



Kenyoro FCS Ltd v Land Registrar Kisii County & 5 others (Environment & Land Case 426 of 2014) [2023] KEELC 18208 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 426 OF 2014**

**M SILA, J
JUNE 14, 2023**

BETWEEN

KENYORO FCS LTD PLAINTIFF

AND

LAND REGISTRAR KISII COUNTY 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

ISABELLA GESARE PETER 3RD DEFENDANT

ELIUD PETER OMAE 4TH DEFENDANT

DAVID KENYANYA MAGARE 5TH DEFENDANT

ALLOYS MANYANGE MOTUKA 6TH DEFENDANT

JUDGMENT

1. This suit was commenced through a plaint filed on 4 November 2014. That plaint was amended on 22 January 2015. The plaintiff has pleaded that she is the registered proprietor of the land parcel Kisii Municipality/Block III/78 being a leasehold interest for a term of 99 years from 1 September 1969. She pleads that she purchased the property in or about the years 1979 to 1983 and obtained registration in her name on 22 September 1998 from the previous registered proprietors, Maendeleo Butchery. She avers to have been in possession since November 1983 and developed the property which was let out to tenants. It is pleaded that on 3 October 2014, the plaintiff found a notice left on the premises, at the instance of the 3rd and 4th defendants, asking the tenants to vacate the premises. It is the plaintiff's case that she has never sold the property to the 3rd and 4th defendants. She alleges that the defendants fraudulently cancelled entries of her proprietorship in the register and carried out a transfer on the basis of forged documents. In this suit, the plaintiff seeks orders for a declaration that the actions of the 1st – 4th defendants in cancelling the title of the plaintiff, transferring it, and attempts to take possession



of the suit property amounts to trespass; an order of permanent injunction to restrain the defendants from the suit property; a declaration that the entries in the register and issue of title to the 3rd and 4th defendants was fraudulent, null and void; a mandatory injunction to compel the defendants to cancel the entries in the register in favour of the 5th and 6th defendants and thereafter the 3rd and 4th defendants, and have title reinstated to the plaintiff; damages for trespass; punitive and aggravated damages for fraud; costs and interest.

2. The Attorney General filed defence on behalf of the 1st and 2nd defendants. They denied that the plaintiff is the registered proprietor of the suit property. They pleaded that the property is registered in the name of the 3rd and 4th defendants. They contended that if the suit property is registered in name of the plaintiff, then the plaintiff obtained registration by way of fraud.
3. The 3rd and 4th defendants also filed defence. They denied that the plaintiff is the lawful proprietor of the suit property. They contended that the lease claimed by the plaintiff was found to have been fraudulent and illegal and was duly nullified.
4. The 5th and 6th defendants did not enter appearance nor file defence. It is said that they are the ones who transferred title to the 3rd and 4th defendants. I have seen the proceedings of 4 April 2019 where it was said that the 5th and 6th defendants are deceased. I have not seen any attempt to have them substituted. The case against them has therefore abated.

B.Evidence of The Parties

5. PW-1 was Charles Ratemo, the Vice-Chairman of the plaintiff. He has been Vice-Chair for 15 years. He elaborated that the plaintiff is engaged in processing of coffee and it also owns the suit land which is located in Kisii Town. He testified that the suit property belonged to four persons who operated a business known as Maendeleo Butchery. The four are Daudi Kenya Magare, Aloys Magare Motuka, Joseph Mokaya and Joseph Mogaka Magare. They had a loan with ICDC which they were unable to pay and they decided to sell the suit property to the plaintiff at Kshs. 545,000/= . They entered into a written agreement and the plaintiff paid some of the money to ICDC and some directly to the sellers. The owners however refused to transfer the property and the plaintiff filed suit against them for specific performance. This is the suit Kisii HCCC No. 22 of 1984 which was decided in favour of the plaintiff. The vendors filed an appeal, which was dismissed. The property was subsequently transferred to the plaintiff and the plaintiff obtained title. They had tenants therein. In 2014, they got a notice that the property does not belong to the plaintiff. They conducted a search and discovered that the 3rd and 4th defendants have a lease in their favour. It was his opinion that they got title irregularly.
6. He was cross-examined and acknowledged not having a letter that Maendeleo Butchery wished to sell the land to the plaintiff. He also acknowledged that the sale agreement that he had is not signed and nowhere does it indicate that the property is being sold to offset a loan from ICDC. He had a memorandum of agreement which was not dated. He was not aware that Maendeleo Butchery owed any money to Income Tax Department and was not aware of any charge in favour of the Income Tax Department as at 1986.
7. With the above evidence, the plaintiff closed her case.
8. DW-1 was Isabella Gesare Peter, the 3rd defendant. The 4th defendant is her husband. She testified that the title to the suit land is registered in her name and that of her husband. She testified that the land was advertised by one Kennedy Mokuia and they did a search which showed the proprietors as David Kenya and Alloys Manyange (David and Alloys) and others, and not the plaintiff. The search showed a caveat to Kenya Revenue Authority (KRA) for the sum of Kshs. 25,000/= which she paid



