



**Koisikir (suing as the Administrator of the Estate of Partoti Koisir (deceased))
v Diplomatic Housing and Co-operative Society Limited; District Land
Registrar, Kajiado County & another (Third party) (Environment & Land
Case 800 of 2017) [2022] KEELC 13773 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 800 OF 2017**

**MN GICHERU, J
OCTOBER 24, 2022**

BETWEEN

**JAMES KIBERESH OLE KOISIKIR PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF PARTOTI KOISIR
(DECEASED)**

AND

**DIPLOMATIC HOUSING AND CO-OPERATIVE SOCIETY
LIMITED DEFENDANT**

AND

**DISTRICT LAND REGISTRAR, KAJIADO COUNTY THIRD PARTY
CHRISTINE KWAMBOKA OGETO THIRD PARTY**

JUDGMENT

1. James Kiberesh Ole Koisir, the plaintiff, suing as the administrator of the estate of the late Partoti Koisir, deceased, seeks the following reliefs against Diplomatique Housing Co-operative Society Limited as per the plaint dated February 20, 2015.
 - a. An order of permanent injunction to issue restraining the defendant by itself, its servants, agents and whomsoever acting under its authority from trespassing, encroaching, entering, alienating, interfering and or dealing in any manner prejudicial to the plaintiff's proprietary interests and those of beneficiaries in respect of subdivisions of LR No Ngong/Ngong/2209 namely, Ngong/Ngong/65586, 65587, 65588, 65589 and 65590.



- b. A declaration to issue confirming the plaintiff as the rightful and registered owner of LR Ngong/Ngong/2209 (suit land) and that the subsequential transactions were lawful.
 - c. Costs of the suit and interest thereon.
 - d. Any such other or further relief as this court may deem fit and expedient to grant.
2. The plaintiff's case is as follows. He is the administrator of the estate of the late Partoti Koisikir who was his father and who died intestate on October 5, 1995 of old age.

Following the death of the plaintiff's father, a succession cause number 556 of 2012 was filed at the High Court of Kenya at Nakuru whereby a certificate of confirmation of grant was issued.

On August 22, 2014, an official search was carried in respect of the suit land. The said search confirmed the deceased Partoti Koisikir as the registered owner of the suit land.

The plaintiff applied to be registered as the owner of the suit land by way of transmission and his application was allowed.

Eventually, the family of the late Partoti Koisikir (deceased) decided to subdivide the suit land into six parcels which are Ngong/Ngong/65585 – 90 (resultant parcels). A parcel of the suit land was eventually sold to Christine Kwamboka Ogeto, the second third party, and she was issued with a title deed on December 3, 2014.

The reason for filing this suit is that the defendant claims to be the registered owners of the suit land. This is not the case because the deceased did not at any time during his lifetime sell the suit land. Had he sold the suit land, he would have informed the plaintiff, his brothers and mother before his death.

The defendant has no lawful claim to the suit land and the prayers by the plaintiff should be allowed.
3. In support of his case, the plaintiff filed the following evidence.
 - i. His own witness statement dated February 20, 2015.
 - ii. Copy of the deceased's certificate of death dated June 15, 2012.
 - iii. Gazette notice No 13255 of September 4, 2012 showing succession cause No 556/2012 at the High Court of Kenya at Nakuru.
 - iv. A copy of grant dated October 25, 2012 issued in the succession case.
 - v. A copy of certificate of confirmation of grant dated July 25, 2014.
 - vi. A copy of official search dated August 22, 2014 showing the deceased as the registered proprietor of the suit land.
 - vii. A copy of the mutation form that subdivided the suit land to the six (6) resultant parcels.
 - viii. Copy of letter dated December 23, 2014 by the plaintiff's counsel complaining of trespass to the suit land.
 - ix. Other correspondence
 - x. Copy of witness statement by Peter Lemaiyan Koisikir dated August 12, 2021.
4. In its written statement of defence and counterclaim dated February 24, 2016, the defendant denies the plaintiff's claim in its totality and avers that it is the registered owner of all that property known as Ngong/Ngong/2436.



The defendant contends that LR Ngong/Ngong/2209 ceased to exist upon its subdivision by the deceased in 1974. By 1975, the deceased had sold both Ngong/Ngong/2436 and 2437 which resulted from the subdivision of Ngong/Ngong/2209.

As at November 13, 1976, the deceased did not have any lawfully registered interest in land number 2209 to transmit to the plaintiff because the file for the same was closed.

The defendant continues to aver that it acquired title to LR 2436 for value from Kabaria Sunrise Stones in November, 1990 and that the posthumous acquisition of a title deed by the estate of Partoti Koisikir of LR 2209 which did not exist after November 13, 1976 smacks of fraud.

In 1975, the deceased sold LR 2437 to Mrs Esther Wanjiku and LR 2436 was sold to John Hoseah Kahara. On January 21, 2015, the land registrar wrote to the plaintiff advising that LR 2209 did not exist and asked the plaintiff to surrender all the title deeds for LR Ngong/Ngong/65585 – 90 for cancellation as they were null and void.

