



REPUBLIC OF KENYA



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**Akute v Ngigi & 2 others (Civil Suit 197 of 2017)
[2023] KEELC 16984 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
CIVIL SUIT 197 OF 2017
MN GICHERU, J
APRIL 27, 2023**

BETWEEN

SAMSON TEELA AKUTE PLAINTIFF

AND

KENNETH J. KAMAU NGIGI 1ST DEFENDANT

TWFORD CERAMICS COMPANY LIMITED 2ND DEFENDANT

**ATTORNEY GENERAL (FOR AND ON BEHALF OF AND AGENT FOR
THE GOVERNMENT OF THE REPUBLIC OF KENYA/ MINISTRY OF
LANDS HOUSING AND URBAN PLANNING/THE NATIONAL LAND
COMMISSION 3RD DEFENDANT**

JUDGMENT

1. The Plaintiff seeks the following reliefs against the Defendants.
 - d. A declaration that the Plaintiff's title deed given to the Plaintiff by the Kajiado District Land Registrar on August 14, 1997 is the only genuine one relating to the suit land known as Kajiado/Dalalekutuk/1320, and that the suit land belongs to the Plaintiff as the only absolute registered proprietor and not Kenneth J Kamau Ngigi.
 - e. A declaration that the "title deed" in the names of Kenneth J Kamau Ngigi is fraudulent, illegal, null and void, ab initio, and the same must be cancelled and the first Defendant be deregistered as the absolute or otherwise proprietor of the suit land.
 - f. A mandatory order to the Kajiado District/County Land Registrar to reinstate the Plaintiff as the only registered absolute proprietor and to deregister and or cancel the registration of the 1st Defendant as the absolute proprietor of the suit land.



- g. An order directed to the County Police Commander, Kajiado County to assist in the enforcement and compliance of the order herein as appropriate and as shall be necessary.
- h. Damages against the 1st, 2nd and 3rd Defendants jointly and severally for trespass.
 - i. Special damages (to be quantified) and interest thereon at court rates.
 - j. General damages and interest thereon at court rates.
- k. Costs of this suit and interest thereon at court rates from the date of judgment till payment in full.
- l. Any other further orders that, in the interest of fairness and justice, this court shall deem fit and appropriate to grant in favour of the Plaintiff.

This is as per paragraph 26 of the plaint dated July 25, 2016. Prayers (a), (b) and (c) were temporary in nature.

2. The Plaintiff's case is as follows. He is the registered owner of the suit land which measures 24.3 hectares. He purchased it from Noah Ole Nkai through one Sammy Kibet Kitur and he became the registered owner on August 14, 1997. Since then, the Plaintiff has never sold the land to any person. He has never met any of the Defendants or had any dealings with any of them.
3. Soon after purchasing the suit land, the Plaintiff fenced it, built some culverts to improve access, bought some livestock and gave them to Johson Katepi Ole Mpoke who put them together with his herd. He then allowed Mpoke to graze their joint herd on the suit land as he acted as caretaker thereof. The land was uncultivated and virgin.
4. The Plaintiff was introduced to Noah Ole Nkai by both Ole Mpoke and John Mwishu Mwatu who was the Kajiado District Works Officer at the time. He bought the suit land for Kshs 4.2 million at the rate of Kshs 70,000/- per acre. He got the money from his farming activities in Trans Nzoia County.
5. Everything was alright with the Plaintiff's land until he was called by Ole Mpoke who told him that there was heavy Machinery on the land engaged in heavy excavation and carting away of soil. All this was surprising to the Plaintiff who travelled from Kitale to the suit land and experienced the spectacle first hand.
6. Investigations by the Plaintiff and his counsel revealed that the Kajiado Land Registry did not have any records of his registration of the suit land. Instead he learnt to his chagrin that the first Defendant Kenneth J Kamau Ngigi was the registered owner of the suit land according to the records at Kajiado Land Registry. This was very surprising because the first Defendant was a total stranger to him and the two had not met before this.
7. According to the Plaintiff, the first Defendant is not a genuine owner of the suit land. Any claim by him or any other person to the suit land is fraudulent, null and void. The land records at Kajiado Land Registry ought to reflect the Plaintiff as the only true and genuine owner of the suit land.
It is for this reason that he filed this suit seeking nine prayers and others, some of which have been allowed, albeit with some amendment.
8. In support of his case, the Plaintiff filed the following evidence.
 - i. Witness statements by himself, Gideon Ole Nkai Noah, Johnson Katepi Ole Mpoke, Sammy Kibet Kitur, Philip Kang'ethe Kisenya, Timothy Otieno Awuor, Joel Odhiambo Akumu, Engineer John Mwishu Mwatu and John Ondigo.



