



Mboroki (Suing on his own behalf and as the legal representative of the Estate of Salome Stephen Mboroki (Deceased) v Mboroki (Environment & Land Case 44 of 2019) [2023] KEELC 326 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEELC 326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 44 OF 2019
CK NZILI, J
JANUARY 25, 2023**

BETWEEN

JOHN GIKUNDA MBOROKI (SUING ON HIS OWN BEHALF AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SALOME STEPHEN MBOROKI (DECEASED)) PLAINTIFF

AND

ISAAC KIRIMI MBOROKI DEFENDANT

JUDGMENT

1. By a plaint dated August 14, 2019, the plaintiff sued his brother, the defendant, claiming that he fraudulently obtained and registered LR No Nyaki/Kithoka/1674 in his name yet the land was initially registered as a joint property in his name, the defendant and their late mother Salome Stephen Mboroki. He sought for the cancellation of the defendant's names; the property to revert to its original status and lastly; on account of the doctrine of survivorship partition to occur for his portion be transferred to him. The plaint was accompanied by a list of witness's statements and documents of the even date and a further list of documents dated February 14, 2022.
2. The defendant filed a defence dated September 11, 2019, list of witnesses and a list of documents dated November 14, 2019. He denied the alleged joint ownership, fraud and right to co-share the property. On the contrary, he averred that he was a sole absolute proprietor of the suit property acquired through a due process with full consent and participation of the plaintiff. Further the defendant averred that the plaintiff never raised any objection to the transfers during the lifetime of their late mother including during his participation at the land control board meeting.
3. In his reply to defense dated September 26, 2019, the plaintiff denied ever discussing, consenting or being aware of the alleged transfer of the suitland to the defendant. Further, he specifically stated that he became aware of the changes to the property in April 2019.



4. The plaintiff adopted his witness statement dated August 14, 2019 as his evidence in chief and produced a grant of letters of administration issued on September 1, 1987 as P Exh No (1), Gazette Notice No 891 of February 14, 1986 as P Exh No (2), an order dated March 18, 1988 as P Exh No (3), a certificate of confirmation of grant dated May 9, 1988 as P Exh No (4), green cards for LR Nos Nyaki/Kithoka 1178, 1672, 1673, 1674 as P Exh No 5 – 8 a copy of death certificate for his mother Salome Ngoroki as P Exh No (9), Limited grant as P Exh No. (10), a demand notice as P Exh No (11), a response to the demand letter as P Exh No (12), a letter as P Exh No (12), another letter dated April 24, 2019 as P Exh No (13), letter to the land registrar as P Exh No (14), the transfer of land, the consent letter and the forensic examiners report as P Exh No 15 and 16 respectively.
5. The plaintiff refuted claims that he attended the alleged land control board meeting for the issuance of a consent to transfer the land. Similarly, PW1 denied ever appending his signature to the transfer forms or providing copies of his ID card, passport, photographs and or pin certificates in support of the said transfer. In his view, all his alleged signatures in the said documents were forgeries.
6. In cross examination, PW 1 said that LR No 1674 was a subdivision of LR No 1178 initially belonging to his late father. He insisted that the only subdivision and transfer he was lawfully involved in was the one relating to LR No 1673 and therefore it was irregular for the defendant to transfer to himself the entire LR No 1674, which in his view was jointly owned. Further, PW 1 denied that he voluntarily signed the transfer forms alongside his late mother. He insisted that the entries and contents in the transfer forms were erroneous, illegal and irregular as compared with his genuine documents. PW1 said that even though he had all along lived at Kathera area, his inheritance over the disputed land at Kithoka remained.
7. PW 2 was the Land Registrar Meru Central. Her evidence was that the suit land as per P Exh No (8) jointly belonged to three persons and that any transfer could only occur through the named persons. Further, PW 2 stated that for the subject dispute, only two transferors appear to have signed the land control forms, and transfer forms and appeared before the land control board.
8. In cross examination PW 2 said that the aforesaid forms were improperly prepared since they should have indicated the names of the three transferors. Similarly, PW 2 testified that the aforesaid forms ought to have been signed by all the three registered owners with an indication on whether they were transferring all their shares to the transferee.
9. PW 3 was the Chief Inspector of Police, Daniel Gutu, a forensic documents examiner. His testimony was that he was forwarded a transfer form and an application for a land control board consent together with specimen signature of the plaintiff. His opinion as contained in P Exh No (16) was that the plaintiff was not the signatory to the questioned documents but could not establish the maker of the documents.
10. DW 1 adopted his witness statement dated 13.9.2019 as his evidence in chief and produced a grant of letters of administration, gazette notice, certificate of confirmation of grant, green cards for LR No's 1178, 1672, 1673 & 1674, demand notice, certificate of confirmation of grant, green card for LR No's 1178, 1672, 1673 & 1674, demand notice, reply thereto, affidavit sworn by the plaintiff on December 1, 2015, letter by his late father, application for land control board consent, bundle of receipts for rent collection by the plaintiff, search certificates for L.R No Nkuene/Kathera/249 and letter to land registrar dated October 9, 2019 as D Exh No's 1-14 respectively. DW1 insisted that the plaintiff was the one who willingly and voluntarily signed the disputed documents alongside his late mother in the presence of his other siblings. Regarding the visit at the CID office Meru, DW 1 admitted that he gave out his specimen signatures even though the plaintiff was not present at the time.



