



REPUBLIC OF KENYA



**Kiptui & another v Mburu & 3 others (Environment & Land Case
105 of 2012) [2023] KEELC 19983 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 105 OF 2012
FM NJOROGE, J
SEPTEMBER 22, 2023
FORMERLY HCC NO. 277 OF 2012**

BETWEEN

**ISAAC KIBET KIPTUI 1ST PLAINTIFF
BRICKEM COMMERCIAL AGENCIES 2ND PLAINTIFF**

AND

**JOSEPH MBURU 1ST DEFENDANT
HELLEN WANJIRU ONDIEKI 2ND DEFENDANT
JOHN KIIRU NGARI 3RD DEFENDANT
ESTHER WANGUI MURAYA (SUED AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF JOHN MURAYA GITHINJI) 4TH DEFENDANT**

JUDGMENT

1. The orders sought in the present case by the plaintiffs in the amended plaint dated 10/8/2015 are as follows:
 - a. A declaration that the Defendants are trespassers and the 2nd plaintiff is the registered and rightful owner of the suit property.
 - b. An order of eviction against the defendants.
 - c. A permanent injunctive order directing upon the defendants restraining them from ever again trespassing on the suit property.
 - d. Costs and interest.



2. In the body of the plaint the plaintiff sets out his claim as follows: that the plaintiff was a member of Kalenjin Enterprises Ltd which sold him the suit land known as Nakuru Municipality Block 29/409 (Rhonda) in this case; that he is the registered proprietor of the suit land; that sometime in the year 2007 the defendants trespassed onto the said land and conducted developments thereon. They ignored the 1st plaintiff's demands that they cease the trespass. The 1st plaintiff involved the Local Chief and Kalenjin Enterprises Ltd who also advised the defendants to cease the trespass but they also ignored those warnings. The 1st plaintiff avers that the defendants have denied him ownership rights and peaceful and quiet occupation of the suit property. Now the 1st plaintiff has sold the suit property to the 2nd plaintiff who is claimed to be the registered owner. The defendants have however lodged a caution over the suit title.

The Joint Statement of Defence

3. The defendant filed their joint statement of defence and counterclaim. They claimed that the plaintiff acquired the title to the suit land by way of fraud as the same had been allotted to the 4th defendant; that they are therefore not trespassers on the suit land; that the 4th defendant had owned the suit land and had occupied the same from 1980 up to 2003 when she sold the same to the rest of the defendants who took over possession and have been in occupation ever since; that the plaintiff's claim is time barred. They averred that the 1st plaintiff irregularly purported to transfer the suit land to the 2nd plaintiff during the pendency of the present suit.

The Counterclaim

4. In their counterclaim it was stated that in 1977 the 4th defendant purchased the suit land and the corresponding share in Kalenjin Enterprises Ltd from one James Osiako Ingutia and by then there were 12 houses built on it and she took possession after the purchase. Thereafter in 1980 the 4th defendant's husband purchased from one Reuben Kibore Kolei an adjacent plot identified as plot no 2258 (now plot no 409) and occupied it with the knowledge of the plaintiffs until his demise in 2002. Plot No 2258 was subsequently sold by the 4th defendant in 2003 to three other persons not party to the present suit.
5. It is also claimed that after purchase, the 1st -3rd defendants and those other non-party 3 persons subdivided the two plots amongst themselves and allocated themselves plots among the subdivisions by way of balloting. The 1st -3rd defendants took possession of the suit land in the process. They constructed houses on the suit plots and occupied them one year later. Later a certificate of title was issued to the 1st plaintiff in 2005 in respect of plot No. 2258 (409) and he claimed ownership of it whereupon the 1st defendant lodged a caution over the title and lodged a claim in the Land Disputes Tribunal, the proceedings of which the 1st plaintiff failed to attend. The 4th defendant also lodged a caution over the same title. Later, the 2nd plaintiff began claiming ownership of the land and attempted to have the land surveyed. The defendants aver the plaintiffs' suit is misconceived as it relates to plot No. 2260 which upon titling translated to plot No. 410 and not the suit land. The defendants aver in the alternative that the plaintiffs' claim has been extinguished by operation of Sections 7, 13 and 17 of the Limitations of Actions Act and that they are entitled to the suit land by reason of adverse possession. They seek the following prayers in their counterclaim:
 - a. A declaration that the 1st, 2nd and 3rd defendants are the beneficial owners of all that land formerly known as plot number 2258 Barut Farm now known as Nakuru/Municipality block 29/409 (Ronda).
 - b. In the alternative, a declaration that the 2nd plaintiff's title to all parcel of land formerly known as plot number 2258 Barut Farm now known as Nakuru/Municipality Block 29/409 (Ronda)



