



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mbisi v Sirona & 5 others (Environment & Land Case 27 of 2019)
[2022] KEELC 4751 (KLR) (25 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 4751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 27 OF 2019**

**JM ONYANGO, J
AUGUST 25, 2022**

BETWEEN

DAVID NYAGERO MBISI PLAINTIFF

AND

ZACHARY KIRERA SIRONGA 1ST DEFENDANT

SILVESTER OKARI MAIKO 2ND DEFENDANT

FLORENCE KEMUNTO MOTARI 3RD DEFENDANT

THE COUNTY LAND REGISTRAR KISII 4TH DEFENDANT

THE COUNTY SURVEYOR 5TH DEFENDANT

THE ATTORNEY GENERAL 6TH DEFENDANT

JUDGMENT

1. The plaintiff filed suit against the defendants *vide* a plaint dated August 13, 2019 seeking the following reliefs:
 - a) An order of this honourable court cancelling and/or revoking the registration of LR No West Kitutu/Bogusero/1286 in the name Zachary Kirera Sirona, the 1st defendant herein and an order of cancellation and/or revocation of all the sub-divisions and the new or resultant numbers and all the transfers.
 - b) An order restoring LR No West Kitutu/Bogusero/1286 in the name of Mbisi Matunda.
 - c) An order of eviction evicting all the persons and peoples (*sic*) trespassing, occupying, possessing and using the original deceased's land title number LR No West Kitutu/Bogusero/1286.



- d) A permanent injunction permanently restraining the defendants by themselves, their agents, servants, assignees and/or family members from in any way or manner whatsoever trespassing or entering onto or remaining on the suit land.
 - e) Costs of this suit.
2. Together with the plaint, the plaintiff filed an application for injunction to restrain the defendants from interfering with the suit property. Upon being served with the plaint and application, the 1st and 2nd defendants filed grounds of opposition in respect of the application through the firm of Bigogo Onderi & Company Advocates. However, they neither entered appearance nor filed any defence. The other defendants did not file any documents.
 3. By an application dated February 15, 2021 the firm of Bigogo Onderi & Company Advocates filed an application to cease acting for the defendants on the grounds that they had been unable to obtain their clients' instructions. The said application was granted and the plaintiff was directed to serve the 1st and 2nd defendants personally.
 4. After the plaintiff had complied with pre-trial directions, the case was set down for hearing on May 16, 2022. The plaintiff's counsel informed the court that he had served the defendants and that he had filed an affidavit of service. Upon confirming that the defendants had been served, the court proceeded with the hearing *ex-parte*.

Plaintiff's Case

5. The plaintiff testified as the sole witness. He relied on his witness statement dated August 23, 2019 as his evidence and produced the 34 documents in his list of documents as his exhibits.
6. It was his testimony that his father who was known as Mbisi Matunda died in 1984 as per the death certificate (plaintiff's exhibit 15). He subsequently obtained a grant of letters of administration ad litem on July 19, 2017. He stated that his late father was the registered proprietor of land parcel number West Kitutu/Bogusero/1286. He however discovered that the 1st defendant had been registered as the owner of the suit property on July 28, 2011. He stated that when he obtained the certificate of official search, he discovered that the 1st defendant had been registered as the owner of the suit property during the lifetime of the plaintiff's father. The said registration was effected pursuant to the grant issued in respect of the estate of Mildred Asundi Abade. The 1st defendant therefore used a wrong grant to obtain registration in his name. He subsequently sub-divided the suit property giving rise to parcel numbers 6448 and 6449 in the names of Silvester Okari Maiko.
7. The said Silvester Okari later transferred parcel number 6449 to Florence Kemunto Motari (3rd defendant). It was the plaintiff's contention that Silvester transferred the suit property to the 3rd defendant fraudulently. He told the court that the 2nd defendant had constructed a house on the suit property but the 1st and 3rd defendants were only using it for farming. With that evidence, the plaintiff closed his case.
8. After the plaintiff closed his case the court directed the plaintiff's counsel to file his written submissions and the same were filed on July 8, 2022.

Issues For Determination

9. Having considered the pleadings, evidence on record and the plaintiff's submissions, the following issues arise for determination:



- i. Whether the 1st and 2nd defendants were unlawfully registered as the owners of the suit property.
- ii. Whether the plaintiff is entitled to the reliefs sought.

Analysis And Determination

10. It is the plaintiff's case that the defendants were unlawfully registered as the owners of the resultant titles from the sub-division of land parcel number West Kitutu/Bogusero/1286 as the said sub-division and transfer occurred during the lifetime of the Mbisi Matunda (the plaintiff's father), who was then the registered owner as at July 28, 2011 without his consent. The said transfer was effected using a fake grant in respect of the estate of Mildred Asundi Abade who died on October 22, 1996. According to the exhibits presented by the plaintiff, the said Mildred Asundi Abade was the registered owner of land parcels No Suna East/wasweta 1/4345 and 2796 and not West Kitutu/Bogusero/1286 which is the subject of this suit. It is therefore clear that the use of the grant relating to the estate of Mildred Asundi Abade by the 1st, 2nd and 3rd defendants to sub-divide and transfer land parcel number West Kitutu/bogusero/1286 was illegal and unprocedural.
11. Section 26 of the [Land Registration Act](#) No 12 of 2012 provides as follows:

“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.
12. Section 26 above, does provide at subsection (1) that the certificate of title is to be taken as *prima facie* evidence of proprietorship, but it will be seen that such title, is subject to challenge if, the same was acquired through fraud or misrepresentation to which the party is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
13. In the case of [Zacharia Wambugu Gathimu & another v John Ndungu Maina](#) [2019] eKLR it was held that:

“.....As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

163. The import of section 26 of the [Land Registration Act](#) was considered in the case of [Elijah Makeri Nyangwra v Stephen Mungai Njuguna & another](#) [2013] eKLR where



Munyao J, answered the question as to whether title is impeachable under section 26 (1) (b) of the said *Act* as follows;

"First, it needs to be appreciated that for section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

14. In the circumstances of this case, it is apparent to me that the title herein was acquired illegally, unprocedurally or through a corrupt scheme and is therefore invalid.
15. Having held that the sub-division and transfer of parcel number West Kitutu/Bogusero/1286 was illegal and unprocedural, it follows that the resultant titles are illegal and unlawful and therefore they cannot stand.
16. In view of the foregoing, it is my finding that the plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the plaintiff and make the following final orders:
 - a) An order is hereby issued cancelling and/or revoking the registration of LR No West Kitutu/Bogusero/1286 or its resultant titles in the name Zachary Kirera Sironga, the 1st defendant herein.
 - b) An order is hereby issued cancelling and revoking all the sub-divisions and the new or resultant numbers and all the transfers emanating from the illegal sub-division in (a) above.
 - c) An order is hereby issued restoring LR No West Kitutu/Bogusero/1286 in the name of Mbisi Matunda (deceased).
 - d) The defendants are hereby ordered to vacate the parcels of land resulting from the illegal sub-division of land title number LR No West Kitutu/Bogusero/1286.
 - e) A permanent injunction is hereby issued permanently restraining the defendants by themselves, their agents, servants, assignees and/or family members from in any way or manner whatsoever trespassing or entering onto or remaining on the suit land.
 - f) The defendants shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF AUGUST, 2022.

J.M ONYANGO

JUDGE

