



Mukwano Distributors Limited v Sanoye (Environment & Land Case 91 of 2016) [2022] KEELC 13683 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 91 OF 2016
CA OCHIENG, J
OCTOBER 19, 2022**

BETWEEN

MUKWANO DISTRIBUTORS LIMITED PLAINTIFF

AND

SEURI LEGUSI SANROYE DEFENDANT

JUDGMENT

1. Through a Plaint dated the August 29, 2016 which was amended on May 21, 2018, the Plaintiff seeks for the following orders:
 - a. A declaration that the Defendant’s actions amount to unconstitutionally dispossessing the Plaintiff of its right to property contrary to article 40 of the Constitution.
 - b. The Defendant, his servants, successors or assign be hereby evicted from the suit property.
 - c. The Defendant be restrained whether by himself, his agents, servants, successors or assign howsoever from entering, encroaching, trespassing, working, construction, fencing, alienating, building or transaction on all that parcel of land known as LR No 26700/3 comprised in Grant No I R 119946, pending the hearing and determination of this suit.
 - d. Costs of the suit and interest; and
 - e. Any other remedy that the court may deem fit.
2. The suit was defended by the Defendant who filed a Statement of Defence dated the December 11, 2020. In the Statement of Defence, the Defendant denied the averments in the Plaint except the descriptive and the jurisdiction of the Court. The Defendant stated that he is the bona fide proprietor of LR No 26700/3 situated at Mavoko Municipality, hereinafter referred to as the ‘suit land’ which he holds in trust for more than three hundred (300) members of the Maasai Community who have been residing thereon. He claimed they moved into the suit land around 1979 and have continuously resided



thereon for more than forty (40) years. He averred that, by way of a fraudulent scheme, the Plaintiff and other individuals unknown to them, purported to dispose of the suit land to their detriment. He confirmed that sometimes in October 2010, he commenced Machakos HCC C No 238 of 2010 Seuri Legusi Sanoye v Fellow Limited being a suit around ownership of the suit land and obtained orders of injunction restraining the said Defendant from transacting with it. He insisted that the Certificate of Title comprised in Grant No IR 119942 forming the basis of the Plaintiff's claim is false, fraudulent and obtained through a corrupt scheme. He reiterated that there have been previous proceedings in respect to this matter. He pleaded particulars of fraud, illegality and corruption against the Plaintiff and contended that the certificate of title IR No 119942 was not lawfully prepared, processed or issued by the Ministry of Lands and Physical Planning. Further, that the copy of the Deed Plan No 269095 was not certified by the Director of survey before issuance as required during registration and stamp duty had not been paid to the Kenya Revenue Authority before the alleged transfer in favour of the Plaintiff.

3. The matter proceeded for hearing where the Plaintiff called one witness while the Defendant had two witnesses.

Evidence of the Plaintiff

4. PW1 Andrew Wasonga Swak, a Director of the Plaintiff adopted his written statement dated the June 28, 2021 as his evidence in chief. In his testimony, he confirmed that the Plaintiff had conducted due diligence before purchasing the suit land from Fellow Limited and they had confirmed that the title deed had no encumbrance over it. He testified that the Plaintiff entered into a sale agreement dated the January 3, 2015 with Fellow Limited and received all the requisite receipts from the vendor. He contended that the Plaintiff was then registered as the owner of the suit land and it holds the Certificate of Title to that effect. It was his testimony that in an attempt to take possession of the suit land, they were shown a Land Rent Payment Request dated the July 29, 2015 purporting to show the owner of the suit land as Seuri Legusi Sanoye of P.O. Box 292, Mlolongo. Further, that the Defendant has blocked them from taking possession of the suit land and attacks their agents whenever they attempt to fence the said land. To support its case, the Plaintiff produced the following documents as exhibits: Letter from Commissioner of Lands to CID dated March 31, 2010; Letter from Chief Land's Registrar to CID Athi River dated May 4, 2010; Letter from Commissioner of Lands to Numerical Machinery Complex Limited dated May 11, 2010; Certificate of Title to LR No 26700/3; Grant IR 119942; Land Rent Payment Request by Seuri Legusi Sanoye of Box 292 Mlolongo; Agreement for Sale Between Fellow Limited and Mukwano Distributors Limited dated 3rd January, 2015; Transfer dated April 28, 2015; Land Rent Payment Request dated July 29, 2015; Receipt No 176779 from Mavoko Sub County dated July 29, 2015; Clearance Certificate No 6801 dated August 4, 2015; Receipt No 177037 from Mavoko Sub-county dated August 4, 2015; Kenya Revenue Authority Domestic Tax Department Serial No 2544574 dated April 30, 2015 and Letter from Okwach & Company Advocates dated August 9, 2016 to Seuri Legusi Sanoye.

