



**Kiragu & 8 others v Nyere & 6 others (Environment & Land Case
111 of 2016) [2022] KEELC 13702 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 111 OF 2016**

**M SILA, J
SEPTEMBER 28, 2022**

BETWEEN

**SUSAN WANGECHI KIRAGU 1ST PLAINTIFF
ALLY ABDI TIFOW 2ND PLAINTIFF
GITAU GIKONYO 3RD PLAINTIFF
GEORGE NDUNGU GITAU 4TH PLAINTIFF
WARINGA NJONJO 5TH PLAINTIFF
CHRISTOPHER GITHAIGA 6TH PLAINTIFF
MUCUNGWA LANDS LIMITED 7TH PLAINTIFF
HEWA BORA LIMITED 8TH PLAINTIFF
SANDY CREEK HOLDINGS LIMITED 9TH PLAINTIFF**

AND

**SHABAN SALIM NYERE 1ST DEFENDANT
ALI ZUBERI MWANYUMBA 2ND DEFENDANT
SWALE ELEFU 3RD DEFENDANT
MAHSOUD OMAR NYERE 4TH DEFENDANT
OMAR JUMA MAHSOUD 5TH DEFENDANT
MAHSOUD JUMA 6TH DEFENDANT
JUMA MOHAMED OMAR 7TH DEFENDANT**



JUDGMENT

(Suit by plaintiffs seeking to have the defendants restrained from their parcels of land; plaintiffs having purchased land from original allottees in a settlement scheme; defendants claiming that the plaintiffs are strangers and do not know how they got title and generally complaining that land was not properly distributed within the scheme; plaintiffs having titles to the parcels of land which must be respected; no bar to any person to purchase land in any part of the country; no suit by defendants to contest the manner in which land within the scheme was allotted; no counterclaim by defendants to challenge the titles held by the plaintiffs; plaintiffs the ones with proprietary rights over the suit properties; defendants restrained from the parcels of land and those in possession ordered to vacate)

A. Introduction and pleadings

1. This suit was commenced through a plaint which was filed on May 2016. The plaintiffs plead to be the registered owners of various parcels of land as follows :-
 - 1st plaintiff (Susan Wangechi Kiragu) – Kwale/Ramisi Phase II SS/241 and 966.
 - 2nd plaintiff (Ally Abdi Tifow) – Kwale/Ramisi Phase II SS/ 965.
 - 3rd plaintiff (Gitau Gikonyo) – Kwale/Ramisi Phase II SS/947, 948, 962, 964, 967, 970.
 - 4th plaintiff (George Ndungu Gitau) – Kwale/Ramisi Phase II SS/968 and 971.
 - 5th plaintiff (Waringa Njonjo) – Kwale/Ramisi Phase II SS/955.
 - 6th plaintiff (Christopher Githaiga) – Kwale/Ramisi Phase II SS/956, 957, 958, and 959.
 - 7th plaintiff (Mucungwa Lands Ltd) – Kwale/Ramisi Phase II SS/888.
 - 8th plaintiff (Hewa Bora Limited) – Kwale/Ramisi Phase II SS/969.
 - 9th plaintiff (Sandy Creek Holdings Ltd) – Kwale/Ramisi Phase II SS/ 153, 246, 883, 949, 950, 951, 953, 954 and 960.
2. It is pleaded that the defendants are neighbours living in the locality of the suit properties and who usually trespass into them and claim that the plaintiffs' properties belong to them. It is also pleaded that in the year 2015, they removed beacons placed by the plaintiffs. The plaintiffs believe that the defendants want to cause endless violence so that they can unlawfully settle on the plaintiffs' land as squatters and thereafter claim ownership of the same. In the suit, the plaintiffs wish to have orders of a declaration that they are the lawful registered proprietors of the suit properties; a declaration that the defendants are trespassers on the plaintiffs' land; general damages for trespass and destruction of beacons; a permanent injunction to restrain the defendants from the suit properties; costs and any further relief that the court will deem fit to grant.
3. The defendants filed defence where they pleaded that they are residents of Kinondo Ramisi Phase II A Settlement Scheme and they averred that they were brought up here. They stated that the plaintiffs are strangers and they do not know how they obtained title deeds. They pleaded that after demarcation, the plots were reallocated to them and yet title deeds were issued to the plaintiffs. They asked that the plaintiffs' suit be dismissed with costs and in the alternative the court to order that the defendants are entitled to set off for services rendered and therefore owes the plaintiff no money. I must confess that I have not understood this last pleading of the defendants.



