



**Siele (Suing as the administrator of the Estate of the Late Samwel Kipsiele Kurgat (Deceased) v Abuga & 10 others (Environment & Land Case 492 of 2016) [2023] KEELC 16614 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16614 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 492 OF 2016  
JM MUTUNGI, J  
MARCH 28, 2023**

**BETWEEN**

**RICHARD SIELE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SAMWEL KIPSIELE KURGAT (DECEASED)) ..... PLAINTIFF**

**AND**

**MARY NYAKERARIO ABUGA ..... 1<sup>ST</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, NAKURU ..... 2<sup>ND</sup> DEFENDANT  
ZACHARIA MONYANZA ABUGA ..... 3<sup>RD</sup> DEFENDANT  
GABRIEL MWAMBA ABUGA ..... 4<sup>TH</sup> DEFENDANT  
SIMON RIOBA ABUGA ..... 5<sup>TH</sup> DEFENDANT  
CHRISTOPHER ONGERI ABUGA ..... 6<sup>TH</sup> DEFENDANT  
AGNES KADOGO ABUGA ..... 7<sup>TH</sup> DEFENDANT  
THOMAS GESORE KARUGO ..... 8<sup>TH</sup> DEFENDANT  
MAGDALINE CHEPKORIR MOSONGO ..... 9<sup>TH</sup> DEFENDANT  
JOSEPH MOSONGO ABUGA ..... 10<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 11<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff instituted this suit by way of a Plaint dated November 14, 2016 which was amended on May 18, 2018. The plaintiff vide the Amended Plaint prayed for orders that:-



- a. A declaration that the 1<sup>st</sup> 3<sup>rd</sup> to 10<sup>th</sup> defendants are not the owners and are not entitled to exclusive and unimpeded possession and occupation of all that land parcel known a Miti Mingi/Mbaruk Block 3/246 (“suit property”) and the resultant sub-divisions Land Parcels Number Miti Mingi/Mbaruk Block 3/9631, 9633, 9634, 9635, 9636, 9637 and 9638 but belongs to the estate of Samuel Kipsiele Kurgat.
  - b. A declaration that the title deed possessed by the 1<sup>st</sup>, 3<sup>rd</sup>, to 10<sup>th</sup> defendants are not legitimate and the same be revoked and cancelled forthwith.
  - c. A declaration that land parcel known as Miti Mingi/Mbaruk Block 3/246 belongs to the estate of Samwel Kipsiele Kurgat and he be restored as such. In the alternative, an order directing the 11<sup>th</sup> Defendant to compensate the Plaintiff for loss suit property at the current market value.
  - d. An order permanent of injunction restraining the defendants by themselves, their agents, servants, employees and proxies from further trespassing unto, entering, encroaching, damaging, destroying, alienating or in any way dealing with the suit properties, particularly the portions belonging to the plaintiff’s family.
  - e. General damages for trespass and malicious damage;
    - ea. Mesne profits as per the consent order of 17/05/2017; and
  - f. The costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
2. The 1<sup>st</sup>, 3<sup>rd</sup> to 10<sup>th</sup> defendants filed an initial defence dated April 4, 2017 which they subsequently amended on July 2, 2018. The defendants denied the allegations contained in the Plaintiff. They averred the titles held by the plaintiff were not genuine and that the plaintiff wanted to use the court to legitimize and sanctify the illegitimate title. The defendants denied they had trespassed onto the plaintiff’s land and/or that the plaintiff was entitled to any damages from the defendants.
  3. The Land Registrar (2<sup>nd</sup> defendant) filed a statement of defence dated October 18, 2017 through the Attorney General. The 2<sup>nd</sup> defendant denied the averments contained in the Plaintiff and stated that the suit land was registered originally in the name of the Government of Kenya on 18/1/2004 before it was transferred to the 1<sup>st</sup> defendant on 18/1/2005. The 2<sup>nd</sup> defendant further stated the title was closed on subdivision on 17/10/2016 creating land parcels Miti Mingi/Mbaruk Block 3/9631 to 9638.
  4. The suit was heard before me and two witnesses testified in support of the plaintiff’s case. On behalf of the Defence Four witnesses testified and following conclusion of the trial, the parties made written submissions. I set out herein below, albeit, briefly the facts and the evidence in support of the plaintiff’s and the defendants respective cases.

