



**Mukui ( Suing as the Administrator of the Estate Of Joseph Makori Juma Deceased) & another v Osimba & another (Environment & Land Case 77 of 2015) [2023] KEELC 19106 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19106 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 77 OF 2015**

**A OMBWAYO, J  
JULY 28, 2023**

**BETWEEN**

**BETTY MUKUI ( SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH MAKORI JUMA DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**

**JACQUELYNE KWAMBOKA MAKORI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENNEDY OSIMBA ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR NAKURU LANDS OFFICE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Betty Mukui, and Jacqueline Kwamboka Makori suing as the administratrixes of the estate of Joseph Makori Juma have sued Kennedy Osimba the Land Registrar, Nakuru and the honorable Attorney General stating that at all material times Joseph Makori Juma (deceased) has been the registered proprietor of all that parcel of land known as Title Number: Njoro/Ngata 1/1381 (New Kiambu), (herein "Suit Property"). The plaintiffs claim that on or about December 2014, it came to the attention of the Plaintiffs that the 1<sup>st</sup> Defendant herein had physically entered into the suit property and had commenced exercising proprietary rights on the said parcel of land which included construction of a perimeter wall, depositing building materials thereon; which acts are inconsistent with the lawful ownership of the title of Joseph Makori Juma (deceased) to the land and are also illegal, irregular and unlawful.
2. The Plaintiffs on discovering that the suit property had been encroached by the 1<sup>st</sup> Defendant reported the matter to the Local Chief and sought audience with the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant has in defiance of his statutory obligation, declined to intervene and even on application for an official search on the suit property the 2<sup>nd</sup> Defendant declined and has continued to decline to grant an official search



on the property. The Plaintiffs in attempt to further protect the interest of the beneficiaries of the estate of Joseph Makori Juma (deceased) in the suit property; have registered a Caution against the suit property known as Title Number: Njoro/Ngata 1/1381 prohibiting any dealings with the said suit property in whichever way whatsoever.

3. The Plaintiffs as administratrixes of the Estate of Joseph Makori Juma (deceased) are apprehensive that if any documents of title have been issued adverse to registration of the said property in Joseph Makori Juma's name (deceased), they will together with all the beneficiaries of the Estate of Joseph Makori Juma suffer irreparable loss and damage. The plaintiff pray for judgment in terms of :-
  1. Permanent injunction against 1<sup>st</sup> Defendant by himself, his assigns, personal representatives, his servants and/or agents or any one whomsoever restraining them from entering, conveying, dealing, advertising, trespassing, selling or transferring ownership to any third party of the parcel of land known as Title Number: Njoro/Ngata 1/1381 (New Kiambu);
  2. An order to demolish any constructed structures on land know as Title Number:Njoro/Ngata 1/1381;
  3. An order to collect and/or remove any and/or all building material that have been deposited on land Title Number: Njoro/Ngata 1/1381;
  4. An order of eviction against the 1<sup>st</sup> Defendant his assigns, personal representatives, his servants and/or agents or any one whomsoever from the land known as Title Number: Njoro/Ngata 1/1381;
  5. An order to the 2<sup>nd</sup> Defendant to cancel any title documents issued adverse to registration of Title Number: Njoro/Ngata 1/1381 in the name of Joseph Makori Juma (deceased) ;
  6. A declaration that Joseph Makori Juma (deceased) is the registered proprietor of Title Number: Njoro/Ngata 1/1381 and the said land is property of his estate;
  7. General damages;
  8. Costs of this suit from the time of filing at the current court rates; and
  9. Any other just and equitable relief as this Honorable Court may deem appropriate.
4. The 1<sup>st</sup> defendant in his defence states that he bought all that piece of land known as Njoro/Ngata Block 1/1381 (New Kiambu) from the original owner Michael Koskei Kurere on 8<sup>th</sup> October 2011. A sale agreement was duly executed and attested on the said date. He paid the entire purchase price on 16<sup>th</sup> October 2012 and took possession and commenced development. Michael Koskei Kurere executed transfer and went through the required process and the 1<sup>st</sup> defendant was issued with a title deed and denies any illegality. The 1<sup>st</sup> defendant prays that the suit be dismissed with costs. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a general defense denying the contents of the plaint.
5. When the matter came up for hearing, the plaintiffs called Betty Mukui the widow to the late Joseph Makori Juma and the legal representative of the estate. She stated that she was the legal owner of the property, No 151381 as the title was in her later husband's name. On 24<sup>th</sup> February 2010, she carried out a search and found that the title was in her husband's name. In 2011, her advocate saw an advert in the Kenya Gazette indicating that the title had gotten lost. She later found out that someone had fenced the plot and placed building stones on the land. She reported to the area chief. She insisted that she did not sell the property. She relied on the witness statement. On cross examination she states that she does not know who advertised the loss of title. The name of her husband did not appear on the entries.



