



**Mbuthia (Suing in her Capacity as Administrator of the Estate of Mbuthia Mukuru) & another v Gesacho & 4 others (Environment & Land Case 149 of 2012) [2023] KEELC 18568 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18568 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ENVIRONMENT & LAND CASE 149 OF 2012**

**A OMBWAYO, J**

**JUNE 29, 2023**

**(FORMERLY NAKURU HCC NO. 139 OF 2007)**

**BETWEEN**

**JEMIMAH WARUGURU MBUTHIA (SUING IN HER CAPACITY AS ADMINISTRATOR OF THE ESTATE OF MBUTHIA**

**MUKURU) ..... 1<sup>ST</sup> PLAINTIFF**

**KIPLANGAT NGETICH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JAMES GESACHO ..... 1<sup>ST</sup> DEFENDANT**

**ROSEMARY WANJIRU ..... 2<sup>ND</sup> DEFENDANT**

**KALENJIN ENTERPRISES ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR NAKURU ..... 4<sup>TH</sup> DEFENDANT**

**JOB OYUNGE ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff, Jemimah Waruguru Mbuthia has come to court as the administratrix of the estate of Mbuthia Mukuru (deceased) together with Kiplagat Ngetich (hereinafter referred to as plaintiffs) against James Gesacho, Rosemary Wanjiru, Kalenjini Enterprises and Land Registrar (hereinafter referred to as the defendants).
2. The plaintiffs' state that Mbuthia Mukuru (Deceased) is wrongly registered as the proprietor of Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125 measuring approximately half an acre each. That the 1<sup>st</sup> defendant is wrongly registered as the proprietor of



Nakuru Municipality Block 29/661 whereas the 2<sup>nd</sup> defendant is wrongly registered as the proprietor of Block 29/1182.

3. According to the plaintiffs, Mbuthia Mukuru was wrongly registered as proprietor of Nakuru Municipality Block 29/660 and Nakuru/Municipality Block 29/1125 instead of Nakuru Municipality Block 29/1182 due to mistake, error and or fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants which is particularized as ■ failing to pay attention to correct entries in the register of the 3<sup>rd</sup> Defendant. Moreover, wrongfully causing Mbuthia Mukuru ( Deceased) to be issued with Title Deeds for the wrong parcels of land. The plaintiffs fault the defendants for conspiring to issue Mbuthia Mukuru (Deceased) with the Title Deeds for the wrong Plots and failing to act in good faith or with due care. According to the plaintiffs, the 2<sup>nd</sup> plaintiff was entitled to be registered as proprietor of Nakuru/ Municipality Block 29/660 and 1125.
4. The plaintiffs prays for judgment an Order directing the 4<sup>th</sup> Defendant herein to rectify the register by cancelling registration of Mbuthia Mukuru (Deceased) herein as registered proprietor of Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125 and to register the 2<sup>nd</sup> Plaintiff as the owner of the said Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125. To cancel registration of the 1<sup>st</sup> Defendant as registered proprietor of Nakuru Municipality Block 29/661 and to register Mbuthia Mukuru (deceased) as the owner of the said Nakuru Municipality Block 29/661. To cancel registration of the 5<sup>th</sup> Defendant as registered proprietor of Nakuru Municipality Block 29/1182 and to register Mbuthia Mukuru (Deceased) as the owner of the said Nakuru Municipality Block 29/1182.
5. The plaintiffs pray for an order for eviction of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants from Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182 respectively plus costs of this suit together with interest thereon at court rates till payment in full.
6. The 1<sup>st</sup> defendant filed defence whose import is that he bought property number Nakuru/ Municipality /Block 29/661 from one Musonik Tiongik after being satisfied of the existence of the said property by the officials of the 3<sup>rd</sup> defendant . He denies the allegations by the plaintiffs. The 1<sup>st</sup> defendant filed a counter- claim whose gist is that he does not appear in the title documents of Nakuru/ Municipality 29/660 and Nakuru/Municipality Block 29/1125 hence a misjoinder in the suit. He claims to have been in possession of the suit land for more than 12 years hence entitled to the same by way of adverse possession. The 1<sup>st</sup> defendant prays for a permanent injunction restraining the plaintiffs from entering an interfering with the peaceful use and occupation of parcel Land Reference Number Nakuru/Municipality Block 29/661 measuring approximately 0.0935 Hectares.
7. Moreover, he prays for a declaration that he is in adverse possession of the suit-land. Ultimately, he prays for Costs of the suit and interests
8. The 2<sup>nd</sup> defendant denied the allegation in the plaint and put the plaintiffs to the strict of proof. The 3<sup>rd</sup> defendant did not file defence. The 5<sup>th</sup> defendant states that he is an innocent purchaser for value without any notice of any defect. He denies fraud alluded to him.
9. When the matter came up for hearing the 2<sup>nd</sup> plaintiff Kiplagat Ngetich testified that he was a member of Kalenjin Enterprises and was given a share certificate on April 23, 1980. He was given membership card number 727 showing that he was a plot holder of plot number 804. Plot number 804 was divided into two plots thus Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125. When he went to the land office he found that his title has been allocated to Mbuthia Mukuru. Whereas Mbuthia Mukuru's plot number Nakuru Municipality Block 29/661 had been given to another person.



