



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njenga (Suing on behalf of the Estate of Elizabeth Ngendo - Deceased)  
v Muiru & 2 others (Environment & Land Case 126 of 2020)  
[2022] KEELC 14434 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14434 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 126 OF 2020**

**JG KEMEI, J**

**OCTOBER 31, 2022**

**BETWEEN**

**MINNIE WANJIKU NJENGA ..... PLAINTIFF  
SUING ON BEHALF OF THE ESTATE OF ELIZABETH NGENDO - DECEASED**

**AND**

**LIVINGSTONE MWAURA MUIRU ALIAS LIVINGSTONE MWAURA  
NJERI ..... 1<sup>ST</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, KIAMBU ..... 2<sup>ND</sup> DEFENDANT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff filed suit against the defendants seeking orders as follows;
  - a. Declaration that Elizabeth Ngendo, deceased is the lawful owner of parcel No Karai/Karai/63
  - b. A declaration that the registration of interest in the suit property to the 1<sup>st</sup> defendant is null and void *abinitio*.
  - c. Rectification of the register relating to the suit property by the 2<sup>nd</sup> defendant so as to show that the plaintiff is the registered proprietor of the suit parcels of land.
  - d. The costs of the suit be provided for.
2. It is the case of the plaintiff that Elizabeth Ngendo was allocated the land by the county council of Kiambu in 1957 but according to the green card the 1<sup>st</sup> defendant became registered proprietor in 2011 unlawfully.



3. She has pleaded particulars of fraud in para 10 of the plaint.
4. The 1<sup>st</sup> defendant denied the plaintiffs claim and stated that he is the bonafide owner of the suit land having been allocated the same in the year 2008 through a lawful process. That though the deceased was allocated the land in 1975 she did not accept the offer and that therefore the land has been available for allocation since 1973.
5. In particular he denied the claim of fraud and put the plaintiff to strict proof.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants denied the plaintiff's claim and state that if the title was registered in the name of the 1<sup>st</sup> defendant then the same was based on documents presented before the 1<sup>st</sup> defendants offices who exercised due diligence before the registration.
7. PW1- Minnie Wanjiku Njenga stated that she is the aunt to the 1<sup>st</sup> defendant, who happens to be the son of her sister Edith Njeri. That she is also the legal representative to the estate of Elizabeth Ngendo, her deceased mother. She relied on her witness statement on record as her evidence in chief. She produced the documents listed in the list of documents dated the December 8, 2020 and marked as Pex No 1-8 in support of her claim.
8. She stated that the suit land was allocated to Elizabeth Ngendo in 1957 by the county council of Kiambu and produced an extract of the minutes of the said county in support. She stated that she cannot remember the details of the payments made by the said Ngendo for the land as it has been a long time. That the title in the name of the 1<sup>st</sup> defendants name was fraudulently issued. That she was not consulted and neither did she give her consent for the issuance of the same. It was her case that the same ought not have been issued at all as the land was allocated to Ngendo and not the 1<sup>st</sup> defendant. That the land had initially been allocated to her father who incidentally was also named Livingstone Mwaura Muiuru passed away in 1955 but was later allocated to her mother. She stated that her sister lives on the land; she buried Ngendo on the land along with another sister who is deceased.
9. DW1 – Livingstone Mwaura Muiuru stated that he applied for the land from the county council of Kiambu sometime back. That in the process of applying for electricity connection to his land he was told that the land does not have an owner. That he was raised on the land and knew the land well. He stated that the plaintiff is his aunt, the sister of his mother. In cross he informed the court that he was aware the land belonged to Elizabeth Ngendo, his grandmother. That his mother's siblings were not concerned about the land. That he was raised on the land where he lived with his mother among other relatives and their grandmother. That when he went to the council he found the land had been allocated to Elizabeth Ngendo in 1957 but the register showed it belonged to the council. He was insistent that the land is not family land and that he acquired it through allocation with the consent of his family members who live on the land. That his mother and siblings live on the land todate. Asked to explain how the land was transferred to him, his only answer was the transfer was legal. He did not produce any document to support the application at the council. That his grandmother died in 1980.
10. The firm of Maina Wairimu & Associates filed written submissions on behalf of the plaintiff while that of Kanyi Kiruchi submitted on behalf of the 1<sup>st</sup> defendant.
11. Counsel submitted that the suit land was allocated to Ngendo in 1957 and there was no clear indication of how the suit land was transferred from the deceased to the 1<sup>st</sup> defendant and the only inference is that of the plaintiff is an intermeddler going by the provisions of section 45 of the *Law of Succession Act*.
12. Citing the case of *Bahola Mkalindi v Michael Seth Kseme & 2 others* (2021) it was submitted that the *Law of Succession Act* is concerned with the administration of the estate of the deceased persons. The estate of a deceased person has been defined by the Act as property which the deceased person was



