



**Karisa (Suing the Estate of the Late Julius Fondo Karisa - Deceased) v Nzaro & another
(Environment & Land Case 149 of 2012) [2023] KEELC 262 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 149 OF 2012**

**NA MATHEKA, J
JANUARY 24, 2023**

BETWEEN

**KENNETH SAMMY KARISA (SUING THE ESTATE OF THE LATE JULIUS
FONDO KARISA - DECEASED) PLAINTIFF**

AND

**JACKSON NGUA NZARO 1ST DEFENDANT
THE LAND REGISTRAR KILIFI 2ND DEFENDANT**

JUDGMENT

1. The plaintiff avers that at all material times pursuant to this suit the Deceased was the owner of the piece or parcel of land known as Plot No. 554 "A" situated at Mariakani together with the developments erected and standing thereon (the suit property). The Plaintiff avers that on or about 3rd March, 2011 the late Mary Karissa Fondo (Deceased) purported to unlawfully sell the suit property to the 1st Defendant whereafter the 1st Defendant attempted to take over the suit property. The Plaintiff avers that the purported sale by the 1st Defendant late Mary Karisa Fondo (Deceased) to the 1st Defendant is illegal, null and void *ab initio* since the property belongs to the Estate of the Deceased and the late Mary Karisa Fondo (Deceased) has no capacity or right to deal with the Estate or any part thereof. The Plaintiff's claim is for an order of injunction to restrain the 1st Defendant from dealing with or interfering with the Estate of the Deceased and in particular the suit property. The registration of the 1st Defendant as the proprietor of the suit property by the 2nd Defendant under Certificate of Lease No. Mariakani Township Block 4/133 fraudulent illegal and void *ab initio*. The Plaintiff prays that Judgment be entered for the Plaintiff against the Defendants jointly and/or severally for:-

1. A Declaration that the Sale Agreement dated 3rd March, 2011 between the late Mary Karisa Fondo (Deceased) and the 1st Defendant in respect to Plot No. 554 "A" situated at Mariakani Town is illegal, null and void *ab initio*.



2. An Order of injunction to restrain the 1st Defendant whether by himself, his agents, Servants Employees or any other person acting under the instructions or directions of the 1st Defendant from selling, occupying, alienating, or in any way interfering or dealing with Plot No. 554 "A" situated at Mariakani Town.
 3. An Order for Cancellation of the lease issued in respect of the suit property and all subsequent proprietors including the 1st Defendant;
 4. A Order be directing the 2nd Defendant to recall, revoke, cancel and/or annul the Certificate of Lease issued to the 1st Defendant and the rectification of the Register to revert title to Julius-Fondo Karisa as the bona fide owner of the suit property.
 5. Costs of and/or incidental to this suit.
 6. Any other or further relief as this Honourable Court may deem fit and just to grant.
2. The 2nd Defendant denies that the deceased Julius Fondo Karisa was at all times material to this suit the owner of the parcel of land known as plot No. 554 "A" situate at Mariakani as pleaded in paragraph 5 of the Amended Plaint. The 2nd Defendant admits buying the subject property from the late Mary Karisa Fondo who was listed as beneficial owner in the records maintained by the erstwhile local authority under whose jurisdiction the property lay and denies that the said sale was unlawful. The Plaintiff is put to proof of any allegations of unlawfulness. That the 2nd Defendant will aver that he entered into an agreement with the 1st Defendant for the sale of the suit property bona fide and upon satisfying himself that she was the lawful and beneficial owner thereof. That the doctrine of lis pendens does not apply to the suit property insofar as his title has been issued since 2011 well before the inception of this suit. Further, that this suit is brought in bad faith and that the Plaintiff was at all times aware of the 2nd Defendant's dealings with both the 1st Defendant who was mother to the Plaintiff and raised no objection thereto and that the claim herein is steeped in avarice. The 2nd Defendant reiterates that the 1st Defendant lawfully dealt with the property and that in the absence of fraud as alleged then his title is protected under Section 26 of the *Land Registration Act*, 2012.
3. This court has considered the evidence and the submissions therein. The original 1st Defendant was Mary Karisa Fondo who subsequently passed away and the suit abated. The Plaint was then amended and the 1st Defendant is now Jackson Ngua Nzaro and the Land Registrar Kilifi the 2nd Defendant. The Plaintiff brought the suit herein as the administrator and legal representative of the estate of the late Julius Fondo Karisa, who died 21st January 1982 and a Grant of letters of Administration Intestate issued Kenneth Sammy Karisa (the Plaintiff) and Dama Kahindi Ndowa on 22nd May 2012 in Mombasa High Court Succession Cause No. 236 of 2011 (PEX-6). The Plaintiff averred that the late Julius Fondo Karisa was the owner of Plot No. 554 "A" situated in Mariakani together with the developments erected therein. The Plaintiff produced a letter dated 29th October 1982 from the County Council of Kilifi addressing the Commissioner of Lands on Plot No. 554 in Mariakani Trading Centre (PEX-1). The then Acting County Clerk Mr. J.K Ngari informed the Commissioner that Plot 554 was allocated to Julius Karisa Fondo in 1972. The late Julius Karisa Fondo died on 21st January 1982, as seen from his death certificate dated 26th April 1982 (PEX-5). From the pleadings of Mombasa CMCC 398 of 2011 (PEX-7) there is a letter from the Assistant Chief Marikani dated 26th April 2011 indicating the heirs of the late Julius Karisa Fondo. The letter indicated that Mary Katsaka Fondo of ID [particulars withheld] born on 10th July 1928, was the first wife of the deceased and that the Plaintiff, Kenneth Sammy Karisa of ID [particulars withheld] born on 9th November 1953 is the son of the deceased. Together with his sibling, Dama Kahindi Ndowa the Plaintiff applied for the letters of administration intestate to the estate of their late father and were granted with a Certificate of



