



REPUBLIC OF KENYA



**Kamau & 2 others v Kamau & 6 others (Environment & Land Case
011 of 2022) [2023] KEELC 22357 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 011 OF 2022**

JM KAMAU, J

DECEMBER 21, 2023

BETWEEN

PRISCAH NYAKERARIO KAMAU 1ST PLAINTIFF

SIMEON MWANGI KAMAU 2ND PLAINTIFF

FRANCIS MAINA KAMAU 3RD PLAINTIFF

AND

MUTHONI KAMAU 1ST DEFENDANT

JOHN MWANGI KAMAU 2ND DEFENDANT

CHARLES OGUTU ONTUNU 3RD DEFENDANT

MONICAH NJERU KAMAU 4TH DEFENDANT

MARY WANJIRU MASANKWA 5TH DEFENDANT

COUNTY LAND REGISTRAR – NYAMIRA 6TH DEFENDANT

COUNTY SURVEYOR – NYAMIRA 7TH DEFENDANT

JUDGMENT

1. The 1st Plaintiff and 1st Defendant are co-wives and widows /co- Administrators of the late Naman Kamau alias Kamau Mwangi who died on 27/5/2005. The 2nd Plaintiff, 1st, 3rd 4th and 5th Defendants are children of the 1st Defendant. LR No Gesima Settlement Scheme/224 was the property of the late Kamau Mwangi and is subject of Nakuru High Court succession cause No 409 of 2006. It is the Plaintiffs' case that the 1st Plaintiff's co-widow, the 1st Defendant with the assistance of the 6th and 7th Defendants fraudulently, illegally and unprocedurally carried out the sub division of LR Gesima Settlement Scheme/224 and created thereout Gesima Settlement Scheme /1551, 1552, 2553,1554,1555,1556, 1557,1558, 1559 and 1560 which were transferred to the 1st to 5th Defendants



respectively. The Plaintiffs further aver that the above registration was made on 30/10/2008 in the pretext of executing an award of Borabu land Disputes Tribunal in Tribunal case No 3 of 2004 which award was made a Judgment of Nyamira Senior Resident Magistrate's Court Miscellaneous Application No 30 of 2007 but which registration was overturned in Nakuru High Court succession cause No 409 of 2006. They therefore sought the following orders-

- a. A Declaration that the registration of the 1st Defendant Muthoni Kamau as the absolute and sole proprietor of parcel No LR No Gesima Settlement Scheme /224 on 30/10/2008 and the subsequent Title Deed issued to her on 30/10/2008 was procured by fraud, unprocedurally and/or by means of corrupt schemes and therefore fraudulent, illegal, null and void.
 - b. A Declaration that the sub division of LR No Gesima Settlement Scheme /224 into parcels LR No Gesima Settlement Scheme/1551, 1552, 2553,1554,1555,1556,1557,1558,1559 and 1560 effected by the 6th Defendant on 27/10/2022 and the subsequent registration of the 1st, 2nd, 3rd, 4th and 5th Defendants as the proprietors of the said subdivisions and the Title Deeds issued to the Defendants with respect to the said subdivisions was procured fraudulently, unprocedurally and /or by means of corrupt schemes and therefore fraudulent, illegal, null and void.
 - c. An order cancelling the Title Deeds issued by the 6th Respondent to the 1st, 2nd, 3rd, 4th and 5th Defendants in respect of Gesima Settlement Scheme /1551, 1552, 2553,1554,1555,1556,1557,1558,1559 and 1560.
 - d. An order directing the 6th Defendant to rectify the Register for LR No Gesima Settlement Scheme /224 by reinstating the same and cancelling the registers for LR Gesima Settlement Scheme /1551, 1552, 2553,1554,1555,1556,1557,1558,1559 and 1560.
 - e. An order directing the 6th Defendant to register 1st Plaintiff and the 1st Defendant as proprietors of LR Gesima Settlement Scheme/ 224 (as the personal Representatives of the Estate of the late Naman Kamau Mwangi alia Kamau Mwangi) in accordance with the Grant of probate issued in Nakuru High Court succession cause No 409 of 2006 on 14/2/2007.
 - f. Costs of this suit.
 - g. Any other order the court may deem fit to grant.
2. In their joint Defence, the 1st, 3rd, 4th and 5th Defendants deny that LR No Gesima Settlement Scheme /224 was part of the estate of the late Kamau Mwangi nor that the same was fraudulently subdivided and/or transferred. Interestingly, they even deny that the 1st Plaintiff and the 1st Defendant are co-wives nor that any fraud was employed to procure the sub division and the subsequent transfer of Gesima Settlement Scheme/224. The Defendants also deny any fraudulent and illegal means of removing cautions and restriction on the suit land and seek to have this suit dismissed with costs.
 3. On their part, the 6th and 7th Defendants aver that they are strangers to all the illegal involvements mentioned in the Complaint and more particularly that they were party to the fraud and unlawful aiding of the 1st Defendant to cause sub division, transfer and the registration of the sub division of the suit property. They aver that everything they did in all the transactions were done while carrying out their statutory duties. They also aver that the claim in the suit is a succession issue and not within the jurisdiction of this court and that the same should be dismissed.
 4. The first to testify was Priscah Nyakerario Kamau the 1st Plaintiff, a widow of the Deceased. She adopted her statement dated 1/3/2023 where she said that it was the wish of her late husband that the suit property be shared between the 2 houses equally. This was before his death on 27/5/2005. The



