



Mugambi & 2 others v Miriga Mieru Co-operative Society & another (Environment & Land Case 36 of 2020) [2023] KEELC 22194 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 36 OF 2020
CK YANO, J
DECEMBER 14, 2023**

BETWEEN

**MICHAEL MUNYUA MUGAMBI 1ST PLAINTIFF
PIELINA KAIMURI GITUMA 2ND PLAINTIFF
PETER GITONGA M'MBUI 3RD PLAINTIFF**

AND

**MIRIGA MIERU CO-OPERATIVE SOCIETY 1ST DEFENDANT
COUNTY GOVERNMENT OF MERU 2ND DEFENDANT**

JUDGMENT

1. The plaintiffs moved this court by way of a plaint dated 21st August 2020 seeking for rectification of the register in respect of L.R NO. NTIMA/IGOKI/1775 by cancellation of the name of the 1st defendant as the registered owner and replace it with the 2nd defendant to hold in trust for use by Tabiru Coffee Factory and Nursery or alternatively for use by the residents of Gachanka and Kiringa sub-locations. Their case is that the 1st defendant has fraudulently been registered as proprietor of the suit land which is Public Land held in trust for the said factory and nursery and for use by the residents of the said sub-locations.
2. It is the plaintiff's case that the said land was contributed by the residents of the two sublocations through percentage cut during land adjudication and therefore the same never belonged to the County Council of Meru, the predecessor of the 2nd defendant herein. That in or about 2019, the residents of Gachanka saw some developers visiting the land and got concerned and reported the matter to their community development Committee. The plaintiffs aver that a copy of the register of the land revealed that the County Council of Meru had gifted the land to the 1st defendant without public participation and or authority of the residents of the said two sub-locations.



3. The plaintiffs aver that the transfer by way of gift or otherwise to the 1st defendant was against the interests of the residents of the said sublocations and was in breach of trust by the defunct County Council of Meru. The plaintiffs enumerated the particulars of breach of trust as secretly giving away public land without public participation, taking away the residents' public land which was for their use and breaching its trust.
4. The plaintiffs also enumerated the particulars of fraud as taking public land without involving the actual and true owners, conspiring with the officials of the defunct County Council of Meru to grab land meant for the residents of Gachanka and Kiringa sub-locations, keeping the gift and transfer a secret, and not doing any development for benefit of the residents to preserve the land for speculation.
5. The plaintiffs averred that the 1st defendant was in the process of selling the land to private developers to the detriment of the plaintiffs and other residents of the said sub-location. That due to the matters pleaded, the plaintiff and the residents of the said sublocations have suffered loss and damage.
6. During the hearing, the plaintiffs called three witnesses, namely Peter Gitonga M'Mbui, the 3rd plaintiff herein who testified as P.w 1, Michael Munyua Mugambi, the 1st plaintiff who testified as P.w 2 and Peilina Kaimuri Gituma (P.w 3). They all relied on their witness statements dated 9th November, 2020 and were cross examined and re-examined. P.w 1 also produced copies of the register and certificate of search of the suit land, demand notice dated 3rd July, 2020 and a list of community members as P. Exhibit 1 – 4 respectively.
7. The plaintiffs' witnesses basically reiterated the facts contained in the plaint and their evidence was more or less similar. It was their evidence that the two sublocations are old settlements settled by a section of Ameru Tribe from time immemorial. That the area was declared an adjudication area in the 1960s and in the process, it was necessary to set aside some land for public utilities through percentage cut. That to be safe, such public land was to be registered in the name of the defunct County Council of Meru to hold in trust for the public. One such public utilities was Tabiru Coffee Factory and Nursery which had 4.5 acres set aside for it and registered in the name of the County Council of Meru, the predecessor of Meru County Government, the 2nd defendant herein.
8. The plaintiff's evidence was that the land is still there and was only developed by Tabiru Factory which put up Permanent and semi-permanent structures and there is also a coffee plantation thereon. That sometime in 2019, some residents saw some developers visiting the land and they got concerned and reported the matter to the community development committee as rumor was ripe that the land was being sold or had already been sold. That when the plaintiffs' obtained a copy of the register of the suit land, they were surprised that the land had been gifted to the 1st defendant by the defunct County Council of Meru, and that it is the 1st defendant that was selling the land. It is the plaintiffs' contention that the transaction between the defunct County Council of Meru and the 1st defendant had been done secretly and without public participation and had no authority from the residents of Gachanka and Kiringa sublocations, and that the transfer whether as a gift or otherwise was against the interests of the residents of the said sublocations. That there was breach of trust by the said county council of Meru as the true owners of the land have lost the use of the land to the 1st defendant which intends to dispose of the same.
9. When he was cross examined by Mr. Mwenda Mwarania, P.W 1 stated that none of the plaintiffs owned any of the suit land in 1970 when the percentages were contributed. That the suit land was registered on 8th January, 1970 and that Tabiru Coffee Factory & Nursery are owned by the 1st defendant. P.w 1 stated that as at 2002, when the land was transferred to the 1st defendant, the main activity was the



processing of coffee berries and planting of coffee. That coffee farmers formed the 1st defendant and the activities are undertaken on behalf of the farmers currently in the same place as it was in the year 2002.