confirmation of a grant on 28th February 2020 which listed the suit property as one of the deceased properties to be inherited by Kenneth Sammy Karisa, Joseph Kalama, Salima Karisa, Jimmie Beatar Fondo, Jacob Mwakamsha and Shadrack Ruwa Karisa.

4. The 1st Defendant has rejected the Plaintiff's claim that the suit property was owned by the estate of the late Julius Fondo Karisa and insisted that he had transferred the same to his late wife Mary Fondo during his lifetime. He produced a letter dated 15th October 1992 from Maurice K. Mumba, the County Clerk Kilifi addressing the Commissioner of Lands Nairobi (DEX-2). The letter informed the Commissioner of the people in physical occupation of the plots in Mariakani town, and he indicated that Late Mary Fondo in occupation of Plot No. 554. I find that the letter dated 29th October 1982 is a confirmation that the late Julius Karisa Fondo was allotted Plot No. 554 by the Commissioner of lands in 1972. The letter on ratification of the plots in Mariakani town dated 15th October 1992 by the then County Clerk Kilifi Mr. Maurice Mumba shows that the late Mary K. Fondo was the occupant and developer of Plot No. 554 (DEX 2). The Commissioner requested for a list of all plots occupied and the people occupying those plots in Mariakani town.
5. The Plaintiff has pleaded and particularized fraud as against the Defendants, he pleaded that the 1st Defendant fraudulently executed an agreement of sale with Mary Fondo and acquired a lease from the 2nd Defendant in a deceitful manner. The 1st Defendant has denied the assertion and averred that at the time he purchased the suit property from Mary Fondo, she was the lawful owner of the suit property and was listed as the beneficial owner of the suit property as per the records maintained by the local authorities. The agreement of sale dated 3rd March 2011 was entered between Mary Karisa as the vendor and Jackson Nzaro as the purchaser, for Plot No. 544/1 for Kshs 7,000,000/= (PEX-2). The 1st Defendant in support of his interest in the suit land produced a Demand notice from the Town council of Mariakani issued on 28th February 2011 to Mary Fondo demanding Kshs 155,468/= as land rates arrears for Plot No. 554 Block 4/133 (DEX-4). The 1st Defendant also produced a Rates clearance certificate dated 3rd March 2011 issued in the name of Mary Fondo for Plot No. 544/Block4/133 (DEX-5). After the rates were cleared the 1st Defendant then paid Transfer fees to have Plot No. 544/Block 4/133 transferred from Mary Fondo into his name on 3rd March 2011 (DEX-6). This was followed by a letter from Mr. Isaac Kagia the town clerk to the Commissioner of Lands on 4th May 2011 requesting that a title be issued in the name of the 1st Defendant (DEX-7). The 1st Defendant was then issued with a Certificate of lease for land parcel Mariakani Township Block4/133 for a term of 99 years from 1st July 1999 on 10th November 2011 (DEX-9).
6. I find that the 1st Defendant lawfully acquired the title to the suit land and his title is protected by Section 26 of the [Land Registration Act](#), which creates an absolute and indefeasible title. Section 26 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; or



- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.
7. Indeed the law protects the sanctity of a title, however there are two instances when the title can be successfully challenged and impeached. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Since the Plaintiff has impugned the 1st Defendant of being party to fraud and acquiring the title illegally it is of extreme importance for the court to examine the evidence before it to determine whether these allegations have been proved or not.
8. The Plaintiff alleged that the 1st Defendant forged the agreement of sale between himself and the Late Mary Fondo. The Plaintiff maintained that his late mother was illiterate who could neither read nor write and argued that the 1st defendant forged his mother’s signature and her identification number. The Plaintiff claimed that the only probability could be that the 1st Defendant misled the late Mary Karisa Fondo to sell the suit property without involving the beneficiaries of the estate. When I peruse the agreement of sale, the same is signed by Mary Karisa Fondo of ID No. [particulars withheld]. In the pleadings the said Mary Karisa Fondo admits to selling the suit property to the 1st Defendant. Festus Fondo and Joseph Kalama (who are the Plaintiff’s brothers and a named as beneficiaries in the letters of administration produced in court) were witnesses to the said sale agreement between the Plaintiff and the said Mary Karis Fondo. What is also curious to me is that the Plaintiff did not call any of the other family members or any witness to corroborate his allegations of fraud. I find that the 1st Defendant is a bonafide purchaser of value. Consequently, I find that the Plaintiff has failed to prove his case on the balance of probability and I dismiss it with costs.
9. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JANUARY 2023.

N.A. MATHEKA

JUDGE

