



Sanya v Makokha; Sagala & 2 others (Interested Parties) (Environment & Land Case 506 of 2017) [2023] KEELC 390 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELC 390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 506 OF 2017
DO OHUNGO, J
JANUARY 31, 2023**

BETWEEN

MURIELMA SHIRANDULA SANYA PLAINTIFF

AND

VINCENT OSUNDWA MAKOKHA DEFENDANT

AND

HARUN MIHESO SAGALA INTERESTED PARTY

MANASSEH AGUMBA INTERESTED PARTY

JOHN BARASA KAUSI INTERESTED PARTY

JUDGMENT

1. By a plaint dated September 6, 2012, the plaintiff averred that on December 23, 2008, he sold to the defendant land measuring 2 acres to be excised from parcel of land number Kakamega/Matsakha/133 which was registered in the plaintiff's name. That on 18th December the defendant fraudulently, unlawfully and without any permission subdivided parcel of land number Kakamega/Matsakha/133 into land parcel numbers Kakamega/Matsakha/2062, Kakamega/Matsakha/2063 and Kakamega/Matsakha/2064 by forging the plaintiff's signature and causing the defendant to be registered as the proprietor of land parcel number Kakamega/Matsakha/2063 measuring 0.82 hectares. That the defendant arrogated to himself an extra 0.02 hectares without the plaintiff's consent.
2. The plaintiff therefore prayed for judgement against the defendant for the following orders:
 - a. That the court do deregister the subdivisions of the land parcel No Kakamega/Matsakha/133 and do reinstate the original number as registered under the names of Murielma Shirandula Sanya.



- b. Cost of the suit.
3. The suit was initially heard without participation of the defendant and judgment delivered on May 19, 2014 in favour of the plaintiff. That judgment was set aside by ruling delivered on October 4, 2017.
 4. The defendant filed a statement of defence and counter claim on October 12, 2017 wherein he averred that the process of subdivision and transfer of the portion that he purchased was free of any illegality, secrecy, or fraud and that the plaintiff signed all the relevant documents to vest ownership on the defendant. The defendant further averred that the portion captured as excess of 0.02 hectares is a communal land located next to a river which both parties were aware of as at the time of the sale. He therefore sought dismissal of the plaintiff's case and judgment against the plaintiff for:
 - i. A declaration that the defendant is the lawful owner of land parcel No N/Kabras/Matsakha/2063.
 - ii. An eviction order be issued as against the plaintiff from land parcel No N/Kabras/Matsakha/2063.
 - iii. Permanent injunction restraining the plaintiff by himself, his family members, agents, workers, servants and whomsoever claiming through him from entering, occupying, trespassing and or in any manner interfering with the defendant's use, occupation and access to land parcel No N/Kabras/Matsakha/2063.
 - iv. Costs of this suit.
 - v. Any other relief that the Honourable Court shall deem just and expedient to grant.
 5. The interested parties were admitted into the matter following their own applications. The first and second interested parties filed their amended defence and counter claim on November 5, 2018 stating that the first interested party is a bona fide purchaser for value having purchased land parcel No Kakamega/Matsakha/2064 from one Peter Juba Shamala who was the absolute registered proprietor of the aforementioned land at the time of sale and that the first interested party obtained consents of the Malava Land Control Board to transfer the aforementioned title. The second interested party argued that he purchased an acre of land to be curved out of Kakamega/Matsakha/2062 from the plaintiff at a consideration of Kshs 320,000 and that the plaintiff has refused to transfer title to the second interested party despite having received payment of the purchase price in full.
 6. In their counter claim, the first and second interested parties averred that the first interested party was the registered proprietor of land parcel No Kakamega/Matsakha/2064 while the second interested party purchased from the plaintiff a portion of land measuring 1 acre to be curved out of land parcel No Kakamega/Matsakha/2062. That the plaintiff refused to transfer title to the second interested party despite receiving full payment of the purchase price and that entry number 5 dated June 6, 2014 was the result of the judgment and decree which was set aside on October 4, 2017. The first and second interested parties therefore prayed that the plaintiff's suit be dismissed and that judgment be entered against the plaintiff for:
 - a. Entry No 5 dated June 6, 2014 on land parcel No Kakamega/Matsakha/133 be cancelled and land titles numbers N.Kabras/Matsakha/2062, 2063 and 2064 be reinstated in the lands register.
 - b. The plaintiff be and is hereby ordered to transfer title to the 2nd Interested Party for land measuring 1 acre to be curved out of No Kakamega/Matsakha/2062.



