



**M’Mugambi & another (LEGAL REPRESENTATIVE OF THE ESTATE OF  
MUKIRA NABEA-(DECEASED) v Rintaugu & 2 others (Environment & Land  
Petition 23 of 2016) [2022] KEELC 3540 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3540 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND PETITION 23 OF 2016**

**CK NZILI, J**

**MAY 18, 2022**

**BETWEEN**

**JENIFFER GACHERI M’MUGAMBI ..... 1<sup>ST</sup> PETITIONER**

**KINYUA M’MUGAMBI ..... 2<sup>ND</sup> PETITIONER**

**LEGAL REPRESENTATIVE OF THE ESTATE OF MUKIRA NABEA-  
(DECEASED)**

**AND**

**LEONARD GITONGA RINTAUGU ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF LANDS MERU ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. This suit was filed by way of a petition dated August 9, 2016 where the petitioners claim to be the administrators of the estate of one Mukira Nabea (deceased) who allegedly died on February 2, 1968. They aver that deceased was the owner of the land parcel No LR Ntima/Ntakira/1084 which was fraudulently and illegally subdivided on August 11, 1994 to give rise to parcels Ntima/Ntakira 2732 and 2733 and were fraudulently registered in the name of the 1st respondent.
2. The petitioners therefore pray for the following:
  - a. A declaration that the subdivisions of the deceased’s parcel of land No LR Ntima/Ntakira/1084 into LR Ntima/Ntakira/2732 and 2733 and transfer of the same to the 1st respondent’s name were illegal and unconstitutional.



- b. An order for rectification of the register for LR Ntima/nkakira/1084 by cancelling the subdivisions and have the land re-transferred to the deceased's names Mukira Nabeato await the probate and administration by the beneficiaries/dependants.
  - c. costs of the petition and interests.
3. The 1st respondent opposed the suit vide his replying affidavit dated November 6, 2017 where he contends that he bought the land from Mukira Nabeaveide a sale agreement of August 24, 1993, the land parcels were registered in his name on February 15, 1994 and that he has been in possession thereof todate.

### **Petitioners Case**

4. PW1 is the 2nd petitioner. He testified on behalf of himself and on behalf of his mother who is the 1<sup>st</sup> petitioner. He relied on his supporting affidavit dated August 9, 2016 as well as his statement dated November 6, 2017 as his evidence. In the recorded statement, PW1 introduced himself as a son of 1st petitioner who in turn was a daughter of deceased. He contends that deceased owned the parcel of land Ntima Ntakira/1084, that he died in 1968 and was buried on that land.
5. In year 2015, the 1<sup>st</sup> respondent started chasing them. Upon investigations, PW1 discovered that the land had been transferred to 1<sup>st</sup> respondent.
6. They filed a case No CMCC 162 of 2009 but the same was withdrawn on technicalities. Another case CMCC No 204 of 2013 was filed but discontinued.
7. In his oral evidence in court, PW1 initially identified Mukira Nabea as his grandfather, but changed course stating that deceased was a brother of his mother (1st petitioner), so deceased was his uncle. He also identified one Cypriano as his brother and that Cypriano had wanted to sell the land secretly.
8. In cross-examination, PW1 stated that he was born in 1953 at Gitugu village. That Mukira Nabea's land was at Gikumene and Mukira never came to Gitugu. He averred that Jennifer had sued 1<sup>st</sup> respondent in the case HCC No 162 of 2009 where they did the case, got the land but they were chased away in year 2009. They also sued 1<sup>st</sup> respondent in the case Meru CMCC No 204/13 where PW1 stated that in 2013, he had discovered that the suit land was that of his grandfather. That there was also a Tribunal Case No 61 of 2009 but he is not aware of the decree thereof. He cannot recall the year they discovered that the land belonged to his grandfather.
9. He further contends that the land was sold fraudulently as the owner, Makira Nabea was deceased and that he desires to have the succession cause determined so that he can get his rights.
10. The documents availed by the petitioners in support of their case include;the grant *ad litem* issued to both petitioners on April 26, 2016.The green cards for parcels 1084, 2732 and 2733.authority given by 1st petitioner to 2nd petitioner.a notice of withdrawal of suit Hccc Meru No 162/09
11. PW2 is one Vincent Murerwa who introduced himself as a neighbour of the petitioners. He adopted his statement dated November 6, 2016 as his evidence. He avers that he was born on July 7, 1985 at Gitugu village and he never saw the owner of the land. He contends that 2<sup>nd</sup> petitioner had a house on the suit land but it was destroyed by 1<sup>st</sup> respondent in year 2015.
12. In cross examination, PW2 admitted that the information regarding ownership of the suit land as well as when the owner died was given to him by Jeniffer, the 1st petitioner. Adding in re-examination that he doesn't know Mukira Nabea's nephew known as Cypriano M'Kwaria.



