



**Kiniti v Marijoi & 2 others (Environment & Land Case
935 of 2017) [2022] KEELC 118 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 935 OF 2017
MN GICHERU, J
MAY 30, 2022**

BETWEEN

JOHN GUY KINITI PLAINTIFF

AND

ESTHER NAIBARTUNI JULIUS OLE MARIJOI 1ST DEFENDANT

PAUL SENTEU MUNGA 2ND DEFENDANT

**LAND REGISTRAR KAJIADO (SUED THROUGH ATTORNEY
GENERAL 3RD DEFENDANT**

JUDGMENT

1. John Guy Kiniti the Plaintiff seeks the following reliefs against Esther Naibartuni Julius Ole Marijoi, Paul Senteu Munga and Land Registrar Kajiado (sued through the Attorney General) first, second and third Defendants respectively;
 - (a) A declaration that he is the bona fide and legal owner of the suit property Kajiado/Ildamart/173.
 - (b) A declaration that any encroachment by the first and second Defendants is illegal, null and void and that the two Defendants and any third party should be evicted from the suit land and any titles held by them be cancelled.
 - (c) That the third Defendant be ordered to produce and avail the parcel file and records of the suit property
 - (d) That the third Defendant do amend and change all entries made on the suit property to the detriment of the Plaintiff as the sole and legal owner of the suit land.



- (e) A permanent/mandatory injunction restraining the first and second Defendants from encroaching, trespassing, developing, alienating, selling, transferring or in any other way whatsoever by themselves, their agents, servants claiming through them from interfering or dealing with the suit land.
 - (f) Vacant possession of the suit property.
 - (g) Costs of the suit.
2. The Plaintiffs case is as follows. On 12/5/2006 he entered into an agreement for the sale of the suit land with the first Defendant. The purchase price was Kshs. 3.5 million. He paid it in full. The transfer documents were booked at the Kajiado Land Registry vide Day Book Number 791 of 12/2/2010 as evidenced in the presentation book. He was then issued with the Title Deed to the suit land.

In the year 2012, the Plaintiff took some investors to the suit land only to be chased away by the 1st and 2nd defendants. On making inquiries, the Plaintiff learnt that the first Defendant had made a false claim at Kajiado Police Station that she had lost her title deed for the suit land and requested to be issued with a new one.

On 13/9/2012 the second Defendant was issued with a new title deed to the suit land. There was collusion between the three Defendants because the second Defendant was issued with the Title Deed after only six (6) days after the advertisement of the loss in the Kenya Gazette.

The copy of the Register, (Green Card), on record was subjected to examination by the documents examiner who found it to be fake. It related to the entry that transferred the suit land to the second defendant.

Soon after the transfer of the suit land, he subdivided it. A report was made to the police as a result of which the first and second Defendants were charged in Criminal Case No. 216 of 2014. They were later acquitted.

The existence of two parallel title deeds in respect of the same property is the reason behind the filing of this suit. The third Defendant is unable to register the Plaintiffs caution against the suit land because the copy of the register was collected by the Criminal Investigation Department officers from Kajiado and used as an exhibit in the criminal case aforementioned. It is therefore still in the custody of the Court.

3. In support of his case, the Plaintiff filed evidence that included the following;
- (a) His own witness statement dated 14/11/2017.
 - (b) Copy of the title deed to the suit land dated 17/2/2010 in the name of the Plaintiff.
 - (c) Copy of agreement for sale of the suit land dated 12th May, 2006.
 - (d) Copy of presentation book which is not clear.
 - (e) Copy of Gazette Notice No. 12478 dated 7/9/2012 relating to the suit land.
 - (f) Copy of exhibit memo form dated 6/2/2015.
 - (g) Copy of report by the Department of Criminal Investigation dated 9/2/2015 showing the signatures on the green card were forgeries.
 - (h) Known signature of the Land Registrar.
 - (i) Copy of the register for the suit parcel.



