



**Gikera v Tunke & 33 others (Environment and Land Case Civil Suit  
243 of 2017) [2023] KEELC 22156 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22156 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE CIVIL SUIT 243 OF 2017  
MN GICHERU, J  
DECEMBER 13, 2023**

**BETWEEN**

**CHARLES EDWARD GIKERA ..... PLAINTIFF**

**AND**

**LOORINYIA OLE TUNKE & 33 OTHERS ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff seeks the following reliefs against the defendants both jointly and severally.
  - a. A declaration that the plaintiff is entitled to exclusive an unimpeded right of possession and occupation of newly subdivided portions known as LTK/Kimana-Tikondo/5439-5458 and 7149-52 as well as any other subdivision from the parcel of land originally known as Kimana/Tikondo/567 situated within Kajiado County, suit land.
  - b. An order of permanent injunction restraining the defendants either by themselves, their employees, servants and/or agents from trespassing on, continuing being in occupation, purporting to sell, subdividing, erecting structures and/or in any other manner interfering with the plaintiff's quiet enjoyment and possession of the suit land.
  - c. An order of eviction against the defendants, their employees, servants and/or agents in occupation of the parcel of land originally known as Kimana/Tikondo/567 and OCS Loitoktok Police Station be directed to provide security for the eviction exercise.
  - d. An order cancelling the subdivision of L.R. 567 into all the subsequent parcels aforementioned and revert the registration to Margaret Muthoni Gikera.
  - e. Costs of the suit.
  - f. General damages for trespass.



g. Further or other relief as may be just and expedient in the circumstances of the case.

This is as per the amended plaint dated 15/8/2019.

2. The plaintiff's case is as follows. He is a son of the late Margaret Muthoni Gikera who died on 16/8/2000. At the time of her death, the plaintiff's mother was the registered owner of the suit land, i.e. Kimana/Tikondo/567. In her lifetime, the plaintiff's mother did not sell the suit land or any part thereof. The plaintiff has the original title deed to the suit land. Pursuant to succession cause no. 225 of 2001 at Nakuru, the plaintiff was appointed an administrator of his mother's estate. He was also the beneficiary of the suit land through transmission.
3. In the year 2015, the plaintiff discovered that the first defendant had fraudulently and unlawfully become registered as the owner of the suit land and subsequently subdivided it and transferred it to his co-defendants. He reported the matter at Loitoktok Police Station. The first defendant was arrested, charged and convicted in the Magistrate's court at Loitoktok in Criminal Case No. 52 of 2016 of the offence of obtaining registration of title deed by false pretense contrary to Section 320 of the Penal Code and Sentenced to imprisonment for three (3) years. It is for this reason that the plaintiff filed this suit seeking to reverse the illegal and irregular dealings by the defendants with the suit land.
4. In support of his case, the plaintiff filed the following evidence.
  - a. Plaintiff's witness statement dated 1/10/2015.
  - b. Copy of title deed for the suit land dated 4/11/1978.
  - c. Copy of certificate of official search dated 19/5/2009.
  - d. Copy of certificate of confirmation of grant in HCCC 225/2001 (Nakuru) dated 21/11/2014.
  - e. Copy of green card for the suit land showing that the title was closed on 3/9/2013 on subdivision to new numbers 5434 – 5458.
  - f. Copies of green cards for the subdivision of the suit land.
  - g. Copy of charge sheet, proceedings and judgment in Loitoktok Criminal Case No. 52 of 2016.
5. The 2<sup>nd</sup> – 11<sup>th</sup> and the 13<sup>th</sup> to 34<sup>th</sup> defendants, though their counsel on record filed a written statement of defence dated 19/10/2018 in which they plead as follows.

Firstly, they deny that the deceased Margaret Muthoni Gikera was the registered owner of L.R. Kimana/Tikondo/567.

Secondly, the defendants contend that they purchased their respective suit parcels from the first defendant who was then the registered owner as per the records in Kajiado Land registry.

Thirdly, they are bonafide purchasers for value who are unaware of any fraud that may have been perpetrated by the first defendant.

Finally, the defendant's aver that their occupation of the suit land since 2012 has been uninterrupted and therefore the prayers by the plaintiff against them cannot stand.

6. Further to paragraph (5) above, the same defendants filed a notice of claim against the 1<sup>st</sup> and 12<sup>th</sup> defendants in which they seek the following reliefs.
  - a. An order of permanent injunction restraining the 1<sup>st</sup> to 12<sup>th</sup> defendants whether by themselves, officers, agents, servants or any other person whatsoever from interfering with their possession,



use, enjoyment and proprietorship of the subdivided portions which are Loitoktok/Kimana/Tikondo 5439 – 5458 and 7149 – 7152, subsequent subdivision.

