



Kemboi (Suing as the legal representative of the Estate of the Late Soti Masai) v Kibet & 2 others (Environment & Land Case 27 of 2022) [2023] KEELC 20735 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 27 OF 2022
L WAITHAKA, J
OCTOBER 17, 2023**

BETWEEN

NAOMI JEMELI KEMBOI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SOTI MASAI) PLAINTIFF

AND

PENINA KIBET 1ST DEFENDANT

ADEN KIPCHIRCHIR 2ND DEFENDANT

LEDISHA CHEROP 3RD DEFENDANT

JUDGMENT

1. By a plaint dated 3rd June, 2013 and amended on 14th May, 2019 and further amended on 27th September 2021, Soti Masai (now deceased and substituted with Naomi Jemeli Kemboi) filed this suit seeking judgment against the defendants, jointly and severally for:-
 - a. An order of eviction to remove the defendants, their servants and/or agents from the parcels of land known as Mosop/Kapchorwa 700, 688, 689, 690, 691, 701 and 702;
 - b. A permanent injunction restraining the defendants from further entering, encroaching and/or in any other manner interfering with the plaintiff's use possession and ownership of all those parcels of land known as Mosop/Kapchorwa 682 to 690, 700 and 701;
 - c. Costs of the suit
 - d. Any other relief that the court may deem fit to grant.



2. The suit is premised on the grounds that on or about 15th March 2010, the defendants, without any colour of right, entered into and occupied land parcels number 690, 691, 700, 701 and 702 belonging to the plaintiff. The defendants are also said to have unlawfully entered into and occupied parcels number Mosop/Kapchorua 682, 683, 684, 685, 686 and 687 belonging to the plaintiff and reserved for occupation by the children of Hogla Masai (deceased).
3. The defendants filed a defence and counterclaim denying the allegations levelled against them and contending that the plaintiff's registration of parcels number Mosop/Kapchorua 680, 688, 700, 682 and 670 is subject to a trust for them and other beneficiaries of the estate of Masai Kapcali (deceased).
4. Terming their occupation of the suit properties lawful, the defendants have pleaded that they had been in use and occupation of the suit properties for over 24 years as members of the plaintiff's family.
5. It is the defendants' case that the plaintiff was fraudulently registered as the proprietor of the suit properties, which emanated from the estate of Masai Kapcali (deceased). Particulars of fraud urged against the plaintiff are listed under paragraph 12 of the amended statement of defence and counterclaim thus:-
 - a. Attempting to dispose off an interest in land without regard to the interest of the defendants as owners of the suit property;
 - b. Attempting to disinherit the beneficiaries;
 - c. Dealing with land that does not belong to them;
6. It is further contended that the plaintiff acted irregularly, illegally and in breach of the trust vested in her. The particulars of irregularity/illegality and breach of trust urged against the plaintiff are listed in paragraph 12 of the amended defence and counter-claim thus:-
 - a. Attempting to create other interests in the suit property in breach of trust;
 - b. Disinheriting heirs of their rightful shares;
 - c. Displacing legitimate beneficiaries.
7. By way of counterclaim, the defendants seek judgment against the plaintiff for:-
 - i. A declaration that the move to disinherit the legal owner and beneficiaries of the parcels of land known as Mosop/Kapchorua/682, 688, and 670 is null and void;
 - ii. An order of injunction restraining the plaintiff by herself, her agents, assigns or anybody acting through her from transferring, charging, wasting, alienating, selling, disposing or otherwise interfering with the parcels of land known as Mosop/Kapchorua/682, 688 and 670.
8. The defendants also seek the following reliefs:-
 - a. A declaration that they are the beneficiaries of the estate of Masai Kapcali;
 - b. A declaration that they have overriding interest in the parcels known as Mosop/Kapchorua/682, 688 and 700 measuring 1/8, 1/8 and 1/2 of an acres respectively;



