



**Oshumu (Suing as the Personal Representative of the Estate of Letoire Ole Ntirori)  
v Kinyingi & 3 others; Nyakambo & another (Interested Parties) (Environment &  
Land Case 195 of 2018) [2023] KEELC 21971 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21971 (KLR)

*NAIROBI ELC NO. 1061 OF 2015*

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 195 OF 2018**

**MN GICHERU, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JOHN OSHUMU (SUING AS THE PERSONAL REPRESENTATIVE OF THE  
ESTATE OF LETOIRE OLE NTIRORI) ..... PLAINTIFF**

**AND**

**DANIEL MWARIA KINYINGI ..... 1<sup>ST</sup> DEFENDANT**

**DAVID NGUMO WACHIRI ..... 2<sup>ND</sup> DEFENDANT**

**MOHORU NJOROGE ..... 3<sup>RD</sup> DEFENDANT**

**JAMES GITHIGA NJOROGE ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**ROBERT KOMBO NYAKAMBO ..... INTERESTED PARTY**

**DOMINIC MOCHABO MAOBE ..... INTERESTED PARTY**

**JUDGMENT**

1. The plaintiff seeks the following reliefs against the defendants.
  - a. A permanent injunction restraining the defendants from trespassing, subdividing, alienating, dealing, transferring and/or disposing of any land they have fraudulently acquired from the land known as Kajiado/Kitengela/ 2603 and any other land owned by the plaintiff and his family members.
  - b. A declaration that the plaintiff is the legal, rightful and absolute owner of L.R. 2603, suit land.



- c. Revocation of any other land title issued from the suit land.
  - d. An order directing the Chairman National Land Commission and the Registrar, Kajiado County to maintain in the Lands Registry records that the Plaintiff is the legal and absolute owner of the suit land.
  - e. General damages for trespass and harassment.
  - f. Interest and costs of this suit.
  - g. Any other relief that this court may deem fit and just to grant.
2. The Plaintiff's case is as follows. He is the son of Letoire Ole Ntirori who is the lawful owner of L.R. Kajiado/Kitengela/2603, suit land, which was a subdivision of L.R. Kajiado/Olooitikoshi/2002. The registered owner who is now deceased has neither sold the suit land nor subdivided it. At one time, the deceased found that his title deed was missing. He reported the matter to the police who discovered fraud in relation to the suit land. Investigations revealed that an Identify Card No. 7928425 belonging to one Pauline Syowai Musyoka from Kanzokea village in Kangundo, Machakos County had been used to purport to transfer the suit land. Soon after this, the defendants invaded the suit land whereupon they erected permanent and temporary structures in addition to grazing their livestock on the land. Further to this, the defendants attempted to evict John Oshumu and his family from the suit land. It is for the above stated reasons that the current suit was filed.
3. In support of the case, the plaintiff filed the following evidence.
- i. Witness statements by Lotoire Ole Ntirori and John Oshumu.
  - ii. Copy of identity card for the plaintiff
  - iii. Identification report for Letoire Ole Ntirori, ID No. 03428425
  - iv. Identification report for Paulina Syowai Musyoka, ID No. 07928425.
  - v. Copy of title deed for the suit land dated 10/4/1990.
  - vi. Copy of register of the suit land.
  - vii. Copy of application for caution dated 18/4/1991.
  - viii. Copy of letter of consent dated 19/12/1990.
  - ix. Other relevant documents.
4. In their written statement of defence dated 13/2/2020, the defendants, through counsel on record, aver as follows.
- Firstly, they deny that the late Letoire Ole Ntorori is the owner of the suit land and aver that he sold the same to Njoroge Mbugua Gatiba who subdivided it into five parcels.
- Secondly, the defendants deny having obtained the suit property in mysterious, unclear or questionable circumstances and further deny any fraud on their part.
- Thirdly, the defendants aver that the report filed by the District Land Registrar Kajiado in Judicial Review Case No. 20 of 2016 demonstrates that the suit land was lawfully acquired from the Plaintiff.
5. In support of their case, the defendants filed four witness statemetns by Daniel Ngumo Wachira, Mahoru Njoroge and James Githiga Njoroge. They also filed seven documents which include letter



of consent to subdivide L.R. Kajiado/Kitengela/2002, copy of title deed for the suit land in the name of Njoroge Mbugua Gatiba dated 18/4/1991, copy of mutation form, copies of title deeds for L.R. Kajiado/Kitengela/4104, 4105, 38048 and copy of report by the District Land Registry, Kajiado dated 20/10/2017 concerning the suit land.