Evidence of the Defendant

5. DW1 Joseph Pasharr Pello adopted his statement as recorded on July 2, 2021 as his evidence in chief. He confirmed being the Defendant's son and was well conversant with the history of the suit land. He stated that the Maasai clansmen and their forefathers have lived on the suit property for over 50 years. He testified that he was 40 years old and had been a worker at Kenya Meat Commission (KMC) in the 1970s that originally owned the parcel and allowed its workers to reside thereon. Further, when the KMC went defunct, they were left residing thereon to-date. DW1 further stated that in the year 2008, some persons started dividing the adjoining parcels of land prompting them to file a case with the Athi River Lands Disputes Tribunal Case No 98 of 2008 which ruled in their favour and directed



the Principal Registrar to subdivide the land and give the 600 acres to them. Further, that each member was to get four (4) acres. It was his testimony that his father filed Machakos HCCC No238 of 2010 Seuri Legusi Sanoye v Fellow Limited and obtained restraining orders against Fellow Limited. Further, that the said Fellow Limited also filed a suit against his father, being Machakos HCCC No 45 of 2011. It was his contention that that the alleged transfers of the suit land to Numerical Machining Complex Limited who allegedly sold to Multilingual Limited who further sold to Fellow Limited that subsequently transferred to the Plaintiff were all futile as Numerical Machining Complex Limited never owned the suit land in the first place.

6. DW2, Seuri Legusi Sanoye in his testimony adopted his statement as recorded on July 2, 2021. He reiterated the averments of DW1 and explained that vide a letter dated the July 28, 2020, he wrote to the Chief Land Registrar seeking to establish the authenticity of the alleged title by the Plaintiff and through a response dated the July 30, 2020, the Chief Land Registrar indicated that the title was fake as it did not originate from the Registrar's office. In cross examination he denied swearing an Affidavit to a Notice of Motion Application dated June 4, 2020 wherein he had applied to set aside the exparte Judgment earlier entered against him, culminating in the court allowing the said Application. He further denied knowledge of the Certificate of Title annexed therein which was in his name. To support his evidence, the Defendant produced the following documents as exhibits: Letter to the Chief Land Registrar dated July 28, 2020; Letter from the Chief Land Registrar dated July 30, 2020; Still coloured photographs of the suit property; Athi-River Land Disputes Tribunal proceedings dated December 3, 2008; Taskforce Report on irregular appropriation of public land and squatter problem in Athi-River District and Numerical Machining Company Limited CR12.

Submissions by the Parties

Plaintiff's Submissions

7. The Plaintiff maintained that it is the bona fide registered proprietor of the suit land and relied on various correspondence dated between 2009 and 2010 which confirmed the authenticity of the title held by Numerical Machining Complex Limited over the said land. It argued that there were various legal transfers with the latest being to the Plaintiff in 2015. It relied on Section 26 of the [Land Registration Act, 2012](#) which deemed a certificate of title as a prima facie evidence of land ownership on the person whose name appears therein. On the issue of whether the Defendant had acquired the title and ownership over the suit land, it opined that the provisions of Sections 7 and 13 of [Limitation of Actions Act](#) did not accrue automatically and must be invoked through a court of law. Further, that the suit land was originally and until 1992, public land since KMC was a parastatal, hence exempted from occurrence of adverse possession by dint of Section 41(a) of the [Limitation of Actions Act](#). It cited with approval the case of [Presbyterian Foundation v General of the Salvation Army \(2018\) eKLR](#) where the court equated public land to government land hence not subject to adverse possession. On whether the transfer of the suit land to the Plaintiff was done in the existence of a court order staying the said transaction, it submitted that the order automatically lapsed on March 9, 2012 by dint of the provisions of Order 40 Rule 6 of the [Civil Procedure Rules](#), which deemed such interlocutory orders invalid after 12 months unless otherwise extended. As to whether the challenges to the Title Deed it held is meritorious, it submitted that the title was verified vide a letter from the Ministry of Lands and Physical Planning dated the August 6, 2020 and a search certificate bearing the same date. It proceeded to outline that indeed the Plaintiff made a formal complaint to the Director of Criminal Investigations, who confirmed from the Land Registrar that the Plaintiff was the registered owner of the suit land and that the title held by the Defendant was a forgery. Further, that the Defendant was consequently arrested and charged with inter alia, forgery contrary to Section 350(1) of the [Penal Code](#). It further submitted that the Defendant admitted to his arrest during hearing and that the matter is still pending.



