



**Nteresian v District Land Registrar Narok & 3 others (Environment & Land
Case 111 of 2017) [2022] KEELC 2252 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 111 OF 2017
CG MBOGO, J
MAY 18, 2022
FORMERLY NAKURU ELC NO. 9 OF 2015**

BETWEEN

KERENTO OLE NTERESIAN PLAINTIFF

AND

DISTRICT LAND REGISTRAR NAROK 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT 3RD DEFENDANT

JAMES NDUNGU KUSERO 4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed a Plaint dated 19th January, 2015 seeking the following prayers: -
 - a) A declaration that the Land Reference Number CIS Mara/Kojonga/ 1056 is wholly owned by the Plaintiff and he holds true title to the property, and that the 4th Defendant's titles and claims to the property are fraudulent, null and void and bereft of any authenticity or substance and the 1st defendant be ordered to cancel the same and rectify the register to read the plaintiff as the registered owner.
 - b) A permanent injunction restraining the 4th defendant, their servants, agents and/ or assigns from trespassing and interfering in any way with the Plaintiff's property and the Plaintiff's right to quiet possession.
 - c) Costs of the suit and interests thereon.
2. In the Plaint, the Plaintiff averred that at all material times, he was the beneficial owner and occupant of land known as CIS Mara/ Kojonga/ 1056 having been allocated the same by the 3rd defendant



- in the year 1979 when it was declared an adjudication section and he has been in occupation and has developed the same. He resides there with his family and livestock. He further stated that in the year 1992 after the adjudication had been completed, he was informed that the 4th defendant had been allocated the same land in which he lodged a complaint with Kojonga Adjudication Section Committee and the matter was heard and it was confirmed that he is the rightful owner of the suit land.
3. The plaintiff further stated that the matter was later referred to Kojonga Adjudication Section Arbitration Board and it was heard on 10th June, 1997 and again he was confirmed as the rightful owner of the suit land. The 4th defendant lodged an objection to the finding and on 30th March, 2009 the objection was heard and it was overruled by the Kojonga Adjudication Section Board. The 4th defendant then appealed and the District Commissioner heard and determined the appeal on 1st November, 2012 and illegally and irregularly awarded the suit land to the 4th defendant. The plaintiff at all times made payments to the office of the 1st defendant which were received and acknowledged. The plaintiff conducted an official search on the property on 28th October, 2014 and found that the 4th defendant was registered as the owner of the suit land confirming that the 1st defendant had acted on the directions of the 3rd defendant.
 4. The plaintiff averred that it was apparent that the 1st, 3rd and 4th defendants colluded and connived to fraudulently dispossess the plaintiff of the suit land. He cited particulars of fraud as follows: -
 - a) Altering the adjudication records to exclude the plaintiff's registration despite the plaintiff being the first to be registered.
 - b) Issuing a title deed to the 4th defendant in total disregard of the interests of the plaintiff.
 - c) Refusal by the 1st defendant to nullify and or cancel the existing fraudulent titles and rectify the register despite being aware of the above facts.
 5. The 1st, 2nd and 3rd defendants filed their Statement of Defence dated 12th May, 2015 and denied the averments stated in the plaint.
 6. The 4th defendant filed an Amended Statement of Defence and Counter Claim dated 3rd February, 2017. In his Amended Statement of Defence, the 4th defendant averred that he is the bonafide owner of the suit land which was allocated to him in the year 1979. However, the plaintiff is in possession vide trespass and has not developed it in any way except he uses the same for cattle grazing and subsistence farming. The 4th defendant averred that the plaintiff cannot be the owner by virtue of being in possession. The 4th defendant denied that the appeal to the Minister was irregular and illegal and if that was the case, then the plaintiff would have appealed to the court which he did not. The 4th defendant denied the contents of paragraph 12, 14 and 15 of the plaint since the issues raised therein are misleading and have no legal basis.
 7. In his counter claim, the 4th defendant reiterates that he is the registered owner of the suit land and that in the year 1992 he left due to tribal clashes. He averred that he returned in the year 1993 and found the plaintiff in occupation and having interfered with the suit land by cutting down trees, cultivating and cattle grazing. The 4th defendant claims mesne profits as 1.96 Ha income of Kshs. 6,000/= from 1992 (6000*25) being Kshs. 150,000/=.
 8. The 4th defendant is seeking the following:-
 - i) An order permanently restraining the plaintiff, his servants and agents from interfering with Cismara/Kojonga/ 1056 in any way.
 - ii) An order evicting the defendant from L.R. Cismara/Kojonga/ 1056.



