



**Mayoni (Suing as the legal representative of the Estate of Saginoi Ole Ndetuka aka Sagindi Ole Ndentuka (Deceased)) v Mutonyi & 3 others (Environment and Land Case Civil Suit 756 of 2017) [2022] KEELC 13630 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13630 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE CIVIL SUIT 756 OF 2017  
MN GICHERU, J  
OCTOBER 13, 2022**

**BETWEEN**

**JOSEPH SILEMI MAYONI ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAGINOI OLE  
NDETUKA AKA SAGINDI OLE NDETUKA (DECEASED)**

**AND**

**ISAIAH MUTONYI ..... 1<sup>ST</sup> DEFENDANT  
ISAAC GATHUNGU WANJOHI ..... 2<sup>ND</sup> DEFENDANT  
HELLEN SEKATO (SUED AS LEGAL REPRESENTATIVE OF JOHN  
EKANI) ..... 3<sup>RD</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, KAJIADO ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Joseph Silemi Mayon, the Plaintiff suing as the legal representative of the estate of Saginoi Ole Ndetuka aka Sagindi Ole Ndentuka (deceased), seeks the following reliefs against Isaiiah Mutonyi, Isaac Gathungu Wanjohi, Hellen Sekento Ntooka (sued as the legal representative of the estate of John Ekani Ndetuka (deceased), and District Land Registrar referred to as the first, second, third and fourth Defendants as per the amended plaint dated July 8, 2019.
  - i. An order revoking transfer of land reference Kajiado/Kaputiei North/1596 to John Ekani on April 17, 2001, the said transfer having been effected without letters of administration of the deceased estate.



- ii. An order declaring the subdivision carried out on May 8, 2001, partitioning the deceased's property into two i.e. Kajiado/Kaputiei/North/9332 and 9333, null and void the same having been obtained fraudulently, and without letters of administration.
  - iii. An order declaring that the transfer of property number Kajiado/Kaputiei North/9332 to the second Defendant and property number 9333 to the first Defendant did not confer proper title to the first and second Defendants and titles in their hands should be revoked.
  - iv. An order directed to the fourth Defendant to revoke and cancel title numbers Kajiado/Kaputiei- North 9332, and 9333 held by the second and first Defendants respectively.
  - v. That cost of this suit be borne by the Defendants.
2. The Plaintiff's case is as follows. He is the court appointed administrator of the estate of the late Saginai Ole Ndetuka, who was the registered owner of L R Kajiado/Kaputiei-North/1596 (suit land) measuring approximately 150 acres.
- Saginai Ole Ndetuka (the deceased) died intestate on June 8, 1992, and no letters of administration of his estate were taken out before the year 2012.
- During the lifetime of the deceased, the first and second Defendants intended to purchase the suit land from the deceased but he died before the negotiations were concluded.
- The first and second Defendants, well knowing that the registered owner of the land had died, fraudulently and unlawfully transferred the suit land to the husband of the third Defendant without any letters of administration. This happened on April 17, 2001.
- They took advantage of the illiteracy of the third Defendant's husband. The suit land was subdivided into two parcels namely Kajiado/Kaputiei/9332 and 9333, measuring 50 and 100 acres respectively and illegally transferred to the first and second Defendants.
- The fourth Defendant is to blame for effecting the subdivision and transfer without the consent of the relevant Land Control Board.
- The fourth Defendant is therefore guilty of fraud according to the Plaintiff.
3. In support of the case, the Plaintiff filed the following evidence.
- i. A witness statement filed on October 5, 2016.
  - ii. A copy of Limited Grant Letters of Administration *Ad Litem* issued on July 26, 2016.
  - iii. A copy of the register for the suit land (Green Card) with five (5) entries dating from 1/10/1990 to May 8, 2001.
  - iv. Copy of title deed for the suit land dated October 1, 1990.
  - v. Copy of certificate of official search for L R No 9333 dated May 2, 2012.
  - vi. Copy of title deed for L R 9332 in the name of the second Defendant. It is dated August 29, 2002.
  - vii. Copy of the title deed for L R 9333 in the name of the first Defendant.
4. In his amended defence dated October 22, 2019, the first Defendant denies the Plaintiff's claim against him and makes the following averments amongst others;



Firstly, the contents of the suit are invalid because the Plaintiff has committed the offence of perjury and also failed to disclose material facts.