10. P.1 stated that the 1st defendant has registered members and that he is one of them together with the 1st and 2nd plaintiffs. He confirmed that there was an Annual General Meeting attended by the 1st plaintiff in which they discussed how to offset some debts, and this included proposal to sell some parcels from the four factories, namely Kiambogo, Kathurine, Tabiru and Nkabune. P.w 1 stated that they had not challenged the said resolution with either the Co-operative Tribunal or County Cooperative Officer. That in 2020, they realized that the land was transferred, but did not know how the same was done. P.W 1 insisted that the sale was secretive.
11. When he was cross examined, P.w 2 admitted that he attended the AGM of the 1st defendant where they discussed how to settle some debts, and the first option was to sell Cooperative Bank Shares, second option was to get a quarter acre each from Kiambogo, Kathurine, Tabiru and Nkabune factories. That there was a proposal to sell land and a request for 1/8 of an acre by the area assistant chief which was approved and he confirmed that the office of the assistant chief was in place. Though he stated that he had not heard any complaints from farmers, P.w 2 stated that he was not satisfied with the proposal made. He further stated that he was aware of a plot sold at the society's head office, but did not know if the same was from percentage cut or how it was acquired.
12. In their submissions dated 24th October 2023 filed through the firm of Maitai Rimita & Co. Advocates, the plaintiffs gave a brief summary of the case and submitted that there is no evidence led by the 1st defendant to show that they hold a clean title to the suit land. The plaintiffs submitted that they pleaded and proved fraud as against the 1st defendant and argued that on the strength of the evidence adduced in court, the court should find that the 1st defendant does not hold a clean title to the suit land. The plaintiffs relied on the case of Betty Mukui v Kennedy Osimba and Registrar Nakuru Lands Office (ELC NO. 77 OF 2015). It is further submitted that merely producing the certificate of title by the 1st defendant was not sufficient. That that title was under challenge and the 1st defendant did not discharge the burden of proof. Counsel for the plaintiffs relied on the case of Betty Mukui (supra) and Elijah Makeri Nyangwa'ra v Stephen Mungai Njuguna & another [2013] eKLR and Munyu Maina v Hiram Gathiha Maina [2013] eKLR. The plaintiffs urged the court to find that the certificate of title in favour of the 1st defendant as having been obtained fraudulently.
13. The 2nd defendant who are the successors in title to the defunct County Council of Meru echoed the sentiments of the plaintiffs and in their statement of defence dated 10th May 2021 stated that the suit land is public land that arose from a percentage cut from the public during land adjudication which was reserved and registered under Tabiru Coffee Factory and Nursery in the year 1970 in the public register under the custody of the 2nd defendant. The 2nd defendant denied surrendering or extinguishing her trusteeship rights on the suit property either in writing or otherwise and put the 1st defendant to strict proof on how it acquired the property. It was the 2nd defendant's contention that the suit does not disclose a reasonable cause of action as against the 2nd defendant and sought to have its name expunged from the suit.
14. The 2nd defendant called one witness, Harun Mbai, the land administrator for the lands department of the 2nd defendant who testified as D.w 2. He adopted his statement dated 10th May 2021 as his evidence in chief and was cross examined and re-examined. He testified that the suit property is public land which arose from a percentage cut from the public during the adjudication process. That the suit property was reserved and registered under Tabiru Coffee Factory and nursery in the year 1970 in the public register under the custody of the County Government of Meru which at no time surrendered or extinguished her trusteeship rights on the property. He stated that any change of ownership of the land