- iii) Mesne profits of Kshs. 150,000/=
 - iv) Costs and interest.
9. The plaintiff filed a reply to the 4th defendant's Statement of Defence and reply to Counter Claim dated 27th March, 2017. The plaintiff reiterated the contents of the plaint and further averred that a visit to the suit land confirms that the plaintiff has not only developed the suit land but has lived on the same for more than 20 years and by virtue of being in possession, he was in the process of having the suit land registered in his name only to discover that a title deed had been issued to the 4th defendant.
 10. The plaintiff further averred that the 4th defendant's allegations that he did not appeal the decision of the Minister is baseless and frivolous as the existence of this suit is an indication that the plaintiff was dissatisfied with the decision of the minister and that he has clearly shown the events of his intention to fight the decision of the Minister.
 11. In defence to the counter claim, the plaintiff denies the same in its entirety.
 12. The matter proceeded for hearing on 1st February, 2018. The plaintiff testified that he has lived on the suit land ever since he was born and that he lives there with his children. He also testified that he does not know why the 4th defendant was allocated his parcel of land and that it was not true that he was evicted during the 1992 clashes since he is not known in the area. That a meeting was held between the plaintiff, 4th defendant and the officials of the adjudication section and it was determined that the suit land belonged to the plaintiff. He produced Exhibit 1 (a) (b) and (c) being the decision of the meeting, and the receipt of payment as exhibit number 2 and an official search as exhibit number 3. He also produced an application for caution as exhibit number 4, a letter from the area chief as exhibit number 5 and photographs as exhibit number 6.
 13. On cross examination, the plaintiff testified that the suit land was within Oletepesi Olaimutai Group Ranch but was later taken to Kojonga Group Ranch and that the Group Ranch was dissolved a long time ago and could not recall the exact time. He testified that he was allocated the suit land by the committee in the year 1979 by the officials who were Katinu Ole Nkukuu, Ole Silatu and Ole Purkima. He realized later that the suit land was allocated to the 4th defendant and registered with Kojonga Group Ranch when the management changed. That the suit land was allocated to the 4th defendant by the another management committee and it was then that he reported the matter to the adjudication committee. The first meeting was chaired by Samson and the 4th defendant was present in the meeting. That in the second meeting, he complained again and the decision was found to be in his favour. He testified that he went through the entire process and the suit land was found to belong to him. He further testified that he does not know whether the appeal to the Minister was determined.
 14. It is worth noting that during the hearing, the second plaintiff's witness was present/seated in court. Nevertheless, I will proceed to review his evidence. The second plaintiff's witness Sankale Ole Islet Lokua (PW2), testified that he is a neighbour to the Plaintiff and was a member of the committee led by Samson Karoki and according to their records, the suit land belongs to the plaintiff. On cross examination, he testified that there was a major committee that comprised Ntulele and Kojonga Group Ranches and that initially it was one but later it was subdivided into two and the plaintiff was allocated land by the committee led by Samson Karoki. That the 4th defendant obtained title to the land but he was not present when the objection was heard.
 15. Hearing proceeded further on 10th May, 2018. The plaintiff's third witness Salash Ole Matinda Silau (PW3), testified that he was among those who allocated land to the plaintiff as the vice chairman and Katimo Ole Nzukuru as the chairman and present at the time were 15 other committee members.



This took place about 35 years ago. That demarcation began at the time of subdivision and the second committee called the surveyors. He further testified that he was the acting chairman in the second committee as the chairman had passed on and he allocated the plaintiff the suit land having been born and raised in the suit land. The objection to the suit land was filed during the tenure of the second committee. There was a third committee which led to mistake as to how land was demarcated.

