



REPUBLIC OF KENYA



KENYA LAW
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**Kirui v Rop & 2 others (Environment & Land Case E020 of 2021)
[2023] KEELC 20008 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20008 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E020 OF 2021
CG MBOGO, J
SEPTEMBER 26, 2023**

BETWEEN

JONATHAN KIMETET KIRUI PLAINTIFF

AND

SAMWEL KIPKOECH ROP 1ST DEFENDANT

NAROK LANDS REGISTRAR 2ND DEFENDANT

NAROK DISTRICT SURVEYOR 3RD DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated 18th October, 2021 praying for judgment against the defendants jointly and severally for the following orders: -
 - i. An order of permanent injunction restraining the defendants by themselves, their agents and/or servants from trespassing upon the plaintiff's parcel no. Cismara/Olposimoru/354 (suit property), remaining therein, apportioning the same, alienating or in any way dealing with the same hereinafter.
 - ii. An order directing the 2nd and 3rd defendants to undo the alterations they effected on the plaintiff's title and registry index map to the position of the year 2019 and reinstate the land's acreage to 13.00 Ha.
 - iii. Cost of this suit and the interest at court rates.
 - iv. Any other relief this honourable court may deem fit and just to grant.
2. The gist of the plaint is that at all material times, the plaintiff was the lawfully registered proprietor of land measuring approximately 13.0 Hectares known as LR No. Cismara/Olposimoru/354 from the year 1975 to the year 1987 when he was wrongfully evicted together with other residents.



3. The plaintiff further stated that after the unlawful eviction, he went to live in Bomet and later on resumed his residence without any interference save for a case lodged by the 1st defendant's deceased father. Further, he stated that owing to his long stay, his portion of land was hived off and upon conducting a search on 25th February, 2021, he found out that his portion of land was 0.81 hectares with the large chunk being amalgamated with the land owned by the 1st defendant's deceased father.
4. The plaintiff pleaded particulars of fraud, mischief, collusion and illegality and averred that owing to the fraud perpetrated against him, he has suffered loss and damage and is in danger of losing his land.
5. The 2nd and 3rd defendants filed their statement of defence dated 14th November, 2022 and filed in court on 24th November, 2022. The 2nd and 3rd defendants denied the contents of the plaint and the particulars of fraud. The 2nd and 3rd defendants stated that the suit is an abuse of the court process, a non-starter, misconceived, fatally defective and raises no reasonable cause of action.
6. The plaintiff's case proceeded for hearing on 16th May 2023. The plaintiff while adopting his witness statement dated 18th October 2021 produced exhibits marked as PEX Nos 1-15.
7. On cross examination, the plaintiff testified that his parcel of land is no. 354 and its size is 32 acres. That he acquired this land as a result of the adjudication. The plaintiff further testified that he went to live in Bomet after his land was grabbed and later went to the land which belonged to his father. Further, that the 1st defendant's father sold the land in Olposimoru which is part of the suit land which he is still residing in.
8. The plaintiff further testified that the Surveyor determined the acreage of his land in the year 1974 when the area was being surveyed and no Surveyor has been to the land recently. The plaintiff admitted to have brought a map to court showing the people on the ground and informed the court that he also reported the issue of fraud to the chief for investigations. Further, the plaintiff testified that he informed the chief a long time ago and there is a report of fraud filed in court. Also, that after the process of adjudication, the land was registered in his name as Cismara/Olposimoru/354 but he did not pay any fees for registration.
9. On re-examination, the plaintiff testified that the size of his land is 32 acres and that the plaint shows that he was evicted from his land by the government and later on he returned to live in the same parcel of land which he found out that it had been sold.
10. Samuel Arap Kononden (PW1) while adopting his witness statement dated 18th October, 2021 testified and on cross examination told the court that the plaintiff is his neighbour in Bomet and in Narok and that he is aware of the suit land. He further testified that he is also aware of a recent survey of the suit property and he recalls that it was done in the year 1981 and a report was also done before the suit was filed.
11. PW1 further testified that his statement shows that the 1st defendant filed a complaint and the same was dismissed and the plaintiff was declared the owner. Further, that trespass to the land occurred almost twenty years ago which the plaintiff reported to the chief and the chief held that the land belonged to the plaintiff. Further, that together with the plaintiff, they went to the Land's and Survey's office where they learnt that about 30 acres of the plaintiff's land had been taken away. That they reported the matter to the Directorate of Criminal Investigations and no steps had been taken. Also, that they have an OB number of the report that they filed.
12. On re-examination, PW1 testified that he used to inspect the plaintiff's land and was shocked because the green card in the year 2019 showed that the land was 32 acres and the last inspection showed that 30 acres had been taken away.