13. PW3, Susan Peter M'Rimberia adopted her statement dated November 6, 2017 as her evidence. Therein, she introduced herself as a daughter of 1<sup>st</sup> petitioner while 2<sup>nd</sup> petitioner is her brother. She also identified Mukira Nabea as father of 1<sup>st</sup> petitioner and that he died in 1968. She was born in 1953.
14. In her oral evidence in court, PW3 reiterated that she does not know one Cypriano M'Kwaria. She also doesn't know 1<sup>st</sup> respondent. She stated that Jennifer Gacheri is a sister of Mukira Nabea even if her statement states the contrary. That the children of Jennifer are one Stanley Kimaita and the 2<sup>nd</sup> petitioner. She could not recall the particulars of other cases filed before the current one.

### **Defence Case (of 1st Respondent)**

15. DW1 is the 1st respondent. He adopted the contents of his replying affidavit dated November 11, 2016 as well as his witness statement dated November 14, 2017 as his evidence. He avers that on August 24, 1993, he entered into a land sale agreement with Mukira Nabea for sale of land Ntima/Ntakira/1084 of which the seller authorized his nephew Cypriano M'Kwaria to be receiving the payments. They obtained the consent of the land control board, transfer was effected and he was issued with a title on August 12, 1994. DW1 took possession of the land and later sub-divided it into parcels Ntima/Ntakira/1667,2732,2733,2880 and 2881. He contends that Mukira Nabea was alive in 1993 and that he died in 1997 and not 1968.
16. He further states that the petitioners had sued him in the following cases;LDT No 61 of 2009 where a decree was issued in his favour on January 29, 2010,Meru HCCC No 162/2009 of which the petitioners failed to prosecute the case and it was dismissed for want of prosecution in 2015.1st petitioner filed a case Meru CMCC No 204 of 2013 which suit was struck out on December 6, 2013.
17. In support of his case, DW1 produced several documents which included the agreement for sale, land control board consent forms, documents of transfer, copies of title documents appertaining to the death of Mukira Nabea including the death certificate and documents relating to previous cases.
18. In cross examination, DW1 stated that deceased Mukira Nabea was a brother of Jennifer Gacheri, that petitioners have never used the suit land and that it is not true that Mukira Nabea died in 1968. He further stated that he had gone to the land board along with Mukira Nabea and Jennifer Gacheri. He avers that the land sale agreements were done in the office of Meenye and Kirima advocates and all monies were received by Cypriano as per the agreement.
19. DW1 denied colluding with any one to have the land transferred to himself.
20. He averred that he was not involved in the application of the death certificate of Mukira Nabea as this was done by Cypriano.
21. DW2 one Raphael Kinuthia is a registrar of births and deaths in Meru having worked from year 2008. He avers that their office received summons from the court to produce certified copies of death certificate of one Mukira Nabea. To that end, he produced the following documents as exhibits;A certified copy of the death certificate of Mukira Nabea.The register of death from which the death certificate was processed.An authority register for death where applications for late registration are kept.
22. In cross-examination, DW2 stated that the application for the death certificate was made by one Cypriano M'Kwaria in year 2014. The certificate of death was issued on March 13, 2014 as a late registration. DW2 stated that he was not aware that deceased had passed on in year 1968.