- c. Costs of this suit.
 - d. Any or any further relief as this honorable court may deem fit.
7. The third interested party filed his defence and counter claim on November 28, 2019 wherein he averred that he is the personal representative of the late Saidi Silikani also known as Saidi Silikana Chambalia (deceased) who died on September 13, 1998 and who was the original registered proprietor of Kakamega/Matsakha/133. That during his lifetime, the deceased never sold or transferred the parcel to the plaintiff and that the plaintiff, the defendant and the first and second interested parties are not entitled to the prayers that they seek. The third interested party urged the court to dismiss the plaintiff's case with costs and further averred that he was born on parcel number Kakamega/Matsakha/133 and that he was residing thereon with the deceased who gave him ½ acre of the parcel as a gift prior to his demise. That the third interested party continues to reside on the parcel with his family and utilises it for commercial farming. The third interested party went on to state that in contravention of the law, land parcel number Kakamega/Matsakha/133 was transferred to the plaintiff in 2007 after the death of Saidi Silikana Chambalia and that subsequently the plaintiff sold and or transferred parts of the land to the defendant, the first and second interested parties and or their personal representatives, agents and or assigns.
8. The third interested party therefore prayed for judgment against the plaintiff for:
- a. declaration that the land parcel number Kakamega/Matsakha/133 was not lawfully and or regularly transferred to the plaintiff; declaration that the subsequent agreements of sale of land and or transfer(s) of land involving the plaintiff, defendant, 1st & 2nd interested parties and or their personal representatives, agents and or assigns over the suit land are illegal, null and void; reinstatement of the suit land in the names of the original registered proprietor - the late Saidi Silikana also known as Saidi Silikana Chambalia.
 - b. Costs of the suit.
 - c. Any other relief or order that the honorable court may deem just and expedient to grant.
9. At the hearing Murielma Shirandula Sanya testified as PW1 adopted his witness statement filed on September 6, 2012 as his evidence in chief. He stated in the statement that on December 23, 2008 he sold 2 acres from land parcel number Kakamega/Matsakha/133 to the defendant and that on September 18, 2009 the defendant fraudulently, unlawfully and without his permission or consent subdivided the land parcel number Kakamega/Matsakha/133 into land parcel numbers Kakamega/Matsakha/2062, Kakamega/Matsakha/2063 and Kakamega/Matsakha/2064 and consequently the defendant was registered as the proprietor of land parcel number Kakamega/Matsakha/2063 measuring 0.82 hectares which is more than the agreed 0.80 hectares that he had sold to the defendant. The plaintiff concluded by stating that the defendant added to himself 0.02 hectares of land without his consent.
10. Under cross examination by Mr. Kombwayo, learned counsel for the defendant and the first and second interested parties, PW1 testified that Kakamega/Matsakha/133 was registered in the name of Saidi Silikani who was his father and not in PW1's name at the time of the sale. That he was paid the full purchase price by the defendant and further that PW1 has not sued Peter Shamala who is the registered owner of Kakamega/Matsakha/2064. It was PW1's further testimony that he sold plot number Kakamega/Matsakha/2062 to the second interested party.
11. Under cross examination by the third interested party, PW1 testified that when his father passed away in 1998 the plot was still registered in his father's name and that his father had eleven children, seven