- c. A declaration that the plaintiff holds the parcels of land known as Mosop/Kapchorua/682, 688 and 700 measuring 1/8, 1/8 and 1/2 of an acre respectively in trust of beneficiaries of the estate of Masai Kapcali;
 - d. A mandatory injunction to compel the plaintiff to give an account of the estate of Masai Kapcali;
 - e. The plaintiff be compelled to pay costs of the suit as well as those of the counterclaim.
9. The plaintiff filed a reply to defence and defence to counterclaim denying the defendants' contention that the suit properties are subject to a trust in their favour and that they were fraudulently registered in the name of the plaintiff. The plaintiff further contended that there was no property for inheritance as the original property Mosop/Kapchorwa/541 was registered in her name.
 10. In support of her case, the plaintiff availed four witnesses all of whom adduced evidence in support of the plaintiff's pleaded case. The 1st defendant gave evidence in support of the defendants' defence and counterclaim.
 11. From the testimonies of the plaintiff's witnesses and the 1st defendant, the following facts of the case are either common ground or uncontroverted and/or undisputed:-
 - i. That the plaintiff and the defendants are relatives-The 1st defendant is a daughter in law of the plaintiff while the 2nd and 3rd defendant are grand children of the initial plaintiff, Soti Masai;
 - ii. That the suit properties-Mosop/Kapchorua 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 700, 701, 702 and 703 are subdivisions of Mosop/Kapchorua/541 which belonged to Kaptalai Masai, deceased;
 - iii. That Kaptalai Masai passed on in 1994 and was survived by his wife Soti Masai and several children, the 1st defendant's husband being one of the children who survived him;
 - iv. That title number Mosop/Kapchorua/541 was transferred to Soti Masai on 12th May, 1995, way after the registered owner had passed on;
 - v. That no succession process/proceedings in respect of the estate of Kaptalai Masai comprised in parcel number Mosop/Kaptalai/541 was carried out before the property was transferred to the original plaintiff, Soti Masai;
 - vi. That title number Mosop/Kapchorua was closed on 25th January, 1996 after subdivision and creations of the parcels listed in (ii) above which parcels were transferred to the plaintiff.
 - vii. That the defendant were in use and occupation of parcel number 700 before the plaintiff required them to move out of the parcel and to go and live in parcel number 703;
 - viii. That there is no dispute concerning the defendant's use and entitlement to parcels number Mosop/Kapcherop/682, 683, 684, 685, 686 and 687 and



parcels number 692, 693, 694, 695 and 703 (at least going by prayer (b) of the further amended plaint and the testimony of Naomi Jemeli Kemboi) (P.W.1).

- ix. That the initial plaintiff passed on during the pendency of this suit and her estate comprised in the suit properties was not succeeded to as by law required.

12. At close of hearing parties filed submissions which I have read and considered.

Submissions

Plaintiffs Submissions

13. In her submissions filed on 16th June 2023, the plaintiff has given an overview of the case urged by the parties and the evidence given in support thereof and identified the following as the issues for the court's determination:-
 - i. Whether the plaintiff is entitled to the injunctive reliefs sought;
 - ii. Whether the defendants have shown that the plaintiff held the suit parcels in trust for them;
 - iii. Whether the defendants have demonstrated that the plaintiff engaged in fraud.
 - iv. Whether the defendants have proved that they are entitled to orders of mandatory injunction.
14. On Whether the plaintiff is entitled to the injunctive reliefs sought, based on the evidence produced showing that the plaintiff is the registered proprietor of the suit properties, it is submitted that the plaintiff has satisfied the legal requirements for grant of the injunctive reliefs sought.
15. With regard to the 2nd issue, whether the defendants have shown that the plaintiff held the suit parcels in trust for them, reference is made to several cases where the law undergirding the issue of trust is espoused and submitted that the defendants hardly led any evidence capable of proving that registration of parcels number Mosop/Kapchorua 688, 700 and 701 in favour of the plaintiff is subject to any trust in their favour. The plaintiff is said to have demonstrated that it was the family's intention that the suit properties be distributed in the manner they were distributed. It is conceded that parcels number 690, 691, 692, 693, 694, 695, 702 and 703 are subject of a trust in favour of the 1st defendant by virtue of having been the wife of the late Ben Kibet Masai.
16. Maintaining that the suit properties were distributed as per the wishes of the late Masai Kapcali, the plaintiff urges this court to exercise great caution and restraint before interfering with the late Masai Kapcali's wishes.
17. On whether the defendants have demonstrated that the plaintiff engaged in fraud, it is submitted that the defendants did not prove to the required standard of proof that the plaintiff engaged in the pleaded acts of fraud. To the contrary, the plaintiff is said to have proved that she is the bona fide registered proprietor of the suit parcels and that the defendants are way off from showing any legal or beneficial interest in the suit properties.
18. As to whether the defendants have proved that they are entitled to orders of mandatory injunction, it is submitted that owing to their conduct, the defendants are not entitled to any equitable reliefs, since a person seeking equitable reliefs must do so with clean hands. The defendants are said to have approached the court with unclean hands as they took the law in their own hands by trespassing



into the suit properties thereby mocking judicial proceedings. The defendants are also said to have disobeyed injunctive orders issued against them and meted violence on the plaintiff, the late Soti Masai.