23. DW3, Catherine Makau is a land registrar in Meru. She stated that they received summons to produce some documents appertaining to the transfer of the land Ntima/mtakira/1084. To that end, she availed the following documents. Certified copy of the transfer form dated February 7, 1994 registered on February 15, 1994. A copy of the receipts serial No 761632 dated August 30, 1993 in respect of payment for application for land board for Sh 50. A letter of consent issued on February 3, 1994. An application for consent for land control board approved on February 4, 1994. The land certificate in name of Mukira Nabeya issued on March 21, 1978.
24. The documents confirm that the land was transferred from Mukira Nabea to Leonard Gitonga and a title was hence issued to the latter on February 15, 1994.
25. In cross examination, DW3 stated that he could not ascertain as to who thumb printed on the documents but the presumption is that a transfer and a transferee are the ones who executed the transfer documents.
26. DW4 one Moses Kirima introduced himself as the member of parliament for Central Imenti and he is also an advocate with the firm of Meenye and Kirima Advocates. He confirmed that he is the one who drew the agreement between Leonard Gitonga and Mukira Nabea in 1993. He had identified the parties via the ID cards and he also knew them.
27. In cross-examination, DW4 stated that he knew the old man (vendor) and he had come to the office with a relative known as M'kwaria whom he did not know until that time when he came to his office. As per the agreement, purchaser was to take possession while vendor was to leave that land to go and stay with M'Kwaria.
28. He avers that it is not true that Mukira was not alive by 1993, as he died in 1997.
29. DW5, one Fredrick M'ithinji adopted his statement dated November 14, 2017 as his evidence. He was born in 1958 and knows all the parties herein. His land and that of 1st respondent share one access road and their gates face each other. He knew Mukira Nabea who had a nickname by the name Ndere and he had constructed his house near some coffee bushes in the suit land and his house was just about 20 metres from DW5's house. DW5 had even wanted to buy that land but they did not agree with Mukira Nabea and eventually, the same was bought by 1<sup>st</sup> respondent. Mukira Nabea left Gikumene area and went to live with "Murianki" ie Cypriano M'Kwaria who was his nephew after the sale of the land. He went to live in Gitugu in Mugambi's land ( the husband of 1st petitioner).
30. DW5 therefore confirms that Mukira was alive in 1993 when he sold the land, hence it is not true that he died in 1968.
31. DW6, one Julius Gitonga Marete adopted his statement dated November 14, 2017 as his evidence. He knew Mukira Nabea and his elder sister Jeniffer Gacheri very well. That Jennifer resides at Gitugu where she was married while Mukira Nabea resided at Ntakira sub-location Nkia village where DW6 was an assistant chief. That one day, Mukira Nabea, his sister Jeniffer and Cypriano Murianki (m'kwaria) came to see him to allow them sell Mukira Nabea's land, and pick him, to go to Gitugu with him and care for him since Mukira Nabea had nobody to care for him at Ntakira Nkia.
32. DW6 avers that the request to sell the land was presented to the clan and eventually, DW6 gave them consent to sell the shamba (land) to one Leonard Gitonga who bought the whole land. They went to land control board for consent, Leonard Gitonga entered into possession in 1994 while Jeniffer Gacheri and her elder son Cypriano Murianki took Mukira Nabea to Gitugu sub-location.



33. In cross-examination, DW6 reiterated that he knew the parties well and they went to him to get permission to sell the land and Mukira was with his sister Gacheri and Cypriano Murianki. His role was to give them a go ahead to sell the land.