### **The Plaintiff’s Case**

5. The plaintiff instituted the suit as the administrator of the estate of Samwel Kipsiele Kurgat (deceased) who was the registered proprietor of land parcel Number Miti Mingi/Mbaruk Block 3/246 in Nakuru County (hereinafter referred to as “the suit property”). The Plaintiff averred that in or about 2009, the plaintiff’s family entrusted the suit property to a caretaker to oversee and utilize pending the filing and conclusion of a Succession Cause. The plaintiff further averred that during the period March 2016 to May 2016 during the absence of the caretaker from the suit property, the 1<sup>st</sup> defendant unlawfully entered the suit property and demolished the structure that the caretaker had erected and either by herself and/or through agents erected other structures and proceeded to cultivate on the suit land.



The plaintiff further averred that the 1<sup>st</sup> defendant in collusion with the 2<sup>nd</sup> defendant caused the suit property to be unlawfully subdivided into 8 portions being land parcels Miti Mingi/Mbaruk Block 3/9631 to 9638. The plaintiff claims the acts by the defendants were illegal and malicious as particularized under paragraph 7 of the Amended Plaintiff and claims damages for trespass and damage to property.

6. The plaintiff testified as PW-1- and it was his evidence that the suit property, land parcel Miti Mingi/Mbaruk Block 3/246, was registered in the name of his deceased father, Samuel Siele Kurgat. He testified that his father purchased shares held by one Bartor Kibet in Kalenjin Enterprises Co. Ltd in 1986 and thereby became a shareholder of the Company. He stated his father processed title to the land and that transfer of the land was effected to him in 1992 by the Government and registered on 2<sup>nd</sup> September, 1992 (“PEX- 3” plaintiff’s Documents). The plaintiff’s father was issued with a title deed exhibited as “PEX 2” in the plaintiff’s bundle. The plaintiff stated his father was cultivating on the land but had left the land under the care of a caretaker who was residing thereon. The plaintiff testified that in March, 2016 the caretaker went home to Bomet and when he returned to the suit property he found his house had been demolished and the land ploughed by some other people who had put up other structures thereon. The plaintiff stated that upon being given the information he visited the suit land and confirmed that indeed some other person had entered the land and when he made enquiry the person stated the land belonged to the 1<sup>st</sup> defendant and that she had ownership documents for the land.
7. The plaintiff stated that he carried out a search at the Lands Office on September 8, 2016 (“PEX 4”) which affirmed that the suit property was still registered in the name of his deceased father. He stated he instructed his Advocates to sue the 1<sup>st</sup> Defendant for eviction. When he later learnt the suit property had been subdivided and/subtitles issued in the names of the 3<sup>rd</sup> to 10<sup>th</sup> defendants he sought amendment of the Plaintiff to join the 3<sup>rd</sup> to 10<sup>th</sup> defendants. He stated he was not aware when the land was being subdivided and did not participate in the exercise. He stated all through the original title in the name of his deceased father was in their possession and custody and had not been surrendered to facilitate the subdivision. The plaintiff stated the Land Registrar was joined to the suit as he was instrumental in issuing title to the 1<sup>st</sup> defendant and thereafter registering the subdivision and issuing the subtitles thereof. The plaintiff averred that the title held by the 1<sup>st</sup> defendant and the resultant titles consequent to the subdivision cannot be genuine as his deceased father held title to the suit property as attested by the records in the Lands Office. The plaintiff prayed that he be granted the prayers sought in the plaintiff.
8. In Cross-examination the plaintiff affirmed that his father died in 1998 and that he had not applied for full succession. He explained that in 2009 he engaged a caretaker to look after the land though he routinely paid a visit to the suit land. He stated when he visited the land in August 2016, he found the 1<sup>st</sup> defendant’s son in occupation. The plaintiff reiterated that his father bought shares from Bartor Kibet who was a shareholder of Kalenjin Enterprises Ltd. He stated he had no agreement to support the assertion that his father bought the shares.
9. The plaintiff in further cross-examination stated that he learnt about the subdivision of the suit land after he had filed the present suit. He said the subdivision was carried out on 29/11/2016.
10. PW-2- Fredrick Kipkirui Bii testified that he was engaged by the Plaintiff as a caretaker over land parcel Miti Mingi/Mbaruk Block 3/246 in 2012 after a neighbor, one Kibet Maloi who was looking after the land died. The witness stated he was residing on the land and was using the house that Kibet Mdoi had been using. The house was a temporary mud house with a mabati roof. The witness stated that in 2016 when he had left the land for sometime he was informed by a neighbor Richard Kimosop that some