16. The matter further proceeded for defence hearing on 5th October, 2021 with the 1st defendant's witness-Tom Chepkwesi (DW1), the Land Registrar, Narok. He relied on his statement dated 19th July, 2021 and produced exhibits marked 1-6. On cross examination, he testified that the first defence exhibit marked number one showed that the suit land was first registered in the name of the plaintiff and that when a person is listed as a first proprietor of the land, that is taken as proper registration subject to other matters that may arise under the *Land Adjudication Act*. He further testified that there was a dispute regarding the suit land and the outcome of the appeal to the Minister determined that the suit land be awarded to the 4th defendant and it was a result of the minister's decision that a certificate of title was awarded to the 4th defendant.
17. Further defence hearing proceeded on 25th October, 2021 with the 3rd defendant's witness-Benjamin Mwangi (DW2), the District Land Adjudication and Settlement Officer, Narok who relied on his statement dated 19th July, 2021 and the list of documents dated 1st July, 2021. On cross examination, he testified that the record of the adjudication process indicates case number 337/ 2009 in which the defendant was the appellant and the plaintiff was the respondent. He testified that he does not know if the officer who heard the appeal had visited the suit land. He further testified that there was an appeal which was heard by the Deputy County Commissioner and determined. He did not produce the objection proceedings. On further cross examination, he testified that one ought to have right over land in adjudication process through inheritance and/ or succession. That according to their records, the 4th defendant was allocated the suit land after appeal. That prior to that, an objection was filed in which the 4th defendant lost and the suit land was recorded in favour of the plaintiff. It followed that the matter then went to the arbitration board which determined in favour of the plaintiff and his name was recorded in the adjudication record which is signed by the chairman of the committee and demarcation officer. That the chairman takes responsibility on behalf of the committee. In this case, the judgment of the appeal shows that Olingashar Punyua as the chairman of the committee and when the appeal is heard the record is sent to the Chief Land Registrar to issue a title deed. In this case, the green card confirms that the 4th defendant is the rightful owner.
18. The 4th defendant testified that he is a farmer and a businessman and resides in Nairagie Enkarre. He testified that when the suit land was allocated to him, the plaintiff trespassed and claimed ownership. He relied on his statements dated 10th March, 2015 and 4th April, 2017 and a supplementary list of documents dated 3rd February, 2017. He further testified that he was shown the suit land on the ground by the committee but the plaintiff was not present when this was done. He further testified that he has never resided on the suit land and that he left the area when the tribal clashes occurred in the year 1992. He participated in the objection proceedings and appealed the decision to the Minister in which he succeeded and obtained a title to the suit land. He later issued the plaintiff with a notice to vacate which was never heeded to.
19. On cross examination, the 4th defendant stated that he was born in the year 1942 in Ngong and his relatives reside in Ngong. He testified that in his appeal he stated that he resides in Sintakara which is within Nairagie Enkarre. That Ntulele Group Ranch was subdivided into seven large parcels namely Ole Tepesi, Olchorro Ole Punyua, Lenkome, Sirario, Nkorinito, Ildamat and Ntulele Centre. Further, that Kojonga was not part of Ntulele Group Ranch. He further testified that the suit land was allocated to him by the second Group Ranch's Committee in 1979 and that the committee gave land to him in



- the year 1987. Further that there were minutes of the committee of the meeting held on 4th October, 1980. That the old committee was chaired by Partimoi Ole Nkuku and the latter committee only pointed out boundaries to the members. That it was the second committee that allocated the suit land to him and that he wrote a letter to the committee requesting to be allocated land in 1986. He also applied for land in 1988 but has not developed the land since. According to him, the judgment of the appeal, showed that he had lived on the land for many years. He testified that at one time, he was requested to transport people to Narok town to be allocated land and that all along he has participated in the objection proceedings. He testified that when the suit land was allocated to him, he was a resident of Sintakara and was only allocated one parcel of land at Kojonga.
20. The 4th defendant's third witness Wuantai Ole Shonko(DW3), testified that he was a committee member of Olgashar Ole Punyua and that together with other committee members, they allocated land to the 4th defendant in an area known as Enkosho Ronkai in Kojonga which borders the plaintiff. He was a member of the first and the second committees. He went on to say that the first committee did not allocate the entire parcels of land to members and some parcels remain unallocated. He further testified that he knew the 4th defendant at Nairagie Enkarre and he does not know where he was born and that the land in Kojonga was allocated to residents and those who made requests and that the 4th defendant made a request to be allocated land once. Further that the 4th defendant has never resided on the suit land and neither has he cultivated the same.
 21. The 4th defendant's fourth witness, Stanley Ole Nkamasiani(DW4), testified that the 4th defendant was allocated land by the committee of the group ranch and he later vacated after tribal clashes. On cross examination, he testified that he does not come from Kojonga but was present when the 4th defendant was allocated land by the committee led by Olgashar sometime in the 1990s' although he could not recall properly. He said that the 4th defendant resided on the suit land until tribal clashes erupted in 1993. He further testified that there is a road that marks the boundary of the suit land. He further testified that the plaintiff is one of the 4th defendant's neighbours' and that the plaintiff's land is separated from the 4th defendant's land by a road and that when he visited the suit land, he found that the plaintiff was cultivating and grazing livestock on the same.
 22. The 4th defendant fifth witness-Shakutiti Ole Koyei(DW5), testified that the suit land is in Olosiro area which was shown to him by the 4th defendant. He further testified that he has never lived in Olosiro area but he knows the committee that allocated land to the 4th defendant that was led by Ngashao Ole Punyua. He could not remember the year when the allocation took place and that the plaintiff is a neighbour to the 4th defendant and there exists a boundary that is marked by trees. He further testified that the 4th defendant has never lived on the suit land neither has he made any construction thereon.
 23. The plaintiff filed written submissions dated 19th January, 2022. The plaintiff's issue for determination is, who is the rightful owner of CIS Mara/Kojonga/ 1056? The plaintiff submitted that he was born in Kojonga area and has lived there since. He also has children who live on the suit land. He engages in crop farming and livestock rearing for a living. That trouble began when the second committee came in and fraudulently allocated land to the 4th defendant. The plaintiff further submitted that the evidence he submitted in court was not rebutted by the defendants. It was also the plaintiff's submission that the evidence of the 4th defendant was dishonest as he could not clearly demonstrate how he acquired ownership of the land. The plaintiff submits that the 4th defendant is currently holding title to the suit land owing to fruits of corruption. The plaintiff relied on the case of *Arthi Highway Developers Limited vs West End Butchery Limited & Others* Civil Appeal No. 246 of 2013 and *Munyu Maina versus Hiram Gathika Maina*, Civil Appeal Number 239 of 2009.



