



**Shung'ea & another v Mutonyi & 6 others (Environment and Land
Case Civil Suit 261 of 2017 & Environment & Land Case 189 of 2017
(Consolidated)) [2023] KEELC 17816 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 261 OF 2017 &
ENVIRONMENT & LAND CASE 189 OF 2017 (CONSOLIDATED)**

MN GICHERU, J

MAY 30, 2023

BETWEEN

**SERAH NOTI SHUNG'EA 1ST PLAINTIFF
DANIEL PITITIK SHUNG'EA 2ND PLAINTIFF**

AND

**ISAIAH MUTONYI 1ST DEFENDANT
ISAAC WANJOHI 2ND DEFENDANT
JULIUS WANJOHI MWANGI 3RD DEFENDANT
FAITH NJERI MWANGI 4TH DEFENDANT
FRED PERTET 5TH DEFENDANT
SIMON MUKURIA MUTHEE 6TH DEFENDANT
MARY WANJIRU KIARIE 7TH DEFENDANT**

JUDGMENT

1. The Plaintiffs' claim against the seven Defendants is as follows.
 - a. A declaration that any purported sale agreements between the deceased John Pasha Parmereta and the Defendants prior to the deceased being registered as owner of L.R. Kajiado/Kitengela/312, suit land, are null, void and unenforceable.
 - b. An order that any subsequent subdivision done on the suit land was obtained fraudulently and they be declared null and void.



- c. An order that the Registrar quashes the subsequent subdivision of the suit land and cancels the respective titles Kajiado/Kitengela/10764, 10765, 10766, 10767, 10768, 10769 and 10770 together with any subsequent subdivision of the aforesaid parcels of land that were fraudulently obtained be declared null and void.
 - d. Costs of the suit.
2. The Plaintiffs case is as follows. The deceased John Pasha resided on L.R. Kajiado/Kitengela/10 which belonged to one Kiparki Tukuyoi Pasha who was the deceased's father. Between 1984 and 1992, the Defendants purported to purchase a portion of L.R. Kajiado/Kitengela/10. This was not possible because the deceased was not the registered owner of the land.
 3. In the year 1992 or thereabout, the deceased became registered as the proprietor of the suit land Kajiado/Kitengela/3127 measuring eighty (80) acres. It was a subdivision of his father's land No. Kajiado/Kitengela/10.
 4. The deceased misplaced or lost his title deed to the suit land and he did not apply for its replacement. In the year 1997, the deceased was involved in negotiations with the Defendants over the sale of the suit land. These negotiations did not bear fruits. However the deceased found out that the Defendants had applied for a fresh title deed to replace the lost one and they had subdivided the deceased's property amongst themselves and fraudulently transferred the same to themselves.
 5. The Plaintiffs discovered this fraud in the year 2007. The fraud left the Plaintiff and her children destitute yet they occupy the suit land.
 6. The Plaintiffs filed a case before the Land Disputes Tribunal but the High Court stayed the tribunal case on the grounds that the tribunal lacked jurisdiction.
 7. The Plaintiffs contend that it is only the first Defendant who had a written sale agreement with the deceased. The rest of the Defendants have no such agreements.
 8. The Plaintiffs' case is based on fraud whose particulars are as follows.
 - i. Purporting to deal with the deceased over land in which he had no transferable interest.
 - ii. Purporting that there was land control board consent when there was none.
 - iii. Purporting to apply for the consent of the Land Control Board more than seven (7) years after the alleged agreement.
 - iv. Transferring the suit land without the knowledge of the deceased.
 - v. Transferring the suit land without the deceased executing the necessary transfer forms.
 - vi. Subdividing the suit land without the knowledge of the deceased.
 9. In support of their case, the Plaintiffs filed the following evidence.
 - i. Witness statement by the first Plaintiff dated 19/6/2018.
 - ii. Witness statement by the second Plaintiff dated 19/6/2018.
 - iii. Copy of limited grant in Nairobi Succession Cause No. 2729/2011 dated 1/2/2012.
 - iv. Copy of certificate of death for John Pasha Parmereta.
 - v. Copy of green card for the suit land with thirteen entries between 8/10/1991 and 29/10/1999.



