



Mose & 4 others v Mageto & another (Environment & Land Case E004 of 2022) [2023] KEELC 22153 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22153 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E004 OF 2022**

JM KAMAU, J

NOVEMBER 23, 2023

BETWEEN

**WILLIAM MOSE 1ST APPLICANT
EVANS ORONI MOSE 2ND APPLICANT
TABITHA BASWETI MOSE 3RD APPLICANT
HENRY NYAGWAYA MOSE 4TH APPLICANT
MARITA ONKOBA 5TH APPLICANT**

AND

**RICHARD MAGETO 1ST RESPONDENT
JACKLINE NYABOKE MAGETO 2ND RESPONDENT**

JUDGMENT

1. In this case which was commenced by way of an Originating Summons, the Applicants have urged this Court to declare them to have acquired prescriptive rights over the parcel of land LR.NO. GESIMA SETTLEMENT SCHEME/319 by way of adverse possession and that the Land Registrar, Nyamira be directed to cancel the requisite entries for the Respondents and register the Applicants as the registered proprietors of the same. The Applicants have deponed that they have resided on the land for more than 35 years openly, exclusively and uninterruptedly. The stay has been open, without secrecy and without interruption nor resistance. All the Applicants are members of the same family who have sub-divided the land equally on the ground. The land measures 2.01 Hectares and they aver that they have never seen the Respondents for all those 35 years they have been on the land.
2. On the other hand, the Respondents have defended the suit by way of a Replying Affidavit sworn on 31/10 2022 by the 2nd Respondent with the 1st Respondent's authority. The averments in the Originating Summons and its Supporting Affidavit are denied and the Respondents term it



as falsehoods. The 2nd Respondent deponed that GESIMA SETTLEMENT SCHEME/319 was purchased by the 1st Respondent from one Joseph Nyabiosi Nyakundi in 2003. The same is a sub division of GESIMA SETTLEMENT SCHEME/145 alongside GESIMA SETTLEMENT SCHEME/ 320, 321 and 322. GESIMA SETTLEMENT SCHEME/319 is registered in the name of the 1st Respondent. Joseph Nyabiosi Nyakundi had purchased the land from one Mose Mainga in 1992. Mose Mainga is the husband of the 3rd Applicant. The 3 wives and children of the late Mr. Mainga were against the sale. She equally deponed that the Applicants have never been in occupation of the said land as they claim but only encroached on the suit land on 27/10/2022 by vandalizing the 1st Respondent's fence around the suit land which matter was reported to the Land Registrar, Nyamira. Supporting Documents were filed and the matter was treated as a normal suit with the Originating Summons as Plaintiff and the Replying Affidavit as Defence. Witness statements and documents were filed accordingly.