The defendant concludes the defence by averring that in view of the cancellation of the title deed for Ngong/Ngong/65585-90, the plaintiff did not have a good title to pass to the second third party who was not a bonafide purchaser.

5. In the counterclaim, the defendant pleads the particulars of malice and fraud on the part of the plaintiff as follows.
 - a. Procuring illegal titles out of the subdivision in the title Ngong/Ngong/2209 which had been closed on November 13, 1976.
 - b. Alleging that LR 2209 which had ceased to exist in 1976 was the property of the deceased on October 5, 1995.
 - c. Using succession proceedings in Nakuru HCCC 556 of 2012 as a vehicle to gain control over LR 2209 which was not owned by Partoti Koisikir at the time of his death.
 - d. Causing the subdivision of non-existence land namely LR 2209 and procuring title deeds for LR 65585- 65590 for sale to unsuspecting members of the public.
 - e. Illegally entering the defendant's property and purporting to sell the defendant's property to unsuspecting members of the public as title deeds Ngong/Ngong/65585 – 65590.
 - f. Passing of the defendant's property namely 2436 as the plaintiff's property.
 - g. Using false allegations and nullified title deeds numbers 65585 – 65590 to lay claim over the defendant's property.
 - h. Refusing to surrender the illegal and void title deeds when called upon to do so by the registrar.
6. The particulars of fraud and collusion on the part of the land registrar are pleaded as follows.
 - a. Creating illegal entries on subdivision by the plaintiff of a file Ngong/Ngong/2209 which was closed on November 13, 1976.
 - b. Preparing title deeds for LR 65585 – 65590 which are null and void.
 - c. Giving illegal and void title deeds for LR 65585 – 65590 to the plaintiff.
7. In conclusion, the defendant prays for the dismissal of the plaintiff's suit with costs for judgment against the plaintiff as per the counterclaim as follows.



- a. A declaration that the defendant is the bonafide registered proprietor of the suit land Ngong/Ngong/2436.
 - b. A declaration that title deed LR Ngong/Ngong/65585 – 90 and all transaction relating to them are null and void.
 - c. An order directing the land registrar to cancel the title deeds for LR 65585- 90 and all the transactions relating to them.
 - d. A permanent injunction to restrain the plaintiff by himself, his servants, agents, employees and/or any persons claiming from him from trespassing or otherwise meddling in any way whatsoever and offering for sale LR No 2346.
 - e. Costs of the suit plus interest thereon.
8. In support of its case, the defendant filed the following evidence.
- i. Mutation form for title No Ngong/Ngong/2209 dated 22/09/1974.
 - ii. A copy of transfer form dated June 9, 1975 transferring LR 2436 to John Hosea Kahara.
 - iii. Copy of application for consent of the Land Control Board dated June 9, 1975.
 - iv. Copy of transfer form for LR 2436 from John Hosea Kahara to Kahara to Kabiria Sunrise Stones Limited dated August 10, 1987.
 - v. Copy of transfer form in favour of the defendant by Kabaria Sunrise Stores Limited.
 - vi. Copy of title deed for LR 2436 dated December 13, 1990 in the name of the defendant.
 - vii. Copy of letter by Land Registrar Kajiado dated January 21, 2015 to James Kiberesh Ole Koisikir asking him to surrender title deeds for LR 65585- 90 for cancellation.
 - viii. Witness statements by Benard Sendeu Olemereu, Jacob Kilunda Malatya, and Richard Okanda Owade.
 - ix. Copy of a letter dated June 26, 2014 written by the defendant to the Land Registrar, Kajiado complaining of encroachment on the suit land.
 - x. Copy of a letter dated December 15, 2014 by the defendant to Deputy County Commissioner, Land Registrar and DCIO Ngong, complaining of encroachment on the suit land.
 - xi. Copy of the letter by the defendant dated January 19, 2015 to the Chief Land Registrar complaining of encroachment onto the suit land.
 - xii. Copy of green card for the suit land showing how the land was transferred from Partoti Ole Kosikir on November 13, 1976 all the way to the defendant on December 15, 1990.
 - xiii. Site inspection report.
 - xiv. Excerpt of Kenya gazette notice of July 22, 2016.
 - xv. Demand letter dated May 31, 2017.
 - xvi. Witness statement by Christopher Chika filed in court on July 21, 2021.



9. The first third party filed a statement of defence dated March 14, 2019 denying indemnity sought by the defendant and also denying creating any illegal title deeds or entries in respect of Ngong/Ngong/2209 and 65585-90.

10. The second third party filed her statement of defence dated October 25, 2019. In the said statement, she avers that the plaintiff is the registered proprietor of LR Ngong/Ngong/65586 and she is a bonafide purchaser for value without notice of any interest of the defendants.

She concluded by saying that she is in possession of the said parcel and the defendant's counterclaim should be dismissed with costs.