10. PW2 Jemimah Waruguru Mbuthia states that Mbuthia Mukuru was his father who died on August 6, 2014. He was the 1<sup>st</sup> plaintiff before he died. According to PW2 her father bought plot number Nakuru Municipality Block 29/661 on 8<sup>th</sup> February 1995 from David Gatune before he died. The agreement was done in the office of Kamene and Co. Advocates. She produced the copy of green card for parcel number Nakuru Municipality Block 29/661. She produced the title deed for parcel number Nakuru Municipality Block 29/661 dated March 13, 2002. She produced agreement between Mr. Ego Kiprono Wilson and her father dated 14<sup>th</sup> June 1996 over plot number Nakuru Municipality Block 29/660. He was selling half the plot. She produced the transfer of shares from Kiprono to her father. She produced the green card for parcel no. Nakuru Municipality Block 29/1182 where entry No. 2 dated March 6, 2002 is in favour of her father. She produced a copy of title deed for parcel number Nakuru Municipality Block 29/1182 issued to her father.
11. PW3 Elijah Kiplagat Kipkenei Cheleite, a director of Kalenjin Enterprises Limited states that parcels Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182 are within Nakuru/ Municipality Block 29 (Rhoda). They originated from plot 803 which was allocated to Ego Arap Rono in 1972. Ego Arap Rono sold to Mbuthia Kuku plot Number Nakuru Municipality Block 29/661 which is now in the name of Mbuthia Mukuru whereas plot number Nakuru Municipality Block 29/660 was subdivided into 660 and 1125 whereas Nakuru Municipality Block 29/661 was subdivided into 661 and 1182. He has never seen a transfer from Mbuthia Mukuru to James Gesacho or Rosemary Wanjiru.
12. Defence Witness 1, Nyanchama Osumo, the widow to the late James Gesacho testified that her husband bought parcel number 661 at a consideration of Ksh55,000 from Tiongik Musonik. After buying the land her husband processed the title that was issued on October 15, 2004. An official search reveals that the property is in the names of the 1<sup>st</sup> defendant. There is a transfer from Tiongik Mosonik to her name. She lives on the land with her 2 children. She has lived on the land since 1994. She has a temporary shelter on the land.
13. The 2<sup>nd</sup> defendant Rosemary Wanjiru Githeki testified that she bought the suit land from Musonik in 1994. Musonik bought the land from Kimibei. She used the land from 1994 to 1995. She sold the land on June 23, 2005. Before selling the land she found that her name had been deleted from the register and the name of Mbuthia Mukuru had been inserted but the same was corrected. The land was registered in her name but it did not affect the ground. According to the witness the land owned by Mbuthia Mukuru is Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125.
14. DW3, Job Oyunge testified that he bought parcel number Nakuru Municipality Block 29/1182 from Rosemary Wanjiku in the year 2005. He had a sale agreement and did due diligence and found the land to be without any encumbrance. He followed due process. He collected the title deed in August 2005.
15. DW4, Collins Liyai Aliela, an advocate of the High Court of Kenya and the Land Registrar, Nakuru testified that parcels number Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182 were registered by the department of lands in the Nakuru Registry. The register for Parcel number Nakuru Municipality Block 29/661 was opened on March 29, 2000. The land is registered in the names of James Gesacho. He produced the parcel file that contained the original titles in the names of Mbuthia Mukuru dated March 13, 2002. The title deeds were cancelled for rectification under section 142 (1) (a) of Registration of *Land Act*. The land was transferred to James Gesacho on August 18, 2004. The Registrar produced the green card, certificate of official search and transfer of land to Mbuthia Mukuru from Government of Kenya. The members Register showed that the owner of the property was James Gesacho. The register was rectified and the name of Mbuthia Mukuru deleted and James Gesecho inserted. The name Mbuthia Mukuru appears under parcel number Nakuru