people had come and they had occupied the land. He stated he came back and confirmed that indeed some people had occupied the land claiming ownership of the land.

11. The witness further in his evidence stated that he made a report to the Chief regarding the invasion on the land by the other claimants but the Chief advised that the matter be referred to the court for determination of ownership. The Chief advised the plaintiff who was claiming ownership of the land to seek relief from the court. The witness affirmed that he was away from the land between March and May, 2016 and that was the period during which the land was invaded and his house demolished. He explained that he later came to learn that it was the 1<sup>st</sup> Defendant's son who had occupied and cultivated the land on the basis that they owned the land.
12. In Cross examination, the witness clarified that he was not employed by the Plaintiff but was only a caretaker. He was as such allowed by the Plaintiff to cultivate on the land and he was cultivating about 3 acres. The witness stated between 2009 and 2012 he was also cultivating on the land but through Kibet Mdoi. He affirmed he was not residing on the land with his family.

### **The Defendants Case**

13. The defendant, Mary Nyakerario Abuga, testified as DWI. It was her evidence that she was allocated the land by Kalenjin Enterprises after paying for it. She produced as exhibits the payment receipts ("DEX3") and ("DEX 4") and explained that she balloted for the plot and was issued with a ballot paper ("DEX 11"). She testified that she paid the survey fees at the DC's offices and was issued with a clearance certificate ("DEX 7"). She stated she was issued a share certificated by the company ("DEX 9") and was eventually issued with a title deed for the land exhibited as ("DEX 2").
14. The defendant testified that when she balloted for the plot she located the plot on the ground and the Surveyor placed timber beacons to delineate each plot. The defendant further testified that she took possession of the land and commenced cultivation thereon. She stated she acquired title to the land before she subdivided the land amongst her children.
15. In Cross examination, the defendant stated she bought the land from Kalenjin Enterprises. She stated when she was allocated the land it was vacant. She stated her son immediately started cultivating on the land. The defendant stated that when Samuel Kurgat died he was not residing on the suit land but on some land nearby. She stated she does not herself live on the suit land but lived elsewhere. She affirmed it was her children who facilitated the subdivision of the land. The defendant stated she did not know the plaintiff.
16. DW-2- Christopher Kiprono Koech testified that he was a Director of Kalenjin Enterprises. He testified that the 1<sup>st</sup> Defendant was a member of the Company and was allocated land parcel Number 246 as per the ballot ("DEX 5"). He explained that after being allocated, land members were allowed to take possession, cultivate and/or build thereon. The witnesses stated members were required to pay survey fees, land rent and clearance certificate fees. He stated the 1<sup>st</sup> defendant made all the payments as per the receipts exhibited in the bundle of documents. The witness testified further that the Company maintained a member's register. He stated in the abstract of the register exhibited in court ("DEX 10") the 1<sup>st</sup> Defendant's name is indicated as Nyakeirari and not Nyakerario. He maintained the 1<sup>st</sup> defendant was allocated the suit property by the company. He denied any knowledge of the plaintiff stating his name did not appear in their records and neither did the name of Barton Kibet appear. He stated that during the 1980's when balloting for the plots took place he was not a Director but was a member of the Company. He further stated that the members register did not indicate the plot numbers of the members.



