



**Nyangoto v Kahindi & 2 others (Environment & Land Case
E020 of 2023) [2024] KEELC 14124 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E020 OF 2023
EK MAKORI, J
DECEMBER 18, 2024**

BETWEEN

ABRAHAM BIRUNDU NYANGOTO PLAINTIFF

AND

JOSEPH PONDA KAHINDI 1ST DEFENDANT

HANCE JOACHIM PAUL POLZIN 2ND DEFENDANT

LAND REGISTRAR, MOMBASA 3RD DEFENDANT

RULING

1. The 2nd Defendant/Applicant filed the Notice of Motion Application, dated the 21st May 2024, which is brought under the provisions of Articles 50 and 159 of *the Constitution* of Kenya, 2010, Sections 24, 25, and 26 of the *Land Registration Act* No. 3 of 2012, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15, Civil Procedure Rules, seeking the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to issue forthwith an Order that the Complaint and Notice of Motion filed by the Plaintiff herein be struck out for being a frivolous, vexatious, and gross abuse of the process of the Court and the entire suit be dismissed and all orders be set aside.
 - c. That this Honourable Court be pleased to issue forthwith an Order of mandatory injunction directing the Plaintiff, by himself, his employees, agents, assigns, or anyone claiming in and through him to immediately vacate and grant vacant possession of the suit property, to wit, Land Reference Number 267 Section IV Mainland North, Mombasa, to the 2nd Defendant.
 - d. That costs of the suit and the Application herein be awarded to the 2nd Defendant against the Plaintiff.



2. The affidavit of the 2nd Defendant supports the application and is also based on the Grounds in the application's body.
3. The application is opposed. The Plaintiff's replying affidavit controverts the issues raised in the application.
4. The application was canvassed through written submissions.
5. The gist of the 2nd Defendant/Applicant's application herein is that he purchased the suit property from the 1st Defendant for valuable consideration, whereupon the property was transferred to him on the 21st of July 2021. He then extensively repaired the building thereon, cleaned the compound, planted many trees and plants, turned the property from a jungle into a paradise full of plant life, and spent more than Kshs. 3,000,000.00/- in that process. The 2nd Defendant stored the expensive equipment he had brought from Germany in a Container in the first room and locked the same. He also stored goods for Andrew Duma in the 2nd and 3rd rooms in the suit property. From purchasing the suit property and taking possession thereof, the 2nd Defendant exercised open ownership, and no one laid any claim thereto.
6. However, on the 3rd day of March 2023, at about 11 am, the Plaintiff forcefully entered the suit property without any Court Order or any colour or legal right thereto, accompanied by four other men and a lady, and proceeded to command the 2nd Defendant to leave the property violently and planted security guards in the suit property.
7. Due to the said invasion, the 2nd Defendant/Applicant filed a suit against the Plaintiff Chief Magistrate's ELC Case No. 069 of 2023, Kilifi, and thereafter, orders were issued to put the 2nd Defendant/Applicant back to the property. The said Court Orders were enforced on the 10th August 2023, whereupon the 2nd Defendant/Applicant was put back into the suit property, but only for one day, because the next day, 11th August 2023, and upon arrival thereat, the 2nd Defendant/Applicant's padlock at the main gate had been broken and another one inserted thereon by the Plaintiff, who, without any Court Order and with impunity, again put guards on the property.
8. The Plaintiff then proceeded to file the suit herein. In this suit, it is on record that Counsels for the Plaintiff and 2nd Defendant agreed to submit the conflicting Certificates of Title in the possession of the Plaintiff and the 2nd Defendant to the Registrar of Titles so that the Registrar may confirm which Certificate of Title is genuine. Thereafter, the Registrar of Titles, Mr. George Nyangweso, in the presence of the Plaintiff and the 2nd Defendant's Counsel, confirmed to the Plaintiff that his Certificate of Title is not in any of the records of Lands Office at Mombasa and thus proceeded to certify the 2nd Defendant's Certificate of Title as the only one in their records.
9. The Applicant avers that In presenting the case herein and all along, the Plaintiff has been purporting that he is an Attorney for an alleged Joseph A. Ngetich vide the purported General Power of Attorney allegedly registered at the Lands Office, Mombasa, on the 26th August 2019, which is alleged to have been executed before Tengyon Koske & Co. Advocates. However, a search through the LSK Advocates Search Engine to verify the existence of the Firm of Advocates known as Tengyon Koske & Co. Advocates confirmed that the same does not exist and that the correct Firm is Tengkyon Koske & Co. Advocates.
10. Applicant states that the Power of Attorney is purported to have been stamped with the purported Rubber Stamp. Legally, an Advocate cannot use the Firm's Stamp in executing a document, as the Plaintiff purports to do in the General Power of Attorney. One of the Partners in the Firm of Tengkyon Koske & Co. Advocates by the name of Japhet Koske, Advocate, confirmed to the 2nd Defendant's



Advocate that neither he nor his Partner, Kibet Arap Saina Tengekyon, had prepared nor signed the purported General Power of Attorney.