and she got a letter from KRA to confirm the payment. She testified that Kenyoro FCS was a tenant of David and Alloys and she was given a copy of the tenancy agreement which she produced as an exhibit. She also produced a letter stating that David and Alloys were paying rates. The sellers transferred to them the property and they got a Certificate of Lease in their name. She asserted that it was their title which was the lawful title.

9. Cross-examined, by learned State Counsel, she testified that when she purchased the property, it was already developed and according to her, it was developed by David and Alloys. She denied any collusion with the Land Registrar to get title.
10. Cross-examined by counsel for the plaintiff, she acknowledged that the search she did before she purchased the property showed four proprietors, David Kenyanya, Alloys Manyange, John Mokaya, and Joseph Mokaya as tenants in common in equal shares trading as Maendeleo Butchery. The persons who executed the transfer instrument, as vendors, were David Kenyanya Magare, Aloys Manyange, John Joseph, and Florence Bonareri. She acknowledged that Florence and John Joseph were not indicated in the title as proprietor. She stated that Florence was wife of one of the proprietors, Mr. Mokaya, who had died, though she could not tell which of the two Mokaya's noted as proprietors had died. She was not aware whether Florence had conducted any succession. She asserted that John Joseph was the same as Joseph Mokaya. She paid Kshs. 30 million to buy the land. She had a letter dated 7 October 2014 from the Ministry of Lands which pointed out that one proprietor had died but she stated that she did not conduct any investigation to find out who among the four proprietors was deceased. The transfer she had was registered on 17 October 2014 which was ten days after the letter from the Land Registrar. She contended that Kenyoro FCS was tenant of David and Alloys in reference to the lease dated 26 June 1983 which had a term of 30 years. She had no information that Kenyoro FCS had sued the former proprietors in court as the property had been sold to them. The title of Kenyoro FCS was put to her and she could see that it is one issued in 1998. She stated that the tenants in possession had told her that they pay rent to David and Alloys, and after she obtained title she demanded that they pay rent to her. She admitted that she never got a consent to transfer from the Lands office before registering the transfer.
11. Re-examined, she testified that Florence was wife of Joel Mokaya and that she executed the transfer on his behalf since he was deceased at the time. The Land Registrar accepted the transfer instrument.
12. With the above evidence, the 3rd and 4th defendants closed their case.
13. The Attorney General did not call any witness.
14. I invited counsel to file written submissions, and I have seen the submissions of Mr. Soire learned counsel for the plaintiff, and Mr. Ochwangi, learned counsel for the 3rd and 4th defendants. Mr. Ndiritu, learned counsel for the 1st and 2nd defendants stated that he would not be filing any submissions. I have taken account of the submissions before arriving at my decision.

C. Analysis and Disposition

15. There is no question that before the disputed proprietorship of both plaintiff, and 3rd and 4th defendants, the suit property was owned by four proprietors trading as Maendeleo Butchery. The four proprietors were David Kenyanya, Alloys Manyange, John Mokaya, and Joseph Mokaya as tenants in common. The plaintiff claims to have purchased the suit property from the said proprietors in 1978 at a time when ICDC had threatened to sell it for not being paid their loan. There is an avalanche of documents indicating that the property was indeed charged to ICDC who had called on the loan, and there are also various documents exchanged between the plaintiff and ICDC towards the purchase of the property. I am not in doubt that the property was sold to the plaintiff for the sum of Kshs.



