



**Togom v Ngeny & another (Environment & Land Case 31 of 2006)  
[2023] KEELC 21103 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21103 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 31 OF 2006  
FO NYAGAKA, J  
OCTOBER 30, 2023**

**BETWEEN**

**REBECCA JERONO TOGOM ..... PLAINTIFF**

**AND**

**WILLIAM K. NGENY ..... 1<sup>ST</sup> DEFENDANT**

**GIDEON TOROP KENDAGOR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff sued the Defendants on 15/03/2006. She sought against them reliefs that the Court declares that land parcel No. Kaplamai/Kachibora Block 3/Sosiot/2 measuring approximately 3.921 hectares was owned by her and that the Defendants were trespassers thereon. Besides costs, she also sought for and eviction, and a permanent injunction against the two parties, their agents, servants and any one claiming through them from occupying, interfering or trespassing onto the said parcel.
2. The Defendants entered appearance on 27/03/2006 and filed a joint Statement of Defence and Counterclaim on 04/04/2006. Upon denying all the allegations in the Plaintiff's name and a permanent injunction against her, her servants and/or agents from trespassing onto, selling, charging, entering onto and or in any way interfering with the quiet possession of their title of the land.
3. On 21/03/2019, the Plaintiff's claim would be dismissed for want of prosecution. The Court did not award the Defendants costs. Then the matter lay in abeyance for all the time until when the Defendants fixed their Counterclaim for hearing on 10/05/2023. Despite service of the notice on the Plaintiff she never attended to defend the Counterclaim. The hearing took place and the Defendants closed their evidence on the Counterclaim.



4. In their defence they averred at paragraph 13 that the suit land was registered fraudulently in the name of the Plaintiff. They listed the particulars thereof as, the Plaintiff registering herself as owner while knowing that the land had been sold to the Defendants, obtaining the registration after the death of Martha C. Kemei, obtaining the registration without following the proper procedures under the Land Control Act, getting herself registered secretly without notice to interested parties, refusing to surrender the title documents to the land registrar upon being required to do so, and failing to disclose to the Land Registrar that the suit land had already been sold to the Defendants.
5. At paragraph 15 they prayed for cancellation of the registration of the title in the Plaintiff's name. At paragraph 16 they prayed for an injunction as summed up above.
6. The 1<sup>st</sup> Defendant testified as DW1. He testified on his own behalf and that of the 2<sup>nd</sup> Defendant who had given him a written authority to plead. He adopted the witness statement he wrote on 26/01/2023. In it stated that initially the suit land belonged to one Martha Kipchumba Kemei who has since died. That sometime in the year 2000, deceased, before dying, sold the suit land to him and the 2<sup>nd</sup> Defendant for the sum of KShs. 700,000/= only. He contributed a sum of KShs. 460,000/= while the 2<sup>nd</sup> Defendant raised KShs 240,000/=.
7. After the payment the three parties went to the Land Control Board for subdivision of the land. It was granted. The land was subdivided into two portions of which approximately 6.7 acres were due to him and approximately 3 acres to the 2<sup>nd</sup> Defendant. That the vendor surrendered to him the original title upon signing in their favour the respective transfer forms.
8. Later the Plaintiff showed up with another title, claiming that the land belonged to her. DW1 went to the lands office to confirm that indeed the title held by the Plaintiff was genuine. Afterwards, the registrar summoned the Plaintiff and required her to surrender the title but she refused. That since they bought the land in 2000, both had been ploughing the same to date. He stated that he was aware the vendor Marta Chpechumba Kemei died in 2006. That the Plaintiff was the daughter in law of the deceased Marta and she obtained the title by fraud.
9. His oral testimony was that the 2<sup>nd</sup> Defendant before he moved to Canada he gave him authority to plead. He referred to the List of Documents which he filed on 10/05/2023. To it were attached copies of documents which he produced as follows:
  1. Authority to plead, DExh 1
  2. Copy of the 2<sup>nd</sup> Defendant's Passport and Identity Card, DExh 2
  3. Title deed for Kaplamai/Kachobora Block 3/Sosiot/2, DExh 3
  4. Copy of title deed for Kaplamai/Kachobora Block 3/Sosiot/3, DExh 2
  5. Certificate of official search, DExh 5
  6. Letter dated 25/01/2006, DExh 6
  7. Letter dated 24/07/2007, DExh 7
  8. Copy of the mutation form, DExh 8
  9. Consent of the Land Control Board, DExh 9
  10. DW1's Agreement with vendor, dated 17/2/2000, DExh 10
  11. DW2's agreement with vendor, dated 01/09/2000, DExh 11