24. The 1st, 2nd and 3rd Defendants filed written submissions dated 18th February, 2022. The 2nd defendant raised 3 issues for determination: -
- a) Whether the 1st- 3rd Defendants are liable for any fraudulent activities.
 - b) Whether the Plaintiff has proved her case.
 - c) Whether the Plaintiff is entitled to the orders sought.
25. The 2nd defendant submitted that it is the responsibility of the 3rd defendant to prepare adjudication records upon which the 1st defendant shall cause the title to be registered. That the actions of suing the 1st defendant is baseless as it relied on the documents provided by the 3rd defendant to issue a certificate of title. The 2nd defendant submitted that the plaintiff had to substantially link and trace elements of fraud and that the law places a higher burden on anyone relying on a claim of fraud to go an extra mile of adducing evidence that will suffice to link the allegation of fraud to any party. The 2nd defendant relied on the case of *R.G Patel versus Lalji Makanji* (1957) E.A 314-317 and *Alfred Sagero Omweri versus Kennedy Omweri Ondieki* [2015] eKLR.
26. The 2nd defendant further submitted that the plaintiff has failed to provide evidence before the court to prove his case against the 1st to the 3rd defendants as is required in section 107 of the *Evidence Act*. The 2nd defendant relied on the case of *Ndege Kabibi Kimanga & Another versus Karinga Gaciani & 12 Others* [2016] and *Ndolo versus Ndolo* (2008)1 KLR (G&F)742.
27. The 4th defendant filed written submissions dated 14th December, 2021. The 4th defendant submits that as per Section 29 (1) of the *Land Adjudication Act*, the Minister's decision is an administrative action and the plaintiff should have approached this court by way of Judicial Review. As it is, the suit is misconceived and without any foundation. The 4th defendant relied on the case of *Onesmus Daniel Masukumbo & Others versus Augustine Baya Thotho* [2019] eKLR. It is his submission that the plaintiff took 2 years and 2 months to lodge this suit from the Minister's decision which leaves the question whether the suit was filed within reasonable time.
28. The 4th defendant further submitted that the issue of fraud has neither been properly pleaded nor strictly proved by the plaintiff as was held in *Kinyanjui Kamau versus George Kamau* [2015] eKLR. The 2nd defendant further submitted that the plaintiff appropriated himself land belonging to the 4th defendant denying him the right to enjoy so contrary to Article 40 (1) (a)(b) of *the Constitution* and it is clear that the plaintiff cannot purport to question the Minister's decision simply because it was contrary to his expectations. For the above reasons the plaintiff should be evicted from the suit land since he is in illegal possession.
29. I have carefully analysed the pleadings filed by the parties and considered the written submissions thereof. In my view, the issues for determination are as follows: -
- 1) Whether the 4th Defendant acquired title to the suit land by fraudulent means.
 - 2) Whether the Plaintiff is entitled to the orders sought in the plaint.
 3. Who is entitled to costs.
30. The plaintiff in his evidence stated that he was born and has lived on the suit land since birth. It was his evidence that he was allocated the suit land by Kojonga Adjudication Section Committee in the year 1979. He filed an objection with Kojonga Adjudication Section Committee dated 24th March, 1992 and the suit land was awarded in his favour and the 4th defendant was granted 14 days right of appeal. An observation of the decision of the committee found that the case was heard in the absence



