



Mungai (Suing as the Legal Representative of the Estate of Peter Mungai Muthami – Deceased) v Okong’o & 3 others (Environment & Land Case 264 of 2016) [2022] KEELC 3511 (KLR) (17 August 2022) (Judgment)

Neutral citation: [2022] KEELC 3511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 264 OF 2016
FM NJOROGE, J
AUGUST 17, 2022**

BETWEEN

**JOYCE MWENDE MUNGAI PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER
MUNGAI MUTHAMI – DECEASED**

AND

**ISAIAH OTIENO OKONG’O 1ST DEFENDANT
MARY WANJIRU MUTHINJI 2ND DEFENDANT
MARY NYAMBURA MBUGUA 3RD DEFENDANT
ATTORNEY GENERAL (SUED ON BEHALF OF DISTRICT LAND
REGISTRAR NAKURU) 4TH DEFENDANT**

JUDGMENT

1. The plaintiff commenced the instant suit by way of a plaint dated 19/7/2016 seeking the following prayers:
 - a. A declaration that Peter Mungai Muthami (Deceased) was the lawful registered owner of Title Number Miti Mingi/Mbaruk Block 3/14 (Barut).
 - b. The Land Register at Nakuru Land Registry be rectified to remove the names of the 1st and 2nd defendants as the registered owners of Title Number Miti Mingi/Mbaruk Block 3/14 (Barut) and replace them with the name of the Plaintiff as Administrator of the Estate of Peter Mungai Muthami (Deceased).



- c. The Title Deed issued to the 1st and 2nd defendants on 24/12/2014 be cancelled and a fresh Title Deed be issued in the name of Peter Mungai Muthami (Deceased).
 - d. An order of eviction of the defendants, their agents, servants, employees, spouses, children, assignees etc. from Title Number Miti Mingi/Mbaruk Block 3/14 (Barut).
 - e. A permanent injunction restraining the defendants by themselves, their agents, servants, assignees etc. from selling, charging, entering into subdividing, cultivating, leasing out or in any other way interfering with Title Number Miti Mingi/Mbaruk Block 3/14 (Barut).
 - f. Costs.
2. The plaintiff's case is that she is the administrator intestate of the estate of her late husband who was registered as proprietor of Title Number Miti Mingi/Mbaruk Block 3/14 (Barut) (hereinafter "the suit land") on 28/1/1992. The deceased and the plaintiff lived together on the suit land and after the demise of the husband the plaintiff continued living thereon. The grant of representation to his estate was confirmed and the title registered in the names of his sons, namely, John Muthami Mungai, James Kibaru Mungai Reuben Njenga Mungai and Samuel Ndungu Mungai in equal shares; between 2011 and 2015 the records for the suit land were inaccessible at the Nakuru lands registry. The plaintiff alleges that the 1st, 2nd and 4th defendants fraudulently had the suit land registered in the names of the 1st and 2nd defendants and that in April 2016 the 3rd defendant trespassed onto the suit land, fenced it and cultivated it hence the instant suit.

Defence of the 3rd defendant.

3. The 3rd defendant filed her defence on 6/2/2017. She averred that she is the registered proprietor of the suit land having purchased it from one Anthony Ngetich Seurey who was formerly entitled to it by virtue of his shareholding in Kalenjin Enterprises Ltd. She further averred that the plaintiff's deceased husband was involved in fraudulent acquisition of documents relating to the suit land. The 3rd defendant further averred that the plaintiff's husband surrendered the share certificates to Anthony Seurey on 31/7/1997 in acknowledgment that the latter was the legitimate owner of the suit land, and that the plaintiff has never been in occupation of the suit land at all. She averred that the suit is misconceived and ought to be struck out.
4. I have perused through the court record and I have not found any memorandum of appearance or defence filed by the 1st, 2nd and 3rd defendants.

Evidence of the parties.