- (j) Copy of application for caution.
4. The first and second Defendants through their counsel on record filed a written statement of defence dated 26/2/2018 in which they deny all the averments in the plaint. The main feature of the defence is the admission that the Plaintiff paid Kshs. 350,000/= only and not the Kshs. 3.5 million that he says he did.

Regarding the report of the loss of the title deed to the police, the Defendants say that it was a genuine report and it was not false as alleged by the Plaintiff.

In support of their case, the Defendants filed two witness statements by themselves both of which are undated.

The third Defendant in a written statement of defence dated 2nd February, 2018 denied the Plaintiff's claim generally.

5. At the trial four witnesses testified. They included the Plaintiff, the 2nd Defendant, the Documents Examiner and the Land Registrar, Kajiado.

The Plaintiff and the second Defendant reiterated what they said in their witness statements and documents.

Mr. Alex Mwongera, the Documents Examiner, testified to the effect that entry number 8 in the copy of the register (green card) which transferred the suit land from the first Defendant to the second Defendant was not by the registrar by whom it is purported to have been. He found the signature to have been made by a different person and to be a forgery.

The Land Registrar Mr. Paul Tonui in his testimony on 22/3/2021 said he is not aware of the status report of the suit land. He said that he is aware that it was subdivided to create L.R. 2398 which belongs to Wige Investment who are not parties to this suit.

6. Counsel for the parties filed written submissions on 28/4/2021 (plaintiff) and 15/6/2021, (third defendant). No submissions were filed by counsel for the first and second defendants. The issues raised by the Plaintiff's counsel are four namely;

- (a) Whether there was a valid sale transaction between the Plaintiff and the first Defendant for the sale of the suit land Kajiado/Ildamat/173.
- (b) Whether the Plaintiff holds a valid title deed for Kajiado/Ildamat 173 and is thus the bonafide owner thereby.
- (c) Whether the title deed held by the second Defendant was acquired fraudulently and/or irregularly as a result of the actions of all the Defendants.
- (d) Whether the Plaintiff is deserving and entitled to the prayers made in the Plaint.

On the other hand, the third Defendant's counsel identified three issues which are more or less similar to the Plaintiff's issues. They are as follows;

- (a) Whether the Plaintiff has been able to prove his case.
- (b) Whether there is any wrong doing on the part of the third Defendant.
- (c) Whether the Plaintiff is entitled to the orders sought.

According to the counsel for the third Defendant, none of the above has been proved and the Plaintiff's suit ought to be dismissed as against the third Defendant.



7. I have carefully considered all the evidence adduced by all the parties including the witness statements, documents and testimonies at the trial.

I have also considered the submissions by learned Counsel for the parties, the issues raised therein and the law relied upon.

On the first issue, I find that there was no valid transaction between the Plaintiff and the first Defendant for the sale of the suit land.

Firstly, the agreement produced by the Plaintiff as an exhibit gave the completion date of the agreement as 11th August, 2006 vide clause 5. In his testimony in Court on 2/7/2019, the Plaintiff said in cross examination “I paid the balance of the purchase price until (sic) 2009 through my lawyer”. This is admission by the Plaintiff that he did not adhere to the agreement. He was late in complying with his own obligation to the first Defendant by more than two (2) years.

There is no evidence from the Plaintiff if there was a second agreement that allowed him to complete his part of the agreement more than two years late.

Secondly, the Plaintiff has not proved that he paid more than Kshs. 350,000/- for the suit land. He has not filed copies of the cheques that he says he issued to his lawyer for payment to the first Defendant. He has also not filed copies of his bank statement to prove that the cheques were paid from his own bank account.

He has not adduced any evidence to prove that his lawyer actually paid the money to the first Defendant or her lawyer if she had one.

Thirdly, the Plaintiff has not adduced evidence of consent of the Land Control Board, payment of stamp duty, application for consent of the Land Control Board, transfer instrument duly executed by the first Defendant and himself amongst other relevant evidence.

