



**Njenga (Legal Representative in the Estate of Ngamau Kiburu Ngamau) v Njenga & 3 others
(Environment & Land Case 1480 of 2016) [2023] KEELC 18659 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1480 OF 2016**

**AA OMOLLO, J
JULY 13, 2023**

BETWEEN

**DAVID MUKUNDI NJENGA PLAINTIFF
LEGAL REPRESENTATIVE IN THE ESTATE OF NGAMAU KIBURU NGAMAU**

AND

**PHILIP MBURU NJENGA 1ST DEFENDANT
BERNADETTE NJOKI KAMAU 2ND DEFENDANT
VIRGINIA WANGUI NGAMAU 3RD DEFENDANT
JOHN NG'ANG'A KIBE 4TH DEFENDANT**

JUDGMENT

1. What is before this court is a suit by the Plaintiff against the Defendant through an amended plaint dated 21st July 2022 seeking for the following orders;
 - i. An order of permanent injunction restraining the defendants by themselves, their servants, agents, representatives and or employees or anyone claiming under them howsoever from entering, remaining thereon, encroaching on, trespassing on, or transferring on, charging, selling, alienating or in any other way whatsoever from interfering with the Plaintiff's quiet enjoyment of all that parcel of land known as Nairobi/Block 126/461.
 - ii. Costs of the suit.
2. The Plaintiff stated that at all material times to this suit, the deceased was the registered owner of all that parcel of land known as Nairobi/Block 126/461 measuring approximately 1.08 ha hereinafter referred to as "the suit property" That on 9th October, 2016 he discovered that the 1st, 2nd and 3rd Defendants had authorized the 4th Defendant to sell the suit property on their behalf and as a result the 4th Defendant



subdivided the same in various portions and is in the process of selling them to unsuspecting members of the public.

3. The Plaintiff further stated that demand has been made, and notice of intention to sue given but the defendants have threatened to carry on with their said illegal activities. He is apprehensive that unless restrained by an order of this court, they will carry out their threats to his detriment.
4. The Defendants filed their defence dated 13th October 2022 denying all the allegations in the Plaintiff and put the Plaintiff to strict proof. They further stated that the initial registered owner of the suit property was their deceased grandfather by dint of his shareholding at Ng'undu Farmers' Cooperative Society. They averred that their grandfather had 3 sons namely Ngamau Kiburu J-deceased, Kamau Kiburu-deceased and Ngamau Kiburu S (the deceased plaintiff herein). The Defendants pleaded further that after the death of their grandfather, the deceased plaintiff illegally and fraudulently caused himself to be registered as the owner. They admitted subdividing the suit land but qualify that the sub division they did was done in good faith for the benefit of all the beneficiaries.
5. The Plaintiff filed a reply to the defence dated 14th November 2022 reiterating the contents of the amended plaintiff and stated that he is a stranger to the averments in the defence, and put the Defendants to strict proof thereof.
6. The matter proceeded for hearing with David Mukundi Njenga, testifying as PW1 and adopting his written statement dated 21.7.2022 as evidence in chief and the documents in the list dated 28.11.2016 produced as PExh 1-7. He stated that at all material times to this case, the suit property belonged to his father Ngamau Kiburu Ngamau-deceased which land his father acquired by virtue of his membership to Ngundu Farmers' Cooperative SACCO. PW1 added that prior to issuance of the title, the deceased had been issued with a certificate of ownership of the land in the year 2004.
7. In support of his evidence, the witness referred to the documents produced which included, copy of certificate of ownership issued to Ngamau in 2004; certificate of lease of the suit property in the name Ngamau Kiburu; receipts of payment made to Ng'undu Framers Sacco by Ngamau; and a receipt of payment for the processing of the title. He also produced correspondence exchanged between the SACCO and Ministry of Lands for issuance of title to Ngmau Kibwa and photos of fencing and beacon indicating the subdivision being done on the land.
8. In cross-exam, PW1 said that the 1st defendant is his cousin while the 2nd and 3rd Defendants were aunties (wives to his late father's brothers). He asserted that the suit property does not belong to the Defendants' grandfather Joseph Kiburu Mutiria, and he denied that the deceased Plaintiff took the documents relating to the land to pursue title documents. He further denied that the deceased Plaintiff passed off in the name of his father. Pw1 contested the contents of the chief's letter which was relied upon and produced in the Defendants' documents.
9. The 1st Defendant, Philip Mburu Njenga gave his testimony as DW1 and stated that Kiburu Ngamau was his grandfather and a shareholder of Ng'undu Farmers Sacco Ltd. He stated that when the land was bought in the 1960s & 1970s, the grandfather used to send his sons with money to pay for him at SACCO. That the deceased plaintiff was given receipts in the presence of the 3rd Defendant to follow up on the title thus the suit land belongs to the three sons of Kiburu namely; Ngamau Kiburu, Francis and Jona. DW1 wondered how Ngamau Kiburu-deceased became the registered owner of the suit property.
10. On cross examination, DW1 stated that the chief's letter was written on 21.8.2016 because there was no dispute over the property previously. He confirmed that his grandfather died in 1977 but the receipts produced were dated between 1984 and 1987 by which time the grandfather had passed on. He admitted being aware that in the succession cause relating to the estate of their grandfather had



been filed and the suit property was not mentioned. However, he argued that it was because he had given it to his grandson Joseph Kiburu Kahai who later told his uncles that he did not want it.

