



**Nyamu v Marungo (Environment and Land Case Civil Suit
19 of 2018) [2023] KEELC 16699 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND CASE CIVIL SUIT 19 OF 2018
EC CHERONO, J
MARCH 21, 2023**

BETWEEN

JULIUS NJIRAINI NYAMU PLAINTIFF

AND

HENRY MBURU MARUNGO DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit against the defendant seeking the following reliefs;
 - a. A decalartion that the subdivision of land parcel no. Inoi/Kamondo/1943 and the subsequent transfers of all the resulting numbers in favour of the defendant was fraudulent, illegal and the same be revoked.
 - b. An eviction order be issued against the defendant either by himself, his agents or any other person claiming any right through him in land parcel no. Inoi/Kamondo/1943.
 - c. The court be pleased to issue a permanent injunction restraining the defendant either by himself, his agents, invitees, workmen and or servants entering and or interfering with land parcel no. Inoi/Kamondo/1943
 - d. Costs of the suit and interest.
2. It is averred that the defendant, then a District Surveyor, Kirinyaga County was contracted to sub-divide land parcel Inoi/Kamondo/1986 by the family of Nyamu Kiura(deceased) and thereafter transfer the respective sub-divisions to the beneficiaries in return for half an acre parcel of land in settlement of his fees. The plaintiff further averred that the land was sub-divided into 4 parcels and together with his mother Rossy Micere were registered as joint owners of land parcel Inoi/ Kamondo/1943 which was a resultant of the subdivision.



3. The plaintiff also averred that after engaging his services, the defendant offered him a job as a caretaker in his farm and while working as such, he demanded from the defendant to be given the title deed for his parcel of land in vain. He thereafter left his employment and upon conducting a search at the land's registry, he found that the suit property had been closed for subdivision into 2 parcels to wit; Inoi/Kamondo/2081 and 2082. He also learnt that Land parcel Inoi/Kamondo/2081 was further subdivided into land parcels No. Inoi/Kamondo/2071 and 2172 which were later transferred in favour of the defendant.
4. As a result of the aforesaid, the plaintiff therefore avers that the subdivision of land parcel Inoi/Kamondo/1943 and the subsequent transfer was fraudulent, illegal and ought to be cancelled and the register corrected.
5. The defendant entered appearance and filed his statement of defence denying the plaintiff's claim and averred that on 6/12/1997, he bought a portion of land measuring 0.5 acres out of land parcel Inoi/Kamondo/1943 from the plaintiff and his mother and paid the sum of Kshs 27,000/=. The said parcel was then subdivided into Inoi/Kamondo/2081 and 2082, the latter being the defendant's portion while the plaintiff and his mother retained the former.
6. It is further stated that after the said purchase and by a further agreement dated 12/11/1998, the defendant bought a portion measuring 0.16 Ha from both the plaintiff and his mother which parcel was to be excised from Inoi/Kamondo/2081 and he paid the sum of Kshs 28,000/-. As a result of the purchase, land parcel Inoi/Kamondo/2081 was sub-divided into Inoi/Kamondo/2171 and 2172, the former being retained by the plaintiff and his mother while the latter went to the defendant.
7. He further averred that on 20/10/1999, he again purchased a portion measuring 0.06 Ha from land parcel Inoi/Kamondo/2171 and he paid a consideration of Kshs 25,000/= but because the land could not support further subdivision, the parties agreed to consolidate land parcel Inoi/Kamondo/2171 with the 0.06 Ha with the intention of later apportioning between themselves. The plaintiff and his mother later ceded ownership of the entire portion to the defendant for the sum of Kshs 75,000/= and an agreement was drawn to that effect. The defendant thus denies the particulars of fraud alleged against him.
8. Julius Njiraini who is also the plaintiff testified as PW-1 and stated that the defendant had used his position of influence in the lands registry to fraudulently subdivide and transfer to himself land belonging to them without his knowledge and or consent. He asked the court to order the land be reverted back to the original land parcel number Inoi/Kamondo/1943.
9. In cross examination, he stated that they had not preferred any complaint to the law enforcement offices, and that he did not know how the agreement was written since he does not know how to read and write.
10. The defendant testified as DW-1 and his testimony was that he bought the suit parcels of land from the plaintiff and his late mother in 1997 and that he had taken possession in the same year and has undertaken substantive developments thereon where he lives with his family. He stated that the plaintiff executed the transfer documents and had even lodged a complaint with the police who did not charge him.
11. In cross examination, he stated that he bought land parcel Inoi/Kamondo/1943 on 6/12/1997 from the plaintiff and his mother. He denied taking advantage of the plaintiff to transfer the land and that from the documents produced in court, the consent to transfer is missing. He insisted that the plaintiff was his friend and he had assisted him when he had been imprisoned.



