



**Makori v Orango (Environment & Land Case 804 of 2016)
[2023] KEELC 20700 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 804 OF 2016
JM ONYANGO, J
OCTOBER 16, 2023**

BETWEEN

PETER RIANGA MAKORI PLAINTIFF

AND

MARY KEMUNTO ORANGO DEFENDANT

JUDGMENT

Introduction

1. Peter Rianga Makori the Plaintiff herein filed suit against the Defendant vide a plaint dated the 26th January, 2012. In the said Plaint the Plaintiff states that he is the registered owner of land parcel number Kisii/Wanjare/Bogiakumu/3266 (hereinafter referred to as the suit property). He further claims that sometime in the month of September 2011, the defendant wrongfully and unlawfully entered a portion of the suit property, cultivated the same and planted maize and Napier grass without the Plaintiff's permission. Despite being given notice to desist from trespassing on the plaintiff's land the defendant persisted in her wrongful acts thus prompting the plaintiff to institute this case. The plaintiff seeks the following reliefs against the defendant:-
 - a. An eviction order as the plaintiff is the sole owner and/or bonafide owner of the said plot number Kisii/Wanjare/Bogiakumu/3266
 - b. A permanent injunction be issued against the defendant, her agents, servants, or otherwise howsoever from trespassing into or interfering with land parcel No. Wanjare/Bogiakumu/3266 in whatsoever manner.
 - c. General damages
 - d. Any further relief that the honourable court may deem just to grant.



2. In his Statement of Defence dated 28th July 2012, the Defendant denies the Plaintiff's claim and states that the Plaintiff fraudulently caused himself to be registered as the owner of the suit property. The Defendant further raised a Counterclaim in which she claimed that she was married to one Nyoero Ongori, the wife of Ongori Ontita who was the registered owner of the parcel of land known as Wanjare/Bogiakumu/2451. She states that after the death of Ongori Ontita, the plaintiff, offered to assist Nyoero Ongori to file a Succession case in respect of her late husband's estate and fraudulently caused a portion of the deceased's land to be registered in his name without the consent of the said Nyoero Ongori and the other beneficiaries of the deceased.
3. She therefore prays that the plaintiff's title for land parcel no. Wanjare/Bogiakumu/3266 be cancelled and that the land reverts to Nyoero Ongori.
4. The case commenced before Justice Okong'o who took the evidence of the Plaintiff (PW1) on 14.4.2015. It was subsequently adjourned several times before I took the Defendant's case between November 2021 and July 2022.

Plaintiff's Case

5. The Plaintiff who testified that he is a journalist based in Kansas City in the U.S.A stated that he had sued the defendant because she trespassed on his land parcel no. Wanjare/Bogiakumu/3266 in 2011 and planted maize and Napier grass. He explained that he had purchased a portion of land parcel number Wanjare/Bogiakumu 2451 measuring 0.61 Hectares from one Nyoero Ongori and after sub-division land parcel no Wanjare/Bogiakumu/3266 was registered in his name on 13.6.2001. He told the Court that they obtained the consent of the Land Control Board and the said Nyoero Ongori signed the mutation forms as well as the transfer form before G.J Mainye Advocate (now deceased).
6. It was his testimony that land parcel no. 2451 was initially registered in the name of Ongori Ontita – Deceased who was the husband of Nyoero Ongori that Nyoero and at the time she sold the land she had obtained a Grant of letters of administration in respect of her late husband's estate. He produced a certified copy of the register for the suit property, a copy of the title deed, a certified copy of the application for consent of the Land Control Board a certified copy of the transfer form and a certified copy of the confirmation of Grant as Plaintiff's exhibits 1-6. He maintained that the transfer was proper and stated that the Defendant's Counterclaim had no basis.
7. In cross-examination he stated that he was not aware that the defendant was part of Nyoero Ongori's family but he knew that her co-wife was aware of the transaction. He told the court that in addition to the suit property, he also bought parcel no. 2452 from Nyoero Ongori. They agreed that he would buy land parcel no. WANJARE/BOGITA/2800 for Nyoero Ongori to settle her grandchildren but the said transaction did not go through. He said he did not have the sale agreement as it got lost.

Defendant's Case

8. The Defendant testified as DW1. She relied on her witness statement date 9.4.2015. She denied that she had trespassed on the Plaintiff's land. She denied that the defendant had bought the suit property from Nyoero Ongori. Upon cross-examination, she said that she was not involved in the sale of land parcel number 2452. She stated that the plaintiff gave her niece a cheque which later bounced. She denied that parcel number 3266 was a sub-division of land parcel no. 2451 and instead stated that it was a sub-division of parcel no. 2452. She denied that Nyoero Ongori sold the suit property to the plaintiff as she was very old and blind and she could not have signed the mutation forms or transfer forms.