- from public to private was fraudulent. He did not know who was currently on the land. He confirmed that the land was transferred to the 1st defendant in 2002 before the coming into force of the constitution 2010 which gave rise to the 2nd defendant. He stated that he had not come across the documents relied on by the 1st defendant in their records, adding that the same were not certified.
15. In their defence dated 19th November, 2021, the 1st defendant denied the plaintiffs' claim. The 1st defendant stated that the suit land was reserved for Tabiru Coffee Factory and Nursery in early 1970s and which is a coffee factory belonging to the 1st defendant and is still the activity going on in the suit land. Further, that the same was formally transferred to the 1st defendant on 25th April 2002 and that the 1st defendant still carries on the same economic activity on the land for the benefit of the local resident coffee farmers in the area, including the plaintiffs. It averred that the suit land having been formally transferred to it on 25th April 2002 does not fall under the category of public land by dint of Article 62 (1) (a) of the Constitution having been alienated by way of transfer to it more than 8 years before the promulgation of the Constitution of Kenya 2010.
 16. The 1st defendant further averred that the suit land is currently the private property of the 1st defendant and that if any public participation is required in dealing with the same, it is that of the legitimate members of the 1st defendant who include the 1st plaintiff. That the 1st defendant has never dealt or attempted to deal with the land without the approval of its members, including the 1st plaintiff, who passed through a resolution at a general meeting as required under the Co-operative Societies Act. The 1st defendant averred that the resolution to sell a portion of the suit land to settle some of its outstanding debts was passed at its annual general meeting held on 4th July, 2019, adding that the said resolution was seconded by the 1st plaintiff having been proposed by one Geoffrey Koome. That the intended sale was properly sanctioned by a resolution of the general meeting as required under the Co-operative Societies Act and that there was nothing secretive, fraudulent or illegal about it. That if any member was dissatisfied with the same, they should challenge the same through the Co-operative Tribunal not to collect strangers majority of whom own no land in the locality nor were they members of the 1st defendant. The 1st defendant averred that the suit land was not reserved for the community members or indeed the residents of Gachanka and Kiringa sub-locations, but for Tabiru Coffee Factory and Nursery. That there was no fraud or breach of trust in the formal transfer of the land to the 1st defendant as it is by law empowered and entitled to own property in its name. That if any of the plaintiffs are not coffee farmers in the area, they have no legal authority to question the operations of the 1st defendant under the guise of being "community members."
 17. George Karemu (D.w 1) testified on behalf of the 1st defendant. He stated that he used to work with the 1st defendant as a manager. He adopted his statement dated 8th February, 2021 as his evidence in chief and produced the 1st defendant's documents and supplementary documents as exhibit 1 – 13 respectively. These are list of members, valuation report, application to the County Council of Meru and receipts, minutes, letters, part development plan, transfer form, green card and sketch map. D.w 1 reiterated the averments in the 1st defendant's defence and stated that majority of the plaintiffs do not own any land in the area while a few recently bought land there and had no land as at 8th January, 1970. That if the 1st and 3rd plaintiffs who are members of the 1st defendant or any other member has a problem with the running of the 1st defendant's affairs they should file a claim before the Co-operative Tribunal. It is his evidence that the suit land has never been set aside for public use. He stated that the 1st defendant's acquisition of the land was legal and backed by a legal resolution to sell.
 18. In their submissions dated 6th November, 2023 M/s Mwenda Mwarania Akwalu & Co advocates for the 1st defendant gave a brief background of the subject matter. They faulted the 2nd defendant for appearing to lay a claim against the 1st defendant who is a co-defendant without following the



procedure set out under order 1 rule 24 (1) of the *Civil Procedure Rules*, or 3rd party proceedings under Rules 15-21 of the same order. It is the 1st defendant's submissions that the actions complained of were not reported to the DCI or EACC for proper investigations to be carried out. That no contradicting documents were filed by the 2nd defendant who is the originator and custodian of the originals through succession in title of the defunct County Council of Meru.