12. Letter of consent of Board dated 21/11/2001, DExh 12
  13. Another consent dated 24/04/2002, DExh 13
  14. Application dated 22/04/2002, for consent of Board, DExh 14
  15. Receipt for application, dated 21/11/2001, DExh 15.
10. He prayed for the grant of the reliefs sought in the Counterclaim.
11. After the conclusion of the suit the Defendants filed written submissions. That was on 30/05/2023. In the submissions they summed up their case on the counterclaim and the evidence they adduced in support of it. They submitted on the import of Order 7 Rule 3 of the Civil Procedure Rules which provides for filing of set-offs and counterclaims by co-defendants when facts of a case warrant it. They then set out four issues for determination. They were, to whom the suit land belonged; which the lawful title of the suit land was; whether the Plaintiff acquired a better title to the suit land than the Defendants; and whether the title held by the Plaintiff should be cancelled.
12. Regarding the first issue they submitted that one parcel of land cannot in law have two different titles. They submitted that the vendor held a title issued to her on 19/01/1998 while the Plaintiff had one she claimed was issued to her on 29/03/2005. Again, the Defendants reiterated their evidence that they bought the respective portions of the suit land on 17/02/2000 and 01/09/2000 from Marta C. Kemei and they took actual possession of the same. They submitted that the area chief wrote a letter on 24/07/2007 stating that they lived on the land since February 2000. Further, that the vendor handed over the original title to them upon purchase of the land from her. After that the vendor signed the mutation forms in their favour and applied for consent to transfer the two parcels to them. They submitted that in the circumstances there could not be any possibility of her transferring another title to the Plaintiff.
13. On the 2<sup>nd</sup> issue, they submitted that the title that was held by the vendor, which was handed over to them was the legal one and that the one obtained by the Plaintiff was fraudulently acquired. About the 3<sup>rd</sup> issue, they submitted that the Plaintiff could not acquire a better title than them since there was no evidence of the transfer by the vendor to the Plaintiff. Lastly, they submitted that the court should cancel the title acquired fraudulently.
14. I have considered the pleadings in the case, the law, the evidence on record and the submissions by the Defendants. The issues for determination are whether
- a. the Defendants have proved on a balance of probabilities that they bought the suit land from the owner;
  - b. the owner put them into possession;
  - c. the Plaintiff committed fraud in registering the suit land in her name;
  - d. the Plaintiff's title should be canceled;
  - e. who to bear costs
15. It is not in dispute that the subject suit land, parcel No. Kaplamai/Kachobora Block 3/Sosoit/2, is registered in the names of both Marta Chepchumba Kemei and Rebecca Jerono Togom. The Defendants have in their possession the original title to the land as was registered in the name of Martha C. Kemei on 19/01/1998 while the Plaintiff claims to have the original title registered in her name



29/05/2005. It means that one of these two titles must be genuine while the other is fraudulent: there cannot be two titles to the same parcel of land as submitted by the Defendants.

16. Regarding the ownership. It was the Defendants' evidence that the land was initially owned by one Marta Chepchumba Kemei. She sold to the two of them respective portions in the year two thousand. They produced as DExh 9 and 10, originals of two agreements entered into between them respectively and that said Martha Kemei on 17/02/2000 and 01/09/2000. Further they produced as DExh 12 an application for consent to the land control board of Cherangani to subdivide the land into two parcels, another one for transfer of the two parcels of land in favour of the Defendants and a letter of consent for the transfer of the two parcels of land in to the Defendants. They also produced as DEx. 8 the mutation form for the suit land. Lastly, they produced as DExh. 5 and DExh. 3 respectively the original of the certificate of official search and the original of the title for the suit land. The title was registered in the name of the Marta C. Kemei. and a consent to that effect.
17. I have carefully analyzed the documents. I find that indeed the said Marta C. Kemei was the registered owner of the suit land by the year 2000 when she entered into the two sale agreements in favour of the Defendants. Further that, after that she sought for a consent from the land control board to both subdivide and transfer the subdivided parcels in favour of the Defendants and the same was granted. She also signed the mutation forms in favour of the subdivision. It is my finding that indeed the Defendants lawfully bought the suit land from the said vendor.
18. Regarding the whether the said Marta Kemei put the Defendants into possession after the transaction of sale, the Defendants testified that indeed they took possession of the land upon purchase of the same and they have been in ploughing it to date. The area chief, one, Bosire wrote a letter confirming that the two were in possession. I therefore find in the affirmative.
19. On whether the Plaintiff committed fraud, I find that the Defendants have proved that indeed the Plaintiff committed it. The evidence of the Defendants as summarized above is to the effect that upon entering into the process of purchase of the suit land from the vendor, she took them through the process of application for consent in the land control board, they obtained the consents, she gave them the original title to the land and they still have it. There is absolutely no evidence on the part of the Plaintiff to show how she got registered as owner of the title without an application for consent being made to the land control board and the transfer of the title to her name without an original being surrendered to the land registrar for cancellation. This evidence shows fraud on the part of the Plaintiff.
20. On whether the title held by the Plaintiff should be cancelled, it is my finding that since the court has found fraud on the part of the Plaintiff, the title she holds in her favour cannot stand. It is for cancellation.
21. On who to bear the costs of the instant counterclaim, Section 27 of the *Civil procedure Act* is that costs follow the event. Thus, the judge ought to order that costs be borne by the loser unless for good reason the judge thinks otherwise. The event herein is that the Counterclaim has succeeded. The Plaintiff shall bear the costs of the Counterclaim.

### **Final orders**

22. The upshot is that the Plaintiff's claim having succeeded this Court enters judgment for the Defendants against the Plaintiff as follows:-
  - a. A declaration is hereby issued that the Plaintiff's registration as the owner of land parcel No. Kaplamai/Kachibora Block 3/Sosiot/2 was obtained by fraud, it is unlawful, null and void.



- b. An order is hereby issued cancelling forthwith the registration of the Plaintiff, one Rebecca Jerono Togom, as the proprietor of land parcel No. Kaplamai/Kachibora Block 3/Sosiot/2.
- c. An order is hereby issued for the registration of the Defendants, namely, William K. Ngeny and Gideon Tirop Kendagor, as proprietors of 6.7 acres and 3 acres respectively of the said title upon presentation of transfers duly signed by the Deputy Registrar of this Court in favour of the respective Defendants and other instruments of conveyance, and the Land Registrar in charge of Trans Nzoia County is directed to rectify the register accordingly.
- d. There is hereby issued a permanent injunction restraining the Plaintiff, whether by herself, her agents, servants and/ or other persons claiming through her from entering, remaining on, trespassing onto, charging, selling, transferring and/or in any way dealing with the Defendants' quiet possession of the respective titles to be subdivided from the suit land herein.
- e. The Defendants shall have the costs of the Counterclaim.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE**