3. On the 23/2/2023 Tabitha Basweti, the 3rd Applicant took to the witness stand and repeated the words in the Applicants' joint Supporting Affidavit sworn on 6/10/2021. She testified that her late husband Mose Mainga bought Gesima Settlement Scheme/319 from the Government of Kenya where she has all along lived. She produced a copy of certificate of search dated 13/1/2022 showing the land, a sub division of GESIMA SETTLEMENT SCHEME/145 to be registered in the name of Richard Mageto, the 1st Respondent. On cross examination by Mr. Ochoki for the Respondents the witness said that her husband had 2 other wives, Jerusa and Nyaboke. She also said she doesn't know the acreage of the land she occupies and that she can't remember for how long she has been on the land but in 1991 she was on the land. But she later said she cultivates the entire 5 Acres. PW 2, Kennedy Ondikei Michoma testified that he has lived in the neighbourhood of the suit premises for more than 30 years and the Applicants have all along lived in the land but that he has never seen the Respondents on the land. The suit land has food crops ranging from Maize, beans, vegetables, sorghum, avocados, bananas and napier grass among others. He summed up his evidence in chief by saying that he doesn't know the L. R. No. of the land nor the one he lives on, which belongs to his father. On cross examination, Mr. Michoma said he is now 53 years old and by the time he was born he found the 3rd Applicant on the suit land. He also said that there is one parcel of land between the Applicants' and the land he lives in and that he also doesn't know how many homes are erected on the suit land nor the acreage. He was also quick to say that if there had been any purchase of the suit land in the neighbourhood he would not have known at the age of 22 years. He finally said in re-examination that only the 1st Applicant has a permanent house on the suit land. In answer to questions from the Court, the witness said that after completing form 4 in 1989, he went to Nairobi to do a course in electronics till December, 1992 and continued living in Nairobi where he was doing business until 2015 when he came back home. He could therefore not account for what was happening in the neighbourhood from 1989 to 2015.
4. The next witness, Elizabeth Onsombi, a neighbour also testified that she has lived in the neighbourhood of the Applicants for more than 30 years and that she knows the Applicants who have been her neighbour all this time but that she has never seen any of the Respondents on the suit land. On cross examination Mr. Moguche Onsombi said that she is now 70 years old and that there are 4 houses on the suit land and one of them is permanent which belongs to the 1st Applicant whom she referred to as William. She also said that she doesn't know the acreage of the suit land. She said she doesn't know Nyabiosi and that Tabitha is the wife of the late Mose Mainga.
5. The last Applicants' witness, Gladys Kemunto Nyabuto, another neighbour to the Applicants since 1991, said that she is not aware that the late Mose Mainga ever sold the suit land to anyone. She said there are 5 houses on the suit land and that the 3rd Applicant lives on a mud house.



6. After the close of the Applicants' case the 1st Respondent who testified online from Delaware in the USA said that he is the registered owner of the suit land which is a sub division of GESIMA SETTLEMENT SCHEME /145. He produced a green card to show that he is indeed the registered owner of the same and that the late Mose Mainga (3rd Applicant's husband) sold the same to Joseph Nyabiosi Nyakundi in 1992. The said Mainga was also the father to the 1st, 2nd, 4th and 5th Applicants. He said that the Applicants were not happy with the purchase of the land by the late Joseph Nyabiosi Nyakundi from Mose Mainga. He produced in Court a copy of the Mutation forms in respect of Gesima Settlement Scheme/145 and a certificate of search dated 21/6/2022 showing the parcel of land GESIMA SETTLEMENT SCHEME/319 to belong to him since 6/11/2003 and a Title Deed issued on 6/11/2007, a green card showing the transfer to himself from Joseph Nyabiosi Nyakundi, an unsigned Application to Land Control Board (the same undated) for the transfer of the suit land from Mose Mainga to Joseph Nyabiosi Nyakundi. The Application was allegedly made to Chairman of Borabu Land Control Board. He also produced a copy of the Title Deed in his name. On cross examination by Mr. Nyamweya for the Applicants Mr. Mageto said he bought the land in 2003 but could not produce a copy of the sale agreement of either transaction. He also said that he doesn't know who the witnesses were and was not shown the Title Deed before he purchased the land. He said that he could not tell the purchase price Joseph Nyabiosi paid. He has also never seen a copy of the consent to transfer the land to himself or to Nyabiosi. Further, he said he cannot recall having paid any Stamp Duty for the land nor whether Mr. Nyabiosi paid any. He testified that he was last on the suit land in 2005. On reexamination he said that his agents and sister are on the land. Dw2, Mr. George Maina, Land Registrar Nyamira testified that GESIMA SETTLEMENT SCHEME /145 was originally registered in the name of S.F.T., then in the name of Mose Mainga and later subdivided into GESIMA SETTLEMENT SCHEME/319,320,321 and 322 on 29/1/1992. A Mutation was presented for registration on 29/1/1992 as Entry No.0078 and all of them registered in the name of Mose Mainga. GESIMA SETTLEMENT SCHEME/319 and GESIMA SETTLEMENT SCHEME /322 were transferred to Joseph Nyabiosi Nyakundi on 7/7/1992 and Title Deeds issued the same day. Gesima Settlement Scheme /322 has been transferred twice. First to Japheth Onyari and later to Jason Ondera. Gesima Settlement Scheme/319 was on 6/11/2003 transferred to the 1st Respondent without any consideration indicated and that there are no houses on Gesima Settlement Scheme/319. He also testified that he doesn't have the name of the Surveyor who prepared the mutation forms since the same is not indicated on the mutation forms and that his office doesn't have the original Title Deeds that were supposed to have been surrendered by Nyabiosi and Mose respectively. The other Defendant's witness in the case, Jacqueline Nyaboke Mageto the 2nd Respondent herein testified that she is the 1st Respondent's sister. She also reverberated the evidence by the 1st Respondent. She says she has been cultivating the suit land since 2003 and that there are no houses on the land.
7. Dw4 Hellen Nyabiosi, wife to the late Joseph Nyabiosi said that her late husband bought the suit land from the late Mose Mainga. But she did not have a copy of the sale agreement to that effect. She only talked of a copy of the Application for consent. She said that she has no interest in the suit land which was sold to the 1st Respondent by her late husband for US \$ 26,000. There was a balance which is yet to be paid. However, she could not tell how much it was. She also finally testified that in her late husband's funeral programme the 1st Respondent was described as her late husband's nephew but admitted that this is not true.
8. I am faced with yet another interesting case where parties in a sale transaction do not adhere to the law when actualizing a transfer of land. I would summarize the scenario in this case from the evidence that has been adduced and from the documents tendered in Court. Gesima Settlement Scheme/319 was hived off from Gesima Settlement Scheme/145 the latter having been first registered in the name