19. The 1st defendant submitted that the suit land does not fall under the category of public land as defined Under Article 62(1) (a) of *the Constitution* having been alienated to the 1st defendant on 25th April 2002. That all the procedures required for the transfer at that time were followed and that the intended sale of a portion of the suit land was approved by members of the 1st defendant in the Annual General Meeting held on 4th July, 2019 attended by members, including the 1st and 3rd plaintiffs. That if dissatisfied with the resolution to sell a portion of the land, the plaintiffs' remedy was to file a claim before the Co-operative Tribunal. The 1st defendant submitted that the plaintiffs have not proved their case and urged the court to dismiss it with costs and to lift the interlocutory inhibition order registered against the suit land.
20. The court has carefully considered the pleadings filed, the evidence adduced and the submissions. The issues that arise for determination are whether the suit land is public land or not, whether there was a breach of trust and whether the acquisition of the suit land by the 1st defendant was fraudulent.
21. In this case, it is the plaintiffs' case that the suit land is public land held in trust for Tabiru Coffee Factory and Nursery. Their case was that the land arose from a percentage cut from the public during land adjudication and that it was reserved and registered under Tabiru Coffee Factory and Nursery in the year 1970 in the public land register under the custody of the now defunct County Council of Meru, the predecessor of the 2nd defendant herein. The 1st defendant on its part contended that the land does not fall under the category of public land as defined under Article 62(1) (a) of *the constitution* having been alienated to the 1st defendant on 25th April 2002.
22. I have perused a copy of the register for the suit land parcel No. Ntima/Igoki/1775 which was produced by the plaintiffs as an exhibit. The same shows that it was opened on 8th January, 1970 and was reserved for Tabiru Coffee Factory and Nursery. Entry number 1 of 8th January, 1970 indicates that the land was registered in the name of Meru County Council. On 25th April 2002, the land was gifted to Miriga Mieru Farmers' Co-operative Society Limited and title issued to the 1st defendant on 5th April 2002.
23. From the evidence on record, it is clear that adjudication in the area was carried out in the 1970's. The plaintiffs' evidence is that during adjudication the residents of Gachanka and Kiringa Sub Locations gave out percentage cuts in which the suit land was reserved and registered under Tabiru Coffee Factory and Nursery in the public register under the custody of the now defunct Meru County Council. This evidence is corroborated by the evidence given by the witness for the 2nd defendant and the exhibits produced herein. Whereas the 1st defendant alleges that Tabiru Coffee Factory and Nursery belongs to the 1st defendant and that all that took place was a formal transfer to the 1st defendant on 25th April 2002, the 1st defendant has not given any explanation why the land allegedly belonging to a private entity was registered under Meru County Council on 8th January, 1970 and not the 1st defendant. The only plausible explanation one can give for such registration was the Meru County Council and later the 2nd defendant herein was to hold the land in trust for the residents of the said two sub-locations. The 2nd defendant clarified that it has not surrendered nor extinguished her trusteeship rights on the suit property. And even assuming that the defunct Meru County Council alienated the suit land to the 1st defendant and necessary approvals given as argued by the 1st defendant, the same in my view, would still have been unlawful because the suit property was land that had already been donated and



reserved for a specific use by Tabiru Coffee Factory and Nursery and registered under the 2nd defendant (or its predecessor) to hold in trust for the public who are the residents of the said two sub-locations. Therefore, the same was not an unalienated land that could be gifted to the 1st defendant or anyone else.

24. Further, having looked at the documents produced as exhibits, and in particular the copy of the register of the suit land, the same indicates that the suit land was gifted to the 1st defendant on 25th April 2002 and title issued on 5th April 2002. It is clear from this that the title was issued even before the said land was allegedly gifted. This is because the title is shown to have been issued on 5th April 2002 but the land was gifted later on 25th April 2002. In my view, the title issued to the 1st defendant was issued fraudulently and is void to the extent that the land was reserved for the public and was not available for alienation. In the case of *Banja Properties Limited vs Syednan Mohammed Burbannudin Sabed & 4 others* [2016] eKLR, the court of appeal held that-;

“ ... an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land....

... it is trite law that all titles to land are intimately based upon possession in the sense that the title of the man seized prevails against all who can show no better right to Seisin...”

25. In the instant case, the plaintiffs have given convincing evidence to prove that at all material times, the suit property was public land reserved for them as residents of Gachanka and Kiringa sub-locations for use as a public utility known Tabiru Coffee Factory and Nursery and the land was registered in the name of Meru County Council, the predecessor of County Government of Meru, the 2nd defendant herein, to hold in trust for the said public utility. This court has not been shown on what basis the land was gifted to the 1st defendant by the defunct Meru County Council. The land had already been reserved for Tabiru Coffee Factory and Nursery and therefore it was not available to be allotted, either by way of gift or otherwise.
26. Section 26 of the *Land Registration Act* is categorical that a certificate of title can be challenged where the same has been acquired fraudulently, uprocedurally or through a corrupt scheme. In this case, I am not persuaded that the 1st defendant acquired its title legally or procedurally. First, the land was no longer available for allocation since the same had been alienated and reserved for Tabiru Coffee Factory and Nursery. Secondly, it is questionable how the title in the name of the 1st defendant was issued on 5th April, 2002 even before the same was allegedly gifted to the 1st defendant later on 25th April 2002. The 1st defendant’s title is therefore impeachable since its acquisition was not procedural. I find that the plaintiffs have proved their case on a balance of probabilities.
27. In the result, I find that the plaintiff’s claim succeeds and I accordingly enter judgment for the plaintiffs against the 1st defendant in terms of prayer (a) of the plaint.
28. I award the costs of the suit to the plaintiffs against the 1st defendant.
29. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF DECEMBER, 2023

IN THE PRESENCE OF

Court Assistant – V. Kiragu/Lena M

Mwenda Mwarania for 1st defendant

Mwendwa holding brief for Ms Rimita for plaintiffs



No appearance for 2nd defendant

C.K YANO

JUDGE