- ii. Copy of consent by Purka Land Control Board dated April 24, 1996.
 - iii. Certified copy of presentation book from Kajiado Land Registry for May 29, 1996, August 18, 1997 and May 28, 1996.
 - iv. Copy of title deed in the names Samson Teela Akute.
 - v. Copy of title deed in the names Kenneth J. Kamau Ngigi.
 - vi. Copy of mutation form for Kjd/dalalekutuk/616.
 - vii. Copy of letter from Government Printer dated July 22, 2016 signed by John Ondigo for Government Printer.
 - viii. Other relevant documents.
9. The first Defendant in a written statement of defence dated September 15, 2016 denies the Plaintiff's claim in its entirety. He avers that proper procedures for his purchase of the suit land commenced in December 1995 and culminated in his registration as the owner of the suit land on May 29, 1996. He bought the suit land from the late Noah Melita Ole Nkai, now deceased, at Kshs 1, 480, 000/- and was issued with a title deed. He adds that he took possession on purchase and there has never been a third party including the Plaintiff on the suit land since the date of purchase.
- He concludes by saying that after May 29, 1996, the deceased lacked capacity to sell the suit land to the Plaintiff after having sold it to him for valuable consideration. He therefore called for the dismissal of the Plaintiff's suit with costs.
10. In support of his case, the first Defendant filed the following evidence.
- i. Copy of his undated witness statement but filed on August 8, 2017.
 - ii. Copy of title deed for the suit land dated May 29, 1996.
 - iii. Copy of transfer form for the suit land dated May 29, 1996.
 - iv. Copy of witness statement by Moses Osikishoi Ole Rorua dated December 20, 2017.
 - v. Other relevant documents.
11. The second Defendant in a written statement of defence dated September 29, 2017 denies the Plaintiff's claim against it especially the allegations of fraud. It avers that before purchasing the suit land, it undertook the necessary due diligence at the Land Registry at Kajiado and confirmed that the first Defendant was the registered proprietor of the land.
12. In addition to the above, the second Defendant adds that on January 2, 2016, it erected a signboard on the suit land which was prominently displayed notifying the public that it was buying the land and no objection was ever raised. It therefore denies any wrong doing on its part and avers it is completely innocent to the allegation of fraud. It calls for the dismissal of the Plaintiff's case with costs.
13. In support of its case, the second Defendant filed the following evidence.
- i. Witness statement by Li Ruigin, Jeremia V. Otieno Muga, Eric Nduhiu, and Nelson Bosuben.
 - ii. Copy of sale agreement between the first and second Defendants dated December 23, 2015.
 - iii. Copy of deed of variation dated May 26, 2016.
 - iv. Copy of certificate of official search dated December 1, 2015 and January 13, 2016.