has been extinguished by the operation of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya and that the 1st, 2nd and 3rd defendants have acquired title to it by adverse possession and an order compelling the plaintiffs to transfer all that land formerly known as plot number 2258 Barut Farm now known as Nakuru/Municipality block 29/409 (Ronda) to the 1st, 2nd and 3rd defendants forthwith.

- c. A permanent injunction restraining the plaintiffs whether by themselves, their employees, servants, agents, or otherwise howsoever from entering, occupying, charging, carrying on any developments, or dealing with all that parcel of land formerly known as plot number 2258 Barut Farm now known as Nakuru/Municipality block 29/409 (Ronda) in any manner prejudicial to the interests of the defendants.
- d. Costs of the suit.
- e. Any other relief that the Honourable court may deem fit to grant.

Reply to defence and counterclaim

6. The plaintiffs filed a reply to defence and counterclaim denying fraud and the other matters raised therein by the defendants, and maintaining that they obtained the title to the suit land lawfully and procedurally and that the defendants are trespassers. They denied that the suit is time barred. In the defence to counterclaim they deny that the suit was named “plot No. 2258” and aver that it was originally baptized “plot no 2260” as per the records held by Kalenjin Enterprises Ltd which the 1st plaintiff purportedly acquired from that company.

Evidence of the plaintiffs

7. PW1 was the 2nd defendant. He testified to having purchased the suit land from the 1st defendant for Kshs 4,000,000/- in 2014 during the pendency of the present suit and with full knowledge that defendants were already on the suit land. He stated that the title was issued in the name of Bricken Commercial Agencies which is his firm; that he followed due process and conducted a search. According to PW1, the 1st plaintiff had supplied him with supporting documents and produced copies of the documents in the plaintiffs’ bundle as evidence.
8. PW1 produced copies of documents whose effect was that the suit land had been transferred to him by the 1st plaintiff; however, he has not taken possession of the land as the defendants are in occupation.
9. Upon cross-examination by Mr. Konosi, PW1 admitted that he was never shown any beacons to the suit land at the time of purchase and that he never knew the extent of the plot; that there was a maize crop on the land then; that at purchase he was aware of the pendency of the present case; that he met the defendants on the property during a visit; that according to a search at the lands registry, Plot No 408 belongs to the 4th defendant’s late husband and that share No. 2290 yielded Plot No 409.
10. PW2 was Elijah Kiplagat Kipkemei Chelaite. His evidence was that he has been the chairman of the board of directors of Kalenjin Enterprises Ltd; that before 2008 he was a director and between 1996-2001 he was a committee member. The company finally altered its name to Rift Valley Enterprises Ltd. According to him plot no 409 was initially known and referred to as Plot no 2260 in the company records. After balloting it went to one Michael Komen as its first owner in 1972; later on the 1st plaintiff approached the company with some documents and claimed to have purchased the suit land from Michael and his name was put into the company records in lieu of Michael’s. According to him a letter of 1974 (P. Exh 13) was written to state that the land was Michael’s and the balloting register of 1972 (P. Exh 14(b) shows the same thing. P. Exh 14(c) produced under his hand is a document showing how



the old numbers were replaced by new numbers. PW2 stated that the 1st plaintiff was given a clearance certificate (P. Exh 10). According to him the 4th defendant owns plot no 408 (which he claimed was formerly plot no 2258 issued to one Reuben Arap Kolei). Between the year 1972 when Michael Komen balloted and the year the 1st plaintiff presented documents of purchase, the company had not been informed of the sale.