- vi. Copy of sale agreement dated 21/2/1984.
 - vii. Copy of sale agreement dated 28/2/1992.
 - viii. Copy of letter dated 16/7/2020 from the Director of National Registration.
 - ix. Copy of exhibit memo form dated 29/7/2020.
 - x. Copy of forensic document examination report dated 30/7/2020.
 - xi. Copy of letter dated 12/3/2020.
 - xii. Copy of letter dated 16/3/2021.
 - xiii. Copy of letter dated 16/3/2021.
10. The first and second Defendants, through counsel on record filed a defence and counterclaim dated 2/7/2018 in which they make the following averments.
 11. Firstly, they contend that this suit is fraudulent and aims at reviving fraudulent claims which have been rejected before.
 12. Secondly, the Plaintiffs' claim is barred by the rule in *Obiero –versus- Opiyo* (1972) EA and *Osireyo –versus- Esiroyo* (1973) EA 388 in which it was held all customary claims are extinguished upon registration of land under the Registered [Land Act](#).
 13. Thirdly, neither the deceased nor his legal representatives can lawfully claim property that the deceased transferred to the first and second Defendants.
 14. Fourthly, the suit is bad in law as it is barred by Section 7 of the [Limitation of Actions Act](#) for having been filed 23 years after the sale was completed. The claim is also bad in law because it is based on fraud which is a tort and actions based on tort must be brought within three (3) years from the date of accrual.
 15. Finally, the suit is an afterthought and an abuse of the court process.
 16. It is the contention by the first and second Defendants that they lawfully purchased L.R. Kajiado/Kitengela/10765 registered in the name of the second Defendant and 10766 and 10767 now registered in the name of the first Defendant and because proprietors within the meaning of Section 27 the Registered [Land Act](#) (repealed) and Section 24 of the [Land Registration Act](#).
 17. According to the two Defendants, a registered proprietor of land under the repealed and the current law has the right to sell his or her land without reference to the wife or brother like the Plaintiffs herein.
 18. The Plaintiffs cannot purport to enforce a contract of sale of land to which they are not parties since they have no privity of contract with the first and second Defendants considering that the vendor did not question the contract of sale during his lifetime. To this end, the vendor's children namely Richard Saona and Noti Shung'ea challenged his human autonomy and tried to prevent him from selling his property but the Kajiado Land Disputes Tribunal dismissed their claim.
 19. The Defendants contend that they have been in occupation of the suit land since 1994 and it is only on 18/5/2018 that the Plaintiffs entered a small portion of the suit property. In the counterclaim, they pray that the Plaintiffs be evicted from this portion and that they pay damages for the trespass.
 20. In support of their case, the first and second Defendants filed the following evidence.
 - i. Witness statements by the two Defendants dated 23/7/2018.



- ii. Witness statement by Mr. Emmanuel Kenga, Forensic Documents Examiner.
- iii. Copies of title deeds for L.R. 10767 and 10766.
- iv. Copy of proceedings before the Chief Land Registrar dated 27/10/1999.
- v. Copy of proceedings before Land Registrar dated 16/7/1999.
- vi. Copy of letter dated 18/9/1998 by Land Registrar, Kajiado.
- vii. Copy of mutation for L.R. 3127 dated 23/9/1999.
- viii. Copy of letter by Land Registrar, Kajiado dated 4/2/1995.
- ix. Copy of gazette notice No. 1009 dated 28/2/1997.
- x. Copy of decision by Kajiado Land Disputes Tribunal dated 7/1/2002.
- xi. Copy of notice of attendance to objector dated 7/6/2007.
- xii. Copy of title deed for L.R. 10765.
- xiii. Photographs of the suit property.
- xiv. Copy of OB No. 18/5/2018 of Olosirkon Police Station.
- xv. Copy of an offer of compensation made to the first Defendant dated 3/5/2018.
- xvi. Copy of supplementary witness statement by the first Defendant.
- xvii. Copy of witness statement by David Nyika dated 11/3/2020.
- xviii. Copy of ruling of the Land Registrar dated 16/7/1999.
- xix. Copy of order dated 23/5/2018 by Principal Magistrate Kajiado.
- xx. Copy of ruling by Kajiado Land Disputes Tribunal dated 15/10/2002.
- xxi. Copy of sale agreement dated 16/4/1989.
- xxii. Copy of green card for L.R. Kajiado/Ololoitikoshi/Kitengela/10.
- xxiii. Copy of title deed for L.R. 3127.
- xxiv. Copy of sale agreement dated 15/5/1989.
- xxv. Copy of sale agreement dated 28/4/1992.
- xxvi. Copy of application dated 18/6/2012.
- xxvii. Copy of sale agreement dated 12/11/1992.
- xxviii. Copy of sale agreement dated 27/3/1995.
- xxix. Copy of memorandum of understanding dated 8/4/1994.
- xxx. Copy of receipt dated 25/2/1997 for a new title deed.
- xxxi. Copy of application for consent of the Land Control Board.
- xxxii. Copy of letter of consent for transfer of L.R. 8225 dated 14/7/1998.