of the 4th defendant who refused to sign summons without any reasons. It followed thereafter that on 10th June, 1997 the case went before the arbitration board where the 4th defendant was the Plaintiff. The arbitration board dismissed the Plaintiff and made a finding that the 4th defendant acquired the suit land through corruption by the committee. An appeal to the Deputy County Commissioner was heard and a decision was found in favour of the 4th defendant. I note that from the Judgment, the 4th defendant appeared to have lived on the suit land for many years and made several developments. The 4th defendant also appeared to support his claims by giving documentary evidence proving that he was indeed allocated land and has lived thereon. Section 29 (1) of the [Land Adjudication Act](#) provides that 'Any person aggrieved by the determination of an objection under section 26 of this act may, within sixty days after the date of determination, appeal against the determination...' Going by the above provisions, and based on the timelines stipulated by law to appeal an objection, the 4th defendant lost the opportunity within the year 1992. I will not dwell on this further.

31. The 4th defendant evidence, in my view was marred with contradictions. He testified that land was first allocated to him in the year 1979. Later, he informed the court that he applied for allocation of land in the year 1986. It was his evidence that he has never lived on the land neither has he cultivated on the same. It was also his evidence that based on the decision of the Minister, he had lived on the land for many years and made developments thereon which appeared to him as a shock. The 4th defendant's witnesses also gave contradicting evidence both in court and the statements they adopted in court dated 6th June, 2017. The 4th defendant's third witness, testified that the 4th defendant has never lived on the suit land and neither has he cultivated.
32. The 4th defendant's fourth witness, testified that the 4th defendant lived on the suit land until tribal clashes erupted in 1993 and there is a road that marks the boundary between the Plaintiff's land and the 4th defendant's land. The 4th defendant's fifth witness testified that the 4th defendant has never lived on the suit land and that the boundary is marked by trees. From the foregoing it is clear that the 4th defendant is not truthful as to how he acquired title to the suit land and neither does know where his land is located.
33. The [Land Registration Act](#) does not define fraud. The *Black's Law Dictionary* defines fraud thus: -

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’.
34. Fraud is essentially a common law tort of deceit and its essentials are: -
 - a) false representation of an existing fact;
 - b) with the intention that the other party should act upon it;
 - c) the other party did act on it; and
 - d) the party suffered damage.



35. In the case of *Koinange & 13 Others v. Charles Karuga Koinange* 1986 KLR at page 23 Justice Amin citing the case of *Ratilal Patel Makanji* (1957) EA 314 observed as follows:

“When fraud is alleged by the plaintiffs, the onus is on the plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a balance of probabilities is required”.

36. Fraud would, therefore, consist of deceitful actions which may be made through either positive assertions or concealment of facts. It was the Plaintiff's evidence that he was in the process of obtaining title to land and made application for the same. He produced exhibit 2 as a copy of receipt of payment. The Plaintiff's evidence was not rebutted.

37. It also appears that there was misrepresentation of facts in the Appeal to the Minister because from the 4th defendant's testimony he appeared shocked that the decision of the Minister found that he had lived on the suit land for many years and made developments thereon which now resulted to a change in the records of the suit land at the Land Registrar's office.

38. Section 26 of the *Land Registration Act* states as follows: -

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

39. I am of the view that the plaintiff has, on a balance that is more than a balance of probabilities proved that there was fraud on the part of the 3rd and 4th defendants.

40. Arising from the above, the Plaint dated 19th January, 2015 partially succeeds in terms of prayer item (a) of the Plaint. The Defence and Counter Claim dated 3rd February, 2017 is dismissed with costs. In the circumstances, I hereby proceed to enter judgement for the plaintiff and against the defendants jointly and severally as hereunder.

(a) A declaration that the Land Reference Number CIS Mara/Kojonga/ 1056 is wholly owned by the Plaintiff and he holds true title to the property, and that the 4th Defendant's titles and claims to the property are fraudulent, null and void and bereft of any authenticity or substance and the 1st defendant be ordered to cancel the same and rectify the register to read the plaintiff as the registered owner.



(b) costs of the suit to be borne by the 3rd and 4th defendants.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 18TH MAY, 2022.

MBOGO C.G

JUDGE

18/5/2022

In the presence of: -

CA: Timothy Chuma