It was incumbent upon the Plaintiff to prove all the above as required by Sections 107 and 108 of the *Evidence Act*. He who alleges must prove. The Plaintiff has not proved.

On the second issue, I find that the Plaintiff does not hold a valid title to the suit land for the same reasons given as regards to the first issue.

On the third issue, I find that there is discrepancy on the acquisition of the title deed by the second Defendant in the face of the evidence by the documents examiner that the signature against entry number 8 on the green card is not by the Land Registrar who is purported to have made it.

However, the second Defendant’s ownership of the suit land cannot be easily defeated because there is no evidence that he did not obtain it from the registered owner. Again, the second Defendant in his testimony in Court on 22/3/2021 said that he was born on the suit land 44 years ago and that it is him and not the Plaintiff who is in occupation.

On the Plaintiff’s fourth and final issue, I find that he is not entitled to the orders sought in respect to the whole land parcels which measures 40.47 hectares. I however find that he is entitled to a tenth of the suit land measuring 4.047 hectares.

This is because it is admitted by the first Defendant that the Plaintiff paid Kshs. 350,000/= to her on or before 12th May, 2006 as per the agreement for sale of the suit land.



In making this finding, I am relying on Article 10(1) (a) (b) and 2(b) of the Constitution which provide as follows;

- “(1) The national values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them –
- (a) Applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law
- “(2) The national values and principles of governance include-
- (b) ...equity...”

8. The word equity has many definitions both in law and commerce but the core meaning in law has the major component as fairness. Applying equity in this case, I find that it is not fair for the Defendants to deny the Plaintiff land which he paid for.

He may or may not have paid for the whole land but we are sure that he paid for a tenth of the suit land. It is unconscionable for the first and second Defendants to have taken the Plaintiff’s money for a tenth of the suit land and then fail to give him that land.

In the case of Willy Kimutai Kitilit – versus - Michael Kibet Civil Appeal No. 51 of 2015 (Eldoret) at paragraph 24, the Court of Appeal had this to say;

“There is another stronger reason for applying the doctrines of constructive trust and proprietary estopped to the Land Control Act. By Article 10 (2) (b) of the Constitution of Kenya, equity is one of the national values which binds courts in interpreting any law.”

9. I find that it is equitable to order that the Plaintiff gets the land that he paid for

Finally on the third Defendant’s second issue which is the only one which is not resolved, I find that there is wrong doing on the part of the third Defendant.

When Paul Tonui testified in Court on 22/3/2021, he was not able to give the current status of the suit parcel. He was not aware of the title issued in favour of the second Defendant, the gazettelement of the loss of the title deed, the forensic report by the documents examiner and that the Plaintiff still holds the original title to the suit land among other pertinent things that he ought to know.

I say that there is wrong doing on the part of the Land Registrar, Kajjado because under Section 9 of the Land Registration Act, it is mandatory that he be aware of all the things that he said he is not aware of. It provides as follows;

- 1) “The Registrar shall maintain the register and any document required to be kept under this Act in a secure, accessible and reliable format including-
 - (a) publication...
 - (b) electronic...
 - (c) an integrated land resource register
- 2) The register shall contain the following particulars
 - (a) Name, personal identification number, national identity card number, and address of the proprietor



- (b) Names and addresses of the previous proprietors
- (c) Size, location, user and reference number of the parcel
- (da) Passport number, telephone number and email address, where applicable.

10. The third Defendant cannot be heard to say that there is no wrong doing on his part when he has failed in his primary duty of maintaining the above records. It is this failure that has brought about this case.

11. For the above stated reasons, I order as follows;

- 1) The Plaintiff's suit is dismissed.
- 2) The second Defendant to transfer 4.047 hectares of the suit land to the Plaintiff failing which the Deputy Registrar to sign all the necessary instruments to give effect to this order.
- 3) The Plaintiff to bear the costs of transfer of the 4.047 hectares.
- 4) No order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 30TH DAY OF MAY, 2022.

M.N. GICHERU

JUDGE