- xxxiii. Copy of transfer form for L.R. 8225.
 - xxxiv. Copy of application for consent for transfer of L.R 8226 dated 14/7/1998.
 - xxxv. Copy of consent for transfer of L.R. 8226 dated 14/7/1998.
 - xxxvi. Copy of transfer form for L.R. 8226.
 - xxxvii. Copy of consent for transfer of and transfer form for L.R. 8227 dated 14/7/1998 and 27/4/1998 respectively.
 - xxxviii. Copy of mutation form for L.R. 3127.
 - xxxix. Two photographs of the late John Pasha and the first and second Defendants on the suit parcels dated 10/1/2000.
 - xl. Acknowledgement of receipt of Kshs. 22,970 by John Ole Pasha from the first Defendant dated 16/3/1990.
 - xli. Acknowledgement by John Pasha of Kshs. 571, 000/- dated 18/8/2002.
 - xlii. A bundle of acknowledgment by John Ole Pasha of receipt of various amounts of money from the 1st and 2nd Defendants.
 - xliii. Memorandum of understanding dated 7/7/2000.
 - xliv. Copy of letter by L.S. Sane advocate dated 31/7/2002.
 - xlv. Copy of forensic examination report by Emmanuel Kenya dated 4/5/2021.
21. The third and fourth Defendants through their counsel on record on record filed a written statement of defence dated 25/7/2018 in which they generally deny the Plaintiffs' claim against them.
 22. Secondly, the third and fourth Defendants aver that they are the registered, rightful and legal owners of L.R. Kajjado/Kitengela/22258 and 22259, a subdivision of Kajjado/Kaputiei North/10764.
 23. Thirdly, the two Defendants aver that they were in possession of the suit land until the Plaintiffs herein and the deceased encroached into it in early 2011 which caused them to file Machakos ELC No. 314 of 2011 which is now ELC 189/2017 at Kajjado.
 24. Fourthly, the third and fourth Defendants conclude their defence by saying that they will rely on their pleadings in the related suit.
 25. In suit no. 314/2011 at Machakos, the third and fourth Defendants are the Plaintiffs while Notii, Saoina, Nasha, Richard, Sanoina, Kapara and Ben Pasha all of whom have the surname Parmereta are the Defendants.
 26. In that suit the third and fourth Defendants seek to restrain the above named parties from trespassing upon the suit land namely L.R. 22258 and 22259. They also seek to restrain the same Defendants from causing the remains of Parmereta Pasha from being buried on the land, eviction orders against the Defendants as well as costs.
 27. In the witness statement dated 2/11/2011, the third and fourth Defendants state that they bought L.R. 22258 and 22259 from Winfred Waruguru Mepukori and Kenneth Moipan Mepukori. They obtained the title deeds for the two parcels on 5/9/2006 and 4/10/2007 respectively.
 28. In support of their case, the third and fourth Defendants filed the following documents.