11. On cross-examination by Mr Konosi, PW2 admitted that the plot numbers in PExh 14(b) follow each other sequentially; that some numbers are lost in the sequence and that for reasons that he could not understand plot No. 2259 was not balloted for. According to his evidence, plots got the following new numbers: 2256 got No 4072257 got No 4062258 got No 4082259 ???2261 got No 410
12. PW2 admitted that David O. Ingutia was a member holding plot No. 2257 and stated that his new number is 406, whereas Elijah Orege and Harun Nyangau are now reflected as the owners of plot No. 406 having presented documents and caused themselves to be so registered. He could not tell if David sold his share to the 4th defendant's husband. One Chepkoigot was a member and he balloted for plot No 2261 which is now plot 410. He did not know who lives on plot no 2260. He maintained that the 1st plaintiff was in possession of the suit land.
13. PW3, Peter Kiprono Kirui, a surveyor, gave evidence that he visited plots No's 406, 408 and 409 and made a report dated 25/3/2021 which he produced in court. He testified that the three parcels are distinct on the ground; that a subdivision has also been carried out on plot No 406 and 408. Plot No 409 was fenced and had a permanent structure. All the 3 plots are on the ground as they are arranged on the map.
14. DW1 Joseph Ndungu stated that he resides on plot No 409; that he and his colleagues purchased plots Nos 408 and 409 from the 4th defendant in 2003; that each plot was taken by 3 persons; that he built a permanent house on plot 409 and installed a gate; that he has lived on the said plot since 2003 having taken over possession from the 4th defendant who had resided thereon previously and who had a number of semi-permanent rooms thereon which she demolished at departure; that his colleagues have also built on the said plot. Due to the succession cause in respect of the 4th defendant's late husband, they were not yet registered as proprietors. The 1st plaintiff appeared in 2005 and claimed ownership of the plot No 409 and upon finding out that title had issued in his name the defendants lodged a caution against it. After the 1st plaintiff claimed ownership, the dispute went to the Area Chief's office and to the Police but was not resolved. He is not aware of how the caution was removed to enable the transfer of the land to the 2nd plaintiff. Upon cross-examination by Mr. Langat, DW1 stated that the 4th defendant's husband was deceased by the time of purchase; that the documents they had for plot No 409 indicated that it was previously numbered 2258 and had belonged to Reuben Kolei and 408 was previously numbered 2257 and had belonged to Mr Ingutia.
15. DW2, Esther Wangui Muraya, the 4th defendant gave evidence and adopted her written witness statement in the record dated 10/3/2021. Her evidence is that plots nos 2257 and 2258 belonged to Reuben Kolei and David Ingutia respectively; that in 1977 she purchased plot No 2257. In 1980, her husband purchased plot No 2258 and built 12 rooms thereon and her son resided there. Her evidence is that plot No 2258 translated into plot No 409. The two parcels lay adjacent to each other. She lived on the plots until 2003 when she sold them to among others the 1st -3rd defendants.

Submissions

16. All the parties filed written submissions on the case which I have taken regard of in preparing the present judgment.



Issues for determination

17. Before this court delves into a determination of this dispute it first observes that the defendants raised adverse possession as an alternative claim against the plaintiffs in their counterclaim. That sort of claim can not co-exist alongside a claim that challenges the validity of the plaintiffs' title and I hereby dismiss it summarily. Besides, this court also agrees with the plaintiffs' submission that their claim can not be time barred since the suit was filed in 2012 and the 1st plaintiff's title had been issued in the year 2005, a 7-year difference in contrast to the statutory 12. Consequently, in this court's view, the only remaining issues arising for determination in the present suit are as follows:
- a. Whether the registration of the 1st plaintiff as proprietor of the suit land was fraudulent and whether the resultant titles ought to be cancelled;
 - b. Whether a declaration ought to issue declaring that the 1st, 2nd and 3rd defendants are the beneficial owners of the suit land and if so whether an injunction ought to issue restraining the plaintiffs from interfering with the suit land;
 - c. Who ought to bear the costs of the suit and the counterclaim?
18. The issues are discussed herein under.

