



REPUBLIC OF KENYA



KENYA LAW
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Masinjila & 2 others v Masinjila & 2 others (Environment & Land Case 64 of 2015) [2023] KEELC 15933 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15933 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 64 OF 2015
DO OHUNGO, J
FEBRUARY 28, 2023**

BETWEEN

**LABAN MASINJILA 1ST PLAINTIFF
HARRIET MASINJILA (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF CLEMENT MASINJILA) 2ND PLAINTIFF
JOSEPH MAKARIOS MASINJILA (SUING AS THE LEGAL REPRESENTATIVE
OF THE LATE BARNABAS AMBUTSI MASINJILA) 3RD PLAINTIFF**

AND

**JOSHUA ANDALA MASINJILA 1ST DEFENDANT
DANIEL MWISUNJI MASINJILA 2ND DEFENDANT
ZABLONI ANYULA WILIMISI 3RD DEFENDANT**

JUDGMENT

1. Litigation in this matter commenced through plaint dated March 10, 2015, which was filed on March 11, 2015 by the first and second plaintiffs against the three defendants herein. The first and second plaintiffs averred that following a judgment delivered on April 4, 2005 in Kakamega High Court Civil Case Number 25 of 1995 (OS) No 5 of 1998 (consolidated), it was declared that the first defendant is a trustee of land parcel Isukha/Shirere/574 (suit property) on his own behalf and on behalf of the first and second plaintiffs. That the first defendant was ordered to transfer to the first and second plaintiffs their respective shares of the suit property after survey, failure of which the executive officer of the court was to execute the transfer documents. That the first defendant in total disregard and in contempt of the judgement, proceeded to fraudulently subdivide the suit property and transferred the resulting subdivisions to the second and third defendants.



2. The first and the second plaintiffs therefore prayed for judgement against the defendants for the following orders:
 - a. Nullification of the registration of the certificates of titles in respect of parcel numbers Isukha/Shirere/5726, Isukha/Shirere/5727 and Isukha/Shirere/3524 and execution of the decree issued in Kakamega High Court Civil Case Number 25 of 1995 (OS) No 5 of 1998 (consolidated).
 - b. A permanent injunction restraining the defendants by themselves, their servants and/or agents from entering, surveying, subdividing, allocating, alienating, disposing of and or interfering with or in any way dealing with the said parcels of land which is the suit property.
 - c. Costs of the suit and interest at court rates.
3. The third plaintiff sought joinder to the case through Notice of Motion dated June 13, 2019. The application was allowed through a ruling delivered on November 12, 2019 by my sister NA Matheka, J In his plaint which he filed as a legal representative of Barnabas Ambutsi Masinjila (deceased) and which was against the already existing defendants, the third plaintiff averred that at all material times to the suit, the late Barnabas Masinjila, the first plaintiff and the first defendant were beneficial joint owners in equal shares of the suit property and that the first defendant was registered as the proprietor of the suit property in trust for himself, the first plaintiff and the late Barnabas Masinjila in equal shares. He further averred that the first defendant disregarded the decree in Kakamega HCCC No 25 of 1995 (OS) and No 5 of 1998 (consolidated) by fraudulently subdividing the suit property into Isukha/Shirere/3523 and Isukha/Shirere/3524 and transferring Isukha/Shirere/3524 to the third defendant. That the first defendant further subdivided Isukha/Shirere/3523 into Isukha/Shirere/5726 and Isukha/Shirere/5727 and transferred Isukha/Shirere/5727 to the second defendant. He also averred that all the defendants were aware of the decree and were therefore parties to the fraud.
4. The third plaintiff therefore prayed for judgment against the defendants jointly and severally for:
 - a. A declaration that the first defendant's subdivision of the suit land and transfer of the subdivisions thereof to the second and third defendants in violation of the decree given in Kakamega High Court Civil Case no 25 of 1995 (OS) and No 5 of 1998 (consolidated) is illegal and null and *void ab initio*.
 - b. An order for cancellation of title numbers Isukha/Shirere/3523, Isukha/Shirere/3524, Isukha/Shirere/5726 and Isukha/Shirere/5272 curved out of the suit land.
 - c. An order that the suit land revert to its original title Isukha/Shirere/574.
 - d. An order directing the executive officer of this Honourable Court to execute transfers to the late Barnabas Masinjila (deceased), Laban Masinjila and Clement Masinjila of their respective shares.
 - e. Damages for fraud.
 - f. An order for the costs of the suit.
 - g. Interest on (e) and (f) above.
 - h. Any other relief which this Honourable Court may deem just and fit to grant.
5. The third defendant filed a statement of defence on May 21, 2020. He generally denied the plaintiffs' averments and prayed that the suit be dismissed with costs.



6. In a ruling which I delivered on December 14, 2021, I found that the first defendant passed away in May 2018 while the second defendant passed away in November 2016. I held as follows in the ruling:

In view of the provisions of Order 24 Rule 4 (3) of the [Civil Procedure Rules](#), the suit against the 1st defendant abated in June 2019 while the suit against the 2nd defendant abated in December 2017. The effect of abatement of a suit is that it brings proceedings against the deceased party to a close in the same way that a judgment would. The finality is such that in terms of Order 24 Rule 7 (1) of the [Civil Procedure Rules](#), no fresh suit can be brought on the same cause of action.