It argued that the Defendant was inconsistent in that he admitted to the validity of title at times and denied it, at other times, breaching the doctrine of approbation and reprobation. It concluded that the issue of the date of incorporation of Numerical Machining Complex Limited is a non-issue, as the date on the front page of the title does not reflect proprietorship date by any party.

Defendant's Submissions

8. As to whether the Defendant is the bona fide proprietor of the suit land, he submitted that vide the decision by the Athi Lands Dispute Tribunal of 2008, together with other herders who resided thereon, they obtained an order to have titles issued to them with respect to the said land. He argued that the Tribunal had jurisdiction to hear the matter in 2008 since this was before the enactment of the Environment and Land Court Act of 2011. He further stated that, had any party been aggrieved by the decision of the tribunal, then they should have appealed as provided by Section 8 of Lands Dispute Tribunal Act. He cited with approval the case of Sally Jemeli Korir & Another v William Suter & 2 Others (2020) eKLR wherein it was held that by dint of Section 23(3) of the General Provisions Act, the decisions of the defunct Tribunal should be preserved. As to the acquisition of the title by the Plaintiff being fraudulent, he submitted that the Plaintiff was attempting to mislead the court since the alleged issuance of the title to Numerical Machinery Complex Limited in 1992 could not be possible as the company was incorporated in 1994. Further, the Plaintiff admitted that the Lease was effected in 2009 which was another attempt to mislead the court. It was the Defendant's contention that the various parties who transacted over the suit land were all aware that they were not getting vacant possession since he had always resided thereon together with his clansmen. He pointed to Clause 5 in the sale agreement between Numerical Machining Complex Limited and Multilingual Limited where it was clearly stated that the buyer would before payment of the purchase price visit the property to ascertain the actual ground position thereof. To buttress his averment, he cited the case of Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 Others (2015) eKLR where the court emphasized that the acquisition of title cannot be construed only in the end result but the process of acquiring the same is material. In defence of the dismissal of Machakos ELC No 228 of 2010, he argued that it was purely a mistake of counsel for not handling the matter diligently and not updating him, leading to dismissal for want of prosecution. He concluded by stating that the Plaintiff is trying to mislead the court that the title that had been passed around was 'good title' despite the many encumbrances and the same should be cancelled.

Analysis and Determination

9. Upon consideration of the Plaintiff, Defence, Testimony of the Witnesses, Exhibits and Submissions, the following are the issues for determination: Whether the Plaintiff is the bona fide proprietor of the suit land. Whether the Defendant has legally acquired the suit land. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
10. As to whether the Plaintiff is the bona fide proprietor of the suit land. PW1 in his evidence confirmed the Plaintiff purchased the suit land from the previous owner Fellow Limited vide a Sale Agreement dated the January 3, 2015. PW1 stated that the Plaintiff paid stamp duty of Kshs 6,000,040 at the point of purchase and produced a receipt to that effect. PW1 explained that the Deed Plan in respect to the suit land was verified by the Director of Surveys and produced a Transfer Document dated the April 28, 2015 as an exhibit. I note in the said Transfer, it is in respect of LR No 26700/3, for Kshs 150,000,000. Further, the said Transfer was registered in the Land Titles Registry Nairobi on April 30, 2015. It was the PW1's testimony that the Defendant held a fake title which he had used to apply to set aside the ex parte Judgment vide his Notice of Motion dated the June 4, 2020. He denied that the signature for the Commissioner of Lands was a forgery as alleged by the Defendant and insisted that



vide a letter dated the August 6, 2020, the Directorate of Criminal Investigations (DCI) confirmed the Plaintiff's title was authentic. Further, that the Certificate of Search dated the August 6, 2020 also confirmed the Plaintiff owns the suit land. PW1 explained that vide a letter dated the August 14, 2020 from the Ministry of Lands to DCI, it confirmed the Certificate of Title held by the Defendant was a forgery and that IR No 89699 is registered under Parcel No LR 1870/IV/71 which is in the name of Shimoni Resorts. Further, that the Defendant was charged with presentation of false documents including forceful detainer in which matter he is a state witness.

