



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC NO. 501 OF 2017

**FRANCIS MBUGUA KAMAU AND JOHN KIOI KAMAU (suing as the legal representatives
of the Estate of Kamau Njoroge (deceased)APPLICANTS/PLAINTIFFS**

-VERSUS-

SAIKIMBA OLE LEKISHAPUL.....1ST RESPONDENT/DEFENDANT

THE LAND REGISTRAR KAJIADO.....2ND RESPONDENT/DEFENDANT

THE ATTORNEY GENERAL.....3RD RESPONDENT/DEFENDANT

JUDGMENT

The Plaintiffs' claim against the Defendants is as follows:-

- i. A permanent injunction restraining the first Defendant either by himself, his servants and or agents from alienating or transferring the deceased's portion of the suit property measuring 9.6 acres and or in any other manner from dealing with the deceased's portion of L.R. LTK/KIMANA/TIKONDO/584, a subdivision of the original No. LTK/KIMANA/46.
- ii. An order to the second and third Defendants for the cancellation of title number LOITOKITOK/KIMANA-TIKONDO/46 and any subdivision done on the same title forthwith including new green cards and titles emanating from such subdivisions and for the production and reinstatement of green cards for title numbers LOITOKITOK/KIMANA/TIKONDO/584 and 583.
- iii. An order compelling the Defendants to transfer to the Plaintiffs a portion of land measuring 9 acres from land parcel number LTK/Kimana-Tikondo/46.
- iv. An order for reinstating the green cards for LTK/KIMANA/TIKONDO/584 and 583.
- v. Costs of the suit.

The above is as per the amended plaint dated 7th March, 2019. The Plaintiffs' case is as follows. They are the sons of Kamau Njoroge who is now deceased.

On 27th July, 2015 in Succession Cause No. 593 of 2015 at the Family Division of the High Court of Kenya in Nairobi, they obtained a Grant of Letter of Administration Intestate to represent the estate of their deceased father.

In the year 1974, the Plaintiffs father bought the land reference 584 which was to be exercised off L.R. LTK/KIMANA-TIKONGO/46. It measured 9 acres. The Plaintiffs' father paid the full purchase price. The consent to subdivide was obtained on 16th August, 1977.

Having bought the land, the Plaintiffs' father occupied it and constructed a semi-permanent structure thereon which he occupied together with his family.

The Plaintiffs were at one time threatened with a spear by the first Defendant as a result of which they vacated the land. The Defendant demolished the Plaintiffs house. He then colluded with the land officers and caused all records relating to the subdivision of parcel number 46 to disappear so that the only ones that remain are for the closure of title number 46.

In support of their case, the Plaintiffs filed the following;

- i. A joint witness statement dated 1/11/2015
- ii. Copy of grant in succession cause no. 593 of 2015
- iii. Copy of mutation for title number 46 dated 14/9/1977.
- iv. Copy of letter dated 19/8/2011 by the chief of Kimana location to the Defendant warning him against cultivating the Plaintiffs' land.
- v. Copy of application for Registration of a caution dated 27/9/2002
- vi. Identity certificate dated 24/8/77 for parcels 583 and 584.
- vii. Copy of letter dated 25/7/2005 to the Defendant from the District Officer referring the dispute herein to the Land Disputes Tribunal
- viii. Copy of letter dated 17/3/2005 from the District Officer LOITOKITOK to the Defendant summoning him to the DO's office over land reference number 46.
- ix. Copy of summons to the Defendant and the Plaintiffs' father dated 23/3/2006 issued by the Chairman of the Land Disputes Tribunal asking them to appear on 4th May, 2006 for the determination of their dispute.
- x. Copy of letter dated 16/10/2002 written by the Land Registrar Kajiado to the Defendant notifying him that the Plaintiffs had registered a caution against L.R. 46 claiming an interest.
- xi. Copy of receipt dated 4/12/..... but the year is not clear issued to the plaintiffs' for some prints
- xii. Copy of agreement for sale of land dated 14/9/74 showing that the Defendant received a total of Ksh. 5100/= as part payment for sale of 6 acres of land to the Plaintiff at Kshs. 850/= per acre.
- xiii. An acknowledgement by the Defendant that he had received Ksh. 100/= from the Plaintiffs' father on 11/10/74 and the balance was Kshs. 2, 000/=.
- xiv. An acknowledgement by the Defendant that he had received Ksh. 1000/= from the plaintiffs father on 26/1/1975
- xv. A copy of an agreement between the Defendant and the plaintiffs' father showing that he had sold three more acres making a total of nine (9) acres and acknowledging receipt of Ksh. 2, 550/=. On the same document, there is an acknowledgment by the Defendant that he had received Kshs. 300/- and the balance was Ksh. 2, 550/=
- xvi. Copies of maps for the area in which the suitland is situated.