17. In cross-examination, DW2 affirmed he had nothing to show that he was a Director of Kalenjin Enterprises and/or any authority from the Company to testify on the Company's behalf. DW-2- however, stated a shareholder of the company could sell his land once the same was allocated to him.
18. DW-3 Erick Munene Nyamu a Principal Land Registrar at Nakuru testified on behalf of the 2<sup>nd</sup> defendant. The Land Registrar testified that as per their records the suit property was first registered on 8/1/2004 in the name of the Government of Kenya and was transferred to the 1<sup>st</sup> Defendant on 18/1/2005 and a title issued to her on 11/3/2005 as per the Green Card. The Land Registrar testified that an allocation list was furnished to the Lands Office against which titles were processed and issued. He affirmed that the register for the suit property was opened in January, 2004 and discounted the possibility that title in respect of the same property could have been issued in 1992. He stated they did not have any records at the Lands Office indicating Samuel Kurgat was the registered owner of the suit property. The Land Registrar tendered in evidence the records held at Lands Office relating to the suit property.
19. In Cross-examination the Land Registrar clarified that they only had one register of allottees of Rift Valley Enterprises Ltd, (Kalenjin Enterprises Ltd) in the office. He maintained as per their records the 1<sup>st</sup> defendant was the registered owner of the suit property which she subsequently subdivided. The Land Registrar stated the Lands Office had no records showing the Plaintiff was the owner of the suit property. The witness upon being shown the copy of certificate of search dated 8/9/2016 exhibited by the plaintiff showing the plaintiff was the registered owner of the suit property stated he doubted the genuineness of the search.
20. The court taking into account the two titles held by the plaintiff and the 1<sup>st</sup> defendant over the same suit property issued at different times (1992 and 2004) sought clarification when the survey of the land was carried out for titling purposes. With the agreement of the parties, the Regional Surveyor was summoned to give evidence relating to survey of the suit property.
21. In response to the summons DW4 Annah Njenga Etale a Surveyor from the Regional Surveyors Office attended court and gave evidence and produced a Registry Index Maps (RIM) but the same was unclear. She was stood down to avail one that was clear and legible. The Regional Surveyor filed a report dated July 19, 2022 to which a clear (RIM) was attached which DW4 presented when she returned to complete giving her evidence. As per the report RIM was first published in 1990 and land parcel No. Miti Mingi/Mbaruk Block 3/246 was included. The witness explained that land parcel 246 was subdivided in September 2016 and land parcels 9631 -9638 were created. She stated the amendment was effected in the RIM to reflect these subdivisions. The witness explained that the same Parcel Number cannot appear twice in the RIM of a section unless there was an error. She further explained that titles are processed after the Director of surveys issues the survey Map to the Land Registrar. The witness testified that as per their records there was no duplication of Parcel 246 that was subdivided in 2016.

### **Analysis, Evaluation and Determination**

22. Following closure of the trial the plaintiff and the 1<sup>st</sup>, 3<sup>rd</sup> -10<sup>th</sup> defendants filed written submissions. The Attorney General did not file any submissions on behalf of the 2<sup>nd</sup> and the 11<sup>th</sup> defendants.
23. I have reviewed and considered the pleadings, the evidence tendered and the parties written submissions. The issues that arise for determination are as follows:-



