



REPUBLIC OF KENYA



**Kenzi & 8 others v Kaipoon & 5 others (Environment & Land Case
160 of 2018) [2023] KEELC 22302 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 160 OF 2018
MN GICHERU, J
DECEMBER 18, 2023**

BETWEEN

**ADRIANO WAMBUA KENZI 1ST PLAINTIFF
MUOO MWOLOLO 2ND PLAINTIFF
MUTISYA UVYU 3RD PLAINTIFF
DORCAS NZULA KENZI 4TH PLAINTIFF
JOSEPH KAMULA KAMWATHI 5TH PLAINTIFF
PHILIP NGEI NDIVO 6TH PLAINTIFF
MARY NTHAMBI NTHOME 7TH PLAINTIFF
PAUL MUTUNGA ULELO 8TH PLAINTIFF
JACKSON KITUKU MASUKALI 9TH PLAINTIFF**

AND

**PENINAH MUENI KAIPOON 1ST DEFENDANT
JONATHAN KORUTA KAIPOON 2ND DEFENDANT
BENJAMIN ASAAPE KAIPOON (AS THE ADMINISTRATORS OF THE
ESTATE OF KORUTA KAIPOON TASIEKUO – DECEASED). 3RD DEFENDANT
MALDRIN WANJIKU MAINA 4TH DEFENDANT
CHRISTINE NYAMBURA KARIUKI 5TH DEFENDANT
THE DISTRICT LAND REGISTRAR, KAJIADO 6TH DEFENDANT**



JUDGMENT

1. The plaintiffs seek the following reliefs against the defendants:
 - a) That the 6th defendant be ordered to cancel the registration of LR. Kajiado/Kaputiei Central/4451, 4452, 4453 and 4454 being subdivisions of Kajiado/Kaputiei Central/452 fraudulently and unlawfully obtained by the deceased and registered in the deceased's name and/or people claiming under him and the 4th and 5th defendants.
 - b) That the 6th defendants be ordered to reverse and revoke the title deeds numbers Kajiado/Kaputiei Central/4451 – 4 issued in the deceased's name and/or of anyone claiming under him and the 4th and 5th defendants.
 - c) That the 6th defendant be ordered to register the subdivisions known as Kajiado/Kaputiei Centra/2262 – 2271 undertaken by the executive officer Kajiado Law Courts pursuant to the court orders issued in favour of the plaintiffs.
 - d) The plaintiffs be awarded costs of this suit.
 - e) Any other relief that this court may deem fit to grant.

This is as per paragraph 22 of the plaint dated 16/10/2018.

2. The Plaintiffs' case is as follows. They purchased land from the late Kipoon Koruta Tasiaku also known as Simon Kaipon Koruta. In total they purchased 53 acres broken down as follows:

- 1st Plaintiff 2acres
- 2nd Plaintiff 6acres
- 3rd Plaintiff 5acres
- 4th Plaintiff 12acres
- 5th Plaintiff 5acres
- 6th Plaintiff 6acres
- 7th Plaintiff 5acres
- 8th Plaintiff 6acres
- 9th Plaintiff 6acres

The Plaintiffs occupied their respective parcels soon after purchase and they have since developed them and build permanent houses.

3. The Plaintiffs and the deceased seller had a dispute that was resolved by the Kajiado Land Disputes Tribunal in favour of the plaintiffs. This was in LDT cases numbers 27 – 35 of 2006. The decrees of the tribunal, which were adopted and executed by Kajiado Magistrates Court, were to the effect that the deceased seller was not to deal with the land sold to the plaintiffs and occupied by them. The executive officer of the court was also authorized by the court to execute all the necessary instruments to ensure that the plaintiffs became the registered owners of their land in case the deceased was reluctant to comply with the court order.



