



**Kandie & another v Josiah & 3 others (Civil Case 53 of 2015)
[2022] KEELC 13815 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL CASE 53 OF 2015
M SILA, J
SEPTEMBER 26, 2022**

BETWEEN

DAVID KIPKURUI KANDIE 1ST PLAINTIFF

KIPROTICH H KORIR 2ND PLAINTIFF

AND

LEAH ACHIENG JOSIAH 1ST DEFENDANT

**ALLAN ONYANGO JOSIAH (SUED THROUGH MARGARET A
ONGANYA) 2ND DEFENDANT**

LAND REGISTRAR, KWALE 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. This suit was commenced by way of a plaint which was filed on 30 March 2015. The plaintiffs have pleaded to be the registered owners of the parcel of land Kwale/Galu/Kinondo/410 having acquired a certificate of title on 5 February 1986. They pleaded to have subdivided the land in the year 2011 into 21 plots which they sold to third parties who have been issued with titles. They pleaded that before filing the suit, they became aware of a case, being Mombasa High Court Judicial Review Case No. 51 of 2011, which directed the Kwale Land Registrar to open a new green card over the same land in the names of the 1st and 2nd defendants thus exposing them to the possibility of losing the land. They aver that they were never joined to the said suit and did not participate in it. They state that they attempted to join the suit but their application was dismissed for reason that it was filed after final orders had issued. In this suit, the plaintiffs seek the following orders (slightly paraphrased) :-
 - a. A declaration that they are the lawful owners of the land parcel Kwale/Galu/Kinondo/410 as evidenced by the title issued on 5 February 1986.



- b. An order cancelling the certificate of lease and the entire records purporting to open a new green card over Kwale/Galu/Kinondo/410 to reflect the 1st and 2nd defendants as the owners and an order directing the 3rd and 4th defendants to restore the records over the land so as to reflect the plaintiff as owners.
 - c. A permanent injunction to restrain the 1st and 2nd defendants from laying any claim of ownership and to restrain the Kwale Land Registrar, the Commissioner of Lands or any other authority from interfering with the records held in favour of the plaintiffs and restrain them from dispossessing the plaintiff of his title to the land.
 - d. Costs of the suit.
2. The 1st & 2nd defendants filed a statement of defence through the law firm of M/s A.B. Patel & Patel Advocates. They pleaded that the plot Kwale/Galu/Kinondo/410 (the suit land) was and still is the property of the late Harold Michael Onyango Josiah (Mr. Josiah). It is averred that attempts were made to illegally have the title registered in the names of the plaintiffs. They averred to be strangers to the alleged subdivision of the suit land. They pleaded that the suit property was subject to the case Mombasa Judicial Review Case No. 51 of 2011 and that in the said suit, the Kwale Land Registrar confirmed that the land was registered in the name of Mr. Josiah, after which the Land Registrar, Kwale, reconstructed the records and restored the property to the original owner. It is pleaded that in light of the evidence and decision made in the judicial review proceedings the plaintiffs have no interest in the suit property and are estopped from alleging otherwise. They asked that the suit be dismissed with costs.
 3. I need to mention that the law firm of M/s A.B Patel & Patel, filed an application to cease acting for the 1st and 2nd defendants, which application was allowed. Subsequently on 12 November 2019, the law firm of M/s Waruhiu & Company Advocates filed a notice of appointment of advocate on behalf of the 1st and 2nd defendants. On 11 June 2020, the law firm of M/s Waruhiu & Company Advocates filed an application to cease acting. That application was allowed on 18 November 2020, and no advocate was appointed thereafter, meaning that the 1st and 2nd defendants from that date were acting in person. They have however not taken any interest in participating in this suit and failed to present themselves at the hearing of the matter despite being duly served. The evidence that I have is therefore only that of the plaintiffs.
 4. PW-1 was David Kipkurui Kandie, the 1st plaintiff. He described himself as a businessman engaged in real estate. He purchases, builds and sells land. He relied on a witness statement that had been recorded by his co-plaintiff, as his evidence in chief. That witness statement avers that the plaintiffs are the bona fide owners of the suit land from February 1986 and that they have a certificate of title in their favour. It is stated that on 2 December 2014, the plaintiffs became aware of the proceedings Mombasa High Court, Judicial Review Case No. 51 of 2011. It is said that the pleadings in the said case were never served upon them though the land records showed them to be the registered owners. It is stated that the land previously belonged to Rachel Wamuyu, as at 15 November 1974, who transferred the same to Andrew Kuria Mutuku, on 4 April 1977, then to the plaintiffs on 5 February 1986. It is stated that the plaintiffs have subdivided the land and sold it to third parties since April 2011. There is reference to a certificate of official search dated 30 June 2009 showing the plaintiffs as the legal owners. They wrote a letter to the Land Registrar, objecting to creation of a new title after an advertisement was placed in the Kenya Gazette of 30 November 2012. They filed an application to be joined to the Judicial Review suit but their application was dismissed. It is averred that the land is now subdivided and there are over 21 new owners of the subdivisions who have title in their names. There was produced various documents to support their position.



