



**Moiyale v Pertet & 3 others (Environment & Land Case 35 of 2020)
[2023] KEELC 21016 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 35 OF 2020
MN GICHERU, J
OCTOBER 25, 2023**

BETWEEN

AGNES LASOI MOIYALE PLAINTIFF

AND

JOHN TIPATET PERTET 1ST DEFENDANT

SAMUEL OLE SHAPARA 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, KAJIADO 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. The Plaintiff seeks the following reliefs against the Defendants both jointly and severally.
 - a. An order for the cancellation and/or revocation of certificate for L.R. Kajiado/Kitengela/26693, suit land, and the same to be registered in the Plaintiff's name being the legally registered owner.
 - b. An order of permanent injunction restraining the Defendants by themselves, their agents and or servants from subdividing, alienating, transferring and or interfering or in any way dealing with the suit land.
 - c. That the officer commanding Kajiado Police Division (OCPD) and the officer in charge of Isinya Police Station to ensure compliance with the court orders.
 - d. Costs of the suit and interest at court rates.
 - e. Any other relief that the court may deem fit to grant in the circumstances.



2. The Plaintiff's case is as follows. She used to be the registered owner of L.R. No. Kajiado/Kitengela/21636. She decided to subdivide it into two (2) parcels to provide for all her children. To that end, she handed out the original title deed to the first and second Defendants so that they could ensure that the two title deeds were issued in the Plaintiff's name. This assignment was given to the first and second Defendants in June 2008. The Plaintiff trusted the two Defendants because the first one is her own son.
3. In November 2013, the Plaintiff decided to carry out a search at the Land Registry at Kajiado and to her surprise, she found that L.R. No. 21636 had been subdivided into two parcels namely No. 26693 and 26692 and only the latter was in her name. L.R. No. 26693 had been registered in the name of the first Defendant contrary to her wishes and her instructions to the first and second Defendants. The purpose of this suit is that the illegal transfer to the first Defendant be reversed. The Plaintiff accused the four Defendants of the following four instances of fraud, illegality and unlawfulness.
 - a. Failure to follow the due process of subdivision of the suit land before seeking the consent of the Land Control Board and having a proper mutation form prepared.
 - b. Failure to observe the due process of transfer.
 - c. Purporting to subdivide the suit parcel into two positions and in the process fraudulently, illegally, unlawfully and irregularly registering one of the parcels in the first Defendant's name.
 - d. The first Defendant illegally holding L.R. No. 26693 to the detriment of the rest of the Plaintiff's children.
4. In support of her case, the Plaintiff filed the following evidence.
 - i. Her own witness statement dated 31/3/2020.
 - ii. Copy of her national identity card.
 - iii. Copy of mutation form for the suit land.
 - iv. Copy of the title deed for L.R. 26693 in the name of the first Defendant.
 - v. Copy of application for caution in respect to L.R. 26693.
 - vi. Other documents.
5. The first and second Defendants filed a written statement of defence dated 14/4/2023 in which they generally deny all the averments in the plaint except that the Plaintiff is the biological mother of the first Defendant. They add that the Plaintiff is not the absolute owner of the land and that she is a trustee of the first Defendant and his siblings.

Finally, they aver that the Plaintiff signed all the documents for subdivision consent and transfer and that this suit should be dismissed with costs. The two Defendants did not file any witness statements or documents to support their defence.
6. The third and fourth Defendants filed a written statement of defence dated 14/4/2022 which contains the following averments. They deny fraud on their part and aver that the subdivision and transfer were conducted at the instructions of the Plaintiff. Secondly they deny bad faith and corruption on their part and aver that the Plaintiff slept on her rights by taking eight (8) years to lodge her complaint.

Finally, the two Defendants aver that the Plaintiff has not proved any connection between herself and the suit land by way of documentation. They pray that the Plaintiff's suit be dismissed with costs.



7. In support of their defence, the third and fourth Defendants filed a witness statement by Mr. K. Tonui, Land Registrar, dated 14/4/2022. In the statement the Land Registrar gives a summary of the entries in the register in relation to L.R. No. 26693 from 18/7/2008 to 13/1/2022. On the date of the trial, Mr. Menge for the third and fourth Defendants produced copies of green cards for L.R. 26692 and 26693.
8. At the trial on 18/4/2023, it is only the Plaintiff who testified. No other witness testified even though the date had been taken by consent. The Plaintiff adopted her witness statements as her evidence. She was then cross examined by rival counsel. The Attorney General produced two green cards for L.R. 26692 and 26693 and then closed the case for the third and fourth Defendants.
9. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents and the testimony at the trial. Unfortunately as I write this judgment in early September I have not received any submissions from the counsel for the parties. Nevertheless, I will proceed to conclude this judgment even without the submissions. I identify the issues as follows.
 - i. Whether the Plaintiff authorized the first and second Defendants to transfer L.R. No. 26693 to the first Defendant.
 - ii. Whether the Plaintiff was the absolute owner of L.R. No. 2136.
 - iii. Whether the Plaintiff could be compelled to transfer L.R. No. 26693 to the first Defendant.
 - iv. Whether liability attaches to the third Defendant.
10. On the first issue, I find that the Plaintiff did not authorize the first and second Defendants to transfer L.R. No. 26693 to the first Defendant. In this regard I believed the Plaintiff. She had no reason to lie. She was at liberty to decide when and how to subdivide her land and to transfer to the first Defendant. In contrast the first Defendant had no such liberty and choice like his mother did. He is therefore, the one more likely to be untruthful than his mother. After all, the Plaintiffs evidence on oath is uncontroverted.
11. On the second issue, I find that the Plaintiff could not be compelled to transfer L.R. No. 26693 to the first Defendant. Being the registered owner as well as the first Defendant's mother, she was the one to decide when to transfer and in case she decided to wait until the very end, the first Defendant could do nothing about it. I find his action of transferring the land without the mother's consent was simply jumping the gun.
12. On the final issue, though it was expected that the third defendant would avail the land records being the custodian, and he did not do so in this case, no liability will attach because the Plaintiff has not been able to prove any wrong doing on the part of the third Defendant.

For the above stated reasons, I enter judgment for the Plaintiff against the Defendants as prayed for in the plaint except as pertains to costs. On costs I order that the first Defendant bears all the costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF OCTOBER, 2023.

M.N. GICHERU

JUDGE

In the presence of:

Mr. Otieno for the Plaintiff.



N/A for 1st and 2nd Defendants.

Mr. Menye for 3rd and 4th Defendants.

Court Assistant – Mpoye.