- of whom were still alive as at the date of his testimony. PW1 further testified that he did not involve his family in succession proceedings pursuant to which he became the registered proprietor and that as at the date of the sale agreement, he (PW1) did not have a title neither did he involve his wife or children in the sale agreement. That all the people who he sold land to had forged documents and that he (PW1) has no issue with the second interested party who has developed and settled on his plot. He undertook to regularize for the second interested party upon conclusion of this matter. He further stated that the third interested party was the administrator of PW1's late father's estate as at the date of his testimony.
12. The plaintiff's case was then closed.
 13. During defence hearing, Vincent Osundwa Makokha testified as DW1 and adopted his witness statement filed on October 12, 2017 as his evidence in chief. In the said statement, DW1 stated that he bought a portion of land measuring approximately 2 acres curved from land parcel no N/Kabras/Matsakha/133 from the plaintiff and that after purchase, there was subdivision by the plaintiff and DW1 was registered as the owner of land parcel No N/Kabras/Matsakha/2063 and title deed issued to him. That the plaintiff signed the mutation and transfer forms in the advocate's office and that the land was surveyed by the plaintiff's surveyor. He added that he has not been investigated or charged over any forgery in connection with the plot and that the plaintiff chased him away from the plot with the result that he has not used it since December 2014.
 14. Under cross examination by the third interested party, DW1 stated that the chief was involved when DW1 was buying the land and he did not tell DW1 that the third interested party had any claim over the plot. Under cross examination by the plaintiff, DW1 testified that the plot was in the plaintiff's name as at the time of the sale. DW1 further testified that he bought 2 acres and did not get an extra 0.25 acres. That his title reads 0.82 hectares and that the extra part belongs to the public since it is next to a river.
 15. Betty Wesonga Nambiso testified as DW2. She adopted, as her evidence in chief, her witness statement which she had filed on October 12, 2017. She stated in the statement that on December 23, 2008, her brother Vincent Osundwa Makokha (the defendant) bought a portion of land measuring approximately 2 acres from the plaintiff through her, which portion was curved from land parcel number N/Kabras/Matsakha/133 and that after the purchase, subdivision was done and DW2's brother was registered as the owner of N/Kabras/Matsakha/2063 and a title deed issued. She further stated that the portion has an area measuring approximately 0.002 hectares being the area next to a river which is communal land and that after the purchase, DW2 also paid Kshs 6000 on January 4, 2009 but the addendum was mistakenly dated January 4, 2008. DW2 further testified that her brother put up a house on the land which house the plaintiff moved into and occupies in disregard of the defendant's proprietary rights.
 16. Under cross examination by the third interested party, DW2 stated that when they went to buy the plot, they found the plaintiff living with a woman whom the plaintiff introduced as his wife and that the woman did not sign the sale agreement. That they conducted a search which showed the plaintiff as the registered owner. During cross examination by the plaintiff, DW2 testified that she handled the transaction on behalf of her brother who is the defendant herein and that she does not have the certificate of search which they obtained at the time of the purchase. Under re-examination by Mr Kombwayo, DW2 testified that the plaintiff showed her his wife when they first went to see the land.
 17. Defence case was then closed.
 18. Harun Miheso Sagala testified next as DW3 and adopted his witness statement dated September 13, 2018 as his evidence in chief. He stated in the statement that sometime in 2014, he purchased a parcel of land known as Kakamega/Matsakha/2064 measuring 2 acres from Peter Juma Shamalla at a purchase price of Kshs 800,000 which DW3 paid in full and that thereafter DW3 went to Malaba Land Control



Board and obtained consent to transfer the land to his name and thereafter he fenced the land and started utilising it. That the parcel DW3 had bought included a house and trees and that on going to the parcel, DW3 found that the plaintiff had cut down the trees and further demolished DW3's house. It was DW3's further averments that he is aware that Peter Shamalla had purchased the land from the plaintiff and that the aforementioned Peter sold to DW3 a good title and that prior to filing of this suit, DW3 was the absolute registered owner of land parcel No Kakamega/ Matsakha/2064 while the second interested party was the owner of land parcel No 2062.