Defendants Submissions

19. In their submissions filed on 30th June 2023, the defendants have given an overview of the cases urged by the parties to the suit and identified the following as the issues for the court's determination:-
 - a. Whether original suit property was held in trust;
 - b. Whether subdivision was legally done;
 - c. Whether the titles to the suit property should be cancelled and the suit properties reverted to its original title;
 - d. Whether the plaintiff has locus standi to maintain the suit; and
 - e. Whether this court has jurisdiction to entertain this matter.
20. On whether the original suit property was held in trust, reference is made to the case of Isack M'Inanga Kiebia vs. Isaaya Theuri M'Lintari & Isack Ntongai Mlintari SCOK Petition 10 of 2015, Section 35 of the Law of Succession Act, Cap 160 Laws of Kenya, and to the evidence adduced in this case showing that the original parcel of land was registered in the name of the family patriarch, the late Masai Kapcali, before it was registered in the name of the original plaintiff, Soti Masai, and submitted that registration of the original plaintiff was subject to a trust in favour of the beneficiaries of the estate of Masai Kapcali.
21. On whether subdivision of the original parcel of land, Mosop/Kapchorua/541 was done legally, reference is made to the evidence adduced in the case to the effect that the property was transferred to the original plaintiff at a time when the registered owner was deceased without succession proceedings for the estate of the deceased comprised in Mosop/Kapchorua/541 and submitted that subdivision of the original parcel of land and the subsequent transfer of the subdivisions to the original plaintiff, Soti Masai, was illegal and incapable of conferring any legal rights on the plaintiff. The contention by the plaintiff that the original parcel of land was transmitted to the original plaintiff during the lifetime of Masai Kapcali is said to be unsupported by the totality of the evidence adduced in the case.
22. Based on the provisions of Section 55 and 82 of the *Law of Succession Act*, Cap 160 Laws of Kenya and the decision in the case of In the Matter of the Estate of Paul M'maria (Deceased) (2017) eKLR, it is asserted that the transfer and the subsequent subdivision of the original parcel of land and the transfer of the subdivisions therefrom to the original plaintiff was illegal and incapable of conferring any rights on the original plaintiff and/or extinguishing the trust to which it was subject to.
23. On whether the titles of the suit properties should be cancelled and reverted to the original title, reference is made to the decision in the case of Mcfoy vs. United Africa Co. Ltd (1991) ALL ER 1169 where it was inter alia held that if an act is void, then it is a nullity in law; that void act is not only bad, but incurably bad and on account of the illegality in the transfer of the original parcel of land to the original plaintiff it is submitted that the subsequent subdivisions and titles issued in respect thereof ought to be cancelled. This court is said to be clothed with the power to cancel titles obtained by fraud or mistake. In that regard reference is made to Section 80 of the *Land Registration Act*, 2012 and the case of Republic vs. Kisumu District Lands Officer & another (2010) eKLR.
24. As to whether the plaintiff has locus standi to maintain the suit based on the fact that the suit properties relate to the estate of Masai Kapcali for which the plaintiff is not the administratrix and/or legal representative, it is submitted that the plaintiff has no locus standi to maintain the instant suit.



Concerning the import of having locus standi, reference is made to the cases of Alfred Njau vs. City Council of Nairobi (1983)KLR and the case of Julian Adoyo Ongunga vs. Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015.

25. As to whether this court has jurisdiction to entertain this matter, it is submitted that the issue before this court is purely a succession matter for which this court lacks jurisdiction to determine.

Analysis and determination

26. From the pleadings filed in this case, the evidence adduced and the submissions filed, the issues for the court's determination are:-

- i. Whether the applicable law and procedures were complied with in registration of the plaintiff, Soti Masai, as the proprietor of the parcel of land Mosop/Kapchorua/541;
- ii. Subject to the outcome of (i) above, whether the plaintiff acquired good title to Mosop/Kapchorua/541 which she could pass to herself or any other person;
- iii. Whether the defendants have any beneficial interests to the suit properties?
- iv. What orders should the court make?