a. Whether the registration of the 1st plaintiff as proprietor of the suit land was fraudulent and whether the resultant titles ought to be cancelled

19. Fraud was pleaded by the defendants as required by law. The question is whether it was proved to the required standard which is between a balance of probabilities and beyond reasonable doubt.
20. The plaintiffs state that the question that arises is whether as at the date the title was issued to the 1st plaintiff (27/1/2015), the land was available for allocation, and that the onus is upon the defendants to prove that then land had been allocated. The plaintiffs' case is that the 1st plaintiff purchased plot no 2260 from one Michael Komen. They also admit that the 4th plaintiff's husband purchased plot No 2258 from one David Ingutia and that the issuance of new numbers was done at the land registry during registration. They emphatically relied on PW2's evidence that new numbers were issued as follows:
- a. plot no 2257 was issued with the new number 406.
 - b. plot no 2258 was issued with the new number 408.
 - c. Plot No 2259no balloting done.
 - d. plot no 2260 was issued with the new number 409.
21. PW2 never produced any conclusive evidence to prove that the above was the proper arrangement and correlation of old and new numbers; though his exhibit P. Exh 14(b) only provides the old numbers and exhibit P. Exh 14(c) provides the new numbers and the names of allottees, it is clear that the exhibits are from different sources. The evidence of PW2 on the sequencing of the new numbers suggests that the old plot numbers consecutively followed each other while the corresponding new ones did not. This court would have benefited from a detailed explanation as to why there was discord in the correlation of the numbering but there was no explanation by PW2 as to how it could be, for example, that number 406 would be followed by number 408 while the respective corresponding old numbers followed each other consecutively.



22. There was no explanation for the allegation that no balloting was done for plot number 2259 and no information appears on P. Exh 14(b) as to who the allottee of Plot no 2259 was. PW2's evidence through P. Exh 14 admitted the defendant's claims that David O. Ingutia owned plot no 2257 and that Reuben Kolei owned plot No. 2258. Though PW2 admitted Reuben Kolei's name followed that of David Ingutia in P. Exh 14(b) that name was conspicuously missing in P. Exh 14(b) and had been replaced by that of the 1st Plaintiff without any explanation, yet the 1st plaintiff is said to have purchased the plot from one Michael Komen.
23. PW3's evidence was that plot no 406 has been subdivided into plots nos 1840 and 1841 and plot no 408 has been subdivided into plots nos 1837,1838 and 1839 while plot no 409 has not been subdivided. By his evidence, he concurs with the defendants' position that just like on the official map, plots nos 408 and 409 border each other on the ground.
24. From the evidence of all the parties therefore, there is no dispute that the 4th defendant indeed got plot no 408 from David Ingutia. However, her husband soon thereafter got the neighbouring plot, whatever number it was, from Reuben Kolei and she immediately occupied it and stayed thereon without interruption till the sale. The conclusion that naturally occurs to the independent observer is that going by the numbering sequence, the old number of that plot was 2258. Naturally then, if plot no 2257 was converted into no 408, unless a reasonable explanation was given by PW2 which did not happen, Plot no 2258 ought to have been converted into No 409.
25. The most disadvantageous aspect of the plaintiffs' claim is that all the time from the date the company allotted its members lands up to 2003, and indeed up to date, the 1st plaintiff has never occupied the plot he refers to as his, that is, plot No 409. At all material times, it has been occupied first by the 4th defendant and the 1st -3rd defendants in succession. He does not insist that the former number of his plot was 2258 but asserts that it was No 2260. Michael Komen's name appears against No 2260 and not No 2258 in the balloting list D. Exh 8 and in the plaintiffs' own evidence P. Exh 14(b).
26. Even to the naked eye, the typing format on the printout of P. Exh 14(b) appears ancient and it does not include the 1st plaintiff's name. On the other hand, the typing format on P. Exh 14(c) appears quite modern and it includes the 1st plaintiff's name. PW2 was silent on the actual dates of preparation of both documents, and the continuity of record both before and after the two folios forming each exhibit was not produced. Naturally, it would have been PW2's obligation to produce that whole record. It is this court's view that based on both parties' evidence and in the ordinary sequence, plot no 2258 could not have been allocated any other new number other than No. 409.
27. Finally, on the issue, it is not lost to this court that the map produced as P. Exh 15(b) by PW3 shows that there are two plots that are wedged between plots No 409 and 410. It is a mystery that PW2 failed to explain how these plots which are numbered out of sequence came into being, and how come they were not issued to the 1st plaintiff he being the person entitled under the name Michael Komen which comes next after the name Reuben Kolei in the sequence on P. Exh 14(b). It is also noteworthy that the plaintiff's own evidence shows that the purported letter dated 16/8/1974 demanded that one Chepkoigot arap Mibei, and not Reuben A. Kolei, vacates Plot 2260.
28. To cap it all, two features of this case render the 1st plaintiff's claims quite weak. First, he never appeared in court in person and never gave any authority to anyone by any recognizable means to enable them testify on his behalf and no plausible reason was given for that default. Secondly, despite the evidence of 3 witnesses for the plaintiffs having been taken, no documents were produced by the Plaintiffs evidencing sale or transfer of plot no 409 from Michael Komen to the 1st plaintiff. The oldest credible documents produced by the plaintiffs' witnesses in this case date back to 2003 and these are the two