Municipality Block 29/660. According to the land Registrar, Mbuthia Mukuru owned plot number Nakuru Municipality Block 29/660 and that Mbuthia Mukuru signed the rectification of the Register, hence cancelling the title.

### Submissions

16. The plaintiffs submit that the four parcels of land emanate from Kalenjin Enterprises thus the root of each Title must originate from shares held at Kalenjin Enterprises. According to the plaintiffs, the 1<sup>st</sup> plaintiff, Mbuthia Mukuru acquired the land from Ego and a register was produced showing that indeed Ego was a member of Kalenjin Enterprises. Ego Kiprono's share certificate No. 4012 indicated that he owned 25 shares and that he had successfully balloted for-Plot No. 803. Ego sold a half share to Mary Wambui Kimani vide sale agreement dated November 6, 1978, Mary Wambui then transferred the half share to her brother David Gatune Kimani who later sold it to Mbuthia Mukuru (the 1<sup>st</sup> plaintiff) vide a sale agreement dated February 8, 1995. Mbuthia Mukuru later purchased the remaining half share from Ego vide a sale agreement dated June 14, 1996. Since Mbuthia Mukuru had acquired Ego's whole share, Ego transferred his whole share to him vide certificate of transfer of shares dated January 16, 1997. Kalenjin enterprises approved this by crossing Ego's name in the register and replacing it with Mbuthia Mukuru. Thus, Mbuthia Mukuru became the owner of Plot No 803 at Kalenjin Enterprises.
17. Plot No 803 measured  $\frac{1}{2}$  of an acre and it later became 661 before subdivision to form 661 and 1182. The two parcels were registered in the names of Mbuthia Mukuru on March 13, 2002 and March 6, 2000 respectively and Title deeds issued. Plot no 660 was previously No. 804 during balloting and belonged to Kiplangat Ngetich the 2<sup>nd</sup> plaintiff herein. He has never transferred his shares to anyone and is still in custody of his share certificate, balloting card and payment receipts. Plot no. 660 measuring half an acre was divided into two resulting to plot 660 and 1125. Kiplangat Ngetich's name is still in the original register. So far there is no dispute as to ownership of plots No 660 and 1182 save for the fact that they were erroneously registered in Mbuthia Mukuru's name.
18. From the above facts the 1<sup>st</sup> plaintiff strongly submits that the root of the Plaintiffs' ownership of the suit properties can be traced back to Kalenjin Enterprises as the shareholding, balloting and transfer of shares has been proven. The plaintiffs submit that they are the lawful owners of the suit properties.
19. On whether the registration of the 1<sup>st</sup> and 2<sup>nd</sup> defendants was fraudulent the plaintiff submits that the register was surrendered on March 17, 2004 reflecting that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were owners of parcel No. Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182 respectively.
20. By this time, the plaintiff had been issued with title deeds to the parcel of land. Plaintiff obtained title to land after purchasing the property from Ego ARap Rono. According to the plaintiff, the names of Tiongik Mosonik and Kimibei Ngetich do not appear in the Register. They did not ballot for the land hence had no interest. The plaintiff submits that the documents indicating that Mbuthia Mukuru rectifying the register was a forgery. He could not cancel his own title.
21. The plaintiff further submits that the Registrar has no power to cancel titles under Registration of Land Act repealed, unless in formal matters and case of error and omission. Last but not least, it appears on the register that the 1<sup>st</sup> defendant was registered on August 26, 2004 and the suit was filed on September 5, 2007 hence 12 years had not lapsed when the suit was filed.
22. The 1<sup>st</sup> defendant submits that he is the legitimate owner of parcel number Nakuru Municipality Block 29/661. He bought the land from Tiongik Musonik and became a shareholder of Kalenjin Enterprises. The document produced by the Land Registrar showed that the 1<sup>st</sup> defendant was the owner of the



