



REPUBLIC OF KENYA



KENYA LAW
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**Mwaura v Lemeloi & another (Civil Suit 66 of 2019)
[2023] KEELC 17385 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
CIVIL SUIT 66 OF 2019
MN GICHERU, J
MAY 11, 2023**

BETWEEN

SAMUEL MUTURI MWAURA PLAINTIFF

AND

NAIPAS ENE LEMELOI 1ST DEFENDANT

COUNTY LAND REGISTRAR KAJIADO 2ND DEFENDANT

JUDGMENT

1. The Plaintiff seeks the following reliefs against the Defendants.
 - a. A permanent injunction restraining the first Defendant by herself, her agents, servants, employees or any other person claiming under them from entering, remaining on, trespassing, selling, alienating, charging, learning and/or in any other manner whatsoever dealing with that property known as Kajiado/Kisaju/2787, suit land.
 - b. A declaration that the Plaintiff is the rightful, lawful and legal owner of the suit land.
 - c. An order of the cancellation and or deregistration of the first Defendant as the registered owner of the suit land.
 - d. An order declaring the proceedings, orders and decrees in Senior Resident Magistrate's court at Kajiado Land Dispute Tribunal Case No.11 of 2011 and the award by the Kajiado Central Land Dispute Tribunal made on 22/9/2011 in Tribunal Case No. 670/09/2011 as illegal, null and void.
 - e. Costs of the suit.
 - f. Any other or further relief that the court may deem fit to grant.



2. The Plaintiff's case is as follows. On 13/6/2003 he and the late William Lemeloi Lolkepuny entered into an agreement for sale of ten (10) acres of land which was to be excised from L.R. Kajiado/Kisaju/2271. The purchase price was Kshs. 700,000/- for the ten acres.

At the time of entering the agreement, the seller had received Kshs. 500,000/- from the Plaintiff. The balance of Kshs. 200,000/- was paid on 26/6/2003. The sale agreement was witnessed by Samuel S. Ole Saine. Payment of the purchase price was partly in cash and partly in kind. The last payment was Kshs. 300,000/-. The balance of Kshs. 400,000/- was in form of vehicle registration number KAL 894N, Nissan Caravan.

3. On 24/6/2003, the Plaintiff was registered as the proprietor of the suit land and issued with a title deed on the same date. The land measures 4.05 hectares.

4. In August, 2012, the Plaintiff conducted a search and he confirmed that the suit land was in his name. However, about two years later, on 19/9/2014, he conducted another search and found that the land was in the name of the first Defendant. The transfer had taken place on 12/5/2014 and the title deed issued to her on 20/5/2014.

5. On inquiry at Kajiado Land Registry, the Plaintiff found out that the change in registration had occurred pursuant to a court order issued in Land Case No. 111/2011 at Kajiado Magistrates' Court. This had followed a decision of the Kajiado Land Disputes Tribunal that had cancelled the Plaintiff's title to the suit land and ordered that the first Defendant be registered as the new owner of the same. The Plaintiff learnt that the first Defendant is the wife of William Lemeloi who had sold him the land.

A visit to the land confirmed that it was vacant with no occupation. The Plaintiff reported the matter to the police who registered a restriction thereto. He also instructed his counsel on record to file this suit to recover his land. It is the Plaintiff's case that he was never summoned by the District Land Disputes Tribunal and the affidavit of service by Ernest Odhiambo dated 27/3/2012 is false because he has never met the said Ernest Odhiambo.

6. In support of his case the Plaintiff filed the following evidence.

- i. Witness statements by himself, Samuel Ole Saine and Joseph Nzavi Kimeu.
- ii. Copy of title deed in his name dated 24/6/2003.
- iii. Copy of field diagram and observation on site showing the suit land and the neighboring parcel being L.R. 2786.
- iv. Copy of certificate of official search dated 29/8/2012 showing the Plaintiff as the owner of the suit land.
- v. Copy of certificate of official search dated 19/9/2014 showing the first Defendant as the owner of the suit land.
- vi. Copy of the decision of the Kajiado Central Land Dispute Case No. T.C. 670/09/2011.
- vii. Copy of decree in Kajiado SRM Land Dispute Tribunal Case No. 111 of 2011 dated 3/7/2012.
- viii. Copy of sale agreement for Motor Vehicle No. KAL 894N.
- ix. Copy of agreement for sale of a portion of L.R. 2271 dated 13/6/2003.
- x. Other relevant documents.