11. After the close of the hearing, the parties agreed to exchange written submissions. The Plaintiff filed his submissions dated 28th February 2023 but I have not seen any filed submissions by the Defendants on record. The Plaintiff laid out a summary of his case and the Defendants case and in his analysis presented the issue for determination is the rightful owner of the suit property and whether the Plaintiff is entitled to the orders sought.
12. The Plaintiff submitted that he has produced a certificate of lease issued on 11th November 2016 to the deceased showing that the suit property is lawfully owned by him having been passed to him by virtue of being a member of Ng'undu Farmers' Co-operative Society Limited. In support of his argument, he referred to Section 26(1) of the [Land Registration Act](#) and the Court of Appeal decision in the case of *Munyu Maina Vs Hiram Gathiha Maina* [2013] eKLR, where it was 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.”
13. The Plaintiff submitted that he presented the receipts for payments made to the SACCO by the deceased. That it was through those payments that he was allotted a share in Ng'undu Farmers' Co-operative Society Limited which is evidenced by the copy of Certificate of ownership in the name of Ngamau Kiburu dated 22nd September 2004. Further, he submitted that through various letters dated 29th July 2010, 21st July 2011, 25th July 2011 and 5th August 2011, Ng'undu Farmers' Co-operative Society Limited confirmed to the Commissioner of Lands that the Deceased Plaintiff is the rightful owner of the suit property. The SACCO advised that the title be processed in deceased plaintiff's name and a payment of Kshs10,000 was made payment to Ng'undu Farmers' Co-operative Society Limited for purposes of processing the transfer.
14. It is the Plaintiffs contention that Order 2 Rule (10) (1) (a) of the Civil Procedure Rules, 2010 requires that particulars of fraud be pleaded which the Defendants failed to do when they alleged that the deceased acquired the registration of the suit property illegally. In support, the Plaintiff cited the Court of Appeal in *C O Okere v Esther Nduta Kiiyukia & 2 others* [2019] eKLR where the court quoted the case of *Vijay Morjaria vs. Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) where Tunoi, JA (as he then was) stated as follows; “it is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. That the acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently and that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”
15. The Plaintiff submitted that he is entitled to the prayers sought in the amended plaint as from the record it has been shown that the Defendants are interfering with the quiet enjoyment of the suit property. He also submitted that the Defendants should meet the cost of the suit.
16. As identified by the Plaintiff, this court frames one question for determination;
 - i. Whether the deceased plaintiff legally owns the suit property
 - ii. Whether the reliefs sought in the plaint should be granted



17. The Plaintiff produced several documents to explain how the deceased acquired the suit property. In contesting the Plaintiff's claim, DW1 stated that their grandfather used to send his sons to the SACCO to make payments on his behalf. That the deceased plaintiff requested Ngamau Kiburu (their grandfather) to release to him the documents in respect of the suit property for purposes of processing title. Dw1 also stated that the family made contributions towards various payments for the upkeep of the property which monies he said were handed over to the deceased plaintiff in good faith.
18. DW1 admitted that his grandfather died in 1977 but did not elaborate when the documents were handed over to the deceased plaintiff by their grandfather. He also did not give the names of the family members who contributed money for the upkeep of the suit property. This court is alive to the provisions of section 107 and 109 of the Evidence Act Cap 80 which places the burden on the Plaintiff to prove his case. Sections 107 and 109 provides thus;
 - 107(1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"
 - 109 "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"
19. The payment receipts issued by Ngundu Farmers SACCO Ltd for share capital was made on 11th May 1984, survey fee paid on 18th December 1987 and additional fees receipts are all dated 1988 and 1989. These dates are post the death of the Defendants' grandfather which contradicts the averment that the said grandfather used to send his sons to pay for the suit plot on his behalf. The payment for share capital in 1984 also contradicts the assertion that the deceased grandfather was the initial owner of the suit property. The 1st Defendant did not support his averment that the payments made by the deceased plaintiff were monies contributed by the family members.
20. PW1 went further to produce letters written by the SACCO in the years 2010 and 2011 which confirmed that the deceased plaintiff and recommending the registration and issuance of title of the suit property in his name. No evidence was presented to contradict the contents of these letters or to state that they were forged.
21. The Plaintiff brought this suit claiming interference by the Defendants jointly and severally including authorizing the 4th Defendant to subdivide and sell. The Defendants did not contest this allegation and or offer any basis why they would want to subdivide and sell the suit land without authority of the registered owner.
22. In view of the foregoing analysis, it is my considered opinion and I so hold that the deceased plaintiff and his estate is the rightful owner of the land known as Nairobi/Block 126/461. Consequently, I enter for him judgement in his favor as prayed in the plaint.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2023

A. OMOLLO

JUDGE

In the presence of

Mr Gode h/b for Kingata for Plaintiff

Mr Kahiga for Defendants

