



Sang (Suing as the legal representative of the Estate of Kimbei Arap Tue (Deceased) v Koskei & 3 others (Environment & Land Case 170 of 2012) [2023] KEELC 18263 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 170 OF 2012**

**A OMBWAYO, J
JUNE 15, 2023**

BETWEEN

DANIEL KIPKEMOI SANG (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIMBEI ARAP TUE (DECEASED)) PLAINTIFF

AND

SAMUEL KIPTANUE KOSKEI 1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, NAKURU 2ND DEFENDANT

MOSES NDUU MBUGUA 3RD DEFENDANT

FRANCIS GITHINGA KIARIE 4TH DEFENDANT

JUDGMENT

1. The plaintiff, Daniel Kipkemoi Sang, suing as the legal representative of the estate of Kimbei Arap Tue (Deceased) came to this court by way of amended plaint against Samuel Kiptanui Koskei the District Land Registrar Nakuru, Mose Ndua Mbugua and Francis Githinga Kiarie claiming that at all material times to this suit, the plaintiff remained the absolute proprietor in law of all that parcel of land known as Dundori/Mugwathi Block 2/733 from the year 1998 until on or about April, 2011.
2. The plaintiff aver that he remained in active possession and user of the said parcel of land but on or about diverse dates in the year 2005, the 1st defendant in collaboration, with the 2nd Defendant, maliciously and without authority, through misrepresentation, fraudulently caused the plaintiff's own parcel, Dundori/Mugwathi Block 2/733 to be transferred and/or registered in the name of the 1st defendant by or on the 6th of April, 2011. The plaintiff further avers that the 1st defendant having fraudulently acquired title to the plaintiff's own land, land parcel No. Dundori/Mugwathi Block 2/733 illegally caused the said parcel of land to be transferred and/or registered jointly in the name of the 3rd and 4th defendants by or on the 1st February 2013.



3. The plaintiff further avers that the 3rd and 4th defendants in collusion with the 1st defendant fraudulently and or negligently caused the suit land to be transferred and/or registered in their names despite their knowledge that 1st defendant's title to the said land was under challenge in the suit herein.
4. The plaintiff claims loss and damage in terms of limited user and prolonged anxiety. The plaintiff prays for cancellation of the title to parcel number Dundori/Mugwathi Block 2/733 in the names of the 3rd and 4th defendants. The plaintiff prays for immediate rectification of the register and title documents in respect of parcel No. Dundori/Mugwathi Block 2/733 to reflect the plaintiff as the absolute property thereof. He further prayed for general damages for loss and suffering.
5. The 1st and 2nd defendants filed statement of defence denying the averments in the plaint. The 3rd and 4th defendants did not file any defence to the claim. The plaintiff called two witnesses who gave evidence but the defendants called none.
6. PW1 testified that her father was the legal proprietor of the suit property having gotten the same from Kalenjini Enterprises. She produced the title as PEX1. She produced the certificate of official search as PEX2. She produced a sale agreement dated 8th February 2011 as PEX 3. Her father denied transferring the land to Samuel Kiptanui Kosgei. Her father denied signing any agreement with the 1st defendant. The agreement had no signature of her father. PW1 stated that the agreement was a forgery. Mr Kimbei Arap Tuei testified that he was the lawful registered owner of the suit property and had been in occupation and possession. He denied selling the land to the 1st defendant. The plaintiff's evidence is not controverted. Where the defence fails to call any evidence the law is that the defence remains mere allegations.
7. In the case of North End Tradign Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited Vs. City Council Of Nairobi (2019) eKLR the court held:-
 18. In Edward Muriga Through Stanley Muriga Vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.
 19. In the case of Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra And Another Vs. Raju Govindji, HCCC No.548 of 1998 appreciated that:-

‘Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’”
8. Similarly, the Court of Appeal in the case Edward Mariga through Stanley Mobisa Mariga Vs. Nathaniel David Shulter & Another [1979] eKLR said:-

The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”



9. This is made further clear in the case Cmc Aviation Ltd Vs. Crusair Ltd (no.1) (1987) KLR 103 as follows:-

The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

10. This court finds that the plaintiff has proved on a balance of probabilities that the 1st defendant obtained title to the suit property fraudulently as the agreement allegedly between Kimbei Arap Tuei and Samuel Kiptanui Koskei was a forgery as the latter did not sign the same. Section 26 (i) of the Land Registration Act provides: -

26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

11. This court finds that the plaintiff has proved that the certificate of title was obtained illegally and unprocedurally and therefore subject to challenge.
12. Is the plaintiff entitled to damages? There is no evidence that the defendants ever entered the suit property and therefore the plaintiff is not entitled to general damages for trespass.
13. The upshot of the above is that the plaintiff succeeds and I do grant judgment in terms of cancellation of the title to parcel number Dundori/Mugwathi Block 2/733 in the names of the 3rd and 4th defendants. The court orders for the immediate rectification of the register and title documents in respect of parcel No. Dundori/Mugwathi Block 2/733 to reflect the plaintiff as the absolute property thereof. I do decline to grant general damages for loss and suffering as the same has not been demonstrated. Costs of the suit to the plaintiff.

RULING DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 15TH DAY OF JUNE 2023.

A. O. OMBWAYO

JUDGE