7. Consequently, the case for determination is only as between the plaintiffs and the third defendant.
8. At the hearing Harriet Masinjila, the second plaintiff, testified as the sole witness in respect of the first and second plaintiffs' case. She adopted her witness statement filed on March 11, 2015 as her evidence in chief and produced copies of the documents listed in the first and second plaintiffs' list of documents dated March 10, 2015. She stated that she is a widow of and the administrator of the estate of the late Clement Masinjila who was the applicant in HCC No 25 of 1995 in which judgment was delivered declaring the first defendant herein as a trustee for his four brothers including himself and ordering that the suit property be subdivided into four equal shares to the four brothers. That before the subdivision could be done, the first defendant fraudulently subdivided the suit property, sold a portion to the third defendant, and remained with the other portions and issued "several fake land title deeds" to strangers.
9. The first and second plaintiffs' case was thereby closed.
10. Joseph Makarios Masinjila, the third plaintiff, was the sole witness in respect of his case. He adopted his witness statement dated November 22, 2019 as his evidence and produced the documents in his list of documents dated November 22, 2019. He also referred to the judgment in Kakamega HCCC No 25 of 1995 (OS) and No 5 of 1998 (consolidated) and stated that his father Barnabas Ambutsi Masinjila had passed away by the time the judgment was delivered. That the first defendant went ahead to dispose of the suit property to the second and third defendants herein.
11. The third plaintiff's case was then closed.
12. During defence hearing, Zablon Anyula Wilimisi testified as DW1. He adopted his witness statement dated April 30, 2020 as his evidence in chief. He stated he purchased land parcel No Isukha/Shirere/3524 from Selpher Maina Omulisia upon carrying due diligence and that he was registered as the proprietor of the parcel on October 23, 2007. He further denied that the first defendant fraudulently transferred the parcel to him and added that he was an innocent purchaser for value without notice. He stated that he did not deal with the first defendant and that he was not a party in Kakamega HCCC No 25 of 1995 (O.S) and No 5 of 1998 (consolidated). He also stated that he extensively developed the property to a value of over twenty million shillings with open usage until the plaintiffs instituted this suit in 2015.
13. Defence case was then closed. Parties thereafter filed and exchanged written submissions.
14. The first and the second plaintiffs jointly filed their submissions on July 4, 2022 and reiterated the contents of the plaint and further submitted that no appeal was preferred against the judgment in Kakamega High Court Civil Case No 25 of 1995 (OS) No 5 of 1998 and that the first defendant failed to comply with the judgment and subsequently subdivided the suit property. The first and the second plaintiffs therefore urged the court to allow their suit as prayed.



15. The third plaintiff filed his submissions on July 8, 2022 and reiterated the contents of his plaint and further submitted that assuming the third defendant was an innocent purchaser of his portion, then his title is impeachable under Article 40 (6) of the Constitution and section 26 (1) (b) of the Land Registration Act since the third defendant's title was illegally acquired. In further submitting on the same, the third plaintiff relied on Elijah Makeri Nyang'wara v Stephen Mungai Njuguna & another [2013] eKLR.
16. The third defendant filed his submissions on October 12, 2022 and submitted that he is an innocent purchaser for value and that the plaintiffs have failed to adduce evidence challenging the issuance of certificate of title over parcel No Isukha/Shirere/3524 to warrant its cancellation. He further submitted that the suit filed against him does not disclose reasonable cause of action and urged that the suit be dismissed with costs to him.
17. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the plaintiffs have established fraud and whether the reliefs sought should issue.
18. The plaintiffs' case is that the first defendant committed fraud by subdividing the suit property in defiance of the judgment in Kakamega High Court Civil Case No 25 of 1995 (OS) No 5 of 1998. The plaintiffs' allegations of fraud require proof to a standard above a 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.
19. The allegations of fraud primarily target the first defendant, yet as we have noted earlier, the first defendant passed away and the case against him abated. The effect of the abatement was that the suit against the first defendant came to a close in June 2019 before going to trial. In essence, the plaintiffs' suit against the first defendant stood dismissed in June 2019, together with the allegations of fraud. If the plaintiffs wanted to pursue the claim, they ought to have sought revival and substitution, but they chose not to. The plaintiffs contend that the third defendant acquired land parcel No Isukha/Shirere/3524 from the first defendant. Since land parcel No Isukha/ Shirere/3524 is a subdivision of the suit property, the plaintiffs cannot validly attack the third defendant's title without first establishing their case against the first defendant.
20. I find that the plaintiffs have failed to establish fraud. That being the case, the reliefs of cancellation and nullification of titles which they seek based on the alleged fraud cannot issue. The plaintiffs also seek enforcement of the decree issued in Kakamega High Court Civil Case Number 25 of 1995 (OS) No 5 of 1998 (consolidated). That prayer finds a ready answer at Section 34 (1) of the Civil Procedure Act which provides that:

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
21. The plaintiffs herein and the first defendant were parties in Kakamega High Court Civil Case Number 25 of 1995 (OS) No 5 of 1998 (consolidated). By virtue of his family relationship with the plaintiffs and the first defendant, the second defendant is also deemed to have been party to the cases. They should have enforced the decree in the said cases as opposed to filing a new case.
22. In the end, I find no merit in the plaintiffs' case. I dismiss it with costs to the third defendant.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2023.



D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Machafu for the First And Second Plaintiffs

Mr Akwala holding brief for Mr Ambutsi for the Third Plaintiff

No appearance for the first and second defendants

Mr Minishi for the Third Defendant

