



Munge & another v Commissioner of Lands & 2 others (Environment & Land Case 543 of 2017) [2023] KEELC 17094 (KLR) (26 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 543 OF 2017
MN GICHERU, J
APRIL 26, 2023**

BETWEEN

HARUN MWANGI MUNGE 1ST PLAINTIFF

JAMES MWANGI NJOROGE 2ND PLAINTIFF

AND

THE COMMISSIONER OF LANDS 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, KAJIADO 2ND DEFENDANT

JANE NJERI LEINA 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs' claim against the Defendants is as follows.
 - a. A permanent injunction restraining the first, second and third Defendants whether in person or through their agents, servants, appointees or otherwise from revoking, amending or dealing with the titles or register in any manner detrimental to the Plaintiffs interests, rights or remedies as duly registered owners thereof of LR LTK/Kimawa-Tokondo/4454 and 4455 Kajiado District (suit parcels).
 - b. A permanent injunction restraining the 4th Defendant from deliberating on and issuing consent on the third Defendant's application to the board.
 - c. A declaratory order that the 1st and 2nd Plaintiffs are the rightful owners of the suit land.
 - d. Costs of the suit together with interest thereon at such rate and for such period of time as the court may deem fit to grant.
 - e. Any such other or further relief as the court may deem appropriate. This is as per the amended plaint dated 20/6/2014.



2. The Plaintiffs' case is as follows. In January 2007, one Alexander Ole Leina Lembale who is now deceased and who was the husband to the third Defendant approached the first Plaintiff and requested him to find a person ready, able and willing to buy his land No. LTK/Kimana/Tikondo/295.

The reason for this was that his land was about to be auctioned since he was unable to service a loan that he had obtained from the Agricultural Finance Corporation.

3. The Plaintiffs themselves decided to buy the land. They entered into an agreement for sale of the suit land with the deceased. The said agreement was witnessed by the area chief John Laito and the third Defendant herself. It was to the effect that the Plaintiffs would pay the outstanding loan amount to the AFC and the balance of the purchase price would be paid to the deceased.

The Plaintiffs paid Kshs. 168,800/- directly to AFC Loitoktok Branch on 21/01/2008 vide receipt no. 2096139. The balance of Kshs. 10,960/= was paid directly to the deceased. The land was sold at Kshs. 10,700/= per acre. The total acreage was 16.8 acres.

The total purchase price was Kshs. 179,760/-. When the first agreement was recorded at the chief's office, it was thought that the suit land was 18 acres but when the parties engaged the surveyor, it was found to be 16.8 acres. This explains the existence of two sale agreements.

The two Plaintiffs subdivided the suit land into two parcels numbers 445 and 4445 in the names of the first and second Plaintiffs respectively. Both were issued with title deeds dated 6/3/2008.

4. The third Defendant later claimed that the Plaintiffs do not have title to the suit land. She sought the intervention of the first and second Defendants to prevent the Plaintiffs from enjoying quiet possession of their land. The first and second Defendants have threatened to revoke the Plaintiffs' title deeds. This is the reason why the Plaintiffs filed this suit.

5. In support of their case the plaintiffs filed the following evidence.

- i. Their own witness statements.
- ii. Copy of sale agreement dated 19/11/2007.
- iii. Copy of title deed for LR 4454 in the name of the first Plaintiff.
- iv. Copy of notification of discharge for LR 295 dated 6/3/2008.
- v. Copy of mutation form for LR 295 in the name of Alexander Leina Ole Lembale.
- vi. Witness statement by John Laito dated 2/11/2018.
- vii. Copy of proceedings in Kajiado Criminal Case No. 1370 of 2011.
- viii. Pay in slip for stamps duty dated 7/3/2009.
- ix. Copy of certificate of official search dated 7/12/2011 for LR 4454 in the name of the first Plaintiff.
- x. Copy of report by documents examiner dated 2/11/2012.
- xi. Copy of certificate of official search for LR Loitoktok/Kimana Tikondo/6391 dated 26/8/2021 in the name of the third Defendant.
- xii. Copy of the order dated 28/4/2015.
- xiii. Three copies of photographs showing the suit land.