4. The matter was heard and reserved for judgment on 9 March 2022. However, before the judgment could be delivered, there was filed an application by 6 persons, being Peter Kirimi Nyaga, Susan Wanjiru Gachungu, Peninah Wambura Mwoya, Eunice Wanjiku Mwangi, Palm Women Group Limited and Equity Bank Limited, seeking that the proceedings be set aside and they be joined to this suit, and that they be heard before judgment could be delivered. The first four applicants claimed to be entitled to ownership of the plots Kwale/Ramisi Phase II SS/1828, 1829 and 1830, which were said to be subdivisions of the Plot Kwale/Ramisi Phase II SS/958 claimed in this suit by the 6th plaintiff, whereas the 5th applicant, Palm Women Group Limited, claimed to own the Plot Kwale/Ramisi Phase II SS/957, with the 6th applicant, Equity Bank Limited, being chargee. This Plot No 957 is also in the plaint as being owned by the 6th plaintiff. I heard that application and delivered ruling on 21 July 2022. In that ruling, I held that it would be disproportionate to set aside the entire proceedings due to an interest in two of the 27 plots in dispute herein. It was my view that it would serve the interests of justice if I severed the plots Nos. 957 and 958 from this suit (since there was a separate dispute of ownership over it in another case between the applicants and the 6th plaintiff being Kwale CMCC No E003 of 2022) and only pronounce myself to the other remaining plots. For the avoidance of doubt, the judgment herein does not touch on the Plots Nos. 957 and 958.

B. Evidence of the parties

5. PW-1 was John Jeremiah Musyoka who is a surveyor. He gave his evidence before my predecessor, Omollo J. He mentioned that he was relying on a witness statement but I have not seen any witness statement in the file. I can however see in cross-examination that he testified that the suit properties were not occupied and that his role was to establish the boundaries. He did not know where the defendants live and did not know how long they have been on site.
6. PW-2 was Christopher Githaiga the 6th plaintiff. He had a witness statement which he relied on. He mentioned that he was giving evidence on his own behalf and on behalf of the 1st – 3rd, 5th, 7th and 9th defendants. He testified that the plaintiffs are the registered and rightful owners of the suit lands having purchased them from the previous owners. He stated that the defendants are neighbours living within the locality and that they usually trespass on their properties. He stated that on three separate occasions they instructed surveyors to place beacons on their land but the defendants caused the removal of the beacons on all three instances, occasioning them loss and denying them access to their properties. He stated that they requested the District Land Adjudication and Settlement Office in Kwale/Msambweni to re-establish the beacons and the process was carried out. He is apprehensive that unless restrained the defendants will remove and destroy the beacons that have been replaced. He also stated that there is history of skirmishes in the area and they have experienced violence whilst visiting the properties which violence is instigated by the defendants. They are unable to erect boundary fences without protection. Cross-examined, he inter alia stated that they purchased the plots from the individuals who had been allotted them. They purchased the plots in the year 2008. They proceeded to the Land Control Board and to the District Land Settlement Office where they did a letter to be issued with titles. They consequently obtained titles in the year 2013. He denied that the land is the ancestral land of the defendants. Re-examined, he stated that he did not physically witness the beacons being removed. Neither has he seen anyone squatting on the properties and the defendants do not live on the land.
7. PW-3 was George Ndungu Gitau. He testified that he owns the Plots No 971 and 968 which were sold to him in the year 2015 by one Christopher Nottingham Githaiga (6th plaintiff). He went to see the plots on the ground and there was skirmish with people from around. He was shown the beacons but when he went back he found them removed. Twice, he got a surveyor to put them back again. Cross-examined, he testified that the transaction to purchase was done in Nairobi as the seller (6th plaintiff)



did not live on the suit properties. He had also not developed the land but had placed beacons. In 2015, when they went to the land, they were chased away by a crowd and he could not tell the persons in the crowd. He was not aware of any person living on his land but claimed trespass because they were chased away and the beacons removed. He did not know who removed the beacons and he does not know any of the defendants or where they live. He was aware that the land is in a settlement scheme. He was however not aware that the villagers were chasing them away on the basis that strangers have received settlement land.