- b. A declaration that they are the legal and beneficial owners of the subsequent subdivision and that they are entitled to occupation and quiet possession as proprietors to the exclusion of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and any other person whatsoever.
  - c. An order directing the 1<sup>st</sup> to 12<sup>th</sup> defendants to compensate the plaintiff for having transferred and subdivided the suit land.
  - d. In the alternative and without prejudice to the foregoing an order directing the 1<sup>st</sup> and 12<sup>th</sup> defendants to compensate defendants at the current market value upon assessment of the same in case of eviction.
  - e. Costs of the suit.
  - f. Interest on the costs from the date of judgment until payment thereof.
7. In support of their defence the defendants filed the following evidence.
- a. Witness statement by Francis Mwanthi Kioko, the 11<sup>th</sup> defendant.
  - b. 24 sale agreement.
  - c. Payment receipts.
  - d. Copies of title deeds for the subdivision of the original land.
8. The 12<sup>th</sup> defendant filed a written statement of defence dated 9/11/2020 and avers as follows.
- Firstly, it is denied that the late Margaret Muthoni Gikera was even registered as the proprietor of the suit land.
- Secondly, the 12<sup>th</sup> defendant denies being party to any fraud and avers that it only dealt with documents presented by the parties which it believed to be genuine.
- Finally, it is averred that the requisite notice of intention to sue under Section 13A of the [Government Proceedings Act](#) was never served before filing of this suit. It therefore prays for the dismissal of the suit.
9. In support of its case, the 12<sup>th</sup> defendant filed the following evidence.
- a. Copies of green cards for L.R. Kimana/Tikondo/567 and 5439-58.
  - b. Copy of presentation book for 17/1/2012 showing that Margaret M. Gikera was the transferor of the suit land.
  - c. Other documents.
10. At the trial on 6/12/2021 the plaintiff and the 11<sup>th</sup> defendant testified by adopting their witness statements and documents after which they were cross-examined by the counsel for the adverse parties. Again, on 4/5/2023 the land registrar testified and produced the green cards before she was cross-examined.
11. The defendants' counsel filed written submissions dated 27/9/2023 while the plaintiff's counsel filed his dated 20/11/2023. It is only the defendants' counsel who identified two issues for determination. The plaintiff's counsel did not identify any issues but he submitted generally around six areas.



The issues identified by the counsel for the 2<sup>nd</sup> to 11<sup>th</sup> and 13<sup>th</sup> -34<sup>th</sup> defendants are as follows.

- a. Whether the defendants legitimately acquired their properties.
  - b. Whether the notice of claim against the 1<sup>st</sup> and 12<sup>th</sup> defendants ought to be upheld.
12. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents and testimony at the trial. I have also considered the written submissions filed in this case including the law cited therein. I make the following findings.

Firstly, I find that the first defendant was convicted in Criminal Case No. 52 of 2016 at the Magistrates Court at Loitoktok where the burden of proof on the prosecution was beyond reasonable doubt.

Secondly, the burden of proof upon the plaintiff in this case is on the standard of margin of probabilities.

Thirdly, the defendants have not produced in these proceedings evidence in form of a sale agreement between them and Margaret Muthoni Gikera, application for consent of the Land Control Board to transfer the land from Margaret Gikera to the first defendant, letter of consent and transfer of land form.

13. I am persuaded by the submissions by the counsel for the majority of the defendants that the two issues that he identified will determine this dispute. I make the following findings on the two issues.

14. On the first issue, I find that the defendants did not acquire their property legitimately for the following reasons.

Firstly, as correctly submitted by counsel for the plaintiff, the protection of the right to property under Article 40 of the Constitution does not extend to any property that has been found to have been unlawfully acquired. This is the true construction of Article 40(6) of the Constitution.

In the case of Dina Management Limited v The County Government of Mombasa and 5 others, Petition No. 8 (E010) of 2021 at paragraph 111, the Supreme Court of Kenya had this to say about bonafide purchasers of unlawfully acquired property.

“Article 40 of the Constitution entitles every person to the right to property subject to the limitations set out therein. Article 40 (6) limits them to have been unlawfully acquired. Having found that the first registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above, the appellant could not benefit from the doctrine of bona fide purchaser”.

Secondly, Section 47A of the Evidence Act provides as follows.

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for appeal against such judgment or after the date of the decision of any appeal, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged”.

In the criminal case, the first defendant was convicted of obtaining registration of title deed by force pretence contrary to Section 320 of the Penal Code. No evidence has been tendered by the defendants to prove that the first defendant’s conviction was ever set aside.



The first defendant having been found guilty in a case where the standard of proof was beyond reasonable doubt, it then follows that he is necessarily liable in fraud in this case where the burden on the plaintiff was much lighter being on a balance of probabilities. Since all the defendants are claiming through a party who has been found guilty of fraud, they cannot wriggle out of the fraud. They are mired in it. They did not acquire a good title.

15. Coming to the second and final issue, I find that the claim by the 2<sup>nd</sup> to 11<sup>th</sup> and the 13<sup>th</sup> to 34<sup>th</sup> defendants against the 1<sup>st</sup> and 12<sup>th</sup> defendants ought to be upheld but only against the 1<sup>st</sup> defendant for the following reasons.

Firstly, the 12<sup>th</sup> defendant has proved by credible evidence that it was misled by the 1<sup>st</sup> defendant to believe that Margaret Muthoni Gikera who died on 16/8/2000 was alive on 17/1/2012, more than 11 years later and transferring her land at Kajiado Land Registry.

Secondly, the same defendants have not adduced any evidence to prove fraud on the part of the 12<sup>th</sup> defendant.

Thirdly, the first defendant who received the purchase price for the subdivision of the original suit parcel is a party to this suit and he even appeared in court on 6/12/2021 when he unsuccessfully attempted to adjourn the case.

16. In conclusion, I enter judgment for the plaintiff against the defendants as prayed for in the amended plaint dated 15/8/2019.

Secondly, I enter judgment for the 2<sup>nd</sup> to 11<sup>th</sup> and 13<sup>th</sup> to 34<sup>th</sup> defendants against the first defendant only as per their notice of claim dated 23/4/2019 in respect of prayer (d) only.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 13<sup>TH</sup> DAY OF DECEMBER 2023.**

**M.N. GICHERU**

**JUDGE**