- xiv. Copy of certificate of confirmation of grant dated 17/4/2013.
6. There seems to be no written statement of defence on record by the first and second Defendants though it is mentioned in the written submissions dated 23/12/2022. There is however a witness statement by David Nyandoro filed on 18/7/2017. In the statement, the witness who was then Land Registrar Kajiado is categorical that the suit parcels have never been registered in the names of the Plaintiffs and officially, their names and their records do not exist in the Land Registry.
- A copy of the green card for LR 295 is attached to the witness statement by the Land Registrar.
7. The third Defendant in a defence dated 22/6/2018 denies the Plaintiffs' claim in its entirety. She denies that her late husband ever obtained any loan from AFC and avers that if there was any agreement of 19/1/2017 then it is fake and fraudulent and, obtained through impersonation. She prays for the dismissal of the Plaintiff's suit. In support of her case, the third Defendant filed a witness statement dated 30/10/2018.
8. At the trial, only the two Plaintiffs and their witness testified. They adopted their witness statements and documents and they were cross –examined by the counsel for the Defendants. The evidence of the Land Registrar was admitted without his testimony. The third Defendant did not testify even though she was given ample opportunity of doing so.
9. Counsel for the parties filed written submissions on 1/2/2023, 16/2/2023 and 22/2/2023 respectively. The following issues were identified by the counsel for the parties.
- i. Whether the orders sought can be enforced by the court.
 - ii. Whether the title deeds for LR 4454 and 4455 were issued procedurally.
 - iii. Whether the second Defendant had the right to cancel the Plaintiffs' title deeds.
 - iv. Whether the Defendants are in breach of the court orders issued on 25/5/2015 and 18/6/2018.
 - v. Whether the Plaintiffs are entitled to the costs of the suit.
10. I have carefully considered all the evidence adduced in this case by the parties. This evidence includes the witness statements, the documents and the testimony in court. I have also considered the submissions by the learned Counsel for the parties, the issues raised therein and the law cited. I make the following findings of fact.
11. Firstly, I am satisfied on a balance of probabilities that the Plaintiffs either jointly or severally paid a total sum of Kshs. 179, 760/- either to the husband of the third Defendant personally or to AFC Loitoktok branch on his behalf. In this regard, I relied on the evidence of the two Plaintiffs which I found credible and consistent. It is also corroborated by the evidence of Chief Laito and documentary evidence on record.
12. Secondly, I find that the two Plaintiffs never occupied the suit land owing to differences between them and the third Defendant. Instead it is the third Defendant and or her assignees who are in occupation of the suit land.
13. Finally, on the findings of fact, I find that officially, the Plaintiffs never got registered as proprietors of the land. This was confirmed by the Land Registrar Kajiado David Nyandoro.
14. Coming now to the issues identified by counsel, I find that the orders sought cannot be enforced for two reasons.



Firstly, the instruments that are a prerequisite to the registration of a person as a proprietor of a parcel of land are nonexistent as relates to the Plaintiffs herein. Such instruments would include a consent of the Land Control Board, a transfer form duly executed by the transferee and the transferor. Evidence from the Agricultural Finance Cooperation is also missing on how the land was transferred to the Plaintiffs.

Secondly, the Plaintiffs are not in occupation of the suit land. Had they been in occupation, the doctrines of constructive trust and proprietary estoppel as enunciated in the case of Willy Kimutai Kitilit v Michael Kibett Civil Appeal No. 51 of 2015 would apply.

15. For reasons already given in paragraph (13) above, the title deeds issued to the Plaintiffs for LR 4454 and 4455 were not issued procedurally.
16. On the third issue, I find since there were no lawful title deeds issued, there was nothing to be cancelled in the first place.
17. On the fourth issue, I find that there was no breach of the orders issued on 25/5/2015 and 18/6/2018 because when they were issued the suit land was not registered in the names of the Plaintiffs.
18. Finally, before I decide on costs, I make a finding that the Plaintiffs are entitled to a refund of Kshs. 179, 600/- paid to AFC and the third Defendant's husband at the time of the agreement for sale of the suit. It would be unjust and unconscionable for the third Defendant to keep her land and the Plaintiffs' money.

In addition to the refund, I direct that the third Defendant pays interest to the plaintiffs at the rate of 14% per annum from the date of the agreement to the date of the refund in full. The Plaintiffs will also have the costs of the suit and interest.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF APRIL, 2023.

M.N. GICHERU

JUDGE