### **Case For 2nd And 3rd Defendant.**

34. I did not see any pleadings for these respondents and they did not tender any evidence.

### **Determination**

35. I have considered the evidence tendered herein, the rival submissions and the relevant legal frame work. There is no controversy that the original parcel LR No Ntima/ntakira 1084 was registered in the name of Mukira Nabea, that a transfer of the said land was effected from Mukira Nabea to 1<sup>st</sup> respondent sometime in year 1994, that the latter became the registered owner thereof, and that the land was thereafter sub-divided, whereby 1<sup>st</sup> respondent was issued with the resultant titles.
36. The singular key issue for determination is whether the transfer of the parcel of land Ntima/ntakira 1084 from Mukira Nabea to 1st respondent was lawful. The petitioners contend that it was unlawful as Mukira Nabea died in 1968 while 1st respondent states that Mukira Nabea was alive as he died in 1997.
37. The provisions of section 107 of the Evidence Act stipulates that:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
38. In the case of BWK v EK & Another (2017) eKLR, Odunga J had this to say on the issue of burden of proof:
- “the cardinal principle in civil law is that he who avers must prove if the court is to exercise its judicial mind in his favour. In civil cases, this is called burden of proof and with respect to the standard of proof, that is the threshold that the plaintiff must meet if a favourable judgment is to be returned.....”
39. Thus he who asserts has the burden of proofing. See Jennifer Nyambura Kamau v Humphrey Mbaka Nadi (2013)eKLR.
40. What resonates from the analysis of the relevant statute (Evidence Act) and case law is that the burden was upon the petitioners to prove that Mukira Nabea died in 1968 and that he is not the person who did the transfer of the suit parcel in 1994.
41. I find that no tangible evidence has been advanced by petitioners to prove their assertions while by and large, they have attempted to shift that burden of proof upon the 1<sup>st</sup> respondent.
42. Firstly, none of the petitioners gave a plausible explanation as to how they knew that Mukira Nabea died in 1968. It is rather odd that the petitioners have the exact date of death of Mukira Nabea as February 2, 1968! So how did they come up with this precise date with no primary document to support this averment. None of the petitioner’s witnesses could give the circumstance of how Mukira Nabea died and was buried, not even the two siblings that is PW1 (2nd petitioner) and PW3 Susan Peter



- M'Rimberia. As for PW2, Vincent Murerwa, he had never met Mukira Nabea, since he was born in 1985 and that he was given information about Mukira Nabea by Gacheri, thus his evidence is hearsay.
43. It is rather peculiar that PW1 averred that his ID card reads he was born in 1953, yet his sister DW3 also claims to have been born in 1953. The two don't mention that they are twins. Nevertheless, if indeed they were born in 1953, then they were youthful persons of 15 or so years by 1968. They therefore ought to have had vivid memories of the circumstances surrounding the death of their kinsman, Mukira.
44. The evidence of the two siblings appear to be even more muddled up when it comes to relationship. In their recorded statements, both siblings claim to have been grandchildren of Mukira Nabea but in their testimony in court, they clarified that Mukira is their uncle. The confusion on relationship does not end there. The evidence emerging from the defence is that one Cypriano M'Kwaria was the right hand man of Mukira Nabea during the land sale. In his oral evidence in chief, PW1 stated that:
- “I was not one of the people who sold land to Leonard. I know Cypriano. He is my brother. He wanted to sell the land, but it doesn't belong to him. I and my mother and Cypriano have never filed succession cause.....”
45. This far PW1, does admit that Cypriano M'Kwaria is his brother.
46. However, PW3 the sister of PW1 stated as follows in cross-examination
- “I dont know any one by the name Cypriano M'Kwaria. He is not my brother.....”
47. This inconsistency depicts the two siblings as untruthful witnesses whose word of mouth that Mukira died in 1968 cannot be believed on the face of it.
48. Further, even if the 2<sup>nd</sup> petitioner and his sister PW3 have not been forth right in the role played by one Cypriano, I find that the evidence given by DW5 and DW6 gives a rather forthright account of who Cypriano was and his relationship with Mukira Nabea. For DW5, he even knew Mukira's nickname as “Ndere”, while Cypriano was nicknamed “Murianki”. That Cypriano was a nephew of Mukira which is in tandem with pw1's averment that Cypriano was his brother. DW5 added that after the sale of the land, Mukira left Gikumene, and went to Gitugu to stay on the land of Mugambi who is husband of 1<sup>st</sup> petitioner. This evidence resonates well with the evidence of DW6, the assistant chief of where Mukira was residing who stated that , one day, Mukira, his sister, 1<sup>st</sup> petitioner and Cypriano Murianki M'Kwaria( note the use of the nickname again) came to him for permission to sell Makira's land and to take him away. DW6 acceded to the request and Mukira was taken away to Gitugu.
49. This court has also perused the copy of grant availed by the petitioners (the one on page 6 of their bundle). It was issued to the petitioners on April 26, 2016. However, this is a “limited grant *ad litem*” limited for the purposes only of filing civil suit and nothing else. Thus the said document cannot on its own be used to confirm that deceased died in 1968.
50. On the other hand, I find that 1<sup>st</sup> respondent has adduced evidence to show that he bought the land from Mukira Nabea. The sale agreement was executed before an advocate (DW4) who testified to that effect and he knew the old man “Mukira” well. The documents appertaining to the transaction of sale have been availed.
51. DW2 a registrar of births and deaths produced a death certificate along with the other registration records, appertaining to the death of Mukira Nabea. The said documents indicate that he died on