11. In cross examination, DW 1 said that his late father left behind several properties some of which were jointly registered under the names of his late mother.
12. Regarding the Kithoka land, DW 1 admitted that he never sued his late mother even after allegedly discovering that MFI D (9) said to be a will left by his late father had bequeathed this particular property to him. His evidence was that by the time the succession proceedings occurred, he had not come across MFI D (9), but after a meeting it was agreed that he wholly takes over the said property. He did not produce such minutes or a land surrender agreement.
13. DW 1 could not tell who filed the land transfer forms, or explain why names of the parties were missing in D Exh No (10). Similarly, DW 1 could not explain whose handwriting was in P Exh No (15). Further DW 1 was unable to explain the discrepancies in P Exh No (15) as pointed out by the forensic document examiner's report as well as the land registrar.
14. DW 2 was Peninah Nkirote, a sister to the parties. Her evidence was that the Kithoka land was given to the defendant by their late father as per the undated will which she stated was confirmed during a family meeting on a date she could not remember. Further, DW 2 testified that together with their late mother, she attended a land control board meeting in 2007 where the land was voluntarily transferred to the defendant. She could however confirm if the plaintiff was present or if she signed the forms or explain why she did not sign the supporting documents.
15. After the close of the defence case, parties were directed to file written submissions which they did dated October 14, 2022 and October 26, 2022, respectively. The plaintiff submitted that the suit property came under the joint names of the parties and their late mother through transmission in Meru SRCC Succession Cause No 122 of 1986 following which subdivisions were made but LR No 1674 remained as joint property.
16. Relying on *Chemitei Kendago vs John Kpnandi Chebon & 4 others* (2021) eKLR, the plaintiff submitted that his claim was filed within 12 years since the ownership occurred on November 16, 2007. On account of fraud, the plaintiff submitted, the forensic report was clear that he did not append his signatures to the transfer and land control application forms. Further, it was submitted that the transfer forms were improper or irregular as confirmed by PW 2 and admitted by DW 1 that D Exh No 10 was not signed while at the same time, he could not identify who's handwriting it was in D Exh No (10).
17. The plaintiff therefore submitted that he had discharged his burden of proof as held in *Kibiro Wagoro Makumi vs Francis Nduati Macharia & another* (2018) eKLR more so since the defendant also failed to produce any agreement on the surrender of the land by the signatories to him. The plaintiff urged the court to exercise its powers under Section 80 of the *Land Registration Act* as held in *Teresia Wangari Mbugua vs Janice Njeri Nduati & another* (2020) eKLR and cancel the title deed. On the joint proprietorship and the death of one of the joint owners, the court was urged to be guided by *Diana Muchiri vs Lydia Wariara Njenga & another* 2022 eKLR to grant the orders sought.
18. The defense submitted that fraud could not be inferred but must be proved on a degree higher than in ordinary suit as held in *Kuria Kiarie & 2 others vs Sammy Magera* (2018) eKLR and *Ndolo vs Ndolo* (2008) eKLR. The defence took the view that all the documents relied upon by the plaintiff did not establish any irregularity or illegality, were genuine and above board since they were duly signed by the plaintiff and his late mother.
19. Further, the defendant submitted that his late father's intention was that he occupies the suitland, the claim was afterthought, the plaintiff waited until his mother passed on to lodge the claim and lastly, that the same was time barred since the plaintiff did not state when he discovered that there was fraud.