of Mose Mainga. The same was first registered on 29/1/1992. On 7/7/1992 it was transferred to one Joseph Nyabiosi of Identity card Number 4142171/67 and a Title Deed issued the same day. Mose Mainga was the husband of the 3rd Applicant and father to the other 4 Applicants.

9. On 6/11/2003 the land was transferred to the 1st Respondent, Richard Mageto, holder of a Kenyan Passport No. A390128 and a Title Deed issued on the same date. The 2nd Respondent, Jackline Nyaboke Mageto Identity Card No.22043147 then registered a caution against the Title on 2/9/2022. All this information is contained in the green card dated 25/10/2022 produced in Court by the Respondents. The strangest thing is that the 1st Respondent has not produced a copy of the sale agreement showing how he bought the piece of land, Gesima Settlement Scheme/319 from the late Joseph Nyabiosi Nyakundi nor has any of the Respondents' witnesses including the widow of Nyabiosi produced a copy of the sale agreement between Nyabiosi and Mainga. We are also not told at what price the 1st Respondent bought the suit land from the late Nyabiosi nor how much the land was bought by Nyabiosi from Mainga. The closest that the witnesses have mentioned the consideration is when Hellen Nyabiosi, the widow of Joseph Nyabiosi Nyakundi testified that her husband bought the suit premises in 1991 from Mose Mainga, got a Title Deed in 1992 and sold it to the 1st Respondent for 26,000 U.S Dollars. But there was a balance which she can't tell how much it was and that she has not pursued it after her husband's death. This is unbelievable. It is also interesting that this witness only produced the 1st page of the Application for consent of Borabu Land Control Board and not the 2nd page which would have shown who applied for consent. I believe this omission was deliberate in order to conceal the truth, which is that no such Application was ever made. The Application is also undated and there is nothing to indicate that the same was actually delivered to the Land Control Board. There is also no consent to transfer nor did the Respondents produce any minutes of the Board to show that consent was actually obtained. The Land Registrar Nyamira, Mr. Maina said that his office did not even have the original Title Deed before the same was transferred to the 1st Respondent by the late Nyabiosi. In the absence of the consent of the Land Control Board, no sale agreements in favour of Nyabiosi and the 1st Respondent respectively and in the absence of any evidence of consideration by any of the 2, it is highly doubtful that such transactions ever took place.
10. The First Respondent lives in the U.S.A. and lived there during the period of the alleged transfer of the suit property by Joseph Nyabiosi Nyakundi to himself. I would therefore have expected him to produce a copy of his passport in Court to show that he actually travelled to Kenya for the sale transaction, appeared at the Land Control Board and also at the Lands Office or before an Advocate or any other officer before whom the law authorizes to witness the execution of a Transfer by the Transferee. This he did not do and he did not also explain how he made the payments to Mr. Nyabiosi. Was it by cheque, bank deposits, direct transfers or cash? Who were the witnesses? Did they appear before an Advocate to sign the transfer forms and for purposes of executing a sale agreement? All this is shrouded in mystery. I believe this is another case of a scenario that has acquired notoriety and is gaining momentum very fast in this county where people living abroad send money to their otherwise reliable relatives, friends and estate agents for the latter to purchase properties for them but their trusted ones end up defrauding them. Fake documents are sent to them and they are so delighted at it. When they come back to the country, they are shown other people's properties as the ones that were bought for them.
11. The 1st Respondent who testified online from Delaware in the USA where he teaches at the University of Delaware said that he was not shown a copy of the Title Deed before embarking on the sale transaction. He also said that he did not know who were the witnesses to the transaction. He never saw the consent to transfer the land to himself nor to the late Joseph Nyabiosi Nyakundi. He could not even recall having paid any Stamp Duty for the transfer. How could the land have been transferred to either Mr. Nyabiosi or to himself without any payment of Stamp Duty or exemption of the same?