- May 20, 1997. The application for the death certificate was made by Cypriano M’Kwaria which gives credence to the 1<sup>st</sup> respondent’s assertion that this is the person who was with Mukira at the time of sale.
52. The documents availed by the 1<sup>st</sup> respondent appertaining to the sale of the land and subsequent death of Mukira in 1997 have not been challenged in anyway.
53. Finally, as submitted by the 1<sup>st</sup> respondent and admitted by petitioners, there has been previous litigation appertaining to the matter at hand. There was the LDT Case No 61 of 2009, HCC No 162 of 2009 and CMCC No 204 of 2013. I am in agreement with the submissions of the 1<sup>st</sup> respondent that as early as 2009, petitioners knew about the ownership of the suitland by 1st respondent. Thus PW1’s contention in his recorded statement that they discovered the fraudulent and illegal transfers after 1<sup>st</sup> respondent chased them away in year 2015 is false.
54. The decree in the LDT Case No 61 of 2009 (pages 39 of 1st respondents bundle) indicate that 1<sup>st</sup> respondent was found to be the rightful owner of the land. The plaint in Meru HCC No 162/2009 (page 43 of 1st respondent bundle) indicate that the current petitioners were asserting a claim of fraud in respect of the transfer of the suit land to 1<sup>st</sup> respondent herein. And in CMCC No 204/2013 the 1st petitioner herein was at it again, pleading fraud in the manner the land was transferred to 1<sup>st</sup> respondent. To this end, I am in agreement with 1<sup>st</sup> respondent’s submissions that this is not a petition perse. It is an ordinary claim disguised as a petition, as the petitioners have not at all demonstrated as to how their rights were violated. They have not established that they had any rights over the suit land at any given time.
55. I find that the filing of this suit on claims of fraud, when such issues had been raised by the petitioners in previous suits amounts to an abuse of the court process.
56. In the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR, the court had this to say on the subject of abuse of court process;
- “Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. A litigant has no right to pursue *pari passu* two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.
57. Guided by the holding of Odunga J in *BWK v EK & Another* (2017) eKLR, (Supra), in absence of supporting evidence that Mukira Nabea died in 1968, “the court cannot adopt a probability that there was such an occurrence without the advantage of divine omniscience.” The upshot of this finding is that the petition must fail. this suit is hereby dismissed with costs to the 1st respondent.

**DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY, 2022.**

**LUCY N. MBUGUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF MAY, 2022.**

**C. K. NZILI**



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**JUDGE**

In the presence of:-

Gikumba Anampiu for the Petitioners

Mwirigi Kabutu for the 1st Respondent

Kieti for the 2nd & 3rd Respondents

Court Assistant: Kananu