The Defendant has never filed a defence in this suit. However, on 20/6/2016 he filed a replying affidavit dated 17/6/2016 which has three annexures which are copies of 3 title deeds numbers LTK/KIMANA-TIKONDO/7062, 7060 and 7061 in the names of Francis Nderitu Kimani, Lucas Muteti Ndolo and Sakimba Ole Lekishapui respectively.

In the affidavit the defendant says that he did not sell any part of the land title 46 to the Plaintiffs' father. All that he did was to lease at the rate of Ksh. 500 per annum. He allowed the Plaintiffs' father to construct a mud house on the land.

Later on he learnt that the Plaintiffs' father was claiming to have bought the Defendant's land and that he even had a title deed. The Defendant reported the matter to the District Officer's Office at LOITOKITOK. The dispute was referred to elders who heard the dispute and decided it in favour of the Defendant. The award of the elders was confirmed by the Magistrates Court at Kajiado.

In 2011, the Defendant came to know that the Plaintiffs had lodged a caution in respect of the land. He requested the Land Registrar to remove the caution to no avail. When he failed to do so, the Defendant filed Civil Suit No. 23 of 2015 which resulted in the caution being lifted.

Since the removal of the caution, the suit land has been subdivided as per the three annexures.

The Defendant adds that the Plaintiffs' father never occupied the suit land after he left in the mid-eighties. He denied colluding with the Land Registrar to fraudulently deal with the land. Instead it is the Plaintiffs' father who tried to steal the land by stealing the title and presenting an illegally obtained boundary certificate which the illiterate defendant did not understand.

The lost title was gazetted vide Kenya Gazette Notice No. Volume CIV-NO.43/4000 at page 1481.

At the trial on 1/12/2021 only the Plaintiff named Francis Mbugua Kamau testified. He adopted his witness statement dated 10/11/2015 and his documents filed in Court respectively.

The Defendants did not turn up in Court for the trial even though they had been duly served. Counsel for the Plaintiffs filed written submissions on 23/12/2021. In the submissions the issues raised are as follows;

1. Protection of right to property under **Article 40 of the Constitution**.
2. Power of the Court to nullify title to land that is acquired illegally unprocedurally or through a corrupt scheme
3. How to deal with all survey plans and records
4. Costs

I have carefully considered all the evidence adduced by the Plaintiffs, the submissions by the Plaintiffs' Counsel and the law cited therein as well as the law cited there and even the Defendant's affidavit of 20/6/2016.

I find the following issues arise;

1. Was all the requisite evidence necessary to enable the Court arrive at a fair decision adduced in this case?
2. Whose duty was it to adduce this evidence?
3. What is a just decision with the little available evidence?

On the first issue, I find that not all the evidence necessary to prove the plaintiffs' claim as presented was adduced.

Firstly, even though the Plaintiffs produced a total of sixteen exhibits, they did not produce a consent from the Land Control Board to prove that the subdivision of LR 46 and the transfer of LR 584 was obtained prior to the subdivision and transfer.

Section 6 of the Land **Control Act (CAP 302)** provides as follows;

1. Each of the following transactions that is to say

a. The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agriculture land which is situated within a land control area; is void for all purposes unless the land control board for the area or division in which the land is situated has given.

Secondly, even though the Plaintiffs exhibit number seven (7) refers to a tribunal hearing this dispute, the proceedings from the tribunal have not been produced herein.

On the second issue, I find that it was the duty of the Plaintiffs to adduce this evidence. Under **Section 107** of the **Evidence Act**, he who alleges must prove otherwise his case fails.

The Plaintiffs did not, even in the witness statement dated 1st November, 2015 say anything about attending the Land Control Board, obtaining the necessary consent or attending the Land Disputes Tribunal.

In addition to the above, the Plaintiffs have not proved that their father even paid the full purchase price for the land that he was buying from the Defendant.

All that they have proved is that the Defendant was paid a total of Ksh, 9, 050/- by their father between 1974 and 1976.

The Defendant did not defend the suit. This means that the Plaintiffs' evidence is uncontroverted by any evidence by the Defendant.

I find that the Plaintiffs' father paid the Defendant Kshs. 9, 050/= for the purchase of land but the transaction was not blessed with consent of the Land Control Board. Consequently the transaction is null and void.

Under **Section 7** of the **Land Control Act** it is provided as follows;

7. If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.

I find that the provisions of **Section 7** of the Land Control Act apply squarely in this case.

I order that the first Defendants refunds the amount of Kshs. 9, 050/= with interest at Court rates from the date each of instalments was paid

to the Defendant to the date the amount is paid in full.

The Plaintiffs will have the costs of the suit and interest.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 28TH DAY OF FEBRUARY, 2022

M.N. GICHERU

JUDGE