1st Defendant went to Borabu Land Disputes Tribunal in 2008 as a result of which she was declared the proprietor of the suit land. She did this while she was already a co-administrator of the estate of the Deceased. The same was later halted by Lady Justice Wendoh in Nakuru High Court succession cause No 409 of 2006. In spite of this Order, the sub division of the suit land was still procured. She produced the following documents to buttress her case; -

1. A copy of will dated 30/03/2005.
 2. Copy of court order issued on 3/6/2008.
 3. Letter dated 23/1/2022 from the chief, Nyansiongo location.
 4. Notice of filing Award in Nyamira Senior Resident Magistrate on 1/8/2007.
 5. Probate and administration form 3 filed in Nakuru High Court in succession cause No 409 of 2006.
5. On cross examination by Mr. Nyagarama for the 1st to 5th Defendants (inclusive) the 1st Plaintiff said she stayed in Nyandarua while her co-wife Joyce Muthoni stayed in Nyamira and that the 16 Acre land was all along in the name of her late husband. On cross examination by Ms. Opiyo for the 6th and 7th Defendants, Priscah said that she sued the Land Registrar for lifting the caution she had lodged against the suit land.
6. Pw2, Simeon Mwangi Kamau, a son to the late Kamau Mwangi said his father died in 2005 after the determination of the Tribunal case which was that the land had changed to the 1st Defendant but the suit land is included in his late father's will. On cross examination by Ms. Opiyo, he said that the award was given when his father was still alive but the latter never challenged the award which was read on 28/5/2008. He also testified that they were not invited when the caution was removed.
7. Pw3, Francis Maina Kamau a son to the 1st Plaintiff was stepped down for being hostile by disowning his written statement dated 1/3/2023.
8. Dw4 Sila Okoth, the County Administrator of Borabu Land Control Board said that he did give a Notice of the documents required before the consent was issued.
9. Pw5 Charles Igiha, the Deputy County Commissioner, Borabu sub County in Nyamira County testified that the consent to subdivide Gesima Settlement Scheme/224 was issued by his Board. The same is dated 6/9/2012. The search had no issues and that the Application for consent met the required threshold. By then there were no encumbrances.
10. After the close of the Plaintiff's case, the 5th Defendant took to the witness box. She is the Daughter of the 1st Defendant who she said was bed-ridden. She testified that she was born in Mitamaiywa, in Nyamira on the suit land where they all along lived before the 1st Plaintiff married her late father. She told the court that her step-mother, the 1st Plaintiff insisted that she wanted to have a piece of Land in Nyansiongo and that is how the matter ended up in Borabu Land disputes Tribunal and that the suit land was transferred to the 1st Defendant as a result of the award of the Tribunal. The land was then sub divided and transferred by her mother to her children. The award of the Tribunal was made before her father died. She then produced the following: -
- a. A copy of the proceedings from Borabu Land Disputes Tribunal.
 - b. Copy of order from Nyamira Senior Resident Magistrate CC Miscellaneous Application No 30 of 2007.