12. In short, the 1st Respondent was duped.
13. As to whether Mr. Joseph Nyabiosi Nyakundi even bought the land from Mr. Mose Mainga in order to acquire capacity to transfer the same to the 1st Respondent, there was no consent from the Land Control Board for the alleged transfer, no evidence of how much he bought it at and the original Title Deed cannot be traced at the Land Registry, which means that the same was not surrendered to the Land's office at Nyamira. There is also no proof that Stamp Duty was ever paid in respect of the transfer from the late Mose Mainga to Joseph Nyabiosi. Mr. Maina, the Land Registrar, testified that the original Title Deed that was with Joseph Nyabiosi Nyakundi was not surrendered to the Lands Office when he allegedly transferred the land to the 1st Respondent.
14. For the ordinary Kenyan, there is need to know when you can have a good Title and when the Title may not be good. Fraud has effect on the indefeasibility of Title to land. The Respondents and their 2 immediate predecessors in Title were involved in and became victims of fraud as explained above. The 1st Respondent comes out as a susceptible prey. However, as for his explanation that he did not know that Stamp Duty was payable for the transaction as well as his plea of ignorance on the requirement of consent of Land Control Board, ignorance of law is no Defence. Either the 1st Respondent knew about the fraud or he was negligent for failure to conduct due diligence before embarking on the transaction and in either case the 1st Respondent cannot be pardoned. The record is replete with instances of fraud in the transfer between Mose Mainga and Joseph Nyabiosi on one hand and between Joseph Nyabiosi and the 1st Respondent on the other.
15. Our land registration process is entirely a product of the Torrens system of registration. The word 'Torrens' is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1858. This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. The Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation. This statutory presumption of indefeasibility and conclusiveness of Title under the Torrens system can be rebutted only by proof of fraud or misrepresentation. In *Dr. Joseph Arap Ngok V. Justice Moiyo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997 the Court of Appeal categorically declared that: -

“Section 23(1) of the Act gives an absolute and indefeasible Title to the owner of the property. The Title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of Title bestowed upon the Title holder under the Act. It is our law and law take precedence over all other alleged equitable rights of Title. In fact, the Act is meant to give such sanctity of Title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”
16. However, in *Munyu Maina Vs Hiram Gathiha Maina*, Civil Appeal number 239 of 2009 the Court held that; -

“where a party's certificate of Title is under challenge, it is not enough to waive the instrument of Title as proof of ownership but prove the legality of how he acquired the Title”.
17. The issues before this Court are inter alia whether the Respondent's Title was not indefeasible on account of fraud. And since fraud is a question of evidence and this Court has found evidence of



attendant circumstances and primary facts giving rise to a proper inference of fraud on the part of the 1st Respondent and/ or his agents, there is no uncertainty in this case as regards what did constitute fraud and the indefeasibility of the 2 last Titles.