12. The parties also filed written submissions. The plaintiff submitted on two issues to wit; whether the defendant fraudulently acquired and subdivided land parcel Inoi/Kamondo/1943 and; whether the plaintiff should be granted the orders sought in the plaint.
13. On the first issue, counsel submits that the plaintiff has established fraud on the part of the defendant in that the registered proprietor of land parcel Inoi/Kamondo/1886, one Nyamu Kiura(deceased) died on 26th November, 1996 and the said parcel of land was closed for subdivision on 7/1/1997 to create 3 different parcels of land. That the green card does not show that succession proceedings had been undertaken at the time of subdivision and the same amounted to intermeddling with the deceased's estate contrary to section 45 of the [Law of Succession Act](#).
14. It is also submitted that the defendant failed to produce the necessary statutory documents including the land control board consent authorizing the subdivision and transfer and that the defendant therefore used his position and influence as the surveyor to further his fraudulent activities. In this regard, counsel relies on the authority in [Zacharia Wambugu Gathimu & another v John Ndung'u Maina](#) (2019)eKLR.
15. On the second issue, it is submitted that since the plaintiff has established fraud in the process of subdivision and transfer of land parcel Inoi/Kamondo/1943, the court ought to declare the subdivisions fraudulent and illegal and a cancellation of the resultant subdivisions.
16. On the defendant's part, the following issues were identified as being germane to the suit; whether the plaintiff has locus standi to institute the suit, whether the plaintiff's suit is time barred, whether the plaintiff is guilty of laches and finally whether the plaintiff should be granted the prayers sought in the plaint.
17. On the first issue, the defendant submits that by the time the plaintiff instituted this suit, his father, the original registered owner was long dead and he was therefore legally required to first obtain limited letters of administration to enable him file the suit. That the defendant did not know that the said Nyamu had passed on. In this regard, counsel relied on the case of [Hawo Shanko v Mohamed Uta Shanko](#) (2018)eKLR.
18. On the second issue, it was submitted that the land in dispute was subdivided in the year 1998 and this suit was filed in 2018, approximately 20 years after the said subdivision. That the plaintiff knew all along that the defendant was residing thereon and the suit therefore contravenes the provisions of section 7 of the [Limitation of Actions Act](#)
19. On the third issue, it is submitted that since the suit was filed out of time and without capacity/locus, the same ought to be dismissed with costs.

Analysis and determination

20. Having considered the matter herein, it is my view that the following issues commend themselves for determination.
 - a. Whether the plaintiff has the locus standi to institute this suit?
 - b. Whether the suit is time barred?
 - c. Whether the process of subdivision of land parcel No. Inoi/Kamondo/1886 into new resultant parcel No. Inoi/Kamondo/1943, 1944, 1945 &1946 and the transfer of the subsequent portions aboveboard, in the alternative, whether the process was marred by fraud,illegalities and/or irregularities.



- d. The appropriate orders to be granted in the circumstances.
21. Where in his pleadings a party raises a point of a preliminary nature in law and gives intention to raise the same at the earliest opportunity, such a preliminary point shall to be taken at the first business during the hearing of the case. The defendant in his testimony admitted being a beneficiary of subdivisions of land sold to him by the plaintiff and his mother Rossy Micere(deceased). The defendant also admitted that at the time of the alleged purchase, subdivision and transfer of the portions he bought, he did not know that Nyamu Kiura(deceased) had passed on. From the issues raised for determination, I now deal with the issues in the chronology framed as follows;

(a) Whether the plaintiff has locus standi to institute this suit?

22. I have looked at the proceedings in this suit and find that the plaintiff in his affidavit sworn in support of a Notice of Motion dated June 24, 2021 and marked JNN1 had annexed a copy of grant of Administration issued *vide* Kerugoya Succession Cause Number 68 of 2020. In that application, the plaintiff was seeking for orders *inter-alia* that Mwangi Nduma Gichuru, Muriuki Komba, Benson Gichobi Muthai, and Bernard Kathanga Ngungi be joined as parties in this suit. At paragraph 3 of his affidavit, the plaintiff deposed as follows;

“That I have obtained limited Grant of letters of Administration over the Estate of Nyamu Kiura(Annexed hereto and marked “JNN1” is a copy of the Grant of letters of Administration issued *vide* Kerugoya Succession Cause Number 68 of 2020). Though the Grant was issued after this suit was, this Honourable court is also a court of equity and has discretion to consider as done that which ought to have been done. For those reasons, I find that the objection by the defendant that the plaintiff has no locus is not upheld and the same is out for rejection. In any event, the defendant is a beneficiary of the suit properties which he purported to have purchased from the plaintiff. By analogy, the suit properties bought by the defendant from the plaintiff without grant of letters of Administration is null and void and therefore liable for impeachment.