545,000/=. There is for example the letter dated 11 June 1979 from Maendeleo Butchery to the plaintiff confirming receipt of the sum of Kshs. 15,000/= as part payment and confirming payment of Kshs. 20,000/= to ICDC for the sale of the property. That letter advises that the balance be paid to the law firm of M/s Kaplan & Stratton Advocates who were the advocates acting for ICDC. There seems to have arisen a dispute which led to the plaintiff filing the suit Kisii HCCC No. 22 of 1984 against Maendeleo Butchery. I have seen a copy of the decree issued on 14 March 1996. It states as follows :

1. The defendant do and is hereby ordered to sign the transfer of land forms and any other necessary documents to effectuate the whole transfer of the said land parcel No. Kisii Town/Block III/78 and failure to sign the Deputy Registrar of this court do execute the same.
2. The defendant do and is hereby ordered to refund the sum of Kshs. 64,333.90/= to the plaintiff being overpayment made towards the consideration of the said plot No. Kisii Town/Block III/78 .
3. The defendant do and is hereby ordered to pay rents to the plaintiff received from tenants in arrears from November, 1983 at the rate of Kshs. 4,400/= per month till the plaintiffs are given possession of the said plot No. Kisii Town/Block III/78 with interest thereon at the rate of 14%.
4. That the defendant do and is hereby ordered to pay costs of this suit to the plaintiff with interest thereon at the court rates.

16. It is clear from the above that the dispute was resolved in favour of the plaintiff and this is how the plaintiff got registered as proprietor of the suit property.
17. In his submissions, Mr. Ochwangi, learned counsel for the plaintiff attacked the copy of sale agreement that the plaintiff produced, pointing out that what was availed is unsigned and undated. That does not now matter. The plaintiff is not here to enforce that sale agreement and I believe it was only availed to demonstrate that the plaintiff did purchase the suit property. The issue of the sale to the plaintiff was already resolved in the suit Kisii HCCC No. 22 of 1984. The court held that the plaintiff had rightfully purchased the suit property from Maendeleo Butchery and even appeared to have made an overpayment, thus the order for refund. The issue of the sale of the property from Maendeleo Butchery to the plaintiff is now beyond question. I have seen that the plaintiff did obtain title on 22 September 1998 after all issues in the above case had been resolved. I have seen evidence that they had tenants in the property and were collecting rent.
18. How then did the 3rd and 4th defendants obtain a title? Their case is that they purchased the suit property from the erstwhile proprietors, who were the partners in Maendeleo Butchery. Well, Maendeleo Butchery had no capacity to sell the property to the 3rd and 4th defendants in the year 2014, since they had already been divested of title through the decree in Kisii HCCC No. 22 of 1984. The plaintiff had already obtained registration on 22 September 1998 and there was no land for Maendeleo Butchery to sell. But even to make it worse for the 3rd and 4th defendants, one or two of the proprietors of Maendeleo Butchery were already deceased at the time of the alleged sale to the 3rd and 4th defendants in the year 2014. Even the transfer instrument is executed by persons who are not partners of Maendeleo Butchery. I in fact have serious doubt whether the 3rd and 4th defendants entered into any sale agreement and that they expended Kshs. 30 million to buy the property. No sale agreement was exhibited by the 3rd and 4th defendants. Neither did they demonstrate any payment of the purchase price and to whom. The transfer instrument does not show any consideration therein. It is solely by word of mouth that the 3rd and 4th defendants claim to have purchased the suit property.