5. Cross-examined, he stated that the suit land was subdivided into 22 plots and they sold 18 of these plots. He stated that the 1st and 2nd defendants got registered as proprietors of the suit land after the judicial review case.
6. With the above evidence, the plaintiffs closed their case.
7. I have not seen any defence on record filed by the 3rd and 4th defendants, though they called the Land Registrar, Kwale, Ms. Widad Amin, as their witness. Her evidence was that though the plaintiffs claim to be the registered owners, there was another party who applied to court to have the land register revert back to them. They received the court order and opened a new register on 25 July 2015. She averred that there is a mutation registered on 21 July 2015 that did away with the plaintiffs' subdivisions in compliance with the court order.
8. There followed an application by counsel for the 3rd and 4th defendants to recall PW-1 as an issue had arisen about his age when the land was registered in their joint names. Upon recall, he testified that he was born in the year 1970 and was a minor in the year 1986 when the land was registered in his name and that of the 2nd plaintiff. He stated that the position is that it was his father who bought the land together with the 2nd plaintiff and inserted his name as co-owner.
9. I invited counsel to make submissions, which they did in writing, and I have taken note of these before arriving at my decision.
10. The plaintiffs herein assert ownership of the suit land, Kwale/Galu/Kinondo/410. They have an issue with the registration of the 1st and 2nd defendants as owners and they wish to have their names removed from the register of the suit land. To support their case, the plaintiffs have inter alia displayed a title deed, the green card, and an official search. The Certificate of Title shows that it was issued to the plaintiffs on 5 February 1986. There are two official searches relied upon by the plaintiffs. One is dated 30 June 2009 and the other is dated 8 April 2011. Both show the plaintiffs as proprietors and indicate that they became proprietors on 5 February 1986. The green card produced by the plaintiffs gives the history of the land as follows : That the land was first registered in the name of Rechal Wairimu Mungai on 15 November 1974; that the land was then transferred to Andrew Kuria Mutuku on 14 April 1977; that the land was then transferred to the plaintiffs on 5 February 1986. The plaintiffs have also produced in evidence a letter of consent from the Msambweni Land Control Board giving them consent to subdivide the suit land into 20 plots of 0.25 acres. There is a mutation form displayed which shows the proposed subdivision to result into titles number 1829 to 1849. I have however not been shown any of these titles nor any evidence of closure of the register that bears the plaintiffs' names to the mother plot No. 410. Though it was said that these subplots have been created and sold, I have no evidence of this. I will simply assume that what is there is the Plot No. 410 and that there are two titles to it, one to the plaintiffs and one to the 1st and 2nd defendants.
11. In their statement of defence, the 1st and 2nd defendants contended that the land was registered in the name of Mr. Josiah who appears to be deceased. The 1st and 2nd defendants did file the suit Mombasa High Court Judicial Review case No. 51 of 2011. The pleadings in that case were not produced but there are part proceedings of the said suit on record (part proceedings for there is mention that the court file got lost). From what I can see, it appears as if the 1st and 2nd defendants sued the Land Registrar, Kwale, to reconstruct the register to the Plot No. 410 and show that the proprietor is Mr. Josiah. I have seen that the Land Registrar was summoned in court and he stated that he was ready to do the reconstruction and asked the 1st and 2nd defendants to furnish him with the documents in their custody. An order was issued to the Land Registrar to reconstruct the register and place a Gazette Notice to that effect. The Gazettement was done on 30 November 2012 but after the Gazettement an objection was



raised by the plaintiffs herein. Subsequently the plaintiffs sought to be joined in the Judicial Review suit but their application was dismissed in a ruling delivered on 2 March 2015. The court (Emukule J), held that the suit was already determined and the court was functus officio. It is in light of this ruling that the plaintiff filed this suit.