5. The instant suit was heard on 11/2/2021, 24/6/2021 and on 9/2/2022.
6. PW1, was the plaintiff. She adopted her witness statement filed on 19/7/2016. Her evidence followed the contents of the plaint. She stated that her husband who had owned the suit land and had a title deed issued in his name on 30/1/1992, died on 5/6/2009 and the suit property was registered in the names of her 4 sons after the grant of representation to his estate was confirmed. She conducted a search on 11/2/15 and found that the suit land was registered in the names of the 1st and 2nd defendants whom she does not know. She and her husband never resided on the suit land but they used to cultivate it; they at one time rented it out to one James Koech when her husband's health started failing; in 2016 however the 3rd defendant emerged and began cultivating the suit land; at the time of the hearing however, James Koech was in possession under the instruction and on behalf of the plaintiff. The plaintiff averred that she was not aware how the land was transferred to the 1st and 2nd defendant's names.



7. PW2, Elijah Kiplagat Kipkemei Chelaite testified orally and adopted his witness statement dated 20/9/2020. He stated that he was the chairman of Kalenjin Enterprises Ltd; that he has been a member of that firm since 1969; that from 1996 he was elected to join the committee of the company; that in 2002 he was elected director and in 2008 he attained the position of chairman. His further evidence is that the suit property belongs to the deceased who had purchased it from a member, one Sitienei Kiptok. The company stopped selling shares to the public in 1975. He produced a copy of the company register as P. Exh 9. It showed that Sitienei's name is at page 162; that his receipt for shares certificate was serial number was 8062; that he paid Kshs 1000/ and acquired 50 shares valued at Kshs 20/= each; the register was prepared after 1975 when the company had 4413 members. The original land was called Mbaruk Miti Mingi/3 and was about 5000 acres which was purchased from a white man's company by the name of Rhonda Sisal Estates; Kalenjin Enterprises Ltd was however not registered as proprietor, and the government took over the land so as to transfer it to members. It was subdivided between 1987 – 1988. A government surveyor conducted the survey and members paid survey costs and delivered the receipt to the company land allocation committee who would sign it at the back and stamp it. After allocation, a register was made. Thereafter the members would obtain a clearance certificate from the company office and their names would be entered into the company register showing their respective allocations. According to the register the suit land belongs to the deceased and it measures 3.6 acres. A copy of the company allocation register was given to the land registry for purposes of issuance of titles upon presentation of clearance certificates by members. When a member sells his entitlement, his name is crossed out and the buyer's name is inserted into the register and a similar measure is taken in the allocation register at the land registry, but the deceased's name has never been crossed out or altered. According to PW2, the 1st and 2nd defendants were not members of the company as per the company members register. Anthony Seurey was also not a member of the company; his father, Kogo Kiprotich's name however appears on the members' register as having owned 75 shares worth Kshs 1500/= under share certificate no 2636. The witness testified that share certificate number 5026 is fake since membership in Kalenjin Enterprises Ltd never went up to that number. P. Exh 10 shows that Anthony Ngetich Seurey was allocated plot numbers 1780 and 1563.
8. Upon cross-examination by Mr Weche, he retracted his earlier statement and asserted that the land was transferred to name of the company which transferred it to its members; he further stated that the company has a file in which disputes are recorded and that there were disputes that had been resolved internally by the company.
9. PW3, Raymond Gitonga, Nakuru Land Registrar, testified in the case. His evidence is that he has the Kalenjin Enterprises Ltd members' register which shows that the deceased was the allottee of plot number 14. He further stated that upon presentation of a clearance certificate at the land registry by a member, a transfer in the name of the government was prepared and the allottee's name would be entered into the register. He had the transfer to the deceased (P. Exh 11), which was received for registration on 28/1/1992. The deceased was then registered as proprietor as per the extract of the register (P. Exh 12) on 28/1/1992 and the title deed (P. Exh 2) was issued in his name on 30/1/1992. A parcel file containing the original transfer documents and the green card was available at the land registry. He observed that the green card in his registry (P. Exh 13) read that the 1st entry read the "Government of Kenya," the 2nd entry read the 1st defendant's name and the 3rd entry read the 2nd defendant's name, and that the name of the deceased is missing therefrom. However, he stated that as the deceased had been issued with a title deed, a green card must have been issued prior to that title deed. He does not rule out the possibility that there was another green card issued in the land registry. However, he noted that there is no transfer to the 1st or the 2nd defendants in the parcel file.