19. I have had a look at the entries in the register which led to registration in the names of the 3rd and 4th defendants and I am baffled. I see entry of the four partners trading as Maendeleo Butchery as first proprietors and there is an encumbrance therein by the Income Tax Department dated 13 June 1986 for the sum of Kshs. 25,000/=. The encumbrance provides that there should be no registration of a disposition before this is cleared. It appears as if the 3rd and 4th defendants used this encumbrance as a loophole to get title. They paid it and then purported to transfer the land to themselves. But as I have said, the property had already been decreed as belonging to the plaintiff. Payment of the amount claimed as income tax would not have changed anything. There was nothing for the 3rd and 4th defendants to buy, if at all they were truly buying the property, which I have already expressed my doubts upon.
20. In his submissions, Mr. Ochwangi tried to raise some technicalities that the plaintiff never provided its registration certificate nor a resolution by the Board. Those are neither here nor there. If the 3rd and 4th defendants wished to see the registration certificate of the plaintiff, they ought to have issued a notice to produce. On the issue that there was no Board resolution, I have nothing before me to suggest that the plaintiff did not authorize the suit. These issues to me, are mere red herrings being raised by the 3rd and 4th defendants.
21. My opinion is that the 3rd and 4th defendants, either alone or with others, came up with a scheme to try and defraud the plaintiff of the suit property. I see that they got registration by the Land Registrar making an entry No. 8 on 14 October 2014, in the register, that title has reverted to entry No. 1 and 2 (i.e registration of Maendeleo Butchery) so as to pave way for a purported transfer from Maendeleo Butchery to the 3rd and 4th defendants. The Land Registrar had no mandate to revert title to Maendeleo Butchery for the title of Maendeleo Butchery had been extinguished by court through the suit Kisii HCCC No. 22 of 1984. That entry was clearly fraudulent.
22. In as much as title ought to be accorded respect, a title that is illegally acquired is capable of cancellation. This is provided for in section 26 (1) of the [Land Registration Act](#), which provides as follows :-
- 26.
- (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.
23. It will be seen from the above that a Certificate of title obtained by fraud or misrepresentation for which the title holder is proved to be a party, or a certificate of title acquired illegally, unprocedurally or through a corrupt scheme is capable of being cancelled. I am persuaded that the 3rd and 4th defendants were party to the fraud and/or misrepresentation that led to them being registered as proprietors. As I have said, I have seen no sale agreement and no proof of payment of any purchase price. They also knew



the proprietors to be four partners of Maendeleo Butchery. Even assuming that Maendeleo Butchery had capacity to sell, the persons that signed the transfer forms were not the four partners and the 3rd and 4th defendants must have known that one or some of the partners were deceased. That is why I conclude that they were parties to the fraud. Assuming that they were innocent purchasers, their title would still be impeached pursuant to section 26 (1)(b) above, for it is a title issued illegally, unprocedurally and/or through a corrupt scheme.

24. Given the above, order the Land Registrar, Kisii, to proceed and cancel the entries No. 7, 8, 9 and 10 of the register which are the entries that purported to transfer title to the 3rd and 4th defendants.
25. In essence, this court holds that the purported title being held by the 3rd and 4th defendants is a fraudulent title which is hereby nullified. The rightful proprietor of the land parcel Kisii Municipality/Block III/78 is declared to be the plaintiff, i.e Kenyoro FCS Limited.
26. In her plaint, the plaintiff also sought damages for trespass. There were attempts by the 3rd and 4th defendants to take over possession. These were acts of trespass. I have already stated that I doubt that the 3rd and 4th defendants were innocent purchasers for value. I therefore award the plaintiff the sum of Kshs. 750,000/= against the 3rd and 4th defendants as general damages for trespass. I also issue an order of permanent injunction restraining the 3rd and 4th defendants from entering, being upon, or in any other way interfering with the quiet possession of the suit property by the plaintiff. The 3rd and 4th defendants should also not enter into any dealings in respect of the suit property.
27. The last issue is costs. The 3rd and 4th defendants are clearly culpable. However, they could not have executed their corrupt scheme without the assistance and/or connivance of the Land Registry personnel. The 1st defendant is therefore also culpable. I have nothing before me to suggest that there was any anomaly by the National Land Commission. I absolve them from any order as to costs. I thus award costs to the plaintiff jointly and/or severally against the 1st, 3rd and 4th defendants.
28. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 14 DAY OF JUNE 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

KISII