- i. Who between the Plaintiff 's deceased father and the 1<sup>st</sup> Defendant was the rightful owner of land parcel Miti Mingi/Mbaruk Block 3/246 (now subdivided to create land parcels Miti Mingi/Mbaruk Block 3/9631 to 9638?
  - ii. What reliefs/orders should the Court grant?
24. It is evident from both the pleadings and the evidence that both the plaintiffs (through his deceased father) and the 1<sup>st</sup> defendant, claim ownership of the suit property and each of them held title to the land parcel Miti Mingi/Mbaruk Block 3/246 which however was subdivided in September 2016 at the instance of the 1<sup>st</sup> defendant. The issue for determination is which of the two titles was the valid one. On the face of it the two titles were issued by the Lands Office and apparently relate to the same parcel of land. The plaintiff's title was issued on 2/9/1992 whereas the 1<sup>st</sup> defendant's title was issued on 18/3/2005. The plaintiff and the 1<sup>st</sup> defendant claim to have been allocated the land by Kalenjin Enterprises Company (later renamed Rift Valley Enterprises Ltd). In the circumstances it is necessary for the court to interrogate and evaluate the evidence and the documents to determine which of the two competing titles should be upheld.
25. In a situation such as the present one where the disputants each hold title to the same parcel of land issued at different times, it is necessary to investigate and ascertain how each of the titles was issued to the holder. The process through which the title was issued is vital to establish the root of the title. The burden of establishing the root of a title lies on the person who is putting up the title as proof of ownership. In the present case both the plaintiff and the 1<sup>st</sup> defendant are relying on the titles issued to them to claim ownership of the suit land. Consequently, each of them was bound to explain and demonstrate how they acquired the title they hold.
26. Although the *Land Registration Act*, 2012 provides that the title of a registered proprietor is deemed by Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, the Act nonetheless under section 26(1) provides for instances when a title may be challenged. If the title was acquired fraudulently or through misrepresentation which the person is proved to be a party to or had knowledge of and/or ought by exercise of due diligence to have had knowledge of the fraud, such title would be a nullity. See the case of *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 others* (2015) eKLR. Additionally, if the title is shown to have been acquired illegally, unprocedurally or through a corrupt scheme such title is liable to be nullified.

Section 26(1)(a) & (b) of the *Land the Registration Act* provides as follows:-

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.

It is thus not enough for a party to hoist or waive a copy of the title as proof of ownership. A party must demonstrate the procedure through which he acquired the title. The root of the title that he/she holds must be shown in order for the validity of the title to be established and/or ascertained. The Court of Appeal in the Case of *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR clearly spelt



out the burden that a registered proprietor carries when the propriety of his title is under challenge. The court in the case stated thus:-

“We state that when a registered proprietor’s root of title is under challenge it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