receipts dated 27/10/2002 for Kshs 1000/ made as Municipality rates (P. Exh 9(a) and the receipt dated 13/10/2003 being for transfer fees (P. Exh 9b). By that date, the defendants were already in possession. Also, the surprising turn of events surrounding the receipts is that though the plaintiff claims only one plot and his own evidence (in the form of P. Exh 14(c)) shows that one Tapnyobii Chemutai Mibei owns plot no 410, the two receipts are for different plots; indeed, the second receipt bears the number of Plot No 410. The surname of the owner of that plot appearing at entry no 410 of P Exh 14(c) being “Mibei”, an independent observer would be forgiven for wondering if that “Mibei” is not the person against whom the demand to vacate in P. Exh 13 dated 16/8/1974 had been made by Kalenjin Enterprises Ltd who were well placed to know the owners of plots under their mandate. The same “Mibei” appears to be the one listed as owner of plot No 2261 on P. Exh 14(b) which plot, if the proper sequencing and correlation of old and new numbers is studied, should be having new number 412. However, in the plaintiffs’ own evidence (PEXh.14(c)) plot No 412 was allocated to one “Grace Talai Baringo.” The history of plot 410 was not given by the plaintiffs yet it was upon them to explain why they were not claiming it instead of plot no 409. The glaring gaps in the evidence so far analyzed has demonstrated that it is not possible to agree with the plaintiffs that plot No 2260 translated into plot no 409. The very fact that they have not been in possession is evidence that their conclusion that the plot occupied by the defendants belongs to them is a recent stance that is not supported by evidence available. All this evidence suggests that the plaintiffs are claiming the wrong plot.

29. On the other hand, the defendants produced D. Exh 14 and agreement dated 6/6/1980 between Reuben Kibore Kolei and the 4th defendant’s husband which indicated that the vendor was to cause the purchaser’s name to be entered into the register of shareholders. They also produced DExh18, a transfer of share from Reuben Kibole Kolei to John Muraya Githinji, D. Exh 15 and a copy of a share certificate No 5061 issued to the purchaser; a shareholder’s card in the 4th defendant’s husband’s name was also produced as P. Exh 16, reflecting that his entitlement was plot no 2258. These 4 vital documents were not impugned by the plaintiffs and I am persuaded that they are genuine. Consequently, I find that plot number 409 belongs not to the plaintiffs but to the 1st -3rd defendants, the latter having purchased the same from the 4th defendant.
30. The evidence I have analyzed shows that the 1st defendant had all evidence before him, including the full possession of the suit land by the defendants, before the 1st defendant obtained title. Furthermore, he obtained title during the pendency of the dispute between him and the defendants, and also, during the pendency of the present suit, purported to transfer the same to an unincorporated body associated with the 2nd plaintiff.
31. Further, the purported transfer of the suit land to Brickem Commercial Agencies was in the eyes of this court a mere stratagem to place it further away from the reach of the defendants. There is also the question as to whether the Brickem Commercial Agencies can hold land in its own name. Long ago, in the case of *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank* [1992] eKLR it was held as follows by Bosire J:

“In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked the capacity to institute proceedings in its own name, hold property, movable or otherwise. The plaintiff being an unincorporated body lacks the capacity to own land in its own name.”
32. Though the firm has sued through its official, it is clear that Brickem Commercial Agencies does not have capacity to hold property in its name and its title to the suit land is null for that reason per se.



33. On the strength of the evidence available this court finds that the registration of title in the name of the 1st plaintiff and the transfer into the name of Brickem Commercial Agencies was fraudulent and that the said title can not be protected under the law and it must be cancelled.

b. Whether a declaration ought to issue declaring that the 1st, 2nd and 3rd defendants are the beneficial owners of the suit land and if so whether an injunction ought to issue restraining the plaintiffs from interfering with the suit land;

34. By the agreement dated 6/6/1980 vide which John Muraya Githinji purchased plot no 2258 within Barut Farm the suit land now identified as Plot No 409 became his. After his demise the same was sold to the 1st – 3rd defendants by the 4th defendant in her capacity as administrator of John’s estate. The issue of her capacity to dispose of the suit land is not in issue in the present suit and the defendants are taken to have acquired beneficial interest in the suit property vide that sale and they deserve a declaration to that effect. Consequently, owing to the existence of that right on the part of the defendants and also the finding that the plaintiffs have no right or interest in the same, the plaintiffs ought to be permanently enjoined from interfering with the 1st -3rd defendants’ possession and use of the suit land.

c. Who ought to bear the costs of the suit and the counterclaim?

35. As the plaintiffs have been unable to prove their claim on a balance of probabilities it must be dismissed, and as costs follow the event under section 27 of the Civil Procedure Act, the plaintiffs must bear the costs of the present suit.

36. The upshot of the foregoing is that the plaintiffs have failed to establish their case against the defendants on a balance of probabilities while the defendants have proved their counterclaim partially on a balance of probabilities. I therefore issue the following final orders:

- a. The plaintiffs’ claim in the amended plaint dated 10/8/2023 is hereby dismissed.
- b. The defendant’s claim in the counterclaim dated 3/5/2021 is partially allowed in the following terms:
 - i. An order of declaration is hereby issued declaring that the 1st, 2nd and 3rd defendants are the beneficial owners of all that land in Barut Farm now known as Nakuru/ Municipality Block 29/409 (Rhonda);
 - ii. A declaration is hereby issued declaring that the title issued in favour of the 1st plaintiff and subsequently transferred to Bricken Commercial & General Insurance in respect of Nakuru Municipality Block 29/409 (Rhonda) was obtained fraudulently;
 - iii. An order of permanent injunction is hereby issued restraining the plaintiffs whether by themselves, their employees, servants, agents, or otherwise howsoever from entering, occupying, charging, carrying on any developments, or dealing with all that parcel of land formerly known as Nakuru/Municipality Block 29/409 (Rhonda) in any manner prejudicial to the interests of the defendants.
 - iv. The title issued in the name of the 1st plaintiff and subsequently transferred to Bricken Commercial & General Insurance in respect of Nakuru Municipality Block 29/409 (Rhonda) is hereby cancelled by reason of fraud.
 - v. The Land Registrar Nakuru shall cancel all entries in the land register purporting to register or issue title in respect of Nakuru Municipality Block 29/409 (Rhonda) to the



1st plaintiff or to transfer or issue title to Bricken Commercial & General Insurance and in lieu thereof he shall register the 1st, 2nd and 3rd defendants as the legal proprietors of all that land known as Nakuru Municipality Block 29/409 (Rhonda) upon payment of the proper official charges.

vi. All interim orders inhibiting the defendants from developing the suit land are hereby vacated forthwith.

c. The costs of the present suit shall be borne jointly and severally by the 1st and 2nd plaintiffs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