4. The Plaintiffs engaged a surveyor who demarcated their respective parcels and fixed beacons The original suit land being Kajiado/Kaputiei Central/452 within which the plaintiffs land was contained was subdivided through mutation forms and the plaintiffs were issued with numbers Kajiado/Kaputiei Central/2262-2271
5. As the plaintiffs were, though the court, engaged in the subdivision and registration of their respective parcels, the deceased was in the meantime, unlawfully and fraudulently subdividing the suit land without undertaking any physical measurements or installing beacons on the ground. He also purported to transfer part of the suit land to the 4th and 5th defendants. It is these activities of the deceased that the plaintiffs want revoked as they were all done in contravention of lawful court orders.
6. The unlawful activities of the deceased came up with land parcels Kajiado/Kaputiei Central/4451 to 4454. The land is currently occupied by the plaintiffs but is unlawfully registered to the 4th and 5th defendants who knew that the plaintiffs had purchased it before then.
7. In support of their case, the plaintiffs filed the following evidence:
 - i. A joint witness statement by all the plaintiffs dated 16/11/2018
 - ii. Copies of orders issued in LDT 27 – 35 of 2006 at Kajiado Magistrate Court.
 - iii. Copy of letter dated 21/1/2014 requesting the Land Registrar to remove caution.
 - iv. Copies of mutation forms issued in favour of the defendants
 - v. Copies of mutation forms, drawings and gazette notices.
 - vi. Copies of transfer forms and consents.
 - vii. Copy of title deed for L.R. Kajiado/Kaputiei Central/2269
 - viii. Copy of ruling delivered on 12/6/2018
 - ix. 8 copies of sale agreements dated between 28/9/1991 and 26/8/1998
 - x. 30 coloured photographs showing permanent homes and crops growing on the land.
8. In their written statement of defence, the 1st, 2nd and 3rd defendants aver as follows: Firstly, the deceased used to own L.R. Kajiado/Kaputiei Central/452 which does not exist any longer after it was subdivided into parcels 4451 – 4.
9. Secondly, the defendants who are administrators of the estate of the deceased have already distributed and parcels 4452 – 4454 affected by the order issued in High Court Succession Cause no 47 of 2015. The grant has not been challenged.
10. Thirdly, the deceased sold L.R. 4451 during his lifetime and transferred it to a third party who is an innocent purchaser.
11. Fourthly, L.R. no 4451, 4452, 4453 and 4454 have never been sold to any of the plaintiffs.
12. Fifthly, the four parcels have never been the subject of any proceedings before the Land Dispute Tribunal or Kajiado Magistrates Court and cannot be affected by any orders issued by the Magistrate's Court.
13. Sixthly, the purported agreements for sale of land produced by the plaintiffs are outright forgeries, afterthoughts, contrary to the law, null and void and aimed at good winking the court.



14. Seventhly, the three defendants deny being privy to the purported sale agreements, the LDT proceedings and that this suit is a disguised appeal against an order of the High Court. Eighthly, the plaintiffs' transactions are null and void for want of the consent of the Land Control Board within six months and non-registration of the entries.

Finally, the three defendants deny every averment in the plaint.

15. The 4th and 5th defendants in a separate defence dated 26/11/2018 associated themselves with the averments of the other defendants and add the following:

Firstly, they aver that they conducted a search in the land registry and confirmed that the deceased was the registered owner of L.R. 452 before buying the land.

16. Secondly, the land had no encumbrances barring the deceased from dealing with the suit land and that they are innocent purchasers for value without any blame. They therefore pray for the dismissal of the plaintiffs' suit.

17. In support of their case, the defendants filed the following evidence:

- (i) A joint witness statement by the 4th and 5th defendants dated 14/6/2019.
- (ii) Another joint witness statement by the 1st, 2nd and 3rd defendants.
- (iii) Copies of title deed for L.R. Kajiado/Kaputiei Central 4451 – 4454 together with their green cards and certificates of official search dated 22/8/2014.
- (iv) Copies of rulings and court order dated 3/2/2016 dated 3/2/2016 and 14/5/2014
- (v) Copy of certificate of confirmation of grant in respect of L.R. 4452, 4453 and 4454 dated 22/2/2016.
- (vi) Copy of Land Control Board consent dated 3/9/2014.
- (vii) Copy of transfer of land form dated 15/9/2014.

18. At the trial the 1st, 2nd, 4th, 8th and 9th defendants testified on oath. They adopted their witness statements and documents and they were then cross-examined by the counsel for defendants.

On the side of the defendants it is the 2nd and 4th defendants who testified by adopting their witness statements and documents as their evidence before they were cross-examined by the plaintiffs' counsel.