7. The first Defendant, through counsel on record filed a written statement of defence dated 15/1/2015 in which she denies all the averments in the plaint. In addition, she states that the Plaintiff was well aware of the proceedings before the Land Disputes Tribunal and Kajiado Magistrates' Court but he chose to ignore them. She concludes by saying that the Plaintiff's suit is bad in law, malicious, frivolous and an abuse of the court process and should be struck out or dismissed.
8. In support of her case, the first Defendant filed three witness statements by herself, David Koising'et and John Linde Ndoika. A summary of their evidence is to the effect that the suit land was sold secretly without the first Defendant's family being involved by William Lemeloi. Had they known about the intended sale, they would have opposed it. The Plaintiff does not occupy the land and it is the first Defendant's family that graze their livestock on it.
9. At the trial which lasted from 16/2/2017 to 26/1/2022, the Plaintiff testified and called two witnesses while the first Defendant testified and called one witness. The witnesses were cross-examined by counsel for opposing party.
10. The second Defendant did not enter appearance in the suit or file a defence.
11. Counsel for the parties filed written submissions on 21/2/2023 and 7/3/2023 respectively. The issues raised in the submissions are as follows.
 - i. Whether this suit should have been by way of plaint or judicial review?
 - ii. Whether the Land Disputes Tribunal and the Magistrates court had power to order the cancellation of the Plaintiff's title to the suit land?
 - iii. Whether spousal consent was a prerequisite before the other spouse could sell land as at 13/6/2003?
12. I have carefully considered the evidence adduced by the parties including their witness statements, documents and testimony at the trial. I have also considered the submissions by the learned counsel for the parties and the law cited therein. I agree with the learned counsel for the parties that the three issues identified above will determine the dispute.
13. On the first issue, I find that procedurally, this suit should have been commenced as an appeal or a judicial review but not by way of plaint. However, I find that this failure of procedure is not fatal to the suit for the following reasons.

Firstly, the Defendant did not raise the issue at the earliest possible opportunity. She should have done so. Having acquiesced to this procedure from 15th January 2015, it is now too late in the day to raise such an issue.

Secondly, Order 2, Rule 14 of the Civil Procedure Rules provides as follows.

“No technical objection may be raised to any pleading on the ground of any want of form”. I find that this want of form does not affect the substance of the dispute.

Thirdly, the first Defendant has not shown what prejudice she has suffered as a result of the suit having been brought in the current form. She has filed her evidence and has been heard by the court fully.

Finally, *the Constitution* at Article 159 (2) (d) requires the courts and tribunals to be guided by principles that justice shall be administered without undue regard to procedural technicalities.
14. On the second issue, I find that neither the District Land Disputes Tribunal nor the Magistrates Court had jurisdiction to cancel the title lawfully issued to the Plaintiff. Such power was vested only in the



High Court. The tribunal's power was restricted to three narrow areas under Section 3(1) of the Land Disputes Act (Act No. 18 of 1990). It provided as follows. "Subject to this Act, all cases of a civil nature involving a dispute as to –

- a. The division of, or the determination of boundaries to land, including land held in common,
- b. A claim to occupy or work land; or
- c. Trespass to land, shall be heard and determined by a Tribunal established under Section 4"

Clearly, this did not include the power to revoke a title deed lawfully issued. Such power was beyond the tribunal. In fact a perusal of the ruling by the tribunal will show that they were wary about revoking the title to the Plaintiff's land. They stated as follows:-

"After carefully considering the above findings, the tribunal ruled:-

1. That due to scarcity of land for the family of the claimant, the title for parcel No. KJD/Kisaju/2787 be returned to the claimants' family through the normal process of the law"

From the above the tribunal fell short of revoking the Plaintiff's title deed. The subsequent decree by the Magistrate's court was not in tandem with the tribunal's decision. The tribunal did not outline the so called normal process by the law.

15. When the suit land was sold, the Land Registration Act which made a matrimonial home an overriding interest under Section 28 had not been enacted. Again the entire land was not sold. The Defendant still has about 35 acres of land left. This is evident from the copy of field diagram that shows L.R. No. 2786 as measuring 14.94 hectares. The ten acres of land do not qualify to be called a matrimonial home as both parties have agreed that it is all vacant.
16. For the above stated reasons, I find that the Plaintiff has proved his case against the Defendants to the required standard. Consequently, I enter judgment for the Plaintiff against the Defendants as prayed for in prayers 2, 3, 4, 5 and 6 of the plaint dated 26/9/2014.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF MAY, 2023.

M.N. GICHERU

JUDGE

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