11. PW1 denied that the Plaintiff was party to Machakos ELC 238 of 2010 and 45 of 2011 which were consolidated and later dismissed. The Plaintiff claimed the Defendant and his agents had further blocked them from taking possession of the suit land and even attacked some of their agents who attempted to fence it. The Defendant insisted that the suit land was part of the proceedings in the Athi River Land Disputes Tribunal and DW1 stated that the dispute therein revolved around ownership of LR No 1338/3 and 1338/4 respectively which I note is different from the suit land. I further note that the title to the suit land was created on May 1, 1992 while the Ruling of the Tribunal is dated January 3, 1998. The Defendant claimed they own the suit land as they have resided thereon for over 50 years and have built schools, mosque, including permanent homes. Further, DW1 in his testimony contended that his family entered the suit land when the said land belonged to the Kenya Meat Commission.
12. From the evidence I have analysed above, I note the Plaintiff has held its Certificate of Title and demonstrate how it acquired it from the previous owner Fellow Limited. Insofar as the Defendant dwelt on the issue that Numerical Machining Complex Limited was registered as owner of the suit land before being registered as a company in 1994, I have had a chance to peruse the said Certificate of Title and I note although the register of the title was opened on May 1, 1992, one F M Ngethe, Registrar of Titles, signed it on June 10, 2009 on behalf of the Commissioner of Land. Further, except for the Defendant, no party from Numerical Complex Machinery Limited nor Fellows Limited that were previous owners of suit land have come forward to challenge the Plaintiff's title. Section 24 (a) of the [Land Registration Act](#) stipulates as follows:

“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”

13. While Sections 26(1) (b) of the [Land Registration Act](#) states inter alia:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

14. In the case of [Willy Kipsongok Morogo v Albert K. Morogo \(2017\) eKLR](#) the Court held as follows:

“The evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the [Land Registration Act](#).”



15. While in the case of *Joseph NK Arap Ng'ok v Moiyo Ole Keiwua & 4 Others [1997] eKLR*, where the Court of Appeal held that:

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”

16. Further, in Civil Appeal No 246 of 2013 Arthi Highway Developers Limited v West End Butchery Limited and Others, the Court of Appeal expressly stated thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

17. In associating myself with the cited decisions, the quoted legal provisions as well as the evidence before me, I find that the Plaintiff is indeed the absolute proprietor of land parcel number LR No 26700/3 comprised in Grant No I R 119946 and hence entitled to protection of the law in accordance with the provisions of Sections 24, 25 and 26 of the *Land Registration Act*.

18. As to whether the Defendant has legally acquired the suit land. The Defendant has claimed ownership of the land in his Defence and I note he even annexed a Title in his name to an Affidavit he had sworn in support of an Application seeking to set aside the ex parte judgement herein. I note the Plaintiff also produced a copy of a Land Rent Payment Request by Seuri Legusi Sanoye of Box 292 Mlolongo. The Defendant insisted that the title the Plaintiff held is fake and this was confirmed by the Chief Land Registrar. The Defendant proceeded to deny the averments in the said affidavit including the Certificate of Title annexed therein but confirmed he had been charged in court. DW1 confirmed in cross-examination that the suit land in the Athi River Lands Disputes Tribunal Case No98 of 2008 Namunyak Self Help Group v Numerical Machining Complex were 1338/3 and 1338/4 was different from the suit land herein but insisted that the transfer from Numerical Machining Complex Limited to Multilingual Limited was in contravention of the judgement from the said Tribunal. The Defendant further confirmed that the suit land was initially large but had since been subdivided. The Defendant confirmed having furnished in court pictures of iron sheet structures but insisted it had a live hedges. DW2 denied having any title to suit land and did not know who furnished court with the title annexed to the application for setting aside the exparte Judgment. From his testimony, he seemed to shift the blame to his lawyers but to my mind, he did not seem candid. He claims to have been representing over 300 families but I note he only came forward to testify with his son. It is trite that he who comes to equity must come with clean hands, but in this instance, I find that the Defendant does not have clean hands and sought to get the suit land at all costs including producing a fake title. Further, from the evidence of DW1 and DW2 they were at times not consistent on the ownership of land as well as date of entry into the suit land. I hence find that the Defendant has not legally acquired the suit land as claimed.

19. In the circumstance, I find that the Plaintiff is entitled to orders as sought in the Plaintiff.



20. It is against the foregoing that I find the Plaintiff has proved its case on a balance of probability and will proceed to enter judgement for it as against the Defendant and make the following final orders:
- a. A declaration be and is hereby issued that the Defendant's actions amount to unconstitutionally dispossessing the Plaintiff of its right to property contrary to Article 40 of the Constitution.
 - b. The Defendant, his servants, successors or assign be and are hereby directed to grant vacant possession from LR No 26700/3 comprised in Grant No I R 119946, within 90 days from the date hereof, failure of which an eviction order do issue.
 - c. After ninety (90) days, the Defendant whether by himself, his agents, servants, successors or assign howsoever be and are hereby permanently restrained from entering, encroaching, trespassing, working, construction, fencing, alienating, building or transacting on all that parcel of land known as LR No 26700/3 comprised in Grant No I R 119946.
 - d. Cost of the suit is awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF OCTOBER, 2022

CHRISTINE OCHIENG

JUDGE