20. The court has gone through the pleadings, evidence tendered, written submissions and the law. The issues for the court's determination are:
- i. If LR No Nyaki/Kithoka/1674 was initially jointly owned by three persons
 - ii. If the property was lawfully transferred to the defendant on November 16, 2007
 - iii. If the claim is time barred.
 - iv. If the plaintiff is entitled to the prayers sought.
21. The plaintiffs claim is that LR No 1674 was created as a subdivision of LR No 1178 and registered as joint property in favour of himself, his late mother Salome Stephen Mboroki and the defendant. In support of this, the plaintiff produced a copy of records. Entry No (1) shows that the register was opened on July 30, 1991 and a title deed issued on August 1, 1991 while entry No (e) indicates the land was transferred to the defendant and a title deed issued on November 16, 2007 in his favour. This was during the lifetime of Salome Stephen Mboroki who passed on October 19, 2015.
22. The plaintiff faulted the transfer on account of fraud, illegalities and irregularities discovered in April 2019, since his share and that of his late mother was not realized through partitioning and the doctrine of survivorship. In support of the alleged fraud, illegality and irregularity, the plaintiff called PW 2 and PW 3.
23. On the issue, of time the law is that time prescribed does not begin to run until the plaintiff discovers fraud. In *Kibiro Wagoro Makumi (supra)* the court held that the period of limitation did not begin to run until the plaintiff discovered the fraud or the mistake or could with reasonable diligence have discovered it. The court cited with approval *Arthi Highway Developers Ltd vs West End Butchery Ltd and 6 others* (2015) as well as *Dr Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 others* CA No 60 (1997) where it was held a title to land can be impeached on account of fraud or misrepresentation.
24. In *Diana Muchiri vs Lydia Wariara Njenga (supra)* the court was considering the effect of joint proprietorship under Sections 101, 102, 103 and 118 of the *Registered Land Act* (Cap 300) now repealed. The court cited with approval *Isabel Chelangat vs Samuel Tiro Rotich & 5 others* (2013) eKLR, *Re-estate of Dorica Lumire Mapesa (deceased)* (2018) and *Re-estate of Johnson Njogu Gichohi (deceased)* (2018) which discussed the distinction between joint ownership of land and land held in common together with the concept of survivorship which operates to remove jointly owned property from the operation of law of succession upon the death of one of the tenants.
25. Applying the foregoing case law to the facts herein it is not in dispute that as at November 16, 2007, the suit property was jointly owned between the plaintiff, the defendant and the late Salome Stephen Mboroki who passed on October 15, 2015. This is confirmed by both the copy of records and a certificate of official search dated September 18, 2007. PW 2 in her evidence pointed out some procedural irregularities as to the manner the application for land control board consent, the consent and the transfer forms were filled. In particular the land registrar said that the three transferors ought to have signed the forms and indicated their respective shares. On the other hand, PW 3 produced an opinion indicating that the plaintiff was not a signatory to the transfer forms.
26. In his evidence, the defendant faulted the evidence by Pw 2 & 3 since he was he was certain that the plaintiff together with his late mother and the siblings willingly and voluntarily attended the land control board meeting and subsequently appended their signatures to transfer the suitland to him in line with the MFID (9), a will allegedly signed by his late father.