12. I do not think that the 1st and 2nd defendants can hinge on the decision in Judicial Review No. 51 of 2011 to support their argument that they are the *bona fide* owners of the land. That case was limited to demanding a reconstruction of the register in the name of Mr. Josiah, which was done. It should not be forgotten that there was another register bearing the names of the plaintiffs as proprietors, such that a mere order of *mandamus*, directing the Land Registrar to reconstruct the records in favour of the 1st and 2nd defendants, was never going to determine the question of who is the rightful proprietor of the land. Moreover, the judicial review case proceeded without the participation of the plaintiffs despite them having a parallel title to the suit land. The question as to who was entitled to proprietorship of the suit land was not one that was subject of address in that case. I am persuaded that the plaintiffs were perfectly entitled to file this suit to protect their title and seek to have the title of the 1st and 2nd defendants cancelled. I do not know why the 1st and 2nd defendants chose not to present evidence to demonstrate that they are the rightful proprietors of the land. The evidence of the plaintiffs in relation to proprietorship of the suit land is uncontroverted. The Land Registrar, did not attempt to impugn the title of the plaintiffs, but only said that they opened a register in the names of the 1st and 2nd defendants pursuant to the court order in Judicial Review No. 51 of 2011. There is therefore no evidence before me which would go to suggest that the title of the plaintiffs is a bad title and that it is the title of the 1st and 2nd defendants which is good. If the 1st and 2nd defendants wished to assert their title, it was incumbent upon them to come to court and explain their position, but for reasons best known to themselves, they failed to do so.
13. I will not attach too much significance on the registration of the plaintiffs as title holders in the year 1986 despite the 1st plaintiff being a minor at the time. As I have mentioned, if the 1st and 2nd defendants felt that the title of the plaintiffs was not genuine, it was upon them to come to court to challenge it, which they have not done. In her written submissions, Ms. Kiti, learned State Counsel, made submissions that at the time the plaintiffs acquired their title in the year 1986, there was already title in the name of Mr. Josiah. I will repeat that it was upon the 1st and 2nd defendants to call evidence to demonstrate that they had a good title to the land issued prior to that of the plaintiffs, which they did not do. It may be that the documents held in favour of Mr. Josiah are improper, and by failing to appear in court, the 1st and 2nd defendants did not allow for scrutiny of the title that they hold. This court cannot, in those circumstances, declare that it is the title of the 1st and 2nd defendants which is good. Their title was under challenge in this case and they needed to call evidence to demonstrate the root of their title. For the umpteenth time, I repeat, that they have failed to do so.
14. The plaintiffs have traced the root of their title to that first held by Reachel Wairimu Mungai issued in the year 1974. They have shown movement to one Andrew Kuria Mutuku and then to themselves. I have nothing from the defendants, including from the Land Registrar, which in any way attempts to claim that this is not the genuine history of the land. In light of this, I must declare, that as between the plaintiffs and the 1st and 2nd defendants or their predecessor in title, it is the plaintiffs who are the legitimate owners and proprietors of the land parcel Kwale/Galu/Kinondo/410. I proceed to order the Land Registrar, Kwale, to cancel the title and register in names of the 1st and 2nd defendants, and restore the title of the plaintiffs, together with its history, as being the proper register in respect of the land parcel Kwale/Galu/Kinondo/410. I also issue an order of permanent injunction, barring the 1st and 2nd defendants and/or any person acting at their behest, from entering into any dealings or interfering with the possession of the plaintiffs in respect of the suit land.



15. In his submissions, Mr. Ondabu, learned counsel for the plaintiffs, made a pitch for an award of general damages in favour of the plaintiffs in the sum of Kshs. 2,000,000/=. I am unable to award this, since it was never pleaded in the plaint. If the plaintiffs wished to have the said award, they needed to plead it. Neither am I moved to make an award of it within the discretion of court as the plaintiffs did not demonstrate any loss that they suffered as a result of the title of the 1st and 2nd defendants.
16. The only issue left is costs and the plaintiffs will have the costs of this suit as against the 1st and 2nd defendants. I am unable to make any award for costs, for or against the 3rd and 4th defendants, as all the Land Registrar did was comply with an order of mandamus which compelled him to construct a register in favour of the 1st and 2nd defendants.
17. I now make the following final orders :-
 - a. That as against the 1st and 2nd defendant and or their predecessor in title, it is hereby declared that it is the plaintiffs who are the rightful proprietors of the land parcel Kwale/Galu/Kinondo/410.
 - b. That the Land Registrar, Kwale, is hereby ordered to cancel and deregister any green card in favour of the 1st and 2nd defendants and or their predecessor in title.
 - c. That the Land Registrar, Kwale, is hereby ordered to retain the green card displayed by the plaintiffs as the proper green card of the land parcel Kwale/Galu/Kinondo/140 and any further transactions related to the said land be within the green card displayed by the plaintiffs.
 - d. That an order of permanent injunction is hereby issued barring the 1st and 2nd defendants from entering into any dealings or interfering with the possession of the plaintiffs in respect of the land comprised in the land parcel Kwale/Galu/Kinondo/410.
 - e. That the plaintiffs shall have the costs of this suit as against the 1st and 2nd defendants.
18. Judgment accordingly.

DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.

In the presence of:-

Mrs. Ondabu for the plaintiff.

Mrs. Kiti for the 3rd & 4th defendants.

No appearance for the 1st & 2nd defendants.

Court Assistant – Wilson Rabong'o.