8. With the above evidence the plaintiffs closed their case.
9. DW-1 was Shaban Salim Nyere, the 1st defendant. He testified that he is an ophthalmologist within the community. He had a witness statement which he relied on and he also gave oral evidence in court. In his statement, he mentions that it is claimed that he sold the Plot No 953 to Susan Wangechi (1st plaintiff) yet he has never met her and does not know her. He stated that in the year 2016 he was summoned in Kwale (Criminal) Case No 4 of 2016 as a trespasser yet he is staying in his forefather's land where he was born. He stated that in the year 2010, he was called to Fontanella Hotel to sign a sale agreement that he was selling his plot for Kshs 300,000/= but after one month, he cancelled it because he did not see the buyers and also they did not negotiate the sale agreement. He stated that he did not give any document of transfer and was surprised to see a copy of his title deed with the plaintiff. He stated that in the green card, his name is noted as Shaban Salim, without any ID number but in the title deed, the names appearing are Shaban Salim Nyere. In his oral evidence in court, he testified that the Ramisi Phase 2 Settlement Scheme was initiated in Kinondo in the year 2010. He mentioned that this is where they were born and have their crops and wells for water. The land where they resided was surveyed and they waited for allotment letters but did not receive any. They were astonished to see other people that they did not know coming armed with title deeds to take possession of the land. He stated that their earlier possession was not taken into account. He denied interfering with beacons or chasing anyone save that they do move around the area. They had complaints about allocation of land in the Settlement Scheme. They wrote letters to the Land Adjudication Department and also notified the Chief. He testified that it is alleged that he sold the plot No 953 to Susan Wangechi (1st plaintiff) which he claimed was not true. He stated that he does not know her and has never given her a copy of his ID card. He stated that he has never gotten title in his name. He was shown a title deed to Plot No 99 in his name and he stated that he has never got this title deed nor ever been issued with an allotment letter to this plot. He stated that no surveyor has ever come to show him which plot he occupies and no beacons have ever been put. He denied stopping anyone from erecting beacons. He refuted that they were guilty of trespass. He testified that they generally do not fence their parcels of land and have never stopped anyone from going to their land if gotten legally. He stated that he knows the general area where the suit plots are located but does not know the specific plots as there are no beacons. He however acknowledged being in one of the plots. He was aware that the 2nd defendant, Ali Zuberi Mwanyumba, was cultivating among the disputed plots but he stopped after receiving threats and now lives elsewhere. He was aware that the 3rd defendant, Swaleh Elefu, was also cultivating in the disputed plots though was resident elsewhere outside the disputed land. He stated that the 4th defendant, Mahsoud Omar Nyere; the 5th defendant, Omar Juma Mohamed; the 6th defendant, Mahsoud Juma; and the 7th defendant, Juma Mohamed Omar, all have some mango and coconut trees on the disputed parcels of land, which they tend, though their residences are on other parcels of land. Thus, among all persons sued, he is the only one who resides on the disputed parcels of land. He however denied trespassing into anyone's land as he has not crossed or jumped over any fence. He stated that no survey to place beacons has been done.
10. Cross-examined, he affirmed that he resides within the disputed parcels of land but claimed not to know the specific number of the plot. Pressed, he stated that he thinks that it is the Plot No 93. He



denied signing any sale agreement nor receiving any money. He admitted that he went to Fontanella Hotel. He did not cancel anything (meaning a sale agreement). He admitted having land in Ramisi Phase III, being the plot Kwale/Ramisi Phase III Scheme/99, and having title to it. The title has his two names. He testified that he knows one Salim Abdala Said, as they were jointly allocated the Plot No 953 in Ramisi Phase 2 Settlement Scheme. He stated that he also lives in this Plot No 953. He denied that he was ever given a letter of offer of title deed to this plot. He was referred to the plaintiff's documents where there is a letter of offer for this plot in his name and that of Said Abdalla Said but he refuted that the letter ever got to him. He did not know if Said Abdalla ever got the letter of offer. He denied living with Said Abdalla in this Plot No 953. He stated that there was threat from the police when persons came to view their parcels of land but he did not vacate. He contended that the ID number shown in the documents for this plot is not his. He gave a different ID card number which however could not be verified as he had not carried his ID card to court. He acknowledged not knowing the ID number of Said Abdalla.

