaded at paragraph 12 of the plaint. He further argues that the Plaintiff having pleaded trespass and fraud, the two are distinct causes of action. He submits that the 1st Defendant's entry on the land was supported by her claim that the parcel of land was gifted to her by the deceased. It was his submission that an action based on trespass does not result in the cancellation of title but eviction of the trespasser. Counsel submits that trespass cannot be a particular of fraud. He went on to submit that particulars of the corrupt scheme were not set out neither was there evidence during the hearing to support the allegations of the alleged scheme.
 20. He submits that the court can only determine matters which were specifically pleaded. He added that the execution of the transfer documents or lack thereof was also never pleaded by the Plaintiff.
 21. Counsel cited the cases of Raila Amolo Odinga & Another V IEBC & 2 others (2017) eKLR, Boundaries Commission & Ano. V Stephen Mutinda Mule & 3 others (2014) eKLR, Levi Simiyu Makali V Koyi John Waluke & 2 others [2018] eKLR, Pacific Frontier Seas Ltd V Kyengo & another (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR). He submits that based on the pleadings, the plaintiff has failed to prove fraud, illegality or irregularity and the case ought to be dismissed with costs.
 22. Counsel for the 2nd Defendant filed her submissions dated 2nd December, 2024 where she identified two issues for determination. The first issue was whether there is a claim against the Land Registrar (2nd Defendant) Counsel relied on Section 107 of the *Evidence Act* and submits that the suit property was legally transferred to the 1st Defendant. She based her argument on the documents presented at the Lands office. She further submits that the Plaintiff has no cause of action against the 2nd Defendant. She also argues that the Plaintiff knew about the transfer since she was involved in it.
 23. The 2nd issue was whether the 2nd Defendant committed any fraud. Counsel cited the cases of R.G PATEL V Laljii Makanji HCCC No. 135 of 1998 Insurance Company of East Africa V Attorney General & 3 Others and Arthi Highway Developers Limited V West End Butchery Limited & 6 Others [2015] eKLR. She argues that registration of land and issuance of title is document bases as opposed to physical presence of parties. She went on to submit that whenever proper documents effecting registration and subdivision are presented to the 2nd Defendant, the same is deemed as regular. It was her submission that the 2nd Defendant issued a title deed in favour of the 1st Defendant in the strength that the documents presented were proper. Counsel further submits that the Plaintiff's allegation of fraud was particularized but he failed to provide evidence in support of the same. She urges the court to dismiss the Plaintiff's suit having failed to prove fraud on the part of the 2nd Defendant.

Analysis and Determination

24. I have considered the pleadings, evidence on record and submissions and I am of the view that the following issues arise for determination:
 - a. Who is the lawful owner of the suit property?
 - b. Whether the Plaintiff is entitled to the orders sought.
 - c. Whether the 1st Defendant is entitled to the prayers sought in her counterclaim.



- d. Who should bear the costs of the suit.

Who is the lawful owner of the suit property?

25. It was the Plaintiff's case that his late father Macharia Ikua was the legal owner of the suit property L.R Kiambugo/Kiambugo Block 2/94 (Mwariki). It was his case that the 1st Defendant fraudulently and irregularly caused the suit property to be registered in her name.
26. The 1st Defendant on the other hand claims that her late father Macharia Ikua gifted her the suit land since she took care of him while he was ailing. She claims that the deceased did the transfer by himself where she gave him her ID after which the deceased issued her with the title deed in her name.
27. The 2nd Defendant's case was that the suit property belonged to the 1st Defendant as evidenced from the green card. It was its contention that the Plaintiff failed to prove that it had fraudulently issued the 1st Defendant with the title deed for the suit land.
28. Section 107, 108 and 109 of the *Evidence Act*, provides as follows;
- “107
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person.”
29. It is not in contention that the 1st Defendant and Macharia Ikua (deceased) each possess title deeds for the suit property. It is also not in contention that Macharia Ikua (deceased) was issued with the title on 11th October, 1989 while the 1st Defendant was issued with the same on 17th December 1997. The green card captures these facts. It is thus clear that Macharia Ikua (deceased) was the initial owner of the suit property having acquired the same from the government. It is also apparent in the green card that the property was registered in the name of the 1st defendant on the 17th December 1997 and a certificate of title issued.
30. 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



- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” [Emphasis mine]

31. It is the 1st Defendant’s case that Macharia Ikua (deceased) gifted her the suit property. She however failed to produce documentary evidence of the said transfer forms to prove the same. The 2nd Defendant during cross examination in as much as she testified that the suit land belonged to the 1st Defendant, confirmed that she did not have the documents to prove the same. She only relied on the green card. She argued that the registration process was document based and the parties need not be present. I am of the opinion that that being the case, there ought to have been documentary evidence of the transfer forms confirming that the deceased gifted the 1st Defendant the suit property. The Plaintiff on the other hand produced official searches dated 4th February, 2002, 29th September, 2006 and 2nd August, 2013 all which confirmed that the deceased was the absolute owner of the suit land. It is quite ironical how the said searches failed to show the 1st Defendant’s as the owner yet she had been issued with the title deed on 17th December, 1997. It is this court’s view that the root of one’s title is very critical and thus the onus was on the 1st Defendant to prove how she had acquired the title deed. However. Looking at the green card, the last entry shows that the property was registered in the 1st defendant’s name.
32. The Supreme Court in the case of Dina Management Limited V County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the case of Munyu Maina V Hiram Gathiha Maina [2013] KECA, where the court held as follows:
- “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.”
33. Furthermore, in the case of Kinyanjui Kamau V George Kamau [2015] eKLR expressed itself as follows; -
- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –vs 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...”
34. The courts have repeatedly held that allegations of fraud must be strictly proved. In the case of Koinange & 13 others v Charles Karuga Koinange [1986] KLR at page 23 Justice Amin citing the case of Ratal Patel Makanji (1957) EA 314 observed as follows-
- “When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”



35. Furthermore in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR (Civil Appeal No 106 of 2000) Tunoi JA (as he then was) stated as follows:-

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

36. The Plaintiff alleged that the 1st Defendant acquired the suit property fraudulently, however, he did not adduce sufficient evidence to prove the same. It is this court’s view that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts, the Plaintiff must strictly prove the alleged particulars of fraud as stated in the plaint. In addition, the burden of proof lies with the Plaintiff to prove that the Defendants fraudulently acquired the suit property which he failed to do so. It is not proper to expect the 1st defendant to prove that she did not act fraudulently. The plaintiff having failed to prove fraud, the suit is dismissed.

37. This court finds that the 2nd defendant issued a title to the 1st defendant on the basis that the documents presented were genuine. The proprietor of the parcel of land was still alive. The entries in the green card speak for themselves that the 1st defendant was registered as the proprietor and title issued on 17th December 1997. The green card for the parcel of land can only be challenged by producing another green card or by showing that the entries were entered fraudulently.

38. The 1st defendant is the registered owner of the parcel of land as per the green card. Consequently, the 1st Defendant’s counter claim is allowed in the following terms:

- a. A declaration that the property LR Kiambogo/Kiambogo Block 2/94 (Mwariki) does not form part of the Macharia Ikua (Deceased) Estate.
- b. An order of permanent injunction restraining the plaintiff by himself, his agents, servants or representatives or whomsoever acting on his behalf from entering, trespassing, occupying or in any manner interfering with the 1st defendant’s use and occupation of L.R Kiambogo/ Kiambogo Block 2/94 (Mwariki).
- c. Costs to the 1st defendant.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT DATE: 2024-12-20 13:07:35