(b) Whether the suit is time barred?

23. Section 7 of the *Limitation of Actions Act* states;
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, if it first accrued to some person through whom he claims, to that person.”
24. The provision of the law as cited herein above only applies where the party in which the right of action accrued has knowledge of the date the alleged right accrued or crystalized. The plaintiff at paragraph 5 of the Amended plaint averred as follows;
- “5. The 1st defendant was hired by the family of Nyamu Kiura(deceased) to subdivide land No. Inoi/Kamondo/1886 and further transfer to respective beneficiaries and in return be given a half an acre to settle his survey fees and transfer fees and the fees for instituting the Succession proceedings for the estate of the deceased Nyamu Kiura.”
25. Again at paragraph 15, the plaintiff averred that the subdivision of the suit parcel No. Inoi/Kamondo/1886 and subsequent transfer of the resulting numbers in favour of the defendants was illegal and fraudulent. The particulars of fraud are set out in paragraph 16 thereof. In this regard, I find that section 7 of the *Limitation of actions Act* does not apply.



(c) Whether the process of subdivision of land parcel NO. Inoi/Kamondo/1886 into new resultant NO. Inoi/Kamondo/1943, 1944, 1945 & 1946 marred by fraud, illegalities and irregularities, In the alternative, whether the process of subdivision of land parcel NO. Inoi/Kamondo/1886 and subsequent transfer and issuance of Title documents marred by fraud, illegalities and irregularities??

26. The plaintiff in his plaint amended on 18/6/2021 averred that the 1st defendant was engaged by the family of Nyamu Kiura(deceased) to subdivide land parcel No. Inoi/Kamondo/1886 and further transfer to the respective beneficiaries in return for 1/2 acre to settle the legal charges for the succession proceedings for the estate of Nyamu Kiura(deceased), survey and transfer fees. He further averred that after the 1st defendant collected all the relevant documents from the beneficiaries of Nyamu Kiura(deceased), he failed to institute succession proceedings and went ahead to subdivide, transfer and issue Title deeds of the suit land to strangers and not the rightful beneficiaries. On his part, the defendant in his testimony stated that he bought the suit land from the plaintiff and his mother who is now deceased. He referred to his witness statement dated 29/5/2018 which he asked the court to adopt in his evidence. He also produced the documents contained in his list of documents dated the same day as D-exhibit no. 1,2,3,4,5,6,7,8,9 & 10 respectively. On cross-examination, the defendant stated that he came to know Nyamu Kiura(deceased) when his neighbor and friend Stephen Mugo Toto was buying land from him in the year 1996. He admitted that when he bought land from the plaintiff, the said Nyamu Kiura(deceased) had passed on. He also admitted that he is aware of the statutory requirements before a transfer is effected. Where the process of acquisition of a Title deed has been put into question, it is not enough for the proprietor of the impugned Title to dangle the very same document of Title under attack. I have considered the testimony of the plaintiff and the documents produced in evidence. The green card for land parcel No. Inoi/Kamondo/1886 indicates that Nyamu kiura I/D 495195/67 was first registered as proprietor on 15/10/96. The second entry was on 8/8/1997 where the Title was closed on subdivision and new Numbers created being parcel No. Inoi/Kamondo/1943, 1944, 1945 & 1946. He stated that the said subdivision was done without their knowledge and that one of the resultant portions L.R No. Inoi/Kamondo/1943 was registered jointly in his name and that of his late mother Rossy Micere Komba. The plaintiff further stated that on November 26, 1996, their father Nyamu Kiura(deceased) died and the suit land was subdivided and new numbers created being L.R Inoi/Kamondo/1943, 1944, 1945 & 1946. He further stated that the said new resultant parcels were done without Succession proceedings being undertaken and without seeking and obtaining consent to subdivide and transfer from the land control board. Despite raising those concerns in his Amended plant, the defendant did not make efforts to produce copies of the transfer forms duly filled containing the passport size photographs, the Personal Identification numbers from KRA, the stamp duty payment receipt and the consent from the land control board. These are crucial statutory documents without which the process of subdivision and transfer become marred by fraud, illegalities and irregularities and all documents of Title issued thereafter become null and void abinitio.

(d) The appropriate orders to be granted in the circumstances?