27. In the matter before the court the plaintiff stated his father had purchased the shares held by one Bartor Kibet in Kalenjin Enterprises Company and was as a result allocated land parcel Miti Mingi/Mbaruk Block 3/246 in respect of which he processed and was issued a title on 2/9/1992 (“PEX 3”). The Plaintiff did not produce any agreement of sale between himself and the said Bartor Kibet nor did he produce any documents from Kalenjin Enterprises Company to evidence such a transaction. There was no evidence of membership in the Company either by the said Bartor Kibet or the Plaintiff’s deceased father adduced by the Plaintiff. The Plaintiff merely relied on the title he held over the suit property. The registration of the Plaintiff as the proprietor does raise some issues. The search certificate dated 8<sup>th</sup> September, 2016 on the suit property was disowned by the Land Registrar when he testified. The Land Registrar maintained that at the Lands office they had no records showing the plaintiff’s deceased father was at any time registered as the owner of the suit property. The Land Registrar produced the green card of the suit property that showed that the suit property was first registered in the name of the Government of Kenya on 18/1/2004 before being transferred to the 1<sup>st</sup> defendant’s name on 18/1/2005 and title issued to her on 11/3/2005. The Green Card shows that the 1<sup>st</sup> defendant subdivided the suit property on 17/10/2016 and created land parcels Nos. 9631 to 9638. The 1<sup>st</sup> defendant had sought and obtained consent to subdivide the suit property from the Land Control Board as evidenced by the letter of consent exhibited in the 1<sup>st</sup> defendant’s bundle of documents. The plaintiff did not exhibit any abstract of title (green card) and it remains a mystery how the search certificate dated 8/9/2016 was obtained if there were no records in the Lands Office. It is instructive that the Land Registrar observed that the search certificate may not have been from their office.
28. The witness called by the plaintiff, Fredrick Kipkirui Bii (PW-2) merely stated he had been engaged as a caretaker by the plaintiff before he was ejected from the land by the agents of the 1<sup>st</sup> defendant. His evidence did not touch on how the land was acquired and does little to illustrate how the Plaintiff acquired the title under challenge.
29. The 1<sup>st</sup> defendant on her part demonstrated how she acquired title to the suit property. the 1<sup>st</sup> defendant exhibited a copy of certificate for shares, copy of an abstract of members list for Kalenjin Enterprises, copies of payment receipts for survey and clearance certificate and copy of ballot paper for Plot No. 246 (Barut). The 1<sup>st</sup> defendant also exhibited a copy of a Search Certificate dated 20/4/2016 that showed she was registered as owner of the suit property on 18/1/2005 and issued title on 3/11/2005. The area list furnished to the Land Registrar by Rift Valley Enterprises Ltd for processing and issuance of titles showed that the 1<sup>st</sup> defendant was the allottee of Plot No. 246 Miti Mingi/Mbaruk Block 3 measuring approximately 3.0 Acres. The Land Registrar clarified that this was the list that the Lands Office used to process and issue title deeds to the allottees of the Company. The green card produced by the Land Registrar confirmed that the 1<sup>st</sup> Defendant was the first registered owner after the Government ceded ownership to the beneficiaries as identified by the Company.
30. Upon evaluation of the evidence it is my finding that the plaintiff did not demonstrate the process and/or procedure he used to obtain title to the suit property. The copy of the transfer exhibited by



the plaintiff is undated and even though it indicated it was to be executed by the Commissioner of Lands as the Transferor, it was not executed. The transfer indicates it was drawn by the Land Registrar Nakuru but nothing else was exhibited to support the transfer. The suit property was comprised in land owned by Rift Valley Enterprises Ltd and they ought to have executed the transfer as Transferors to their members. The land was not Government land so that the Government would have been the one to make the allotments. The Government of Kenya who are shown to be registered as the first owners of the land were only so registered to hold as Trustees following the surrender of the mother title for purposes of subdivision and issue of individual titles to the members of the Company who had been allocated land by the Company. It is for that reason that the Company had to furnish the Land Registrar with the certified list of allottees for title preparation and issue of title deeds to the individual allottees.

31. I am in the premises satisfied that the 1<sup>st</sup> defendant used due process to acquire title to the suit property. The Plaintiff did not prove that he was a member of Kalenjin Enterprises Company (Rift Valley Enterprises Ltd) and therefore entitled to be allocated land. The Land Registrar did not have any authority and/or mandate to allocate land belonging to the company. In my view the title issued to the Plaintiff's deceased father was issued unprocedurally and is invalid. It is no wonder there are no records at the Lands Office to support the issue of the title to the plaintiff's deceased father. The title is a nullity and ought to be cancelled.
32. Having come to the finding that the plaintiff's deceased father did not obtain title to the suit land procedurally, I make the determination that the title held by the plaintiff is invalid and the same is hereby ordered to be cancelled. The 1<sup>st</sup> defendant in the court's view held the valid title to the suit property and properly caused the same to be subdivided to create land Parcels Miti Mingi/Mbaruk Block 3/9631 to 9638. Hence as between the Plaintiff's deceased father and the 1<sup>st</sup> defendant, the title held by the 1<sup>st</sup> defendant in regard to the suit property was the valid title.
33. The upshot is that the plaintiff has failed to prove his case on a balance of probabilities. The plaintiff's suit is hereby dismissed with costs to the defendants.

Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF MARCH 2023.**

**J. M. MUTUNGI**

**E.L.C - JUDGE**