19. Under cross examination by the plaintiff, DW3 testified that he bought his portion from Peter Shamalla and that the plaintiff was with Peter Shamalla when Peter Shamalla was selling the land to DW3. While being cross examined by the third interested party, DW3 testified that his title was issued on March 10, 2014 and that he does not know if Peter Shamalla's name appears on the green card. Under re-examination, DW3 testified that he bought his portion from Peter Shamalla and that the plaintiff was a witness to the sale and that DW3 has never been charged with having a fake title. That he followed due process in acquiring his title and that the plaintiff chased him from the land.
20. Manase Allan Agumba testified as DW4. He stated that he is a police officer based in Nairobi and adopted his witness statement dated September 13, 2018 as his evidence in chief. He stated in the statement that he purchased an acre of land to be carved out of parcel No Kakamega/Matsakha/2062 from the plaintiff at a consideration of Kshs 320,000 which he fully paid in two instalments of Kshs 215,000 and Kshs 105,000. That before and after the transaction, he conducted a search in the land registry and found that the land belonged to the plaintiff and that he asked the plaintiff to sign the transfer forms after payment of the purchase price and the plaintiff told him that the parcel was a subject to a suit in court. That later on October 22, 2013 when DW4 conducted another search he discovered that parcel No Kakamega/Matsakha /2062 had been nullified.
21. Under cross examination by the plaintiff, DW4 testified that during the purchase of his portion, the plaintiff never told him that he had any case in court concerning the plot and further that the plaintiff never chased DW4 from his portion as he is still in possession and has planted trees thereon. Under cross examination by the third interested party, DW4 testified that he bought the land through instalments using two agreements, that he personally paid the purchase price to the plaintiff and that the plaintiff never introduced any member of his family to DW4 when he sold the land to him.
22. John Barasa Kausi testified as DW5 and adopted his witness statement filed on November 28, 2019 as his evidence in chief. He stated in the statement that he is the personal representative of Saidi Silikana (deceased) also known as Saidi Silikana Chambalia who died on September 13, 1998 while he (deceased) was the registered proprietor of land parcel number Kakamega/ Matsakha/133. That the deceased was his grandfather and that he was born on the suit land and is still in occupation thereof. That during the deceased's lifetime he (deceased) neither sold nor transferred the parcel to the plaintiff and that the parcel was unlawfully or irregularly transferred to the plaintiff after the death of the deceased.
23. Under cross examination by Mr Kombwayo, DW5 stated that he is married to Rael Khasoa Barasa and that they have five children whom he resides with within the former parcel 133. That DW5's parents are both deceased and that they were buried on parcel 133 and that the plaintiff is DW5's uncle and that Saidi Silikana (deceased) was DW5's paternal grandfather who only had one wife called Rael Shipera (deceased) and that DW5 became the administrator of the late Saidi Silikama's estate following a family meeting in 2018.
24. The interested parties' case was then closed. Parties thereafter filed and exchanged written submissions.