- v. Copy of photograph of the signboard erected on the suit land on January 2, 2016.
 - vi. Other relevant documents.
14. The Honourable the Attorney General filed a written statement of defence dated December 8, 2016 in which the Plaintiff's claim is denied. In addition, the Attorney General filed the following evidence.
- i. Witness statement by ND Nyambaso, Principal Land Registrar, Gordon Ochieng Assistant Director, Land Administration, JN. Kariuki of CID Headquarters and Amos Ngenyi.
 - ii. Certified copy of title deed for the suit land issued on May 29, 1996 to the first defendant.
 - iii. Copy of letter of consent dated May 14, 1996 issued to Noah M. Ole Nkai to transfer the suit land to the first Defendant.
 - iv. A certified copy of the lease for the suit land in favour of the first Defendant dated April 25, 2016.
 - v. A certified copy of the PPA2 dated March 22, 2016 approving the change of user of the suit land from agricultural to industrial.
 - vi. Other relevant documents.
15. At the trial which lasted from April 25, 2018 to June 28, 2022 the parties and some of their witnesses testified on oath and they were cross-examined by the adverse parties. The parties also produced their documents as exhibits.
16. In total, sixteen witnesses testified in this case. Fifteen of them testified before my predecessor Hon Justice Christine Ochieng. I only heard the evidence of the last witness Mr Gordon Ochieng. I carefully considered all the evidence on record including the witness statements, documents and the testimony of the sixteen witnesses and I find the following facts to be undisputed.
17. Firstly, the Plaintiff is in possession of a title deed for the suit land dated August 14, 1997, a copy of letter for consent for transfer of the suit land dated April 24, 1996 from Noah Melita Ole Nkai, copy of the presentation book from Kajiado Land Registry for August 18, 1997 which captures the transfer of the suit land from Sammy Kibet Kitur to himself and copy of the presentation book for May 29, 1996 which captures the mutation form for LR Kajiado/Dalalekutuk/616 into parcels numbers 1319 and 1320.
18. Secondly, according to the evidence of John Ondigo it is the Plaintiff's title deed that appears genuine while that of the first Defendant does not appear genuine. John Ondigo is an employee of the Government Printer which printed the title deeds in dispute.
19. Thirdly, the family of the common seller of suit land to both the Plaintiff and the first Defendant, testified through Gideon Ole Nkai that the original owner sold the suit land to the Plaintiff.
20. Fourthly, the first Defendant has in his possession a title deed for the suit land dated May 29, 1996, a copy of transfer form for the suit land dated May 29, 1996 and copy of the letter of consent dated May 14, 1996.
21. Fifthly, the second Defendant is in occupation of the suit land.
22. Sixthly, the Plaintiff's application dated July 25, 2016 seeking to injunct the second Defendant from the suit land was dismissed on July 18, 2017.



23. Seventhly, there is an order of inhibition dated July 18, 2017 forbidding any dealings with the suit land pending the hearing and determination of this suit.
24. Eighthly, the Plaintiff's application dated November 25, 2020 seeking the attachment of the second Defendant's property before judgment was dismissed by the court on 16/9/2021.
25. Ninthly, the official records at Kajiado Land Registry show that the suit land was originally owned by Noah M. Ole Nkai who transferred it to the first Defendant on May 29, 1996 who is currently the registered owner.
26. Finally, the first Defendant's application for change of user of the suit land from agricultural to industrial was approved just like his application to convert the land from freehold to leasehold.
27. Counsel for the parties filed written submissions between 22/2/2023 and 12/4/2023 in which they identified many issues for determination in the entire suit.
28. I have carefully considered the submissions by all the learned counsel for the four parties including the law cited therein. I find that the following issues will determine the dispute.
 - i. Which party has the burden of proof in this case and what is the standard of that proof?
 - ii. Who, between the Plaintiff and the first Defendant is the legal owner of the suit land and why?
29. On the first issue, I find that the Plaintiff is the party with the burden of proof in this case. The reason for saying this is that he is the party who would fail if no evidence was adduced in this case. He is neither the registered owner nor is he in occupation of the suit land.

Section 107(1) of the [Evidence Act](#) provides as follows.

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

In this case it is the Plaintiff who desires the court to find in his favour in all the nine prayers mentioned in paragraph (1) of this judgment. He is therefore the one with the burden of proof. The second way to confirm that it is the Plaintiff with the burden of proof is to look at Section 108 of the [Evidence Act](#). It provides as follows.

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side”.

Again, in this case, it is the Plaintiff who would fail if no evidence were adduced because, he is neither in possession of the suit land nor the registered owner thereof and that is why he came to court in the first place. He is the one who initiated these proceedings.

30. As for the second aspect of the first issue, I find that the burden on the Plaintiff is higher than the one required in ordinary civil cases which is on a balance of probabilities. In cases where serious averments like forgery and fraud are made, then a higher statement of proof is required. It is not as high as the one on the prosecution in a criminal case. It is however somewhere between it and the ordinary standard of proof.



In the case of *Ndolo v Ndolo* (2008) IKLR (G and F) 742, the Court of Appeal set out the law on this issue with clarity where it stated as follows.

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a burden of probabilities; but the burden of proof on the respondent was certainly not one beyond reasonable doubt as in criminal cases...”

31. Even though the plaint dated July 25, 2016 does not specifically particularize the incidents of fraud or breach of trust as is required by Order 2, Rule 10(1) (a) of the *Civil Procedure Rules*, the two allegations in paragraph 5(i) and (ii) of the Plaintiff can be deemed to be said particulars. They include:-
- a. Stealing,
 - b. Causing to be stolen,
 - c. Aiding and abetting the theft of the Plaintiff's records of ownership of the suit land,
 - d. Tampering with the said records,
 - e. Destroying the records to erase, distort and or conceal the Plaintiff's ownership.