11. Re-examined, he agreed that he had a conversation at Fontanella Hotel with some people who wanted to purchase the parcels of land but he told them that he was not ready to sell. He recorded having attended and having received a transport allowance but denied that any sale agreement was drawn. He received Kshs 3,000/=. He asserted that he never got the letter of offer for the Plot No 953 and also denied having sold that land. He stated that he has never been paid for any sale of land. He denied having paid any money to the Lands Office for outright purchase of land and contested a receipt showing as such, which bears his name, and stated that the ID card number noted there is not his.
12. DW-3 was Swaleh Elefu Mwatayai, the 3rd defendant. He adopted a witness statement that he had recorded and also gave oral evidence in court. In his statement, he complains that demarcation of the land (in the Settlement Scheme) was not done properly in the year 2010. He contends that he had land measuring 7 acres but he remained with two acres. He claimed that other people not resident in the area were also given land without their knowledge and the same were left vacant. He stated that on 17 January 2011, they called a meeting at the D.Os office and it was agreed that the measurements be rectified and a report was prepared. In court, he denied preventing other persons from settling on their parcels of land. He stated that they used the land in the scheme for farming though they lived outside it. He testified that when the land was surveyed, they were promised that they will be issued with allotment letters but he did not get one. He mentioned that in the meeting of 17 January 2011 it was agreed that a committee would be formed to rectify the survey works. He added that a report was prepared and handed to the Chief, who was to call a meeting on it, but none was called. He stated that he never saw beacons being placed and has not prevented the plaintiffs from their land. He testified that he used to cultivate the land before the Scheme was created. He knows the other defendants and he stated that apart from the 7th defendant the others do enter the disputed land to cultivate. He nevertheless stated that he does not know the land belonging to the plaintiffs. He denied chasing anyone from their land and has never seen a crowd chasing people from their land.
13. Cross-examined, he testified that he still resides where he used to reside before the year 2010 when the settlement scheme was established. Where he lives is outside the scheme but he only cultivates in it. He stated that those residing within the scheme are the 1st defendant (Shaban Salim Nyere) and one Athumani who have developed houses. He denied being allotted 2 acres though it was put to him that this is what he wrote in his statement. He denied being given any land. He had no evidence of those who were wrongly allocated land. He could not tell whether some sold their land. He denied that there are beacons on the land.
14. With the above evidence, the defendants closed their case.



C. Submissions of counsel.

15. I invited counsel to file written submissions which they did. I have taken full account of the same. At the time of filing submissions, Mr. Gitau, learned counsel, acted for all plaintiffs and filed submissions in respect of all the plaintiffs. At the moment, the 6th plaintiff has appointed separate counsel. In his submissions, Mr Gitau *inter alia* submitted that the defendants do not allege that the title deeds issued to the plaintiffs were issued by way of fraud or misrepresentation. He submitted that the defendants have no counterclaim and neither have they pointed out which parcel of land is theirs. He referred me to Sections 24 and 26 of the [Land Registration Act](#), on indefeasibility of title and the rights of a proprietor. For the defendants, Mr Magolo, learned counsel, *inter alia* submitted that the defendants were sued because they seem to have been visible in their agitation to have a fair allotment of the parcels of land in the settlement scheme. He did not believe that it is a coincidence that all plaintiffs state that they purchased their land at the same price, at the same time, and through the same process. He submitted that there was nothing to show that the defendants are trespassing in the plaintiffs' land. He questioned which defendant has trespassed into what land and what the nature of trespass was. He thought that it was necessary for every parcel of land to be identified and whoever has trespassed on it be shown evidence of the trespass or the surveyor's report.

D. Disposition.

16. I have considered all the above and take the following view of the matter.
17. This is basically a case of trespass where the plaintiffs allege that the defendants have been interfering with their parcels of land and have on several occasions uprooted beacons that the plaintiffs have placed on the land. The plaintiffs have displayed titles to the suit properties. These titles are indeed in a settlement scheme known as Ramisi Phase II settlement scheme. The plaintiffs are not the original allottees of land in the scheme but aver that they purchased the suit properties from the allottees. They have displayed the transfers from the original allottees. As I have mentioned, they have titles in their names. In their defence, the defendants pleaded that the plaintiffs are strangers and they do not know how they got titles to the land.
18. The evidence adduced shows that the plaintiffs purchased their parcels of land from the original allottees of the settlement scheme. I therefore do not see why the defendants question the titles of the plaintiffs. The defendants appeared to allege that persons who were not entitled to be allotted land in the settlement scheme came to them waving titles but this is not the scenario that we have here. The plaintiffs are not original allottees but purchased land from those who had been allotted the same. Indeed, part of the evidence is that the 1st defendant was among the sellers of land to the plaintiffs. One cannot fault the plaintiffs for purchasing the suit properties. A person is at liberty to buy land anywhere in the Republic of Kenya; one does not need to be an indigenous resident of an area to purchase land in that particular region. There is no counterclaim raised by the defendants contesting that whatever land the plaintiffs purchased was not supposed to be allocated to the persons who were originally allotted those parcels of land. If the defendants had a problem with the allocation of land within the scheme, then they needed to contest that in a suit, but I have not seen any evidence of any suit contesting the allocation of land within the settlement scheme. In fact, other than the general pleading that the plaintiffs are strangers, there is really nothing coming from the defendants contesting the plaintiffs' titles.
19. It will be recalled that in his submissions, Mr Magolo submitted that there is no evidence of trespass from the defendants. I will agree that none of the witnesses of the plaintiffs saw any of the defendants uprooting the beacons on their land or being in actual trespass. I agree that the evidence of the plaintiffs