suit land Nakuru Municipality Block 29/661. The 1<sup>st</sup> defendant relied on the provisions of sections 24, 25 and 26 of the Land Registration Act number No 3 of 2012. The 1<sup>st</sup> defendant submits that fraud was not proved as required by the law as there is a sale agreement dated October 31, 1994 where clearly shows that the 1<sup>st</sup> defendant purchased the parcel of land. The 1<sup>st</sup> defendant prays that the suit be dismissed with costs.

23. The 2<sup>nd</sup> defendant submits, that she is the legitimate owner of 29/1182 and that there is no evidence of fraud and that no complaint was ever made to the police.
24. The 5<sup>th</sup> defendant on his part argues that he obtained title legally hence the title held is clean and enforceable under section 24, 25 and 26 of the Land Registration Act.
25. On rectification of title the 2<sup>nd</sup> and 5<sup>th</sup> defendant argue that the same was cancelled by consent of the land owners and therefore the 1<sup>st</sup> plaintiff having given consent for rectification can't turn around and allege fraud. They pray that the suit be dismissed with costs.

### **Analysis and Determination**

26. I have considered the evidence on record and do find that there are four properties in dispute namely Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125 and Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182. On February 8, 1995, Mbuthia Mukuru bought parcel number Nakuru Municipality Block 29/661 and 1182 that were created from plot number 803 that was originally balloted by Ego Kiprono Vide share certificate number 4012. Ego Kiprono Sold half share to Mary Wambui Kimani who sold to his brother one David Gatune Kimani. The latter sold it to the 1<sup>st</sup> plaintiff for a consideration of Kshs.85, 000/= .The plaintiff later bought the remaining half share and therefore acquired the whole share of Ego Kiprono. The shares were transferred on January 16, 1997. Mbuthia Mukuru was registered as the owner of Nakuru Municipality Block 29/1182 on March 6, 2000 and of Nakuru Municipality Block 29/661 on March 13, 2002
27. I have looked at the members Register in respect of the suit property as prepared by the Kalenjin Enterprises and do find that the handwritten Register showed the owner of the land number 661 as Mbuthia Mukuru whereas the typed Register indicated the land was owned by James Gesacho. The registers do contradict each other though they came from the same office. The register produced by the Land Registrar is dated March 17, 2004 and signed by the board of directors. It is ironical that this register is dated and signed after Mr Mbuthia Mukuru had been registered. The said Mbuthia Mukuru was registered as proprietor on March 13, 2002 two years before the register dated March 17, 2004 was prepared. This court finds that the register prepared after the 1<sup>st</sup> plaintiff had been registered proprietor and title issued is invalid. I do believe PW3, the director of Kalenjin Enterprises when he states that Land Parcel Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182 originated from plot No 803 that had been allocated to Ego Arap Rono in 1973 and that the same was sold to Mbuthia Mukuru. I do find that the plaintiff is the owner of parcel number Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182.
28. On whether the registration of the defendants of the suit property was fraudulent, this court find that the registration was done after a purported cancellation of title which was an illegality because the land registrar had no powers to rectify the register without the consent of the parties. The 4<sup>th</sup> defendant produced a rectification of register which was very irregular. It purports to be a consent but it is fraud framed as a consent and yet it is declaration or cancellation by the Land Registrar. The same is purported to be signed by the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant but not witnessed by the Land Registrar. I do find that the purported consent is not a consent as required in law as it is actually a