13. The defendants case proceeded for hearing on 12th June, 2023. Philip Mathew Odidah (DW1) while adopting his witness statement dated 22nd May, 2023 produced documents marked as DEX Nos. 1 to 7 as exhibits.
14. On cross examination, DW1 testified that he is a Land Registrar in Narok which office he assumed a month prior and that the documents are not strange to him as he is the custodian. He further testified that he relied on the records from their office and as per the said records, there was an appeal to the Minister but he did not go to the Minister's officer to confirm the records. Further, that he did not see the document number 4 (copy of proceedings of Land Adjudication Officer- dated 26/3/1992) in the plaintiff's list of documents but has the decision of the adjudication officer before the two parcels of land were registered.
15. DW1 further testified that since he had not seen document no. 4, he could not be able to say if the Minister's decision was plagiarized. He also admitted that it is only the Director of Land Adjudication and Settlement Officer who could answer the question on document no. 4 as his office was only served with the Minister's decision. Further, that the minister's decision was not a forgery and there was no reason to carry out investigations on the said appeal as it tallies with the green card.
16. DW1 further testified that the certificate of search dated 21st March, 2019 emanated from their office and is signed by the Land Registrar and the same shows the acreage as 13.0 hectares with a pending restriction from an order of the Chief Registrar that no restriction should be done until the Minister's decision is finalized. DW1 presumed that the appeal was filed around the year 2014 or thereabout and did not know that the appeal was lodged way back in the year 1992.
17. On re-examination, DW1 testified that the decision from the appeal to the Minister came from the Land Adjudication office and that the appeal was lodged in the year 2015 and not the year 1992. Also, that any anomaly on the documents forwarded to them can elicit investigations but there was nothing to warrant investigations as the change in acreage was occasioned by the Minister's decision.
18. On the 25th June, 2023 the plaintiff filed his written submissions dated 23rd June 2023. The plaintiff raised the following issues for determination as listed below: -
 - a. Whether the alterations in the land records for LR No. Cis-Mara/Olposimoru/354 were lawful.
 - b. Whether the plaintiff is entitled to the orders sought.
 - c. Whether the plaintiff is entitled to general and punitive damages.
 - d. Who ought to bear the costs of the suit.
 - e. Whether the appeal beyond time is procedural.
 - f. Who is the registered owner of LR. No Cis-Mara/Olposimoru/354.
19. On the first issue, the plaintiff submitted that as per the official search done in the year 2019, the suit land measured 13.0 hectares and another official search done in the year 2021, the suit land changed from 13.0 hectares to 0.8 hectares with no transfer documents, records from survey office or any other document provided by the 2nd defendant. He further submitted that it was determined upon analysis of the official search that the measurements in hectares in favour of the 1st defendant were forgeries and given the fact that the plaintiff did not transfer the suit land to the 1st defendant, the alterations made to the land records were unlawful.