27. On whether the applicable law and procedures were complied with in registration of the plaintiff, Soti Masai, as the proprietor of the parcel of land known as Mosop/Kapchorua/541, the evidence adduced in this suit shows that the original parcel of land, Mosop/Kapchorua/541 belonged to Masai Kapcali, deceased, when it was purportedly transferred/trans-mitted to the plaintiff, Soti Masai. Admittedly, no succession proceeding were taken up or conducted before the property was transferred to the plaintiff yet the property constituted part of the estate of a deceased person when it was purportedly transferred to the plaintiff. Transfer of the property to the plaintiff, without any succession proceedings being undertaken in respect thereof clearly violated the provisions of Section 45 as read with Section 82 of the Law of Succession Act, Cap 80 Laws of Kenya.

28. In the case of Re Estate of Paul M' Maria (Deceased) (2017)e KLR it was held:-

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tinctured with killer poison; and is unlawful acquisition; thus, land so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that: Rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

29. Similar sentiments were expressed in the case of Re Estate of John Gakunga Njoroge, (Deceased) (2015) eKLR where it was held:-

“A person can only deal with the estate of a deceased person pursuant to a grant of representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person set out in section 45 of the Law of Succession Act.....



For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the grant of letters of administration to them and before the confirmed grant, the contracts of sale are in valid for offending the provisions of section 45 and 82 of the *Law of Succession Act*. Even if the sale transaction were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under section 82(b) proviso (ii) which provides that:-

(ii) ‘no immovable property shall be sold before confirmation of the grant’

30. In applying the above cited authorities to the circumstances of this case, where there is evidence that the plaintiff dealt with the estate of Masai Kapcali without compliance with the applicable law and procedures, I do find that the purported dealings with the suit property by the plaintiff were not only unlawful but also illegal hence incapable of forming the basis of her claim against the defendants.
31. As to whether the plaintiff acquired a good title to parcel number Mosop/Kapchorua/541 which she could pass to herself or any other person, following the determination that her dealing with the parcel of land known as Mosop/Kapchorua/541 was unlawful and illegal, I do find the purported transfer of the parcel of land known as Mosop/Kapchorua/541 to the plaintiff and the subsequent subdivision and transfer of the subdivisions therefrom to have been a nullity in law hence incapable of forming the basis of her claim against the defendants.
32. As to whether the defendants have any beneficial interest to the suit properties, there being evidence that the suit properties are subdivisions of Mosop/Kapchorua/541 which belonged to the plaintiff's husband, and further, there being evidence that the plaintiff and the defendants are members of the family of Masai Kapcali, deceased, I do find as a fact that the suit property is family land hence subject of a customary trust in favour of the plaintiff and the defendants. In view of the foregoing, I return a positive verdict into the question as to whether the defendants have beneficial interest to the suit properties. It is the considered view of this court that the extent of that beneficial interest can only be determined by a succession court upon administration of the estate of Masai Kapcali deceased.
33. On what orders the court should make; having determined that the parcel of land was unlawfully/ illegally transferred to the plaintiff, I declare that registration a nullity and direct the Land Registrar of the responsible land registry to cancel all transactions concerning the parcel of land known as Mosop/Kapchorua/541 and to revert the property to the status it was before it was unlawfully registered in the name of Masai Soti, deceased.
34. All persons with interest in the suit property should pursue their interest when the estate of the deceased is administered. In the meantime, the status quo, which obtained before the current suit was filed shall be maintained.
35. For avoidance of doubt, neither the plaintiff nor the defendant should lay a claim to the estate of the Masai Kapcali comprised in Mosop/Kapchorua/541 until and unless the same is administered in accordance with the applicable law and procedures. Parties are at liberty to continue using and occupying the portions they were using and occupying before the suit. administration of the estate of Masai Kapcali should be done taking into account the interest of all persons with interest therein, to give them a fair chance to defend their interest.
36. The upshot of the foregoing is that the plaintiff's suit is dismissed. The defendants suit only succeeds to the extent contemplated in this judgment.
37. This being a family dispute, parties shall bear their costs of the suit.



38. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 17TH DAY OF OCTOBER 2023.

L. N. WAITHAKA

JUDGE

