



REPUBLIC OF KENYA



**Bosire v Maina & another (Environment & Land Case 116 of 2016)
[2023] KEELC 894 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 116 OF 2016
JM ONYANGO, J
FEBRUARY 16, 2023**

BETWEEN

GEOFFREY OMARIBA BOSIRE PLAINTIFF

AND

MARY NYABOKE MAINA 1ST DEFENDANT

NABOTH SAGWE B OGETO 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated April 27, 2016, the plaintiff filed suit against the Defendant seeking the following reliefs:
 - a. A declaration that land parcel LR No Central Kitutu/Monyerero/1483 and 1484 registered in the names of the defendants respectively were unlawfully acquired and the same be cancelled and do revert to the original title No Central Kitutu/Monyerero/182 and that the defendants do give vacant possession thereof.
 - b. That upon cancellation, the register be amended accordingly.
 - c. Costs of the suit.
 - d. Any other relief that this Honourable Court may deem fit to grant.
2. The 1st defendant filed a statement of Defence and Counterclaim dated June 8, 2016 denying the plaintiff's claim. In his Counterclaim, he claimed that his title was acquired without any fraud. He therefore prayed for a declaration that he acquired a good title by way of adverse possession. He also prayed for an injunction restraining the plaintiff from interfering with land parcel number Central Kitutu/Monyerero/1483.



3. The 2nd defendant also filed his statement of defence dated February 10, 2017 stating that he is the registered owner of land parcel number Central Kitutu/Monyerero/1484 measuring 0.04 hectares although he is not aware how parcel number West Kitutu/Monyerero/1484 was registered in his name. He further avers that he is ready and willing to execute the necessary documents to enable the plaintiff to obtain title No West Kitutu/Monyerero/1484 in his name.
4. Pursuant to a consent judgment entered on February 13, 2017 the 2nd defendant was ordered to transfer land parcel number Central Kitutu/Monyerero/1484 to the Plaintiff within 60 days.
5. The suit in respect of land parcel number Central Kitutu/Monyerero/1483 was set down for hearing on September 28, 2020 when the Plaintiff testified and closed his case. The Defendant's case came up for hearing on November 25, 2020 when the Defendant and his advocate failed to attend court and the defendant's case was marked as closed. The 1st defendant subsequently filed an application to set aside the proceedings of November 25, 2020 and the application was granted. The 1st defendant's case was then fixed for hearing on July 18, 2022.

Plaintiff's Case

6. The Plaintiff relied on his witness statement dated April 27, 2016. He told the court that the 1st defendant was the widow of his paternal uncle, Joseph Maina Omariba who died in 2014.
7. He testified that land parcel number Central Kitutu/Monyerero/182 was registered in the name of his grandmother Kemunto Omariba in 1973. The said Kemunto Omariba had 3 sons namely; Joseph Maina Omariba, James Manyara Omariba and Peter Bosire Omariba. He told that court that his uncle Joseph Maina Omariba was given land parcel No Central Kitutu/Monyerero/181 while James Manyara was given parcel number Central Kitutu/Monyerero/180. Parcel number Central Kitutu/Monyerero/182 was registered in the name of Kemunto Omariba to hold the same in trust for his father Peter Bosire Omariba who was the last born as he was working away from home. He further testified that his grandmother died in 1983 and his father did not apply for a grant of letters of administration. His father subsequently died in 2007 before having parcel 182 transferred to his name.
8. The Plaintiff told the court that long after his father's death in 2013, he discovered that parcel number 182 had been registered in the name of Joseph Maina in 1995. The said Joseph Maina Omariba later sub-divided the land into parcels 1483 and 1484 without obtaining a grant in respect of Kemunto Omariba. Parcel 1483 was transferred to the 1st defendant while parcel 1484 was transferred to the 2nd Defendant. He claims he made the discovery in 2013 though he waited until 2016 before he filed suit.

Defendant's Case

9. The 1st defendant relied on her witness statement filed in court on June 8, 2016. She confirmed that the Plaintiff was her nephew. She testified that she got married in 2003 and her husband died in 2014.
10. She stated that parcel 1483 was transferred to her by her late husband and she obtained a title deed in 2013. She denied that the said parcel had been transferred to her fraudulently. She told the court that the Plaintiff had his own land and that there was a clear boundary between her land and the Plaintiff's land.
11. After the close of the defendant's case, the parties were granted time to file their final submissions. The plaintiff filed her submissions on 5.8.22 while the 1st defendant filed hers on 16.8.22.