These were the particulars which the Plaintiff set out to prove on a standard higher than on a balance of probabilities but lower than proof beyond reasonable doubt.

32. Coming now to the issue at the heart of the case, there are three finding in favour of the Plaintiff. The title deed dated August 14, 1997 is not supported by crucial instruments required by the law such as the agreement between the late Noah Ole Nkai and Sammy Kibet Kitur and the one between Sammy Kibet Kitur and the Plaintiff. The Plaintiff is not certain if there were such agreements. Yet under Section 3(3) of the *Law of Contract Act*, all agreements for the disposition of an interest in land must be in writing, signed by all the parties thereto and the signature of each party signing attested by a witness who is present when the agreement is signed by such party.

The Plaintiff is not certain if the necessary consent of the land control board authorizing the transfer of the suit land from Sammy Kibet Kitur to himself was ever obtained. Under Section 6(1) of the *Land Control Act*, any transfer or other dealing of agricultural land which is situated within a land control area is void for all purposes unless the land control board has given its consent.

While still on this ground, there is an undated witness statement by one Amos Mathias Ngenyi filed by the third Defendant on 11/1/2019 which says that it is the first Defendant's title deed that is genuine and not the Plaintiff's. The same statement at paragraph 9 says that it was acceptable then to issue title deeds before the consent of the Land Control Board was given.

At paragraph 8, the statement says that the consent, the transfer and the title deed could all have been issued on the same day. Unfortunately, this witness who is said to be the Land Registrar who issued the first Defendant's title deed did not testify in this case. Being the one who issued the title deed, his evidence on oath would have been crucial in assisting the court in arriving at a just conclusion.

The foregoing points out to the crucial facts that the Plaintiff ought to prove in order to preponderate his case to the required standard.

33. When John Ondigo testified in court on April 26, 2018, he said that the Plaintiff's title deed seemed to him to be genuine while that of the first Defendant was not genuine. When he came under cross-



examination, he said that he was not a forensic documents examiner. He was also not aware if the two competing title deeds were examined by a qualified forensic documents examiner. The evidence of John Ondigo did not resolve which of the two documents is genuine. The evidence required was that of a qualified documents examiner.

34. When the Land Registrar testified on June 15, 2021, he said that the documents appearing in the presentation book may or may not be rejected by the Land Registrar. The appearance of documents in the registration book is therefore not evidence of ownership of the land that is mentioned in the said documents.
35. The Plaintiff relies heavily on the evidence of the family of the late Noah Ole Nkai as proof that he bought the said land. He also relies on the evidence of his colleagues. Unfortunately, his evidence is not firsthand because he relied on others. The most crucial witness Noah Ole Nkai is deceased. Without Ole Nkai's evidence, the Plaintiff is left to rely on circumstantial evidence.

The absence of any certificate of official search to prove that the late Noah Ole Nkai owned the suit land before August 14, 1997 seriously dents the Plaintiff's case. This is more so because of the green card showing that by then, the first defendant was the registered owner of the suit land. Could Ole Nkai have taken the Plaintiff's money and issued him with a title deed that was not supported by official records? Could he have taken advantage of the Plaintiff's peripheral approach to the whole transaction? Had the Plaintiff subjected the first Defendant's title deed and the supporting transfer instrument to forensic examination to authenticate the signature of Noah Ole Nkai, these questions would not arise.

The best evidence has not been adduced and the burden was on the Plaintiff. From the above analysis, it is clear that the Plaintiff has not discharged the burden placed on him by law of proving his case beyond a preponderance of probabilities.

36. Going by the overwhelming evidence adduced by the Defendants, I find that the first Defendant, is the legal owner of the suit land. I also find that the interest conferred by registration under Section 24, and the rights of a proprietor under Section 25 of the *Land Registration Act* have not been disproved by the Plaintiff in this case.
37. Consequently, I dismiss the Plaintiff's suit against the Defendants. Secondly, I vacate the order of inhibition dated July 18, 2017. Finally, I award costs to the Defendants.
38. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF APRIL, 2023.

M.N. GICHERU

JUDGE