Secondly, the suit is fraudulent and has been filed to extort more money from the first Defendant after he paid some sums to the Plaintiff and his siblings, who include William Koipitat, Benson Loishuru, Esther Kaipoon, the third Defendant and her late husband.

Thirdly, the first Defendant is an innocent purchaser who bought the suit land for value in good faith and without notice of any encumbrances or fraud, and therefore, obtained a good title.

He prays for the dismissal of the Plaintiff's suit with costs.

5. In support of his case, the first Defendant filed the following evidence.
  - a. His witness statement dated November 14, 2016.
  - b. Copy of sale agreement between him and Saginoi Ole Ndetuka dated June 3, 1988.
  - c. Copy of title deed dated October 1, 1990 in the name of Siginoi Ole Ndetuka. It is for L R Kajiado-Kaputiei-North 1596 measuring 60.7 hectares.
  - d. Copy of burial permit for the late Saginoi Ole Ndetuka dated June 16, 1992.
  - e. Copy of the deceased's identity card.
  - f. Copy of the deceased's certificate of death dated November 15, 2006.
  - g. Certificate of receipt of Kshs 25, 400/- by Simon Sikoyo Rano Pasha from the first Defendant on June 27, 1995. Pasha had paid the said amount to the deceased towards the purchase of the suit land.
  - h. Copy of title deed for the suit land in the name of John Ekani Ole Ndetuka. It is dated April 17, 2001.
    - i. Copy of title deed for L R 9333 dated May 9, 2001 in the name of the first Defendant.
  - j. Copy of memorandum of understanding dated June 7, 2002 between John Ekani Ole Ndetuka.
  - k. Copy of acknowledgment by John Ekani Ole Ndetuka dated August 20, 2002, that he has received Kshs 180,000/= from the first Defendant for the purchase of L R Kajiado/Kaputiei -North/9932 and that there is a balance of Kshs 20,000/=.
  - l. Copy of title deed for L R Kajiado/Kaputiei-9332 dated August 29, 2002 in the name of the second Defendant.
  - m. Certificate of land sale transaction by John Ekani Ole Ndetuka dated September 13, 2002 which is witnessed by John Martine Ole Lakati and Stephen Mungai Wainaina.
  - n. Copies of minutes of meetings held in WCE's office on Ngong Road, Nairobi on September 1, 8, 18, 25 and 27, 2006 attended by John Ekani Ndetuka, John M Lakati, Lepasole Kiruti William K Kisoso, John N Gacivih, the first and second Defendants.
  - o. Copy of letter by the assistant chief Ilpolosat Sub-location in Kajiado dated October 12, 2002, confirming John Ekani Ole Ndetuka as the legal heir of Saginio Ole Ndetuka.
  - p. Copy of indemnity agreement dated April 8, 2010 signed by William Koipitat, Joseph Silemi Mayon (the Plaintiff), Benson Loishorua Mayon, John Ekani Ndetuka, Esther Kaipoon Koipitat and Hellen Ekani in respect of L R Kajiado/Kaputiei-North/9333.



- q. A breakdown of the amounts received by each of the members of the Ndetuka family which shows that the Plaintiff received a total of Kshs 275,000/= from the first Defendant.
  - r. Copies of pleadings in ELC No 112 of 2013 at the High Court of Kenya in Nairobi.
  - s. Other documents.
6. In a nutshell, the defence by the first Defendant is as follows.

