



**Thiga & another v Matinkoi & 5 others (Environment & Land Case
784 of 2017) [2022] KEELC 14443 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 784 OF 2017
MN GICHERU, J
OCTOBER 27, 2022**

BETWEEN

THOMAS KINYANJUI THIGA 1ST PLAINTIFF

JAMES THIGA KINYANJUI 2ND PLAINTIFF

AND

ALLAN KASARO MATINKOI 1ST DEFENDANT

EDWARD MUULA MAATO 2ND DEFENDANT

TIMOTHY NAISON MATINKOI 3RD DEFENDANT

ANNA MATINKOI MULA 4TH DEFENDANT

KITETOI ENE MATINKOI 5TH DEFENDANT

DISTRICT LAND REGISTRAR, KAJIADO 6TH DEFENDANT

JUDGMENT

1. Thomas Kinyanjui Thiga and James Thiga Kinyanjui, the plaintiffs seek the following orders against Allan Kasaro Matinkoi, Edward Mula Maato, Timothy Naison Matinkoi, Anna Matinkoi Mula, Kitetoi Ene Matinkoi and District Land Registrar, Kajiado (first, second, third, fourth, fifth and sixth Defendants respectively).

Raphael Lerionka Kapai joined the suit and the same reliefs as those against the defendants are also sought against him.

- a. A declaration that the plaintiffs are the registered absolute proprietors of land parcels known and identified as Kajiado/Kisaju/1210, Kajiado/Kisaju/1211 and Kajiado/ Kisaju /1208, suit parcels, and the first to 5th defendants are trespassers thereon.



- b. A declaration that the purported subdivisions and transfers of parcels numbers 8462, 8463, 8464, 8465, 8466, 8467, 8468, 8469, 8470, 8471, 8472 and 8473, resultant parcels, being subdivisions of the suit parcels registered against the titles in favour of the first to fifth defendants are null and void.
 - c. An order directed at the District Land Registrar, Kajiado for cancellation of all new title deeds issued by the said Land Registrar in respect of the subdivision of the three such parcels into the twelve (12) resultant parcels.
 - d. An order of permanent injunction restraining the defendants either by themselves, their servants and/or agents howsoever from entering, trespassing, subdividing, further subdividing, cultivating, alienating, leaving or in any way dealing with the suit and resultant parcels.
 - e. Any other order this court may deem fit to grant.
 - f. Mesne profits.
 - g. Costs and interest of the suit.
2. The plaintiffs' case is as follows. They are the registered owners of the three suit parcels which they bought from United Insurance Company Limited and its subsidiary, Fidea, on February 11, 2005 and March 14, 2005 respectively.

The purchase price was Kshs 2.2 million for LR 1208, Kshs 4.8 million for LR 1210, and Kshs 3 million for LR 1211.

All the requisite procedures for the lawful conveyance of land were complied with in regard to the three parcels. They include agreements for sale, consent of the Land Control Board, execution of transfer instruments, payment of stamp duty and issue of title deeds.

The plaintiffs were advised to be on the lookout because land in the area where theirs was situated was susceptible to fraud. Routinely, they would conduct random searches at the Land Registrar's office.

On November 8, 2010, a routine official search revealed that the green cards (copies of the registers) for all the three parcels were missing.

In spite of reassurance by the Land Registry at Kajiado those records were never found. The plaintiffs had to go through a tedious procedure of complaining to the Chief Land Registrar and a gazette notice for the records of the suit parcels to be reconstructed.

Even after the reconstruction of the records, the plaintiffs' problems were not over because on the ground, they found out that the beacons of LR 1208 had been interfered with and a structure had been put up at one corner of the land.

It turned out that it is the first to fifth defendants who had encroached. The encroachment continued with the cutting down of trees. An intended boundary demarcation did not take place due to official procrastination.

It is while the plaintiffs were pushing for boundary dispute determination that they found out that their newly replaced and reconstructed land records had been cancelled and replaced by the names of the five defendants.

In addition to the above, multiple title deeds had been issued to the defendants and purported mutation of the three suit parcels.



The plaintiffs reported this apparent fraud to the CID Headquarters in Nairobi. In the course of the investigations, it came to light that there had been a suit in the lower court relating to the suit parcels.

This was Land Disputes Tribunal Case No 340 of 2012. The plaintiffs were not aware of this tribunal case because they were never served with the summons to enter appearance or any other court process.

As late as the year 2015 with this case pending in court, the defendant or their agents have fenced a portion of the and after removing beacons. This has prompted the plaintiff to warn the public and unsuspecting buyers to be aware.

3. In addition to the above, the plaintiff sought to corroborate his evidence with that of two other witnesses namely Jackson Mulwa Mwangangi and Samuel Gakuru.

The former used to be an accountant and an investment and creditor manager with United Insurance Company Limited and he witnessed the sale of the suit parcel by the late Moses Matinkoi Mula to the insurance company. The latter is an advocate of the High Court and he conveyed the suit parcels from insurance company to the plaintiffs by ensuring that necessary procedures were complied with.