11. Applicant asserts that Plaintiff, in laying his illegal, unlawful, and wrongful claim to the 2nd Defendant's suit property while presenting to this Honourable Court, a fake and/or forged Certificate of Title and a phony and/or forged General Power of Attorney.
12. The Applicant submits that the Plaintiff's suit should be dismissed as it is premised on forged documents.
13. Plaintiff contends that the allegations by the applicant can only be interrogated at a hearing and not summarily.
14. I frame the issues for this Court's decision as whether, based on the Applicant's assertions, the current suit is fit for summary dismissal and who should bear the costs.
15. I agree entirely with the submissions and authorities cited by Mr. Tindika, learned counsel for the Applicant, that courts of law cannot countenance fake documents to deprive a person of his rightful proprietary ownership of a property, for example, In the case of Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR), the Court of Appeal held:

“Further, the Judge also took into consideration the High Court decision in the case of Alberta Mae Gacie vs. Attorney General & 4 Others [2006] eKLR as approved by the Court of Appeal in the case of Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR for the cumulatively holding, inter alia, that courts should not provide succor for any crook using forgery, deceit or any kind of fraud to acquire a legal and valuable title deceitfully snatched from a legally registered innocent proprietor.”

16. I also agree with Mr. Tindika that this Court should not succor/give assistance to any crook using forgery, deceit, or any fraud to lay a claim on a property and lay a claim thereto deceitfully as against the legally registered innocent proprietor, using fake documents and purporting to be acting for a person who is not only faceless but probably non-existent.
17. No court of law should sanction either the acquisition of title to the property in favour of a party (christened crooks by the court) who has acquired such title from a legally registered innocent proprietor using forgery, deceit, or any fraud or enforce an illegal contract or allow itself to be made the instrument of enforcing the obligations alleged to arise out of a contract or transaction which is unlawful.
18. As rightly submitted by Mr. Tindika, In the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, the Court of Appeal held:

“It is, in my view, unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the Registration of Titles Act. I am persuaded by the statements made in Alberta Mae Gacii V Attorney General & 4 Others (2006) eKLR where this court (Hon. Justice Onyancha) stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have, even if it were for valuable



consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.....”

19. Mr. Makworo, learned counsel for the Plaintiff, believes that all the allegations by the parties can only be fully analyzed during the trial. He cites the case of *Mercy Karimi Njeri & Another v Kisima Real Estate Limited* (2015) eKLR, where it was held:

“In the instant case, the admission by the Defendant is not plain, obvious, and clear to warrant summary judgment being entered against the Defendant. This Court employs the principle that the right to be heard is a fundamental right that must not be denied to enable the Defendant to ventilate its position. In my humble view, the Defendant should be given an opportunity to defend the suit and claim by the Plaintiffs against it.”

20. See also the decision in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR, where the Court held:

“Before the grant of summary judgment, the Court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence, or in the affidavit in opposition to the application for summary judgment or in any other manner.”

21. Mr. Makworo also submitted that in *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR, the Court stated that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal stated thus:

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself, as this is solely reserved for the trial judge.

On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing of the case”.

22. Further, Mr. Makworo avers that the grounds and issues raised in the plaint can only be canvassed at a hearing; see the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR, where the Court held that:

“The power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that a plaintiff should not be kept away from his judgment by an unscrupulous defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case.”

23. Mr. Tindika's current application for his client raises germane issues, but as submitted by Mr. Makworo, a hearing will address all the parties' concerns. The summary procedure will not be applicable here because both parties alleged to hold genuine title. At the hearing, the court will tack the root of each title and render a verdict after scrutinizing evidence by both sides on merit.

24. Consequently, the application dated 21st May 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 18TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE



In the Presence of:

Mr. Tindika, for the 2nd Defendant/Applicant

Mr. Makworo for the Plaintiff/Respondent

Hap: Court Assistant