In 1982 or 1983, he became a friend to John Martine Ole Lekati, who introduced him to the late Saginoi Ole Ndetuka in 1985. Saginoi was the eldest son of his father Ndetuka.

He had four brothers namely; Lesomo Mayon, Raraita and Ekani. Saginoi and Raraita were unmarried and had no children. Raraita told the first Defendant that in the event of his death and that of his brother Saginoi, their property would be inherited by their brother Ekani.

Saginoi was a member of Ebuyangat Group Ranch which was in the process of being subdivided and he wished to sell some of the land which he was to get from the group ranch. He got L R Kajiado/ Kaputiei –North/643 comprising 316 acres.

He agreed to sell 150 acres to the first Defendant at Kshs 900 per acre. The first Defendant paid the purchase price partly. This was in the year 1988. Land No. 643 was subdivided to create L R 1596 and another parcel that Saginoi sold to Dr Munei, who was his relative.

In 1990, Saginoi visited the first Defendant in his office in Nairobi accompanied by Raraita and Ekani. He told the first Defendant that even though he had no children of his own, his two brothers Raraita and Ekani were regarded as his sons according to Maasai customs.

In 1992, the Plaintiff learnt that Saginoi had died and had been buried. On June 27, 1995, Raraita visited the first Defendant. He was accompanied by Pasha, Ole Lekati and William Mayon. Raraita told the first Defendant that the deceased's title deed in respect of the suit land was held by Pasha from whom the deceased had obtained Kshs. 25,400/=. He requested the first Defendant to pay the amount to Pasha so that he could release the title deed to pave way for the transfer of the land to the first Defendant.

The first Defendant agreed and an agreement of the same date was recorded. He was left with the title deed.

In 1995, Raraita passed away and Ekani was left as the sole brother to Saginoi. In 1999, Ekani and Lekati visited the first Defendant, and took away the title deed for the suit land so that he could complete the transaction of transferring the suit land to him.

In the year 2000, Ekani visited the first Defendant. He was in the company of Lekati and Lepaso Ole Kiruki; He had the title deed for the suit land in his name.

The first Defendant decided to buy 100 acres instead of the original 150 acres. Out of the 100 acres, Ole Kiruti was claiming 15 acres which he said he bought from Saginoi. Ole Kiruti offered to sell the 15 acres to the first Defendant. He accepted.

L R 1596 was subdivided into 9333 and 9332. On May 9, 2001, L R 9332 was transferred to the first Defendant. Later on, Ekani approached the second Defendant and sold him 50 acres and the land was transferred to him on August 29, 2002.

In 2006, William Koipitat Mayon visited the first Defendant accompanied by one Simon Mula. William was a nephew to Saginoi and his brothers. He asked the first Defendant for Saginoi's title deed. This prompted the first Defendant to call for a series of meetings of the family of Ndetuka which



culminated in the minutes of the meetings which he has annexed herein as evidence. The final product of the meeting was the indemnity which is signed by the Plaintiff among other family members.

In 2010, the same members of the deceased's extended family approached the first and second Defendants yet again. This time, they wanted the two Defendants to buy their 20 acres out of the earlier agreed 26.6 acres at the rate of Kshs 15,000/- per acre.

At first, the two Defendants were not agreeable to this arrangement but the family of Ndetuka through the Plaintiff and William Koipitat requested the late Livingstone S. Sane Advocate to plead with the two Defendants to accede to their request on condition he would prepare an irrevocable indemnity which would be signed by all family members.

The Plaintiff is a signatory to the said indemnity. The family of the deceased Saginoi went away.

In November 2012, the first Defendant was summoned to the fourth Defendant's office where he met William Koipitat, Ekani and members of the PCEA. He learnt that William Koipitat had wanted to fraudulently sell L R 9333 to the church. A forged title deed in the name of Ekani Ndetuka was shown to him.