6. DW1 Kennedy Oruru Asimba testified that he is the registered owner of the land. He bought the land from Michael Kurere. He is registered jointly with his wife. They did a sale agreement in 2012. The seller was Michael Koskei Kurere. The title deed was issued jointly to the defendant and his wife. On cross examination he admitted that he did not have the copies of the did not have copies of the transfer forms.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants called the Land Registrar Nakuru Margaret Anita Omollo. She had a statement that was adopted as evidence in chief. She testified that the land belonged to Kennedy Oruru Asimba and Catherine Wanjiru. On cross examination she agrees that the search dated 24<sup>th</sup> February 2010 shows that the property belonged to Joseph Makori Juma. She also agreed that the gazette notice was printed by the Government printer but issued by the Land Registrar. In the Gazette notice the proprietor was Joseph Makori Juma. There were no transfer forms from Michael Koskei Kurere to Kennedy Oruru Asimba.
8. The gravamen of the plaintiff's submissions is that there are two competing titles and that the court should determine which title takes priority. The plaintiff submits that they produced documents showing that the deceased was the 1<sup>st</sup> person to be registered as the proprietor of the land and therefore the title issued to the deceased takes priority. The plaintiffs are still in possession of the original title deed. Moreover, that Gazette notice issue no CXII No 39 dated 29<sup>th</sup>, April, 2011, Gazette notice number 4584 that indicated that the title was lost showed the owner of the land as Joseph Makori Juma. In a letter dated 14<sup>th</sup> June 2011. The advocates for the plaintiff wrote a letter to the registrar objecting to the issuance of provisional title. The plaintiffs further submit that they have proved that the 1<sup>st</sup> defendant obtained his title fraudulently and illegally due to the manipulation of the records at the land office.
9. Gazette notice issued on 29<sup>th</sup> April 2011 triggered the fraudulent and irregular interference with the suit property. The plaintiff submits that the Land Registrar records were manipulated and interfered with. The fact that there exists the title in evidence of fraud.
10. The 1<sup>st</sup> defendant submits that he is the registered owner of the suit land and therefore entitled to all rights and privileges appurtenant thereto. The plaintiff is not the registered owner. The 1<sup>st</sup> defendant argues that he was issued with a title deed and therefore he is protected by the law. The 1<sup>st</sup> defendant further submits that he purchased from Michael Kurere Koskei being the 1<sup>st</sup> registered owner. The 1<sup>st</sup> defendant argues that his title was obtained regularly.
11. I have considered the evidence on record and rival submissions and do find that the plaintiff has proved on a balance of probability that her late husband was the 2<sup>nd</sup> registered owner of the suit property on 7<sup>th</sup> August 1997 and title deed was issued. The 1<sup>st</sup> plaintiff produced the original title deed. An official search done on 24<sup>th</sup> February 2010 revealed that the property was registered in the names of Joseph Makori Juma. The Kenya Gazette published on 29<sup>th</sup> April 2011 had a Gazette notice No 4584 dated 29<sup>th</sup> April 2011 issued by J M Mwaura the Land Registrar Nakuru District that recognized Joseph Makori Juma as the proprietor of the suit land. However, the said Gazette notice appears to have been a scheme to defraud the deceased Joseph Juma Makori of his land despite the fact that he was deceased. It is not clear who caused the gazette notice to be issued unless it was the ghost of Mr Makori who was long dead. This was the start of a clear fraud.
12. The architect of this fraud was the Land Registrar himself because when he came to court to testify he appears to have had no documents whatsoever even the gazette notice. The only document the Land Registrar had was a green card and a title deed issued in 2014 and yet the land register was opened in 1997. The Land Registrar did not produce any transfer of land, consent of the land control board,



surrendered and cancelled titles to show that the land had been transferred to the 1<sup>st</sup> defendant and title cancelled. The Land Registrar came to court empty handed with only the green card and title deed and nothing from the parcel file which meant that there was manipulation of the same. I do find that the land Registrar knew more about the skewed transactions in this matter hence decided not to avail the parcel file. It is my finding that the plaintiffs' husband and father respectively was the first registered owner of the suit land and that through illegal and corrupt schemes, the 1<sup>st</sup> defendant was registered as the proprietor.