on this point was rather general, as they stated that they were accosted by a crowd of villagers of the area. However, in their evidence, the defendants acknowledged entering into land within the settlement scheme and cultivating in it yet they have no titles to the same. Their excuse was that they were the ones who were to be settled in this land. Well, the position is that this land was allocated by the Government to persons that the Government thought deserved to be allocated the said parcels of land. As I have mentioned, I have no evidence that the defendants have challenged the process of allocation in court. It follows that they have to live with the fact that this land is now allotted to other people and they have to respect the proprietary rights of the allottees or those who have acquired these parcels of land subsequently. The defence that this was their ancestral land can no longer hold given that this is now land with title and with proprietors.

20. The defendants acknowledged cultivating on land within the scheme though they said that they do not know whose land they were cultivating. They may very well be cultivating on land that is owned by the plaintiffs and must be barred from any interference with the same. The 1st defendant did affirm having residence in the land parcel No 953 which is owned by the 9th defendant. His evidence was that he is not aware that he was ever allotted this land and that he never sold it. It is ironical that he contends that he was never allotted this land yet he continues to reside in it. If his evidence is that he was never allotted the land then he clearly cannot have any claim in it. There is however evidence presented by the plaintiffs showing that the 1st defendant together with one Said Abdalla transferred this land. Whatever the case, the 1st defendant has not filed any counterclaim to say that this land properly belongs to him and should be registered in his name. In fact, by refuting his original title to it, he cannot therefore assert any right to the said plot.
21. The fact of the matter remains that none of the defendants have any right to cultivate or use any of the parcels of land belonging to the plaintiffs. As proprietors, it is the plaintiffs who have the exclusive right to use and occupy the parcels of land. This right is enshrined in Sections 24 and 25 of the [Land Registration Act](#), which provide as follows :-
 24. Interest conferred by registration.
Subject to this Act—
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
 25. Rights of a proprietor.
 - (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

22. It will be seen from the above that it is the registered proprietor who holds the proprietary rights over registered land. The defendants have not demonstrated that they have any rights over the suit properties. Given the above, I am persuaded to make the following final orders :-

- a. As between the plaintiffs and defendants, it is hereby declared that it is the plaintiffs who are the registered proprietors of the suit properties noted in paragraph 1 of this judgment (save that the Plots Nos. 957 and 958 are excluded from this judgment as explained herein).
- b. A declaration is hereby issued that the defendants have no recognised proprietary right over the suit properties noted in paragraph 1 of this judgment (save that this judgment excludes the Plots Nos. 957 and 958).
- c. There is hereby issued an order of permanent injunction restraining the defendants from entering, being upon, cultivating, developing, interfering with any beacons, fences or boundaries, or in any other way interfering with the plaintiffs' occupation and use of the suit properties noted in paragraph 1 of this judgment (save that this judgment excludes the Plots Nos. 957 and 958).
- d. That any defendant residing on any of the suit properties must vacate and give vacant possession within sixty (60) days from the date hereof (save that the judgment excludes the Plots Nos 957 and 958) and in default an order of eviction to issue.

23. There was a prayer for general damages for trespass and destruction of beacons. I will not make any award as there was no direct evidence that it was the defendants who destroyed the beacons. The 1st defendant however acknowledged having residence in the plot No 953. He will pay general damages of Kshs 250,000/= for trespass to the 9th plaintiff.

24. The defendants will shoulder the costs of this suit jointly and/or severally.

25. Judgment accordingly.

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