In January 2013, William Koipitat instituted ELC No 1212/2016 at Nairobi which he later withdrew. William Koipitat was claiming to be the legal representative of the estate of Saginoi. The withdrawal was because the first and second Defendants agreed to give the family of Ndetuka 20 acres.

One month after the withdrawal of the suit by Koipitat, the Plaintiff instituted this suit.

In conclusion, the first Defendant contends that the Plaintiff and members of the deceased's extended family are engaged in a fraudulent scheme of either extorting money from buyers of land by reopening bargains or obtaining money by false pretences that they have family land available for sale whilst they know that is not the case.

7. The second Defendant, through his counsel on record filed a written statement of defence dated October 22, 2019. The said defence is intertwined with that of the first Defendant in many particulars.

The variations are however well captured as here below;

He purchased L.R. Kajjado/Kaputiei-North/9332 measuring 50 acres from Ekani for value after conducting due diligence. At the time, Ekani was the registered proprietor and he held a valid title. He contends that he holds a valid title for valuable consideration without any knowledge of any fraud from the apparent registered owner John Ekani Ndetuka.

Further to the above, the second Defendant contends that under Section 39 of the [Law of Succession Act](#), the heirs of Saginoi Ole Ndetuka the original owner of the suit land are his brothers, who are the beneficiaries on whose behalf this suit has been brought.

For this reason, the Plaintiff has no cause of action against the second Defendant.

8. In support of his case, the second Defendant filed the following.
  - a. A witness statement dated November 14, 2016.
  - b. A second witness statement dated January 14, 2021.
  - c. Same documents as those of the first Defendant.
9. The original third Defendant John Ekani filed a written statement of defence dated October 13, 2017. Vide paragraph 3 of the said defence, he averred that he inherited the suit land from the elder brother Saginoi who gave him the said property before he died. He added that on several occasions, he received



money from the first and second Defendants which was the balance of the unpaid purchase price owed to the deceased Saginoi.

He however denied knowledge of how the title deed for the suit land came to be in his name or how it was subdivided. He blamed it all on his illiteracy. He prayed that the Plaintiff's suit be dismissed as against him.

He did not file any witness statement or documents. He passed away when this case was pending and he was substituted by his wife Hellen Sekato who did not file any document either.

10. The Honourable the Attorney General filed a defence dated October 24, 2018 on behalf of the fourth Defendant in which all the material averments in the plaint are denied. The defence calls for dismissal of the plaintiff's suit.
11. The Interested Party did not file any pleadings even after their application to join the suit was allowed.
12. At the trial on December 20, 2021, only the Plaintiff and the first and second Defendants testified. They generally adopted their witness statements and documents and they were cross-examined by the adverse parties' counsel.
13. Counsel for the parties filed written submissions between February 21, 2022 and July 21, 2022. They all complied with the deadline of August 20, 2022 set on March 28, 2022.
14. The Plaintiff's counsel in his submissions dated February 21, 2022 raised the following issues.
  - i. Whether there was a valid agreement for sale of the suit land between the deceased, and the first and second Defendant?
  - ii. Whether the *Law of Succession Act*, especially Section 2(1) thereof, was complied with regarding the estate of the deceased Saginoi Ole Ndetuka?
  - iii. Whether Section 26 of the *Land Registration Act*, Act No 3 of 2012 applies to this case?
15. The first Defendant's counsel in his submissions dated 20/2/2022 raised the following issues;
  - i. Whether the Plaintiff has a cause of action?
  - ii. Whether the first Defendant is a bona fide purchaser for value and without notice?
  - iii. Whether the Plaintiff has compromised his claim through the indemnity dated April 8, 2020?
  - iv. Whether the Plaintiff is estopped from denying the validity of the first Defendant's title?
  - v. Who should bear the costs of this suit?
16. The second Defendant's counsel in his submissions dated March 11, 2022 identified the following issues for determination;
  - i. Whether the second Defendant exercised due diligence before purchasing L R 9332?
  - ii. Whether the second Defendant holds a valid certificate of title for L R 9332?
  - iii. Whether he purchased the land in question in good faith, without knowledge of fraud, and for valuable consideration?
  - iv. Whether the seller John Ekani Ndetuka had an apparent valid title which was accepted by the Land Registrar before issuing a title to the second Defendant?