Issues for Determination

12. Arising from the pleadings, evidence and rival submissions, the following issues emerge for determination:
 1. Whether the 1st Defendant was fraudulently registered as the owner of land parcel number Central Kitutu/Monyerero/1483.
 2. Whether the said title ought to be cancelled so that the same can revert to the name of Kemnunto Omariba.
 3. Whether the plaintiff is entitled to the reliefs sought against the 1st defendant.

Analysis and Determination

13. The plaintiff's case is anchored on fraud. The particulars of fraud pleaded against the 1st Defendant's late husband in paragraph 10 of the Plaint are as follows:
 - a. Changing the title in the lands office from the name of the deceased person to his name without succession.
 - b. Cheating Land Registrar to be the owner of the said land without involving other beneficiaries (sic)
 - c. Transferring title without succession
 - d. Defrauding the plaintiffs of their land parcel
14. The Plaintiff produced a copy of the extract of the land register in respect of land parcel number Central Kitutu/Monyerero/1483 which shows that it was a sub-division of land parcel No 182. Parcel No 182 was initially registered in the name of Kemunto Omariba in 1973 before it was transferred to Joseph Maina Omariba in 1994 and subsequently registered in the name of Mary Nyaboke Maina on 19.8.2013.
15. From the evidence on record, it is clear that the transfer of parcel No 182 from Kemunto Omariba was done after her death in 1983 before succession proceedings were filed. The said transfer took place in 1995. Granted that the said transfer was irregular, the action for fraud ought to have been filed within 3 years from the date when the fraud took place.
16. The provisions of section 26 (a) of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya stipulate that where an action is based on fraud on the part of the Defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the said fraud or could with reasonable diligence have discovered it. In his plaint, the plaintiff did not state when he discovered the fraud. He only attempted to explain the delay in filing suit during cross-examination.
17. The courts have repeatedly held that allegations of fraud must be strictly proved. In the case of *Koinange & 13 others v Charles Karuga Koinange* [1986] KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji* (1957) EA 314 observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”



18. Furthermore in the case of *Vijay Morjaria v Nansingh Madbusingh Darbar & another* [2000]eKLR (Civil Appeal No 106 of 2000) Tunoi JA (as he then was) stated as follows:-

“...It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

19. This decision was upheld by the Court of Appeal in Nairobi in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR(Civil Appeal No 132 of 2005)where it was stated that to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.
20. In the instant case, the plaintiff case rests on the fact that the 1st defendant’s late husband fraudulently transferred the suit property to himself and subsequently to the 1st plaintiff as he had no grant of letters of administration in respect of the estate of Kemunto Omariba. The question I must determine is whether plaintiff’s title should be impeached.
21. The law is extremely protective of title and provides limited circumstances in which a title may be impeached. For this court to cancel a title, the conditions in section 26 of the *Land Registration Act* must have been fulfilled. The said section provides as follows:-

Section 26. (1)

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.
22. The 1st defendant’s evidence is that she collected her title deed from the lands office after her husband’s death and she was not directly involved in the transfer as she did not go to the Land Control Board. It is also evident that the transfer took place way back in 1995 during the lifetime of the 1st defendant’s husband. The plaintiff has not stated in his pleadings when he discovered the fraud. During cross-examination he claimed that he discovered the transfer in 2013 yet he waited until 2016 to file suit. No explanation has been given for this delay. Given the serious nature of fraud, it is strange that the plaintiff did not take immediate action to remedy the situation. More so because the person whom he accuses of fraud was still alive at the time the discovery was made. Why would he wait for the alleged fraudster to die before filing suit?
23. It is also noteworthy that the plaintiff’s father who was the direct beneficiary of Kemunto Omariba did not bother to take out letters of administration in respect of his late mother as he is the one who ought to have been dissatisfied with the manner in which his mother had distributed the land among her sons.



24. From the above analysis I am not satisfied that the Plaintiff has proved his case on a balance of probabilities as the suit was filed out of time without leave of the court. Furthermore, there is no evidence that the 1st defendant was involved in the alleged acts of fraud as the same have been attributed to her late husband.
25. Consequently, the plaintiff's suit has no basis and the same is hereby dismissed with costs to the 1st defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 16TH DAY OF FEBRUARY 2023.

J.M ONYANGO

JUDGE

In the presence of;

Mr. Masolo for the Plaintiff

Mr. Anyona for the Defendant

Court Assistant – Mr. Oniala