4. In support of their case, the plaintiffs filed the following evidence.
 - a. Three witness statements by the first plaintiff, Jackson Mulwa Mwangangi and Samuel Gakuru.
 - b. Copies of sale agreements dated February 11, 2005 and March 1, 2005 respectively.
 - c. Copies of applications for consent and the letters of consent for the three suit parcels.
 - d. Copies of duly executed transfer forms for the suit parcels.
 - e. Copies of title deeds for the suit parcels.
 - f. Copies of certificates of official search for the suit parcels conducted between the years 2005 and 2010.
 - g. Copies of correspondence for the period between March 14, 2011 to April 14, 2011.
 - h. Copy of Gazette Notice No 5704 dated 27th May, 2011.
 - i. Copy of affidavit by the first plaintiff dated March 31, 2011.
 - j. Copy of letter dated April 18, 2012.
 - k. Copies of the second edition title deeds for the suit parcels.
 - l. Copy of letter dated November 12, 2012.
 - m. Copies of proceedings and orders issued in Kajiado PMCC No 34 of 2012.
 - n. A copy of the advertisement in the star newspaper of August 8, 2012.
 - o. Copies of proceedings in Kajiado PMMC No 27 of 2012.
 - p. Copies of title documents showing the subdivision in favour of the first to 5th defendants.
 - q. Copies of conveyance documents between Moses Matinkoi Mula and united Insurance Company Limited dated October, 1994.
 - r. A copy of payment receipt.



- s. Copy of valuation report dated January, 2015.
5. The defendants through their counsel on record filed an amended defence and counterclaim dated February 22, 2018. In the said defence, the defendants aver as follows. They generally deny the claim by the plaintiffs. When it was time to file a succession, they discovered that the suit land was in the names of unknown people.
- They then initiated the legal process of the removal of the unknown people from the register. This culminated in the cancellation of the plaintiffs as the proprietors of the suit parcels. The orders issued by the court subsist and they have never been set aside.
- It is also the defendants' case that they were born on the suit parcels and that they have always lived there as this is their ancestral land. They add that the plaintiffs were duly served with summons to enter appearance and other processes through substituted service. They conclude by saying that this suit is *re judicata* because the issues raised here were determined by the lower court. This makes the current suit an abuse of the court process.
6. In the counterclaim, the defendants aver that the plaintiffs' suit is time barred by virtue of the *Limitation of Actions Act*.
- Secondly, the defendants aver that they have been in continuous occupation, use and control of the suit parcels conspicuously and without the consent of the plaintiffs all their lives such that the plaintiffs rights have become extinguished by operation of law.
7. In an affidavit dated July 30, 2013, Allan Kasaro Matinkoi has given a comprehensive defence in which he states his late father never sold the suit parcels, that no consent of the Land Control Board was applied for or obtained by the plaintiffs, that the purported buyer from his father, United Insurance was under receivership at the time of the alleged sale and that a suit was filed at the Land Disputes Tribunal which nullified the purported sale of the suit parcels to united insurance by the deceased.
- In addition to the affidavit the first defendant filed annexures which include copies of the register for the suit parcels, copies of title deeds for the same parcels in the name of the deceased and all dated June 9, 1992, copy of the deceased's certificate of death dated January 18, 2007, some proceedings of the Land Disputes Tribunal dated July 16, 2011 and a copy of certificate of confirmation of grant dated August 30, 2012 in Succession Cause No 27 of 2012 in the Senior Resident Magistrate's Court at Kajiado.
8. The interested party filed a witness statement dated March 18, 2021 in which he says that he purchased LR 8467 measuring 1.60 Hectares from the first to the fifth defendants at Kshs 5 million. He then took possession immediately and remains in such possession. He concludes that he is not privy to the averments by the plaintiffs.
- He is also not aware of any court orders issued on February 12, 2013.
- Earlier on May 10, 2019, while seeking to join the suit, the interested party had filed a copy of title deed for LR 8467 issued on September 23, 2013.
9. At the trial, the first plaintiff and his two witnesses testified by adopting their witness statement and documents.
- They were then cross-examined by the adverse party's counsel. On the part of the defence, the first and fourth defendants testified and they too were cross examined by the adverse party's counsel.
10. Counsel for the parties filed written submissions on March 17, 2022 in the case of the defendants and April 14, 2022 in the plaintiffs' case. No submissions were filed by interested party's counsel by the deadline of August 30, 2022.



The issues for determination raised by the defendants are three. They are as follows.

- a. Whether the defendants acted fraudulently in any of their actions relevant to this suit or as pleaded by the plaintiffs?
- b. Whether the plaintiffs have ever had good title to the suit property?
- c. Whether the plaintiffs are entitled to the prayers as sought in their amended plaint dated July 18, 2019?

On the other hand, the plaintiffs identified the following issues for determination.