25. The plaintiff filed his submissions on June 9, 2022 and argued that the defendant during cross examination testified that he did not attend land control board for the subdivisions made and as such the defendant fraudulently subdivided the mother title. That the first interested party did not prove his case since his exhibits do not show his name but Peter Juma Shamala who is not a party in this suit and further that the first interested party admitted to having no connection with the plaintiff concerning the suit land.
26. The plaintiff went on to argue that he has no issues with the second interested party who has settled on the land and developed it. The plaintiff concluded by submitting that he had proved his case on a balance of probabilities and that he is entitled to the orders sought.
27. The defendant, the first and second interested party filed their joint submissions on September 16, 2022 and submitted that the plaintiff indeed sold a piece of land to the defendant and that the mother title being parcel 133 was subdivided in the year 2009 to give rise to parcels 2062 to 2064. That in 2013 the title for parcel 2064 was issued in the names of Peter Juma Shamalla who bought the same from the plaintiff who cannot now purport to dispute being aware of the subdivision of the original title parcel 133. That pursuant to Section 26 of the *Land Registration Act*, the first interested party has title to parcel 2064 having bought it from one Peter Juma whom the plaintiff admitted to having sold the said parcel to and that by the plaintiff's admission, the first interested party should be left to enjoy his portion.
28. The defendant, the first and second interested party went on to argue that the plaintiff conceded in his evidence that indeed the second interested party bought a piece of land from him and utilises the same and that the only issue arising is that the plaintiff is yet to transfer the parcel bought by the second interested party and as such the appropriate remedy would be an order of specific performance or in the alternative a refund of the purchase price. That neither the plaintiff nor the third interested party led any evidence to show how the transfer of parcel 133 and its subsequent subdivision happened and as such the plaintiff and the third interested party are conspirators in the whole situation.
29. The third interested party filed his submissions on June 20, 2022 and submitted that there is no evidence that a succession cause was filed in any court regarding the estate of the late Saidi Silikana Chambalia and land parcel number Kakamega/Matsakha/133. He urged the court to declare that land parcel number Kakamega/Matsakha/133 was not lawfully transferred to the plaintiff; that subsequent agreements of sale of land and or transfers of land involving the plaintiff, the first and second interested parties are illegal, null and void; and reinstatement of the suit land in the name of the original registered proprietor the late Saidi Silikana Chambalia (deceased); and that the plaintiff, the first and second interested parties to meet costs.
30. I have considered the parties' respective pleadings, evidence, and submissions. The issues that arise for determination are whether the plaintiff has established any fraud or illegality against the defendant and whether the reliefs sought by the parties should issue.
31. The plaintiff's case is that the defendant fraudulently and unlawfully subdivided parcel of land number Kakamega/Matsakha/133 thereby obtaining an extra 0.02 hectares without the plaintiff's consent. The plaintiff also claims that the defendant forged the plaintiff's signature so as to obtain title. It seems that there was a typing error in the plaintiff's pleadings since the sale agreement, the parties' evidence and records produced from the land registry refer to land parcel number N/Kabras/Matsakha/133.
32. Fraud is a serious allegation that must be pleaded and proved to a standard above balance of probabilities but not beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR* and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR*. Further, a litigant



cannot leave fraud to be inferred from the facts. He must specifically plead fraudulent conduct and distinctively prove it. See *Adam v Adam & 3 others (Civil Appeal 103 of 2019) [2022] KECA 501 (KLR) (1 April 2022) (Judgment)*.

33. The transaction between the plaintiff and the defendant was comprised in the 'Land Sale Agreement' dated December 23, 2008. A reading of the agreement reveals that the plaintiff sold to the defendant 2 acres of land parcel number N/Kabras/Matsakha/133. Mathematically, 2 acres translates to 0.8093 hectares. There is no dispute that following the transaction, the defendant was registered as the proprietor of land parcel number N/Kabras/Matsakha/2063, subdivision of land parcel number N/Kabras/Matsakha/133. The plaintiff produced a certificate of search in respect of N/Kabras/Matsakha/2063 as of November 8, 2010 which shows that the size of the said parcel is 0.82 hectares. That much is also confirmed by the copy of title deed which the defendant produced. The 0.82 hectares in the title translate to approximately 2.02622 acres which is largely in line with the sale agreement. The variation between the size as agreed in the sale agreement and what the defendant's title reads is 0.0107 hectares. Thus, the plaintiff's claim that the defendant obtained an extra 0.02 hectares is not proven. I see the minor variation in sizes as a possible outcome of the fact that the size as per the agreement was in acres while the size in the title is in hectares. Further, the plaintiff did not offer any evidence to prove forgery. I find that the plaintiff has failed to establish any fraud or illegality against the defendant.
34. The other issue for determination is whether the reliefs sought by the parties should issue. The plaintiff sought deregistration of the subdivisions of land parcel number N/Kabras/Matsakha/133 and reinstatement the original number under his name. Those prayers were grounded on the allegations of fraud or illegality against the defendant. Having failed to establish his case, the reliefs are not available to him.
35. On his part, the defendant sought a declaration that he is the lawful owner of land parcel No N/Kabras/Matsakha/2063, eviction of the plaintiff from the said parcel and a permanent injunction restraining the plaintiff, his family, agents, and servants from entering, occupying, trespassing and or in any manner interfering with his use, occupation and access to the said parcel. The first and second interested parties prayed that entry No 5 dated June 6, 2014 on land parcel No Kakamega/Matsakha/133 be cancelled and land titles numbers NKabras/Matsakha/2062, 2063 and 2064 be reinstated in the lands register and that the plaintiff be ordered to transfer title to the second interested party for land measuring 1 acre to be carved out of Kakamega/Matsakha/2062.
36. The reliefs sought by the third interested party are a declaration that land parcel number Kakamega/Matsakha/133 was not lawfully and or regularly transferred to the plaintiff; a declaration that the subsequent agreements of sale of land and or transfer(s) of land involving the plaintiff, defendant, the first and second interested parties and or their personal representatives, agents and or assigns over the suit land are illegal, null and void; reinstatement of the suit land in the names of the late Saidi Silikana.
37. The register for land parcel number N/Kabras/Matsakha/133 shows that the plaintiff became the registered owner of the parcel on November 15, 2007 upon registration of form RL7, a form that was used under the Registered Land Act (repealed) for transfer by a personal representative to person entitled under a will or on an intestacy. This shows that the plaintiff became registered owner as administrator of his father's estate. The plaintiff confirmed as much in his testimony and further stated that his father Saidi Silikana had eleven children and that the plaintiff did not involve his family or siblings in succession proceedings pursuant to which he became the registered proprietor. The register shows that Saidi Silikana was the registered proprietor of land parcel number N/Kabras/Matsakha/133 from August 7, 1973 until it was transferred to the plaintiff and that the register was closed on September 24, 2009 upon subdivision into N/Kabras/Matsakha/2062 to 2064.