- c. A copy of the Title Deed in respect to LR No Gesima Settlement Scheme/224.
11. On cross examination by Mr. Kavita for the Plaintiff, the witness said that her father had not written a will and that she was not aware of any Succession cause in Nakuru. The Tribunal Case was concluded in 2004 and then taken to court for adoption in 2008. The consent for subdivision was issued to the 1st Defendant on 6/9/2022 and the various cautions were removed on 27/10/2022 almost 2 months after the consent to sub divide was issued. On re-examination she said that the award of the Land Tribunal has never been overturned nor appealed against since 28/5/2008.
 12. Dw2 Sabina Buyaki Nyandoro, a neighbour to the 1st Defendant testified that the late Kamau Mwangi had only one wife. But that she heard the Deceased had another wife whom he had bought land for in Nyandarua but that she had never seen her.
 13. On cross examination by Ms. Opiyo for the 6th and 7th Defendants she said that the 1st Defendant went to the Tribunal together with the late Kamau Mwangi but that she was not a witness. On cross examination by Mr. Kavita for the Plaintiff, Nyandoro said that she has never seen the 1st Plaintiff and that she was told that the Deceased had another wife.
 14. The other witness in this case was Martin Osano, the Land Registrar Nyamira since May 2022. He testified that the suit land was first registered on 12/11/1985 in the name of Settlement Fund Trustees, then on 24/11/1986 to the late Kamau Mwangi by way of sale. A caution was registered in favour of the 1st Defendant and on 4/6/2008 the same was removed pursuant to a court order in Nyamira Miscellaneous Application Number 30 of 2007.
 15. On 30/11/2008 the property was transferred to the name of the 1st Defendant and a Title Deed issued the same day. The caution was lawfully and procedurally removed and consents were duly obtained.
 16. On cross examination by Mr. Kavita for the Plaintiffs the Land Registrar admitted that the registration of a Restriction order from the court dated 24/6/2011 was done on 11/5/2022 about 11 years later. He also admitted that he was not shown the Application for consent of the Land Control Board.
 17. The last witness Mr. Henry Abuga, the County Surveyor said that he registered the mutation form for transfer on 27/10/2022. He said that the speed used to register the documents depends on the Applicant.
 18. I asked the parties herein to file written submissions which I have considered before retiring to write this Judgment. The issue before the court is whether LR No Gesima Settlement Scheme /224 forms part of the estate of the late Kamau Mwangi. And to help answer the Question, which would hence help entangle the conundrum here is the Question, “When was LR Gesima Settlement Scheme/224 sub divided and the subdivisions transferred and whether it was so sub divided and transferred unlawfully and/or fraudulently? From the Green Card produced by Simeon Mwangi Kamau, the 2nd Plaintiff the 1st registered proprietor of the parcel of land was the Settlement Fund Trustees of P.O. Box 30450, Nairobi on 12/11/85, then Kamau Mwangi on 24/11/86 pursuant to a sale of Ksh, 4,950. A caution was entered by Muthoni Kamau 1st Respondent on 15/5/2003 claiming licensee interest. Then the same was removed on 4/6/2008 by order of court in Miscellaneous Application No 30 of 2007 in Senior Resident Magistrate Court, Nyamira. And on 30/10/2005 the land was transferred to Muthoni Kamau of Identity Card No (particulars withheld) vide Court order Nyamira Senior Resident Magistrate Miscellaneous Application No 30 of 2007. And a Title Deed was issued the same day. Then followed a series of cautions in favour of the 1st Plaintiff on 14/10/2010, the 2nd Plaintiff on 5/11/2020, another one on 22/11/2021 in favour of the 2nd Plaintiff and an order of the court on 11/5/2022. On 27/10/2022 all the encumbrances were removed “after lapse of time” and the Title



Deed closed on subdivision of LR No Gesima Settlement Scheme/224 to pave way for LR Gesima Settlement Scheme /1551, 1552, 2553,1554, 1555,1556, 1557,1558, 1559 and 1560.

19. It is noteworthy that the Mutation forms for the subdivision were prepared on 5/7/2022 before the encumbrances were removed. The same were registered on 27/10/2022 and even before the Court Order entry No 11 had been vacated.