19. Counsel for the defendants in his submissions dated 16/3/2023 identified the following issues for determination:

- i. Whether the defendants are *bona fide* owners of the suit property.
- ii. Whether the sale transactions between the plaintiffs and the Late Kaipon Koruta Tasiokuo are void.
- iii. The implications of the ruling delivered in Succession Cause no 47 of 2015 dated 3/2/2016.
- iv. Whether there is any judgment/order capable of execution.

20. In his submissions, the plaintiff's counsel has not responded directly to the defendants counsel's submissions. His submissions are general and not specific to the issues raised by the defendants counsel.

21. I have carefully considered all the evidence adduced by both sides including the witness statements, documents and the testimony at the trial. I have also considered the written submissions filed by the



Counsel for the parties and the law cited therein. I find that the four issues identified by the defendants' counsel will determine the dispute.

22. On the first issue, I find that the defendants are not the bona fide owners of the suit property. There are two reasons for this finding. The first one is the existence of the court orders issued by Land Disputes Tribunal and confirmed by the magistrates Court Kajiado in tribunal cases numbers 27, 28,29,30, 31, 32, 33 and 35 of 2006 transferring specified portions for the suit land namely Kajiado/Kaputiei Central/452 to the plaintiffs. Those lawful court orders have never been set aside and if they have, the defendants have not adduced any evidence on this. The said court orders were executed by the court and the plaintiffs had their respective parcels demarcated and were in the final stages of registration before the deceased disobeyed the orders and purported to alienate the same land unlawfully. Nothing done in contravention of a court lawful order can be lawful.

23. Secondly, on the same issue, it is not disputed that the plaintiffs occupy their respective parcels and the occupation was with the consent of the deceased. Under Section 28 (b) of the Land Registration Act, I find that the plaintiffs enjoy an overriding interest. The Section provides as follows:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without being noted as the register.

(b) Trusts including customary trusts”

24. In the case of Isack M. Inanga Kiebia v Isaya Theuri M'Lintari Petition no 10 of 2015, the Supreme Court of Kenya had this to say about trusts at paragraph 48 of its judgment,

“It is now clear that customary trusts, as well as all other trusts are overriding trusts. These trusts, being overriding interests are not required to be noted in the register”.

My understanding of this provision of law is that the plaintiffs' occupation of the land is superior to any title documents that the defendants may have. This is the meaning of the word override.

25. On the second issue, I find that the sale transaction between the plaintiffs and the late Kaipon Koruta Tasioku are not void because they were validated by a court order that has never been set aside. Even if they were void, that would be immaterial in view of the overriding interests that the plaintiffs enjoy over the defendants in relation to the parcels of land that they occupy.

26. On the third issue, I find that the ruling in Succession Cause no 47 of 2015 and dated 3/2/2016 has no effect on this case because it concerned whether the plaintiffs should be allowed to join the Succession Cause or not. In fact at page 12 of the ruling at the 5th line the court had this to say, “The dispute between the applicants and the estate of the deceased can only be entertained by the Environment and Land Court”. The Succession Court was squarely aware that it had no jurisdiction to deal with cases concerning use, occupation of, and title to land”. Such jurisdiction is the province of this court.

27. On the final issue, I find that the order of the Land Disputes Tribunal which was validated by the Magistrates court can and should be executed and implemented in full because it has never been set aside. It was only blurred by the illegal activities of the deceased and the defendants.

28. Finally, under Article 40 (b) of the Constitution it is provided as follows:

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”



In the case of *Dina Management v County Government of Mombasa* Petition no 8 (E010/2021 the Supreme Court of Kenya it was held that the doctrine of bona fide purchaser does not extend to unlawfully acquired land. The registration of the defendants as the owners of the original L.R. no Kajiado/Kaputiei/Central /452 was unlawful for contravening a lawful order that had awarded it to the plaintiffs.

For the above stated reasons I enter judgment for the plaintiffs against all the defendants jointly and severally as prayed for in the plaint.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 18TH DAY OF DECEMBER 2023.

M. N. GICHERU

JUDGE

In the presence of:

Mpoye: Court Assistant

Plaintiffs' Counsel: Absent

1st, 2nd, 3rd, 4th and 5th Defendants' Counsel – Mr. Karwanda - Present