- legally competent to freely dispose of during his lifetime and in respect of which his interest has not been terminated by his death.
13. Counsel submitted that the title of the 1<sup>st</sup> defendant having been obtained fraudulently or through misrepresentation to which a person is proved to be a party and where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme does not enjoy the protection of the law.
  14. Counsel for the 1<sup>st</sup> defendant submitted that at not time was the suit owned by the plaintiff and that the 1<sup>st</sup> defendant is the absolute and indefeasible owner of the suit land having followed the due process in having himself registered as such. Particulars of fraud were vehemently denied and that the investigating agencies cleared him of any wrong doing and there was no forgery or fraud committed. He argued that the claim of conversion does not lie since Ngendo had no tittle and consequently therefore had nothing to transfer and that the requirement of a family consent was not necessary. He maintains that the plaintiff did not lead any cogent evidence to assault his title least of on illegality and or fraud.
  15. As to who is the bonafide and lawful owner of the suit, counsel submitted that the plaintiff failed to produce the allotment letter to Ngendo, payment for the land, counsel cited the case of *Ali Mobammed Dagane v Hakar Absbir & 3 others* (2021) where the court stated that a letter of allotment perse is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all, it cannot thus be used to defeat a title of a person who is registered proprietor of the said parcel of land.
  16. The counsel further submitted that the plaintiff has not tendered any evidence as to the existence of the letter of allotment, compliance with the same including payment of stand premium and ground rent within the prescribed period to warrant it to confer interest upon the said Ngendo. That no interest ever passed to Ngendo or her estate to require the consent of the family and therefore any charge of intermeddling cannot lie- against the 1<sup>st</sup> defendant.
  17. The 1<sup>st</sup> defendant maintained that he followed the right procedure in applying for the land from the council and was of the view that in his case equity aids the vigilant and not those who slumber on their rights.
  18. Counsel for the 1<sup>st</sup> defendant submitted that the 1<sup>st</sup> defendant produced extract of minutes of Kiambu County council as evidence of allocation of the land and that the council and upon approval recommended its transfer. That inspection carried out on the land revealed that the 1<sup>st</sup> defendant had developed the land by constructing his homestead and subsistence farming. On the other hand the plaintiff only produced a copy of the green card showing the land belonged to the county council of Kiambu and thereafter the 1<sup>st</sup> defendant as an absolute and indefeasible owner.
  19. As to whether the 1<sup>st</sup> defendant committed any fraud, the counsel submitted in the negative. He asserted that all lawful procedures were followed to the letter leading to the issuance of the title in his name. That he pursued the land for his own benefit and not on behalf of the family and therefore it is not subject to succession given that no interest passed to Ngendo in the first place. Interalia, that the 1<sup>st</sup> defendant required no consent form the family.
  20. The 1<sup>st</sup> defendant was emphatic that the plaintiff did not proof fraud to the required standard and that it is not enough to infer fraud from the facts. See the case of *Vijay Marjoria v Nansignb Madbusingb Darbar & Anor* (2000).
  21. Having considered the pleadings, the evidence adduced at the hearing and the rival written submissions, the issues for determination are; who is the rightful allottee of the land; whether the land



was lawfully transferred to the 1<sup>st</sup> defendant? Whether the plaintiff proved fraud? Who meets the costs of the suit?

22. The background of this case is that the parties are related, the plaintiff is the aunt of the 1<sup>st</sup> defendant.
23. It is the plaintiff's case that the land was allocated to her mother, the late Elizabeth Ngendo in 1957 by the then county council of Kiambu. Upon allotment she and her family settled on the land and upon her demise in 1980 she was buried on the parcel of land. That the plaintiff and her siblings including Edith Njeri her sister and mother of the 1<sup>st</sup> defendant, including the 1<sup>st</sup> defendant were also raised on the parcel of land. Other family members are buried on the land including her other sister, Harriet Karura Ndungi.
24. The gist of her case before this court is that the registration of the title in the name of the 1<sup>st</sup> defendant is null and void on account of fraud whose particulars are pleaded under para 10 as; obtaining title without following the right procedures given that the land is trust land; failing to seek approval of the family members; forging the signature of Ngendo and using the name of his grandfather to effect registration of the land.
25. The 1<sup>st</sup> defendant on the other hand denied the plaintiffs claim and contended that the suit land never belonged to the plaintiff and that the 1<sup>st</sup> defendant is the absolute and indefeasible owner of the suit land having acquired it through the right procedure. He denied fraud forgeries and contended that the case was investigated by the police and no such allegations were found to exist.
26. I will determine issue No 1 and 2 together.
27. The plaintiff led evidence and produced extract of the minute No 28/57 (allocation of ADC land Ndeiya and Karai Locations) of the local land board meeting held at Kiambu on 9/10/1957 where Elizabeth Ngendo was allocated the plot No 63. She also produced a certified copy of the green card dated the November 10, 2011 which shows that the register was opened on the March 1, 1973.
28. It is trite that once land is alienated by the council as shown in the minute above. Although other crucial documents such as letter of allotment, the payment receipts and the lease were not produced it is clear that Ngendo took possession of the land and occupied it and settle her family which included the 1<sup>st</sup> defendant. It is not in dispute that the said Ngendo was the first allottee of the land.
29. The 1<sup>st</sup> defendant relied on the extract of minutes of the Town Planning Markets and Housing Committee meeting held October 16, 2008 through Min WTPMH222/2008 - transfer of parcel No Karai/Karai/63 from Elizabeth Ngendo Mwaura to Livingstone Mwaura Muiru.
30. The 1<sup>st</sup> defendant led evidence that he applied for allocation of the land in 2008 and was allocated by the council but when asked to produce the application letter, payment of the allocation fees he stated that he did not have. I have perused the said minutes and the same do not allude to an allocation but a transfer of the land from Ngendo to the 1<sup>st</sup> defendant.
31. The next correspondence that I wish to comment on is the letter dated the June 9, 2009 authored by the County Council of Kiambu addressed to the Commissioner of Lands and referenced transfer of land by way of allocation parcel No Karai/Karai/63. The letter starts as follows;