20. I now wish to come to the Tribunal case Number 3 of 2004. The award read as follows: -

“Muthoni Kamau Identity Card No (particulars withheld) who is the Defendant should be the sole owner of the Land Parcel No Gesima Settlement Scheme/224. She should be given a number on her name”

21. I do agree with my sister Justice Wendoh that the Tribunal in Borabu Tribunal case Number 3 of 2004 acted ultra vires the parent statute when it purported to deal with disposition of Land which the court termed a nullity and to that extent I would add that jurisdiction is everything. In *James Alukoye Were v Lurambi Division Land Disputes Tribunal*, Misc. Civil Appl. No 165 of 2005, the Court held that:-

“The Land Disputes Tribunal has no powers to arbitrate on matters involving title to land or give such order to grant specific performance to rectify the register”.

22. Whether challenged or not challenged, this court cannot act upon and give validity to an order granted by a Court void of jurisdiction. The said orders are a nullity. Further, in High Court at Nakuru in Succession cause No 409 of 2006, Justice Wendoh gave the following orders: -

It is hereby ordered; -

a. That the Respondent herein Muthoni Kamau be and is hereby restrained from disposing or dealing with Land Registration No Kisii/gesima Settlement Scheme/224 in any manner adverse to the Deceased Estate or wishes until further orders of this court.

b. That the Applicant herein is given 6 months from the date hereof to file a challenge in relation to Nyamira Miscellaneous Application No 30 of 2007.

23. This was on 24/6/2011. The Honourable Court did not say that these orders would lapse in case the Decree from the Award of the Land Disputes Tribunal was not challenged. It said that the orders would remain in force “until further orders” of the Succession Court in Nakuru High Court Succession Cause No 409 of 2006. I have not been availed a copy of any further orders from the said court. These orders were registered under Entry No 11 in the Green Card on 11/5/2022 in respect of Gesima Settlement Scheme /224. I don’t buy the Land Registrar’s testimony that the 1st Plaintiff could have stayed with a Court Order for more than 10 years without registering it. In a very interesting manner under Entry No 13 the Land Registrar vacated those orders after what he termed as “lapse of time” and on the same day closed the Title and subdivided the land into 10 sub divisions. There were no further orders of the Succession Court. The Land Registrar Mr. Osano had no appellate powers over the High Court Judge Lady Justice Wendoh. His interpretation of “until further order of this court” to mean “after lapse of time” was deliberate and very unfortunate. He should have referred the parties to the High Court to have the said orders lifted if he was not comfortable with them and I believe he ought to be punished for contempt of Court. In any case, the Orders that were acted upon in transferring the suit land to the 1st Defendant were made by a court that had no jurisdiction to do so. On the issue of the removed cautions, although the Land Registrar has power to remove any caution on a title to land, the Land Registrar, Mr. Osano did not provide evidence to explain how the multiple cautions were removed and whether he gave the cautioners a Hearing before so removing them yet the 1st Plaintiff



had complained that the same were removed discreetly and unobtrusively. Section 73 of the [Land Registration Act](#), provides that:

- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

24. The Land Registrar did not adhere to this laid down procedure when removing the cautions. I am also greatly perturbed by the admission by the County Surveyor that the speed used to register documents depends on the Applicant. I can't comprehend what this means. But I hope that by speed the witness meant how fast one is in making an Application and payment for the documents to be registered and nothing more.
25. It cannot also pass scrutiny that the registered owner of the Suit land Naman Kamau Mwangi alias Kamau Mwangi died on 27/5/2005. The Borabu Land Disputes Tribunal Case No 3 of 2004 was filed on 27/4/2004 between himself as Plaintiff and the 1st Defendant as the Defendant in the case. The award was then filed on 1/8/2007 where the parties were Muthoni Mwangi (1st Defendant) and the Deceased. By this time Kamau Mwangi had died. The award was filed in Nyamira Senior Resident Magistrate's court and the same made an order of the court on 28/5/2008, 3 years 1 day after the Deceased had died. There was no substitution of the late Kamau Mwangi and Muthoni Mwangi went ahead to have the award made a Decree of the court. Against who? A Deceased person. Was Kamau Mwangi served with the Application to adopt the Award in his grave?
26. This leaves me with no option but to declare that the award and its adoption were a nullity for the reasons given immediately above and earlier.
27. Finally, the Land Registrar produced the minutes of the Land Control Board meeting held on 6/9/2022 at Borabu DCC Borabu Board Room where under minute Number 13/10/6/09/2022 the Application for the subdivision of Gesima Settlement Scheme /224 into 20 parcels was approved. The question Mr. Osano, the Land Registrar could not answer is where the consents to transfer the subdivisions to the Defendants are. The other interesting thing that cannot escape the court's attention is this. By this time the cautions had not been removed and the court order had equally not been vacated. Mr. Osano or his office must have issued an official search dated prior to 6/9/2022 which ought to have shown that there were several cautions and a court order restraining any interference on the suit land. Since official searches are issued by the Land Registrar it was easier to produce in this Court a copy of the official search given to the 1st Defendant before attending the Land Control Board than to get the