- i. Letter dated 1/7/2010 by the Land Registrar Kajiado referring to a boundary dispute between L.R. 22259, 22258 and 14428.
 - ii. Copies of title deeds for L.R. 22258 and 22259.
 - iii. Copy of certificate of official search dated 30/5/2011.
 - iv. Copy of receipt dated 15/2/2010 for site visit.
 - v. Other relevant documents.
29. In ELC 189/2017, the third, fourth and fifth Defendants filed witness statements and assorted photographs showing permanent and semi-permanent buildings as well as the grave of John Pasha Parmereta. They also filed a written statement of defence dated 3/3/2018 in which they aver that they have always occupied the suit land. They therefore pray for the dismissal of the case by the third and fourth Plaintiffs.
30. David Kadenge Adolwa, Jane Lugalishi Chokaa, Philip Lumadede Adolwa and Robert Kiptanui Kitur sought to join this suit as Defendants vide an application dated 13/8/2018. They are listed as the 8th, 9th, 10th and 11th Defendants.
31. In their written statement of defence, they aver that they are owners of L.R. Kajiado/Kitengela/14428, 14429, 14430, 14431, 14432, 14434 and 14435 which are subdivisions of L.R. 3127. They purchased their land from Fred Pertet who they aver obtained the land lawfully therefore denying any fraud on his part.
32. In support of their defence, the four Defendants filed a total of thirty (30) documents which include agreements for sale of land, copies of title deeds for their parcels, consent of the Land Control Board, copies of transfer instruments, copies of application for the consent of the Land Control Board, replying affidavit by Fred Pertet and other relevant documents.
33. At the trial on 3/2/2022, only the first, second and third Plaintiffs testified by adopting their witness statements and documents. The Plaintiffs and their counsel did not turn up for trial even though they had been duly served. Their application to set aside the proceedings of the day was dismissed for reasons that are already on record. The court however, said that it would consider the evidence filed by the Plaintiffs in its judgment.
34. Counsel for the parties filed written submissions 25/4/2022, 15/8/2022 and 19/12/2022 respectively. In the said submissions the following issues arise.
- i. Which party or parties are in occupation of the suit land?
 - ii. Which parties are the registered owners?
 - iii. Whether consideration was paid to the vendor by the purchasers?
 - iv. Whether John Ole Pasha could have sold land belonging to his father?
 - v. Whether the reports of the forensic documents examiners have any probative value?
 - vi. Who has the burden of proof and what is the standard of that proof?
 - vii. Whether the Plaintiffs suit is bad in law for reviving fraudulent claims that have been rejected before.



- viii. Whether the Plaintiffs can claim through John Ole Pasha who never filed any claim of fraud against the Defendants in his lifetime?
- ix. Whether the suit is time barred under Section 7 of the Limitation of Actions Act for being brought after 12 years.
35. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents, affidavits, annexures and testimonies at the trial on 3/2/2022 and I make the following findings on the issues identified above.
36. On the issue of occupation, I find that the Defendants are in occupation of the suit land except for the small part that the Plaintiffs occupied in 2018 when this case was pending in court. In making the finding, I relied on the plaint filed in court on 20th June, 2012. At paragraph 19 (c), the Plaintiffs pray as follows:-
- “
- “(c) An order that the Defendants vacate the said land parcel”.
The Plaintiffs could not have asked for the Defendants to vacate the land if the Defendants were in occupation.
- The second reason for making this finding is the uncontroverted evidence of the first Defendant that the Plaintiffs invaded a part of the suit land in 2018 and occupied it. I believe this evidence which I find to be unchallenged by any evidence from the Plaintiffs.
37. On the second issue, I find that it is the Defendants who are the registered owners. In making this finding, I have relied on the evidence of the copies of title deeds which the Defendants filed with the exception of the sixth and seventh Defendants who did not file any such evidence. The evidence in form of a certificate of title is prima facie evidence of ownership as per Section 26(1) of the Land Registration Act.
- Secondly, on this issue, since I have already found that the Defendants are in occupation, under Section 116 of the Evidence Act, there is an extra burden placed upon the Plaintiffs of disposing ownership. It provides as follows.
- “When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner”.
- In this case, the Defendants have been shown to have been in possession of the suit land during the lifetime of the previous registered owner. It is incumbent upon the plaintiff to prove that the Defendants are not the owners. This burden is over and above the ordinary burden of proof. This burden is over and above the ordinary burden of proof.
38. Regarding the third issue of whether consideration was paid, there is sufficient evidence in form of agreements and acknowledgments by John Ole Pasha and the Defendants to prove that he received payment for the land that he sold to the Defendants. The evidence is also in form of a bankers cheque. In any event, John Ole Pasha has never denied that he received consideration from the Defendants.
39. On whether Ole Pasha could have sold land belonging to his father before he was registered as the owner of thereof, the answer is yes. Long before the Supreme Court of Kenya held that trusts including customary trusts are overriding interests in terms of Section 28 of the Land Registration Act in the case