11. In support of her case, the second third party filed the following evidence.

- i. Copies of green cards for LR Ngong/Ngong/2209, 2436 and 2437.
- ii. Copies of application for consent for LR Ngong/ Ngong/ 2209, 2436, 2437 dated the years 1975, 1987, 1990, 1985.
- iii. Letters of consent of the Land Control Board dated the years 1975, 1987, 1990 and 1985 for number (ii) above.
- iv. Copies of green cards for parcel numbers 65585-90.
- v. Other relevant documents all totaling 7 in number.

12. At the trial on April 20, 2022, Raphael Suyanka testified on behalf of the plaintiff while Philip R.O Owade testified on behalf of the defendants.

The other parties did not call witnesses.

The plaintiff's counsel identified the following issues for determination.

- a. Whether the plaintiff is entitled to LR No Ngong/Ngong/2209 as per the confirmed grant dated October 25, 2014 and subsequent subdivision thereto?
- b. Whether the defendant has demonstrated that it is the owner of a valid title for LR Ngong/Ngong/2436?
- c. Who pays the costs of the suit?

13. On the other hand, the defendant has identified two issues for determination namely:-

- a. Whether the defendant is the bona fide owner of LR Ngong/Ngong/2436 pursuant to the duly signed and stamped transfer as registered on 13th day of December, 1990.
- b. Whether the plaintiff is entitled to the prayers sought before this court.

14. I have carefully considered all the evidence adduced in this case by all the parties. I have also considered the submission by learned counsel for the parties and the issues raised therein.

I have borne in mind the burden on the plaintiff to prove his case on a balance of probabilities and also the burden on the defendant to prove its counterclaim to a similar standard.

On the first of the plaintiff's issues, I find that he is not entitled to LR Ngong/Ngong/2209 as per the confirmed grant dated October 25, 2014 and the subsequent subdivisions thereto.



The reason for this is simple. There is sufficient evidence from the defendant and also from the third party to show that LR 2209 ceased to exist on November 13, 1976. This evidence is in the copy of green card certified a true copy of the original by the land registrar on July 28, 2015.

The same document has been filed by the second third party as exhibit No 2

If the land was subdivided and ceased to exist, surely it could not have been available about forty (40) years late for inheritance by the heirs of Partoti Koisikir.

Secondly, there is the letter dated January 21, 2015 written by the Land Registrar, Kajiado to the late James Kiberesh Ole Koisikir asking him to surrender the title deeds for LR No Ngong/Ngong/65585-90, for cancellation.

These are the title deeds alleged by the plaintiff to have mutated from LR Ngong/Ngong/2209. This letter is not disputed by the plaintiff and it was produced as defendant's exhibit number 7.

The said title deeds being called for cancellation because they were unlawfully issued.

Finally, there is the witness statement by Bernard Senteu Olemereu filed in court on February 28, 2019 in which the witness says that he was the chief of Kibiko, the area in which the land is situated and he knows that LR 2436 was sold by the late Partoti Ole Koisikir to Mr Kahara who sold it to Kabiria Sunrise Stones, who sold it to the defendant.

This corroborates the copy of green card referred to above.

On the second of the plaintiff's issues, I find that the defendant has demonstrated that it is the owner of a valid title to LR No 2436. The plaintiff has made the absence of a written agreement between the defendant and Kabiria Sunrise Stores Limited an issue at the submission stage.

This issue should have been raised in the pleadings especially in a defence to the counterclaim or in the plaint itself. By raising it in the submissions stage, the defendant has been denied the opportunity of responding to it. This is not fair.

Secondly, the *Law of Contract Act* exempts a purchaser in possession of land from the requirement of an agreement of sale of such land.

I therefore find that the submission is not valid or fair for having been brought up abruptly in the written submissions and not at the appropriate stage.

The defendant has proved how it acquired a valid title to the suit land. The concatenation of transactions leading to the defendant's registration as the proprietor are very clear and all legal.

The same cannot be said of the plaintiff whose only claim to the land is based on a court order that was issued erroneously by the High Court in Nakuru.

Regarding the defendant's first issue, I find that it is the bona fide owner of LR Ngong/Ngong/2436 pursuant to the duly form signed and stamped transfer form as registered on 13th day of December, 1990.

There is overwhelming evidence not just from the defendant and the Land Registrar, but also from the second third party's documents to prove that the defendant is the bona fide owner of the land reference No Ngong/Ngong/2436.

The second of the defendant's issues has already been decided while deciding the plaintiff's issue.

On the issue of costs, they must follow the event as per the proviso to section 27(1) of the *Civil Procedure Act*.



For the reasons given above, I dismiss the plaintiff's suit with costs to the defendant and the third parties.

Secondly, I enter judgment for the defendant against the plaintiff and the third parties as per the counterclaim with costs to the defendant.

Dated signed and delivered virtually at Kajiado this 24th day of October, 2022.

M.N. GICHERU

JUDGE

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HON. JUSTICE M.N. GICHERU JUDGMENT ELC NO.800/2017 5