- a. Whether the plaintiffs are the lawful owners of the suit parcels?
- b. Whether the defendants fraudulently effected subdivision and transfers of the suit property?
- c. Whether the orders sought should be granted in the circumstances of this case?

In addition to the issues raised by the parties, I find the following issues necessary. They were actually raised in the counterclaim. They were not however raised among the defendants' issues.

- a. Whether the plaintiffs' suit is time barred?
- b. Whether the defendants have acquired title to the suit parcels by way of adverse possession?
- c. Whether the tribunal had jurisdiction to order cancellation of the plaintiffs' title to the suit land?
- d. Whether the suit parcels were available for distribution to the defendants in the succession cause?
- e. Whether the plaintiffs have proved that their claim to the suit parcels goes to the root of the title?

11. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents and oral testimony.

I have also considered the submissions by all the parties who filed as well as the case law cited therein.

I make the following findings on the issues raised above beginning with the ones that I have identified.

On time bar, I find that the suit is not time barred because under section 26 of the [Limitation of Actions Act](#), it is provided as follows.

“Where, in case of an action for which a period of limitation is prescribed, either –

- a. The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b. The right of action is concealed by the fraud of any such person as aforesaid; or
- c. The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has disowned the fraud or the mistake or could with reasonable diligence have discovered it ...”

From the evidence adduced by the first plaintiff, it is proved that from November 8, 2010 when he discovered the first fraud of missing records, he did all he could to have the records restored and reconstructed.



When he discovered the second fraud, he filed this suit. The law of limitation cannot affect this case because the plaintiff acted with speed every time he discovered fraud.

On the second issue of whether the defendants have acquired title to the suit land through adverse possession, I find that they have not. No evidence of any occupation by the defendants or any property that they have on the suit land has been adduced.

It is only the interested party who in his witness statement said that he is occupation. However, he did not testify in this case.

In contrast, the plaintiff has proved that he bought the suit parcels when they were vacant and it is only in the year 2015, when this suit was pending that the defendants fenced off a part of it.

In any event, the procedure of seeking to be declared as being entitled to land through adverse possession is outlined in order 37 of the Civil Procedure Rules. The defendants have not complied with that procedure in this case.

On the third issue, I find that the Land Disputes Tribunal sitting at Ngong in Tribunal Case No 11 of 2012 did not have jurisdiction to cancel the plaintiffs land because the jurisdiction of the tribunal was restricted to the three areas by section 3 of the repealed Land Disputes Tribunal Act (Act No 18 of 1990) which provided as follows.

- "3(1) subject to this Act all cases of a Civil Nature involving a dispute as to-
- a. The division of or the determination of boundaries to, land including land held in common;
 - b. A claim to occupy or work land, or
 - c. Trespass to land,
- Shall be heard and determined by a tribunal established under section 4".

By ordering the cancellation of title to land, the tribunal acted where it had no power. The tribunal's action being unlawful, it means that the defendants title to the suit land parcels were obtained unlawfully. Under section 26(b) of the Land Registration Act, such title is impeachable.

On the fourth issue, I find that the suit parcels were not available for distribution to the estate of the deceased on 30th of August, 2012.

This is because I am satisfied that the late Matinkoe Ole Mula sold the suit parcels to United Insurance Company Limited who in turn sold them to the plaintiffs.

The conveyance documents including the transfer forms, the letters of consent and the applications for consent are all part of the record.

Finally, on the issues identified by the court, i find the plaintiffs' claim goes to the root of the title.

The plaintiffs have in their oral and documentary evidence laid bare the concatenation of events that led to their acquisition of the title deeds to the suit parcels.

12. I now come to the issues raised by the defendants' counsel.

On the first issue, I find that the defendants acted fraudulently in several actions relevant to this suit.

Firstly, the defendants acted in disobedience of the court order, first issued on February 13, 2013 and extended over and over again. The said order restrained the defendants from selling, subdividing



etcetera any of the suit parcels or the resultant parcels pending the hearing and determination of the notice of motion dated February 5, 2013.

While the said order was in force, LR 8467 was sold to the interested party who became registered on September 23, 2013. Nothing done in disobedience of a court order can be lawful.

Secondly, the defendants sought an order of cancellation of title to land from a tribunal when such tribunal did not have jurisdiction to issue such an order.

On the second of the defendants' issue, I find that the plaintiffs obtained a good title for reasons already given.

On the third and final issue, I find that the plaintiffs are entitled to the prayers sought in the amended plaint dated July 18, 2019 for the reasons already given.

Finally, I need not consider the plaintiffs issues because they have already been determined in the above analysis.

For the above stated reasons, I enter judgment for the plaintiffs against the defendants jointly and severally as prayed for in the plaint.

Secondly, I dismiss the defendants' counterclaim with costs to the plaintiffs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF OCTOBER, 2022.

M.N. GICHERU

JUDGE

HON. JUSTICE M.N. GICHERU JUDGMENT ELC NO.784/2017 6