6. At the trial, the plaintiff testified and produced his documents as exhibits. He also called retired corporal John Nyakundi as his witness whose evidence is that the identity card number used to transfer the suit land did not belong to the deceased Letoie Ole Ntirori but to one Pauline Syowai Musyoka. He contends that there was fraud in the transfer of the deceased's land to the parties or the one who sold it to them.
7. Paul Abuto who is an assistant director at the National Registration Bureau was also called by the plaintiff as his witness. His evidence is to the effect that the deceased's identity card number was duplicated. The duplicated numbers were 3428425 and 3928425. This duplication occurred in the year 1996. There was no fraud in the duplication and the late Letoie Ole Ntirori was called and asked to return the card.
8. The first Defendant was the only witness who testified on the part of the defence. He adopted his witness statement and the seven documents as his evidence and called for the dismissal of the plaintiff's case.
9. Counsel for the parties filed written submissions dated 16/3/2023 and 2/5/2023 respectively and identified the following issues for determination.
  - a. Whether the plaintiff is the legal owner of the suit land.
  - b. Whether there was fraud occasioned by the defendants in the acquisition of the suit land.
  - c. Whether the plaintiff is entitled to the prayers sought.
  - d. Whether failure to join the personal representatives of the late Njoroge Mbugua Gatiba and the Kajiado District Land Registrar renders the plaintiff's suit incompetent.
  - e. Whether the plaintiff's suit is statute barred.
  - f. Whether the defendants engaged in any fraud during the acquisition of the suit land.
  - g. Whether the prayers sought by the plaintiff are tenable.
  - h. What orders should the court make.
  - i. Who should bear the costs of the suit.
10. I have carefully considered all the evidence adduced by the plaintiff, the first defendant and their witnesses. It includes the witness statements, documents and the testimonies at the trial. I have also considered the submissions by learned counsel for the parties, the issues raised.
11. On the first issues, I find that the plaintiff is not the legal owner of the suit land. He is not the registered owner of the land. The official records filed in this case show that the deceased transferred the suit land to Njoroge Mbugua and the deceased received Kshs. 344,000/- as consideration. The suit land no longer exists because it was subdivided into parcel numbers 4101, 6269, 6270 and 6271.
12. On the second issue, I find that the fraud has not been proved on the part of the defendants. Under Section 107 and 108 of the *Evidence Act*, it is incumbent upon the plaintiff to prove all the allegations in the plaint. This is because, he is the one who will fail if fraud is not proved. He has alleged fraud in paragraph 4 of the plaint. The only thing that the plaintiff has proved is that the identity card number



used in the transfer of the suit land was number 7928425/66 instead of ID No. 3428425. This is not sufficient because as we have been told by the plaintiff's own witness Paul Abuto, the plaintiff's identity card was duplicated. This means that he had more than one identity card. It is also a matter to take judicial notice of that the old generation identity cards had slashes as in number 7928425/66. There is that probability that the deceased used the old generation identity card in the transaction for the sale of L.R. 2603.

It is noteworthy that there is no forensic report by the documents examiner to prove that the document produced by the Land Registrar are not authentic. The burden on the plaintiff to prove fraud is higher than in the originally civil cases as per the holding by the court of Appeal in the case of Elizabeth Kamene Ndolo –versus- George Matata Ndolo in Civil Appeal No. 128 of 1995.

“...the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but... certainly not one beyond a reasonable doubt as in criminal cases...”

13. On whether non joinder of the estate of Njoroge Mbugua Gatiba is fatal to the plaintiff's case, I find that it is not fatal because under Article 40(6) of *the Constitution* all the plaintiff needs to do is prove that the suit property was unlawfully obtained but as we shall see at the conclusion, he has not done this.
14. Regarding the suit being time barred, I find that owing to Section 26(a) of the *Limitation of Actions Act*, time would start running when the alleged fraud was discovered by the plaintiff. Unfortunately the pleadings by the plaintiff do not state when the alleged fraud was discovered but it would seem to have been after the year 2012 and since the suit was filed in 2015, then it is not time barred.
15. From the findings in paragraph 12 above it is clear that the plaintiff's suit is not preponderated to the standard required by the law. I therefore find no merit in the entire action and I dismiss it with costs to the defendants.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**M.N. GICHERU**

**JUDGE**