10. Upon cross-examination he stated that he does not have any company clearance in the deceased's name. After PW3 completed giving his evidence the plaintiff's case was marked closed. The 4th defendant's case was also marked closed.
11. DW1 the 3rd defendant testified in her defence and adopted her witness statement filed on 19/8/2019. Her evidence is that one David showed her the suit land and informed her that was on sale. DW1 asked to meet the owner and he was brought to her by David. He was Anthony Ngetich Seurey. He showed her a receipt from Kalenjin enterprises and a share certificate. Thereafter she visited the offices of Kalenjin enterprises and ascertained that he was the owner. He did not have title. They went to an advocate's firm where DW1 paid Kshs 1,000,000/= out of the agreed Kshs 1,700,000/= purchase price, and it was agreed between them that the balance was to be paid after issuance of title but no title has ever issued to date in that transaction. DW1 took possession of the suit land and ploughed it, cultivated it and planted crops thereon. Soon thereafter, a demand letter from an advocate warned her that the land did not belong to her or to Anthony and she sought Anthony for an explanation. Anthony gave the explanation that someone by the name Peter Mungai Muthami had stolen his documents and taken the suit land for himself, but on 21/6/2012 the issue had been resolved between him and Peter when Peter returned his documents.
12. Upon cross-examination she stated that she had used the suit land for 3 years when she received the plaintiff's advocate's demand letter; that at the time of purchase of the suit land, she believed that there was no dispute as she had been made to believe that Peter had returned all the documents to Anthony. She also stated that she never conducted a search at the land registry before purchase since Anthony had informed her that he did not have any title. Instead she visited the Kalenjin Enterprises offices. She believed that Anthony was a member of Kalenjin Enterprises upon being shown the share certificate (DEXh1) and the receipt. However, when they visited the company offices they were not issued with any letter or a copy of the company members register; she did not know the David Rono mentioned in D. Exh 3, or that by then Peter had passed on. She had paid a further Kshs 500,000/= to the advocate handling the transaction but it was later refunded to her. She did not also know the 1st and 2nd defendants and she came to hear of them in court in the instant suit.
13. After the DW1 completed giving her evidence the cases of the 1st, 2nd and 3rd defendants were marked as closed and the court ordered the filing of submissions. The plaintiff filed her submissions on 5/5/2022, the 4th defendant on 29/3/22 and the 3rd defendant on 30/5/2022.

Determination.

Issues for determination.

14. I have considered the pleadings the evidence and the submissions of the parties. The issues arising for determination in the present suit are as follows:
 - a. Who between the plaintiff and the defendants is the lawful owner of the suit land?
 - b. Who should bear the costs of the suit?
15. Regarding the first issue, it is the case that the 1st and 2nd defendants never defended the suit. Only the 3rd and 4th defendants did.
16. The 3rd defendant has no title deed to the land. She purports to have purchased it from one Anthony whom she never joined to the instant suit. Anthony had shown her a share certificate and claimed the land to be his. By the time of her purchase of the suit land on 20/1/2016, the same was already registered in the name of the deceased, yet she never conducted an official search because she believed



Anthony when he informed her that he had not yet obtained title. It is curious that she would believe that Anthony had no title and at the same time fail to ask for a company clearance certificate in Ngetich's name that would guarantee that she would obtain a title deed upon presentation at the land registry. It is more curious still that none of the share certificates number 2636 and 5026 were in the name of Anthony, the purported seller. Anthony was never summoned to testify to own up to those documents or to admit to have purported to sell the suit land to the 3rd defendant. In this court's view the 3rd defendant's conduct in the transaction between her and Anthony hardly appears to be that of a cautious purchaser; she never carried out sufficient due diligence to establish if the said Anthony was the true owner of the suit land, and further, it is strange that she failed to secure his joinder to the instant suit for any remedy against him despite having shown loss of faith in the transaction by obtaining a partial refund out of court.