27. It is not in dispute that the original subject matter of this suit is land parcel No. Inoi/Kamondo/1886. It is also not in dispute that the registered proprietor of the said land parcel No. Inoi/Kamondo/1886 was one Nyamu Kiura(deceased) who died on November 26, 1996. It is not in dispute that the said land parcel No. Inoi/Kamondo/1886 was closed on subdivision on 7/1/1997 and new resultant parcel numbers issued being Inoi/Kamondo/1943, 1944, 1945 & 1946 respectively. It is also not in dispute that at the time of the purported subdivision on 7/1/1997, no grant of letters of Administration had been issued for the estate of the registered proprietor, Nyamu Kiura(deceased)



28. From the Sale Agreements produced by the defendant as exhibits in his defence case, it is clear that he was purchasing resultant parcels from the original land parcel NO. Inoi/Kamondo/1886. The vendors/Sellers of the said resultant parcels are the plaintiff and his mother Rossy Micere Komba(deceased). It is not in dispute that the plaintiff and his Mother Rossy Micere Komba had not obtained grant of letters of Administration to transact on the estate of a deceased person.
29. It therefore follows that when land parcel No. Inoi/Kamondo/1886 was closed for subdivision and new resultant parcels created, no succession proceedings had been filed in respect of the estate of Nyamu Kiura (deceased). It is therefore my finding that the four new resultant Titles created from subdivision of land parcel No. Inoi/Kamondo/1886, being Land parcels No. Inoi/Kamondo/1943, 1944, 1945 & 1946 were improperly acquired and liable to be impeached.
30. Section 45 of the [Law of Succession Act](#) provide as follows;
- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
2. Any person who contravenes the provisions of this section shall
- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
31. From the sale Agreements produced as exhibits by the defendant herein, it is clear that the subject of the sale are resultant parcels from the subdivision of land registered in the name of Nyamu Kiura(deceased) long after his demise being land parcel No. Inoi/Kamondo/1886. It is worth noting that the purported subdivision was also done without the consent from the land control board.
32. Section 26 of the [land Registration Act](#) No.3 of 2012 provide as follows;
- “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.”
33. From the above provisions of the law, it is clear that a certificate of title is a factor of production jealously guarded and the law provides only two ways of impeaching the same. The first is where the title is



obtained by fraud and 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. The interpretation of that section was put into perspective in the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another* (2013) eKLR where Munyao J (as he then was) held;

“---First, it needs to be appreciated that section 26(1)(b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

34. I entirely agree with the decision by the learned judge. Having found that Nyamu Kiura (deceased) was still the registered proprietor of land parcel No. Inoi/Kamondo/1886 on 7/1/1997 when the same was purportedly subdivided into new resultant parcel No. Inoi/Kamondo/1943, 1944, 1945 & 1946 and having found that the purported subdivision was done without a grant of letters of Administration being obtained, it follows that the said titles and all the subsequent resultant titles therefrom are impeachable and liable to be cancelled under section 26(1) (a) and 26(1)(b) for being obtained on grounds of fraud and misrepresentation. The plaintiff has also proved that the titles were acquired by the defendant by illegally, unprocedurally or through a corrupt scheme. For avoidance of doubt, the subdivision of land parcel No. Inoi/Kamondo/1886 being LR No. Inoi/Kamondo/1943, 1944, 1945 & 1946 and all subsequent subdivisions and transfers are also null and void and liable to be cancelled.
35. The upshot of my findings is that the plaintiff has proved his claim on the required standard. In the result, I enter judgment as follows;
 1. A declaration that the subdivision of land parcel Number Inoi/Kamondo/1886 and subsequent transfers of all the resulting numbers in favour of the defendant is fraudulent, illegal and the same is hereby cancelled
 2. An order directing the land Registrar, Kirinyaga county to rectify the register by cancelling all resultant titles from the subdivision and transfer of land parcel No. Inoi/Kamondo/ 1943, 1944, 1945, & 1946 and all subsequent subdivisions and transfers being land parcel No. Inoi/Kamondo/2081, Inoi/Kamondo/2171, Inoi/Kamondo/2172, Inoi/Kamondo/3070, Inoi/Kamondo/3071, Inoi/Kamondo/3072, Inoi/Kamondo/3073, Inoi/Kamondo/3042, Inoi/Kamondo/4255, Inoi/Kamondo/3110, and Inoi/Kamondo/3111
 3. The land Registrar Kirinyaga County to issue a new title deed in favour of Nyamu Kiura, the original registered proprietor (deceased) to be dealt with in accordance with the *law of succession Act*.
 4. An order of eviction is hereby issued against the defendant either by himself, his agents, servants employees or any other persons claiming through him from land parcel No. Inoi/Kamondo/1886
 5. A permanent injunction be and is hereby issued restraining the defendant by himself, his agents, servants, employees, invitees and or workmen from entering and/or interfering with land parcel No. Inoi/Kamondo/1886
 6. The defendant shall bear the costs of this suit plus interest at court rates.



READ, SIGNED AND DELIVERED AT BUNGOMA VIRTUALLY THIS 21ST MARCH, 2023

HON. EC CHERONO

JUDGE

In the presence of;

Mrs Githaiga holding brief Mrs Makworo for Plaintiff

M/s Wanjiru for Defendant

Joy C/A