minutes of Borabu Land Control Board where he has no role to play. The truth of the matter is that the Green Card has been doctored to suit the 1st Defendant's case for which the Land Registry cannot escape blame for connivance and equally the minutes of the Land Control Board can also not be relied upon. An official search is a pre-requisite to the determination of an Application for consent. If one was brought to the attention of the Board, it would be expected that the latter would have quickly noticed the caution and the restraining order by the court and to reject the Application. Secondly, where are the minutes that facilitated the transfer of the suit land to Muthoni Kamau and the other transferees as a pre-condition to the Application for the transfer of the subdivisions which is a requirement for the said transfers? I would not hesitate to say that even craftiness requires some degree of intelligence, sound mind and consistency. But where wicked conspirators and crooks gathered in this matter, the angel of God preceded and confused them. Yes, they may have succeeded in altering Entries Nos. 12 & 13 in the Green Card. But they could not remember that by the time of removal of the restrictions, the consent to sub-divide had already been granted. Whereas God is omnipresent and all-knowing, being alert over what is happening all over, the devil on the other hand can only be in one place at a time. And again, he is not a virtuoso. The removal was backdated. But still to a time after the consent to sub-divide had been issued. They therefore left their imprints at the Lands office. Light must have found darkness before it had edited its work to ensure constant flow. The latter had to leave in a hurry. There was no time to read the script backward forward.

28. Having come to this conclusion, Section 26(1)(a) &(b) of the [Land Registration Act](#), 2012 guides me on the need to protect the sanctity of a Title Deed but limits me where there is darkness: -

“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.

29. The proviso to this sacred Section has been brought out clearly in the monkeyshines and tomfooleries in this case. There are so many particulars of fraud, unprocedural and illegal procedures in the transfer of the Title in respect to Gesima Settlement Scheme /224 ranging from unbelievable entries in the land registry, to clear and deliberate misinterpretation of High Court orders to aid and suit the Defendants' selfish and self-centered interests and self angradisement. A registered proprietor only enjoys the statutory protection of Title as long as he/she can show that the Title was acquired procedurally.

30. My hands are therefore tied to one thing. Which is? To get recourse to Section 80 of the [Land Registration Act](#), 2012 as follows: -

1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.



Subsection (2) of the Act,

- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”

is inapposite and the Defendants cannot hide behind it since the 1st Defendant was an active party in Nakuru High Court Succession Cause No 409 of 2006.

31. I therefore grant the Plaintiffs the reliefs they have sought in their Plaint dated 6/12/2022. And so I do. But as for prayer Number (e) the LR Gesima Settlement Scheme /224 shall revert to the name of the 2nd registered proprietor, Naman Kamau alias Kamau Mwangi and not the 1st Plaintiff and / or 1st Defendant as prayed for in the suit. And consequently, the parcel of land known as LR No Gesima Settlement Scheme/224 shall form part of the Estate of Naman Kamau Mwangi alias Kamau Mwangi to be so included forthwith in Nakuru High Court Succession Cause No 409 of 2006. The Plaintiffs shall also have the costs of this suit against the Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 21ST DAY OF DECEMBER 2023.

MUGO KAMAU

JUDGE

In the presence of: -

Court Assistant: - Brenda

Plaintiff – Mr. Kavita.

Defendant- Mr. Nyagarama.