17. Anthony was according to the evidence of PW2 merely an heir to his father Kogo Kipngetich, whose name appears on the share certificates vide which the 3rd defendant purported to purchase the suit land; PW2 also testified that Kogo Kiprotich's name however appears on the members' register, and he owned 75 shares worth Kshs 1500/= under share certificate no 2636 and that share certificate number 5026 is fake since the membership of Kalenjin Enterprises Ltd. never rose to that number. That Anthony did not own the shares is evident since his name appears to have been merely inserted and in brackets in the share certificate no 2636 which according to PW2 is the genuine certificate. There was no evidence presented that Anthony was a member of the Company, or that he had the authority of his father, if alive, to sell the shares to the 3rd defendants. There was also no evidence that he had a grant of representation, if his father was deceased, such as would give him capacity to transfer any shares owned by the estate to the 3rd defendant. Lastly, PW2 testified - and supported his statement by producing P. Exh 10 - and showed that Anthony Ngetich Seurey was allocated plot numbers 1780 and 1563, probably by virtue of his heirship to his father's estate. It is possible that these two plots are the only land parcels that he had capacity to transfer to the 3rd defendant, as it is evident from PW2's evidence that he may have somehow had capacity to obtain company clearance certificates in respect thereof.
18. The upshot of the foregoing discussion is that the 3rd defendant has failed to demonstrate that she has any proper claim to title in the suit land. In this court's view, the claim against her in trespass must be upheld.
19. On the other hand, the failure to enter appearance and file defence on the part of the 1st and 2nd defendants made the claims against them respectively go undefended. There is no denial therefore to the plaintiff's allegations of fraud as against the 1st and 2nd defendants. The evidence of the Land Registrar in the instant case was that the title to the plaintiff could not have been issued without a green card having been issued first. The foregoing can only mean that the green card was prepared but it disappeared and the green card bearing the names of the 1st and 2nd defendants was prepared and inserted into the land registry records which is evidence of actual fraud. One glaring gap was however not filled, and this is what gives the 1st and 2nd defendants away: though they were the first natural persons whose names appeared on the green card, there are no documents in the land registry records, not even the company clearance form or government transfers of the suit land to them, evidencing the transfer of the suit land to their names. In this court's view therefore the plaintiff has established her claim of fraud against them to the required legal standard.
20. It is this court's finding that the 4th defendant acquitted himself by providing evidence to the effect that his office still recognises the plaintiff as the proprietor of the suit land despite the proved fraudulent actions of the 1st and 2nd defendants.



21. In conclusion, the plaintiff's claim against the 1st the 2nd and the 3rd defendants has merit. I therefore enter judgment against the 1st, 2nd and 3rd defendants and I issue the following final orders:
- a. A declaration is hereby issued, declaring that the estate of Peter Mungai Muthami (Deceased) is the lawful owner of Title Number Miti Mingi/Mbaruk Block 3/14 (Barut);
 - b. The Land Registrar shall rectify the land register at the Nakuru Land Registry to expunge the names of the 1st and 2nd defendants from the land register where they are purportedly recorded as the registered owners of Title Number Miti Mingi/Mbaruk Block 3/14 (Barut);
 - c. The Land Registrar shall rectify the land register by reinstating the name of the Plaintiff as Administrator of the Estate of Peter Mungai Muthami (Deceased) as the registered proprietor.
 - d. The Title Deed purportedly issued to the 1st and 2nd Defendants on 24/12/2014 is hereby cancelled and a fresh Title Deed shall be issued by the Land Registrar in the name of the Administrator on behalf of the estate of Peter Mungai Muthami (Deceased).
 - e. The 1st, 2nd and 3rd defendants, their agents, servants, employees, spouses, children, assignees shall remove themselves from from Title Number Miti Mingi/Mbaruk Block 3/14 (Barut) forthwith and in default they shall be forcibly evicted therefrom;
 - f. A permanent injunction is hereby issued restraining the 1st 2nd and 3rd Defendants by themselves, their agents, servants, or assignees from in any way interfering with the land comprised in Title Number Miti Mingi/Mbaruk Block 3/14 (Barut).
 - g. Costs of the instant suit of the plaintiff and of the 4th defendant shall be borne by the 1st, 2nd and 3rd defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 17TH DAY OF AUGUST, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