9. She stated that she had leased the suit property to Ronald Angwenyi between 2017 and 2018. She said she was not aware that the plaintiff had obtained a judgment in his favour in ELC Case No. 26 of 2017 whereby the court had declared that he was the owner of land parcel No. 3266. She said that before Nyoeri Ongori died, she had donated a power of Attorney to the defendant to represent her in this case. She said she was currently in possession of land parcel no. 2452 and not 3266 and she could therefore not be evicted from parcel No. 3266.
10. The Defendant called one witness, Onsongo Nyakeya Oeri who testified as DW2. He told the court that he was approached by one Beatrice Nyoeri Ongori who wanted to buy a parcel of land from him. He agreed to sell her the land at Kshs.180,000 and she paid a deposit of Kshs.40,000/= but the sale was not completed as Nyoeri Ongori did not pay the full purchase price.
11. In cross-examination, he denied that he had entered into a written sale agreement. He confirmed that the parcel he intended to sell was L.R No. Wanjare/Bogitaa/2800. Upon being shown a written sale agreement, he stated that the said agreement indicated that the purchase price was Kshs.160,000 which was not the agreed price. He confirmed that the said agreement had his name and ID number although the signature thereon was not his. He denied that he had been paid the sum of Kshs.100,000. He maintained that he could not transfer the land to Nyoeri Ongori as she did not pay the agreed purchase price in full.
12. The parties consented to the production of the court file for ELC Case No. 26 of 2017 and the same was marked as Defence Exhibit 1. With that evidence, the Defendant closed her case.
13. The parties were granted time to file their submissions but only the Defendant filed her submissions. In her submissions, learned counsel for the Defendant submitted that the Plaintiff had failed to prove that he purchased the suit property from Nyoero Ongori as he did not produce any sale agreement of evidence of payment. He relied on the case of *Moses Abuto & 13 others v Muka Mukuu Farmers Co-operative Society Limited* (2021) eKLR.
14. It was his contention that the Plaintiff had acquired the suit property by way of fraud and that the said title should be cancelled. He relied on the case of *Daudi Kiptugen v Commissioner of Lands Nairobi and 4 others* (2015) eKLR for the proposition that the acquisition of title cannot be construed only in the end result; the process of acquisition is material. He also relied on the case of *Samuel Odhiambo Oludhe and 2 others v Jubilee Jumbo Hardware Limited and another* (2018) eKLR where the court quoted the case of *Republic v Minister for Transport and communication and 5 others Ex Parte Waa Ship Garbage Collector and 15 others* Mombasa HCMCA No.617 of 2003 (2006) 1 KLR (E&L) 63 Where Maraga J as he then was stated as follows;

“ court should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title..”

Issues for Determination

15. Having carefully considered the pleadings, evidence on record and the Defendant’s submissions, the following issues arise for determination:
 - i. Whether the plaintiff is the lawful registered proprietor of land parcel number Wanjare/Bogiakumu/3266?
 - ii. Whether the said title was obtained fraudulently, and if so whether it should be cancelled
 - iii. Whether the defendant has trespassed on the suit property.



- iv. Who should bear the costs of this suit.

Analysis and Determination

16. It is not in dispute that the Plaintiff is the registered owner of land parcel number Wanjare/Bogiakumu/3266. He produced a certified copy of the register for the suit property, a certified copy of the mutation form, a certified copy of the application for consent of the Land Control Board and a certified copy of the Transfer registered on 14th June, 2001 as his exhibits. In cross –examination, he stated that the sale agreement was lost. Also produced was the court file in ELC Case No. 26 of 2017 Peter Rinag’a Makori v Ronald Oino Angwenyi in which judgment was entered in favour of the Plaintiff whereby the court held that he is the lawful and valid registered owner of the suit property.
17. It instructive to note that the defendant abandoned her counterclaim in which she had alleged that the Plaintiff obtained his title fraudulently. She can therefore not pursue her prayers in that regard.
18. With regard to trespass, the Defendant conceded that she had leased the suit property to one Ronald Angwenyi between 2017 and 2018. She however denied that she was in occupation of the suit property as she was living on land parcel number Wanjare/Bogiakumu 2452. She said she was not aware that the said Ronald Angwenyi had been evicted from the suit property in 2020.
19. From the evidence on record, I am satisfied that the plaintiff has proved that he is the registered owner of land parcel number Wanjare/Bogiakumu/3266. Even though he did not produce a sale agreement, he produced a certified copy of the transfer signed by Nyoero Ongori (now deceased). Furthermore, the court in KISII ELC Case No. 26 of 2017 Peter Rinag’a Makori v Ronald Oino Angwenyi held that he is the lawful and valid registered owner of the suit property. No evidence was produced to show that the said judgment has been challenged on appeal and it therefore still stands. I can therefore not vary the said judgment as that would be sitting on appeal on a judgment of a Judge of concurrent jurisdiction.

Section 22 of the [Land Registration Act](#) 2012 provides that:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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....”

Section 24 of the said Act further provides as follows:

“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”.

Section 25 (1) of the said Act also provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section”.

20. In view of the foregoing provisions of the law, it clear that the Defendant is the lawful registered proprietor of the suit property and he is entitled to enjoy the use and occupation of the same without any interference from anyone.



21. With regard to general damages, I have taken note of the fact that the defendant is no longer in possession of the suit property as she last leased it to Ronald Angwenyi in 2018. I also note that the Plaintiff has since evicted the said Ronald Angwenyi and presumably, the plaintiff is now in possession of the suit property. In the circumstances, I do not deem it appropriate to award any general damages.
22. Regarding costs, even though costs ordinarily follow the event, I note that the parties herein are neighbors who will continue to live side by side and it is evident that the Defendant is no longer in possession of the suit property. Consequently, each party shall bear their costs.
23. Accordingly, I enter judgment for the Plaintiff and make the following final orders:
 - a. A declaration is hereby issued that the plaintiff is the sole owner and/or bonafide owner of the said plot number Kisii/Wanjare/Bogiakumu/3266 and an eviction order is hereby issued against the defendant.
 - b. A permanent injunction is hereby issued against the defendant, her agents, servants, or otherwise howsoever from trespassing into or interfering with land parcel No. Wanjare/Bogiakumu/3266 in whatsoever manner.
 - c. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF OCTOBER 2023

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J.M ONYANGO

JUDGE

In the presence of;

Miss Nyandoro for Mr. Bosire Gichana for the Plaintiff

Mr. Ochoki for the Defendant