27. To found a claim based on fraud, the court in *Ndolo vs Ndolo (supra)* held that the burden and the standard of the burden of proof lay on he who averred that there was fraud or forgery. The court held that the evidence of experts must be considered alongside all other available evidence and reasons given why it was to be believed. In *Dixon Okindo Mageto & another vs Dinah Mageto* (2022) eKLR the court cited with approval *Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina* (2019) eKLR, where the court held that allegations of fraud must not only be pleaded but must be strictly proved.
28. In *Chemitei Kandagor* (surpa) the court cited with approval *KPA vs Timberland (K) Ltd* (2017) eKLR on the proposition that in an action based on fraud, the period of limitation begins to run upon discovery of the same by the plaintiff. The defendant takes the view that the transfer form dated November 2, 2007, was lawfully executed by the transferors in his favour, following a land control board consent dated October 11, 2007 issued after an application for the same to the chairman Miriga Mieru East dated October 1, 2007.
29. The plaintiff has challenged the documents leading to the transfer on account of fraud, irregularities and illegalities both as to form and substance. In support of this the plaintiff called PW 2 & 3 who pointed out and confirmed that indeed there are irregularities and procedural improprieties.
30. Other than the cross examination, the defendant did not call the maker(s) or the witnesses to the transfer form or members of the land control board to confirm that indeed the documents were duly obtained, filled and signed by the plaintiff together with his late mother. The transfer form was prepared and witnessed by Eusebian Omayo advocate of Meru. He was the one who certified the supporting annexures to the transfer form including the signatures of the plaintiff which the PW 3 has found as not belonging to the plaintiff.
31. The defendant did not see it fit to bring any independent witnesses especially the lawyer who witnessed the said signatures and certified the copies of the ID card, passports and the pin certificates to the transfer form to come and counter the plaintiff's evidence.
32. It was not enough to submit from the bar and or challenge the said expert evidence by way of cross examination. The plaintiff's evidence in my considered view has not been challenged by way of rival expert evidence. This court has no reason to disbelieve it. Similarly, there is no evidence of a surrender agreement or evidence on whatever consideration the joint proprietors were given in exchange of transferring the or shares to the defendant. The defendant did not produce any evidence if he ever paid for the statutory transfer fees as well as the stamp duty.
33. The defendant has pleaded that the plaintiff consented to and participated in the manner in which he became the registered owner of the suit premises by attending the land control board meeting for the consent and executing the transfer forms. In *Dr Joseph Ngok* (supra) the court held that when the legality of a document of land ownership is in dispute a party alleging the validity of the same must produce a clear paper trail tracing the process of the acquisition of the title document.
34. In this suit, it was not enough for the defendant to waive the title deed and claim absolute proprietorship. The defendant had a duty to show that the process of transfer and registration into his name was above board. It was upon the defendant to explain why the entries to his supporting documents did not include all the names of the joint owners.
35. Similarly, the defendant was unable to offer any reasonable explanation why the said documents had glaring irregularities and missing signatures. Additionally, the defendant was unable to explain why there was no surrender agreement showing that the plaintiff and his late mother at the time willingly surrendered their shares to the property and for what consideration.



36. All these missing information and glaring gaps to the transfer forms and lack of witnesses in their support coupled with the evidence of PW 2 & PW 3 gives credence to the plaintiff's claim that the property was not properly and legally transferred to the defendant.
37. As to whether the claim is time barred, the plaintiff pleaded that he discovered the illegality in April 2019 while the transfer occurred on November 16, 2007. The law is that time starts to run after the discovery of the same by a party basing his claim on it. In this suit the plaintiff testified that she discovered the changes to the title in April 2019 after which he wrote a demand letter dated April 15, 2019 to the defendant who replied to it by a letter dated April 18, 2019. D Exh No's 6 & 7 which are also P Exh No's 11, 12 and 13 respectively. The court therefore makes a finding that as at the time the suit was filed, 12 years had not elapsed so as to make the claim stale.
38. Regarding the prayers sought the transfer occurred on November 16, 2007 during the lifetime of the late Salome Mboroki.
39. The suit land was jointly owned at the time. The applicable law was Sections 101, 102 & 103 of the Registered Land Act (repealed). Section 102 (a) thereof required that any disposition thereto to made by all the joint proprietors. Under Section 118 thereof upon the death of a joint proprietor, the land registrar on prove of death was required to delete the name of the deceased from the register.
40. Since the court has made a finding that the transfer on November 16, 2007 was not signed by all the joint proprietors, it follows therefore that the same remains null and void and the title deed must be cancelled. The effect of the cancellation is that the property reverts to its status prior to November 16, 2007, which is in the names of the three joint proprietors.
41. Given that the late Salome Mboroki passed on in 2015 by virtue of the doctrine of survivorship, the property automatically reverted to the surviving owner(s) without the need to apply for letters of administration as per WM Musyoka J as cited with approval in *Diana Muchiri vs Lydia W Njenga & others (supra)*.
42. Consequently, the appropriate reliefs under the circumstance are that title to LR No Nyaki/ Kithoka/1674 was illegality obtained in favour of the defendant; the same is hereby cancelled to revert to the names of both the plaintiff and the defendant as at October 16, 2015; the land shall equally be partitioned and each parcel to be registered in the individual names of both parties herein. The plaintiff is awarded costs of this suit
43. Costs of the suit, the partition and transfer to be met by the defendant.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25TH DAY OF JANUARY, 2023.

In presence of:

C/A: Kananu

Mwirigi Kaburu for plaintiff

Anampiu for defendant

HON. C.K. NZILI

ELC JUDGE