38. One of the members of Saidi Silikana's family is now claiming in this matter as the third interested party. The third interested party who claims to be Saidi Silikana's grandson now asserts that he is the administrator of the estate of Saidi Silikana pursuant to grant of letters of administration issued to him on November 14, 2018 in Butali PMC Succession Cause No 354 of 2018. It has not been stated what happened to the letters of administration that had been issued to the plaintiff earlier.
39. It seems that the dispute is one of succession of the estate of Saidi Silikana. Parties should resolve it before the court with jurisdiction in succession matters. Parties have a duty to plead cases that actually resolve the dispute at hand. In this case, parties are skirting around the main issue, which is whether the registration of the plaintiff as proprietor of land parcel number N/Kabras/Matsakha/133 and his subsequent actions of subdividing it and transferring the subdivisions should stand. If the plaintiff's grant is ultimately revoked then everything may crumble, including the defendant's title as well as other titles issued following subdivision of land parcel number N/Kabras/Matsakha/133.
40. I am keenly aware that there is a grave risk that this court's judgment may be used to further muddle issues. If for example, I was to declare the defendant the lawful owner of land parcel number N/Kabras/Matsakha/2063 as is sought, what then happens if the plaintiff's grant is ultimately revoked? The court has a duty to steer clear of mechanistic and short-term justice. Instead, parties should take the bull by the horn and resolve the underlying succession dispute. If they are all too comfortable co-existing with it then they will have only themselves to blame in the long run.
41. The first and second interested parties have prayed that entry number 5 dated June 6, 2014 in the register of land parcel number N/Kabras/Matsakha/133 be cancelled and that land titles numbers N.Kabras/Matsakha/2062, 2063 and 2064 be reinstated in the register. The said entry cancelled entry number 4 dated September 24, 2009 which closed the register for parcel number N/Kabras/Matsakha/133 upon its subdivision into N/Kabras/Matsakha/2062 to 2064. Entry number 5 was made pursuant to the initial judgment delivered in this matter on May 19, 2014 in favour of the plaintiff, but which was set aside on October 4, 2017. The entry cannot stand following the setting aside. It ought to be cancelled. That is the much that the court can grant in so far as the interested parties' claims are concerned.
42. In view of the foregoing, I make the following orders:
- a. The plaintiff's case is dismissed.
 - b. The defendant's counterclaim is dismissed.
 - c. Entry number 5 dated June 6, 2014 in the register of land parcel number N/Kabras/Matsakha/133 is hereby cancelled.
 - d. No order on costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance by the plaintiff

Mr Kombwayo for the defendant and 1st and 2nd interested parties

No appearance by the 3rd interested party



Court Assistant: E. Juma