cancellation and or a rectification. There was no provision in law for Mbuthia Mukuru to cancel a register. Mbuthia Mukuru denied having ever consented to the cancellation of title and rectification of register. The purported consent was a deceit, device and machination to deprive Mbuthia Mukuru of his parcel of land.

29. In the case of Githinga Kibutha vs Caroline Nduku ELCA No 16 of 2007 the court stated thus:-

The *Land Registration Act* does not define fraud. Recourse must therefore be had to other sources of law. The Black's Law Dictionary defines fraud thus:-

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’.

Fraud would, therefore consist of deceitful actions which may be made through either positive assertions or concealment of facts. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”

30. I do find that the whole process of cancellation and rectification was a fraud by the defendants as they intended to deprive the 1<sup>st</sup> plaintiff of his parcel of land duly registered in his name.

31. On whether the Land Registrar had powers to cancel the title and rectify the Registration, I do find that section 142 1(1) of Registration of *Land Act* repealed was clear it provides:-

142.

- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
  - (b) in any case and at any time with the consent of all persons interested;
  - (c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify

32. Having found that the alleged consent was a fraud, the Land Registrar had no powers to rely on it and therefore rectifying the registration and cancel title.

33. This court further finds that the 2<sup>nd</sup> defendant unlawfully obtained title to the property Nakuru Municipality Block 29/1182 after the Land Registrar illegally rectified the register and cancelled title in the names of the plaintiff and registered the 2<sup>nd</sup> defendant as proprietor of parcel number Nakuru Municipality Block 29/1182. Ultimately, the 2<sup>nd</sup> defendant had no title to transfer to the 5<sup>th</sup> defendant having been illegally registered and title issued.



34. On adverse possession I do find that the 1<sup>st</sup> defendant cannot claim adverse possession in respect to 661 because the titles are in his names, the Register having been rectified by the Land Registrar and new titles issued. Adverse possession cannot be invoked where the claimant is the registered owner as a result of a cancellation or a rectification of the register.
35. Ultimately, I do allow the plaintiff claim and dismiss the 1<sup>st</sup> defendants counter claim. I do grant judgment in the in the terms that an Order is hereby issued directing the 4<sup>th</sup> Defendant herein to rectify the register by cancelling registration of Mbuthia Mukuru (Deceased) herein as registered proprietor of Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125 and to register the 2<sup>nd</sup> Plaintiff as the owner of the said Nakuru Municipality Block 29/660 And Nakuru Municipality Block 29/1125. To cancel registration of the 1<sup>st</sup> Defendant as registered proprietor of Nakuru Municipality Block 29/661 and to register Mbuthia Mukuru (deceased) as the owner of the said Nakuru Municipality Block 29/661. To cancel registration of the 5<sup>th</sup> Defendant as registered proprietor of Nakuru Municipality Block 29/1182 and to register Mbuthia Mukuru (Deceased) as the owner of the said Nakuru Municipality Block 29/1182. Lastly, I do grant an order for the eviction of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants from Nakuru Municipality Block 29/661 and Nakuru Municipality Block 29/1182 respectively after the expiry of 90 days from to date. I do grant the plaintiffs costs together with interest thereon at court rates till payment in full.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29<sup>TH</sup> DAY OF JUNE 2023.**

**A. O. OMBWAYO**

**JUDGE**