13. The 1<sup>st</sup> defendant claimed that he bought land from one Michael Kurere Koskei he did not call him to assist him in unraveling the mysterious transactions. No evidence of certificate of official search was produced to show that Kurere at any time the registered owner at the time of transfer. Kurere was neither made a party nor called to testify. The green card produced by the Land Registrar appears to be a forgery and manipulated because it does not mention the name of Joseph Makori Juma and yet he was the first registered owner of the land. It has come a time when the corrupt schemes at the Ministry of lands have become so complex to the detriment of land owners and people who genuinely are desirous of owning land through purchase and therefore whosoever buys land has a duty to do a higher due diligence than that of obtaining a certificate of official search. One is now required to peruse the whole parcel file and ascertain that all entries in the green card were properly made and that the historical background of the land is ascertained. One must ascertain that from the 1<sup>st</sup> to last entry in the green card, duly executed transfer forms are available. Otherwise, fraudsters will be taking advantage of innocent owners of land. Indeed Article 40 sub article 1 and 6 of the Constitution of Kenya 2010 places this duty to whoever acquires title to land. The Article provides as follows:-

40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
  - (a) of any description; and
  - (b) in any part of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

14. The import of the above is that the court has no duty to protect an unlawfully obtained title even if one is an innocent purchaser for value so long as it is proved that the title is unlawfully obtained. This position is expounded by the provisions of the Land Registration Act no 6 of 2012. Under Section 26 (1) of the Land Registration Act, a certificate of title issued by Registrar shall be taken by all courts to be conclusive evidence of proprietorship. Nonetheless, the section provides that the title of that proprietor is subject to challenge under the following circumstances: -

- (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.



15. In the case of *Elijah Makeri Nyangw'ara v Stephen Mungai Njuguna & another* [2013] eKLR, the court held, inter alia:-

“...is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

16. In this case, I do find that the 1<sup>st</sup> defendant title is a product of an illegal and corrupt scheme and therefore cannot be protected. In any event, the plaintiffs’ deceased husband’s title is first in time. It is trite law that where two titles exist in respect of a parcel of land the 1<sup>st</sup> in time prevails. I do adopt the view taken by Munyao J In the case of *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others* [2016] eKLR, that:-;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

17. This position was emphasized in the case of *Wreck Motors Enterprises v The Commissioner of Lands and others* Civil Appeal Civil Appeal No 71 of 1997, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority ‘

18. The same position was held in the case of *Gitwany Investment ltd v Tajmal Ltd & 3 others* [2006] eKLR where the Court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

19. I find that the Plaintiff’s title was the first in time and as equity teaches in its maxim that; “when two equities are equal, the first in time prevails”, then the Plaintiff’s title deed was the first in time and should prevail.



20. The Court of Appeal in the case of *Muny Maina v Hiram Gathiba Maina* [2013] eKLR, held as follows:

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’

38. Section 80 (1) of the *Land Registration Act* provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

21. In this case, I do find that the plaintiff has proved the case on a balance of probabilities and therefore entitled to the sought orders as the title held by Joseph Makori Juma was the first in time. I do give judgment in terms:-

1. Permanent injunction against 1<sup>st</sup> Defendant by himself, his assigns, personal representatives, his servants and/or agents or any one whomsoever restraining them from entering, conveying, dealing, advertising, trespassing, selling or transferring ownership to any third party of the parcel of land known as Title Number: Njoro/Ngata 1/1381 (New Kiambu); This order to operate after expiry of 120 days.
2. An order to demolish any constructed structures on land know as Title Number: Njoro/Ngata 1/1381 within a period of 120 days
3. An order to collect and/or remove any and/or all building material that have been deposited on land Title Number: Njoro/Ngata 1/1381 within 120 days
4. An order of eviction against the 1<sup>st</sup> Defendant his assigns, personal representatives, his servants and/or agents or any one whomsoever from the land known as Title Number: Njoro/Ngata 1/1381 upon issuance of a one hundred and twenty(120) days’ notice.
5. An order to the 2<sup>nd</sup> Defendant to cancel any title documents issued adverse to registration of Title Number: Njoro/Ngata 1/1381 in the name of Joseph Makori Juma (deceased);
6. A declaration that Joseph Makori Juma (deceased) is the registered proprietor of Title Number: Njoro/Ngata 1/1381 and the said land is property of his estate;
7. General damages of Kshs 100, 000
8. Costs of this suit from the time of filing at the current court rates. Orders accordingly

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF JULY 2023.**

**A. O. OMBWAYO**

**JUDGE**