18. The transfer of the property was tainted by an illegality as Joseph Nyabiosi Nyakundi did not have a clean Title capable of being transferred to the 1st Respondent. The fact that he managed to obtain a Title through fraudulent and corrupt means denies him a clean Title capable of being transferred to the 1st Respondent. As to giving the benefit of doubt to a person who obtains a Title Deed without using the legally laid down legal mechanism Justice Onyancha in *Alberta Mae Gacci – vs – Attorney General & 4 Others* (2006) eKLR stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid Title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

19. Section 26 of the [Land Registration Act](#) is categorical that a certificate of Title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of Title has been acquired fraudulently, unprocedurally or through corrupt practice.
20. Having acquired Title by way of fraud, can the Title of the 1st respondent be protected? My short answer is a resounding NO! The applicable law is Section 26 (1) of the [Land Registration Act](#) which provides as follows: -

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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the Title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.
21. The issue for determination here is whether the suit property was illegally or fraudulently transferred to the 1st Respondent and whether the Applicants are entitled to their prayers. The answer is in the affirmative.
22. Even if the Court were to stop at this point, the inevitable order would be that the suit land, Gesima Settlement Scheme/319 to revert to the Estate of Mose Mainga whose registration as proprietor has no issues. The effect of this would be that the Applicants herein, being the legitimate beneficiaries of the the Estate of Mose Mainga would after probate still get the land which they have asked the Court to give them courtesy of adverse possession. This is because the 2 transfers, first from the late Mose Mainga to Joseph Nyabiosi Nyakundi and later from Joseph Nyabiosi Nyakundi to the 1st Respondent were therefore fraudulent.



23. The evidence in this case puts no one in doubt that the Title to the 1st Respondent was obtained illegally, unprocedurally or through a corrupt scheme. The Title could not therefore have been obtained legally or procedurally. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud or from fraud perpetuated on his behalf or in order to benefit him. I am satisfied that the provisions of Section 26 (1) (b) [Land Registration Act](#) have been met and that this is a case befitting the cancellation of the Title of the 1st Respondent.
24. It is regretful that the 1st Defendant, while living and working outside the country and with a desire to invest locally for his retirement, he was snared by the scheme perpetuated by his trusted people. I sympathize with him but I must ensure that the real owners of the suit land are protected and that they are registered as the proper owners of the suit land. Unfortunately for the 1st Respondent, the court cannot turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of Title. For other investors in land, the advice given by his Lordship Justice Munyao Sila in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR would be of much assistance:

“I am prepared to give the 3rd respondent benefit of doubt that they were not privy to the fraudulent transactions. It is another matter whether they undertook proper due diligence. Their position is that they conducted a search and that constituted good due diligence. I would not want to set any precedent that a person has any legal obligation to go beyond conducting an official search from the land registry so as to find the proper owner. That may be the legal obligation. However, there is no harm in going the extra mile and digging deeper into the Title. In fact, it is probably advisable to do so, given the fact that this country is notorious when it comes to land scams, and land fraudsters have continuously been in the kitchen, creating new recipes for land con schemes. I would inform any prudent person wishing to deal with land, to go beyond the legal obligation of conducting an official search, and always prod a little more to find out if the person has good Title to the land. It is not easy, but it is advisable to do so.”

25. As to whether the Applicants have lived on the suit land for over 12 years uninterruptedly, openly and without the Respondent's consent/ permission I am persuaded from the Applicants' evidence and that of their witnesses that they have so lived on the suit land and have therefore met the threshold of adverse possession. Consequently, either by way of adverse possession or by virtue of beneficial interest or both, the Applicants are legally entitled to the suit land and I therefore proceed to order that the Title Deed in respect of GESIMA SETTLEMENT SCHEME/319 in the name of the 1st Respondent, Richard Mageto be cancelled forthwith and, in his place, the same be rectified to read the names of the Applicants who will share the same equally or as they desire. I will also award the Applicants the costs of this suit.

JUDGMENT DATED AND DELIVERED AT NYAMIRA THIS 23RD DAY OF NOVEMBER 2023.

MUGO KAMAU

JUDGE