“The land under reference was allocated by this council through ballot system to Elizabeth Ngendo Mwaura in 1975.

Upon her demise the council under Min WTPMH/222/2008 of works two planning markets and Housing committees meeting ratified by full council meeting held on October



16, 2008 .... considered and recommended transfer of the same to Livingstone Mwaura Muiru.

Pursuant to section 144(b) of the Local Government Act, the Hon Minister’s consent is hereby sought to facilitate issuance of title documents to Livingstone Mwaura Muiru.”

32. It is evident from the above letter that the council was aware that the land was allocated to Ngendo by way of ballot and that the land belonged to her. Secondly it is evident that the council did not allocate the land to the 1<sup>st</sup> defendant but rather transferred it to him as shown in the minutes above. 3rdly the council recognized that Ngendo was deceased. 4thly there is no evidence led to show that the consent of the Minister for Local Government was ever given to facilitate the issuance of the title to the 1<sup>st</sup> defendant.
33. Vide a letter dated the September 27, 2011 a transfer document was forwarded to the Land Registrar Kiambu for registration. This document was not presented before the court in order to determine who the transferor was and what the consideration was.
34. Having found that the land was allocated to Ngendo, and secondly the council having known that the original allottee was deceased, the legal and proper way of transferring the land was through the legal representative of the estate of Ngendo. There was no land available for the council to allocate to the 1<sup>st</sup> defendant as the same had been alienated to Ngendo in 1957 or 1975 and what was pending was the processing of the title in her name.
35. It is my finding that the purported transfer of the land from the council through minutes held on the October 16, 2008 was unprocedural and contrary to the law.
36. Under section 26 of the LRA a title can be impugned through two ways; on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.
37. In this case the title of the 1<sup>st</sup> defendant was acquired illegally unprocedurally and or through a corrupt scheme. I say this because of two reasons; the land was not available for alienation it having been allocated to Ngendo in 1957 who settled on the land with her family to date; The county council had no power to alienate land that was already balloted by Ngendo 33 years later; the 1<sup>st</sup> defendant used deceit to acquire the land knowing too well that the land belonged to his late grandmother and therefore family land; the circumstances of transfer of the land to the 1<sup>st</sup> defendant are unclear and begs the question as to who transferred the land and for what considerations; the 1<sup>st</sup> defendant despite the title having been put under scrutiny did not render any explanation or lay evidence to explain the root of the title; the registration of the title in the name of the 1<sup>st</sup> defendant was without any basis in law. It is illegal null and void.
38. I am guided by section 80 of the Land Registration Act which states that;
  - “ 80 (1) subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.
  - (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission,



fraud or mistake or substantially contributed to it by any act, neglect or default.”

39. In the end I find that the plaintiff has proved her case and I enter judgment as follows;
- a. It is hereby declared that Elizabeth Ngendo, deceased is the lawful owner of parcel No Karai/Karai/63
  - b. It is hereby declared that the registration of interest in the suit property to the 1<sup>st</sup> defendant is null and void *abinitio*.
  - c. The Land Registrar Kiambu be and is hereby ordered to rectify the title by deleting the name of the 1<sup>st</sup> defendant and inserting the name of Elizabeth Ngendo, deceased to await the distribution as provided for under the Law of Succession.
  - d. The costs of the suit be met by the 1<sup>st</sup> defendant in favour of the plaintiff.

Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 31ST DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Maina for Plaintiff

Ms. Muchemi for 1st Defendant

Defendant 2 & 3 - Absent

Court Assistant – Dominic