20. On the second issue, the plaintiff submitted that the cumulative actions and omissions of the defendants consisted of a deceitful practice with intent to deprive the plaintiff of his right to the suit land as he gave evidence of ownership. He further submitted that the 2nd defendant has not produced evidence to support the basis upon which the green card being in its custody was altered in favour of the 1st defendant. That since the alterations to the land records was a sham, the defendants were not capable of making full transfer any other transfer to the suit land to the 1st defendant. The plaintiff relied on the case of *Alberta Mae Gacie versus Attorney General & 4 Others* [2006] eKLR.
21. The plaintiff further submitted that he has proved that he is the owner of the suit land and there was fraud on the part of the defendants in unlawfully altering the land records.
22. On the third issue, the plaintiff submitted that under Section 13 (7) of the *Environment and Land Court Act*, the court is empowered to award damages as well as compensation as he endured hardship, pain and suffering in taking all reasonable steps to secure his land rights and peaceful enjoyment of the same. The plaintiff relied on the cases of *Mikidadi versus Khaigan & Another* [2004] eKLR and *Coast Neurology Center Limited versus Mohamed Kasim Bakari & 3 Others* [2020] eKLR.
23. On the fifth issue, the plaintiff submitted that the appeal to the Minister was filed twenty-three years in the year 2015 which was out of time after the ruling by the Land Adjudication Officer that was delivered in the year 1992. Further, that to file an appeal out of time and seek the court to extend time is presumptive and inappropriate.
24. On the fourth issue, the plaintiff submitted that he is entitled to the costs and judgment against the defendants.
25. The 1st defendant did not enter appearance and neither did he file his defence as evidenced by the affidavit of service sworn on 27th January 2022 and filed in court on 16th March 2022. The 2nd and 3rd defendants did not file their written submissions even though on the 24th November, 2023 they filed their defence dated 14th November, 2022.
26. Be that as it may, I have considered all the pleadings filed, evidence tendered and the written submissions filed by the plaintiff and the issue for determination is whether the plaintiff is entitled to the orders as sought in the plaint.
27. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
28. Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
29. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
30. It was the plaintiff’s evidence that he acquired the suit land through the adjudication process way back in the year 1975 but later went to live in Bomet where he was evicted and relocated back only to realise later that 30 acres of his land had been hived off and given to the 1st defendant. It was his evidence that as per the official search conducted in the year 2019, the suit land measured 13.0 hectares but upon conducting another search in the year 2021, he found that there was unlawful alteration to the acreage of the land. The 2nd defendant testified that the changes in the acreage of land was effected as a result of the decision of the appeal to the Minister delivered in the year 2015.
31. I have looked at the documents produced by both parties and indeed, the interest in the suit land emanated from the adjudication process as per the adjudication records of the year 1985 with an objection raised being dismissed in the year 1992.
32. Interestingly, it appears that an appeal was filed to the Minister as Case No. 32 of 2015 whose outcome prompted the changes in the acreage of the suit land. The said decision was delivered on 12th August, 2015.
33. Section 29 (1) of the [Land Adjudication Act](#) provides that;
- “Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by— delivering to the Minister an appeal in writing specifying the grounds of appeal; and sending a copy of the appeal to the Director of Land Adjudication and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”
34. It was also the 2nd defendant’s evidence that as per their records, the said appeal to the Minister was indeed filed in the year 2015 and the appeal was allowed. Based on the above provisions of the law, the 2nd defendant while implementing the decision of the Minister was perhaps not aware of the lapse of time that had already occurred in filing and determining the appeal. In other words, the Minister’s decision was a nullity as it was heard and determined outside the timelines stipulated in law as provided under Section 29 (1) of the [Land Adjudication Act](#).
35. In my view, the alterations that were made on the Registry Index Map and the green card were, therefore, unlawful and unprocedural. 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.”
36. It is my finding that the plaintiff herein is entitled to ownership of the suit land as per the adjudication records of the year 1992 which provided a determination of the objection proceedings before the Land Adjudication Officer.



37. The plaintiff submitted on his entitlement to general and punitive damages. I would have awarded the plaintiff general damages but the same was not prayed for in the plaint and as such cannot be granted.
38. The upshot of the above is that the plaintiff succeeds and judgment is entered against the defendants jointly and severally in the following terms: -
- i. An order of permanent injunction is hereby issued against the defendants, by themselves, their servants or agents from trespassing, remaining therein, apportioning, alienating or in any way dealing with the plaintiff's suit land known as Cis Mara/Olposimoru/354.
 - ii. An order is hereby directed to the 2nd and 3rd defendants to rectify the register and undo the alterations on the plaintiff's title and the Registry Index Map to reflect the initial size of the suit land measuring approximately 13.0 Hectares.
 - iii. Costs of the suit.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 26TH DAY OF SEPTEMBER, 2023.

HON. MBOGO C.G.

JUDGE

26/9/2023

In the presence of: -

CA: Pere Meyoki