of Isack M' Inanga Kiebia –versus- Isack Theuri M' Linturi Petition No. 10 of 2015, we had Section 30(g) of the Registered Land Act (now repealed) which provided as follows.

“ 30: Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

- (g) The rights of a person in possession or actual occupation of land to which he is entitled in right of such possession or occupation, save where inquiry is made of such persons and the rights are not disclosed”.

From the above provision, it is immaterial that the late John Ole Pasha was not the registered owner of the land that he sold to the Defendants. The Defendants' occupation of the land created an overriding interest, superior to the title held by the father to John Ole Pasha.

- 40. On the issue of the reports of the documents examiner, I find that they have little probative value. The Plaintiffs' case is not based on first hand evidence. It is based on hearsay. None of them was a party to the agreements. None of them is a witness to the agreement. The late John Pasha never denied having executed the agreements. It was therefore unnecessary to subject the agreements and the transfer forms and other documents to forensic examination.
- 41. Regarding the party with the burden of proof, I find that it is the Plaintiffs who have the burden. This is because under Sections 107 (I) of the evidence Act it is provided as follows.

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

In this case it is the Plaintiffs who seek the order of revocation of the Defendants registration as owners of the suit land. It is them who bear the burden of proof.

Secondly, the standard of proof is higher than that required in ordinary civil cases because the Plaintiffs have made serious averments of fraud. In the case of Ndolo –versus- Ndolo Civil Appeal No. 128 of 1995 it was held thus:-

“ ...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 balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

- 42. On the issue of the suit by the Plaintiffs being bad in law for reviving fraudulent claims that have been rejected before, I find that it is indeed bad in law. There is evidence all the way from the Land Disputes Tribunal to the Land Registrar Kajiado and the Chief Land Registrar that late John Pasha was unable to prove that the first and second Defendants got registered as proprietors of the suit land unlawfully. Yet the Plaintiffs are litigating over the same issue and claiming under John Ole Pasha who was a party at the Tribunal and who was unable to prove his case against the first and second Defendants.
- 43. The Plaintiffs cannot raise a claim of fraud against the Defendants when the late John Ole Pasha never raised such a claim in his lifetime. They are estopped from doing so.



44. On the final issue of whether the suit is time barred under Section 7 of the *Limitation of Actions Act* for being brought outside the 12 year period, I find that it is not time barred because under Section 26 (a) it is provided as follows:-

“Where, in the case of an action for which a period of limitation is prescribed, either (a) the action is based upon fraud of the Defendant or his agent, or of any person through whom he claims or his agent; the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it ...”

In this case, the action is based on the alleged fraud of the Defendants so time would start running immediately the fraud is discovered and this could well be outside the twelve years.

45. For the reasons stated hereinbefore, I find that the Plaintiffs in Case No. 261 of 2017 have failed to prove their case to the required standard and I dismiss it with costs to the Defendants.

Secondly, I find that the first and second Defendants have proved their counterclaim to the required standard and I enter judgment for them as prayed in the counterclaim.

As regards ELC No. 189/2017, I find that the Plaintiffs have proved their claim against all the Defendants to the required standard. I enter judgment as prayed for in the plaint.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 30TH DAY OF MAY, 2023.

M.N. GICHERU

JUDGE