- v. Whether the second Defendant has his property guaranteed protection under Article 40 of the Constitution?
  - vi. Whether this suit is fraudulent and brought in bad faith and whether it should be dismissed with costs?
17. The counsel for the fourth Defendant in her submissions dated July 13, 2022 raised two issues namely;
- i. Whether the fourth Defendant was engaged in any fraudulent activities?
  - ii. Whether the fourth Defendant should bear any costs?
18. I have carefully considered all the evidence adduced by all the parties as well as the submissions by their learned counsel and I make the following findings on the issues raised.

I agree that the issues as raised will determine the dispute herein.

On the issue of whether there was a valid agreement between the late Saginoi Ole Ndetuka and the first Defendant, I find that there was. Even though the land parcel mentioned is Kajiado/Kaputiei-North /643, formerly Plot No. 74 Empuyiangat Group Ranch, the agreement says it is only 150 acres out of the 400 acres. It is not in dispute that the suit land is a subdivision of L.R. 643.

On the second issue raised by the Plaintiff's counsel, I find that the burden was on the Plaintiff to prove that the Law of Succession Act was not complied with. He was the one with the burden of proof that the Law was not complied with. He only averred. He did not prove as required by Section 108 of the Evidence Act.

In any event, Section 32 of the Law of Succession Act, exempts Kajiado County from the application of the Intestacy Law. It provides as follows;

V – Intestacy

32. Excluded Property

“The provision of this part shall not apply to –

- a. Agricultural land and crops thereon; or
- b. Livestock,

In various Districts set out in the schedule

West Pokot Wajir

Turkana Garissa

Marsabit Tana River

Samburu Lamu

Isiolo Kajiado

Mandera Narok

On the third and final of the Plaintiff's issue, I find that Section 26 of the Land Registration Act, does not apply in this case. The date of commencement of the Act is May 2, 2012. All the transactions relating to the suit land took place between June 3, 1988 and August 29, 2002.

The last transaction, which is the registration of the second Defendant as the proprietor of L R 9332 took place ten years before the commencement of the Act.



19. I now come to the first Defendant's issues;

On the first issue, I find that the Plaintiff has no cause of action. He has not shown under what law he became the heir of his father's brother Saginoi Ole Ndetuka. Is it under Statutory Law or Customary Law that he became the Administrator of the estate of his father's brother's estate ahead of his father's brothers themselves?

In his book, "Restatement of African Law 2, Eugene Cotran had this to say about Intestate Succession among the Maasai;

4. Estate of an unmarried man

The estate of an unmarried man is inherited by:-

- a. By the next younger brother; or in his absence,
- b. By the next elder brother; or in his absence,
- c. The son of his next younger brother; or in his absence,
- d. The son of his next elder brother; or in his absence,
- e. His eldest half-brother; or in his absence,
- f. His eldest paternal uncle.

From the above, it is clear that John Ekani Ole Ndetuka being a brother to Saginoi ranked higher in his succession than the Plaintiff did.

If the Law of Succession Act were applicable to the estate of the deceased, then under Section 39 (c) thereof, John Ekani Ndetuka would rank higher than the Plaintiff in the succession of the deceased Saginoi Ole Ndetuka.

On the second issue raised by the first Defendant, I find that he is a bona fide purchaser for value without notice of any fraud.

The first Defendant has demonstrated that he paid for the land over and over again and every time a dispute arose, he settled it through consensus. He would involve all the family members of the Ndetuka lineage especially the old men. It started at the time of Pasha, to Lepaso Ole Kiruti, and finally to William Koipitat Ole Mayon.

On the third issue, I find that Plaintiff has compromised his claim through the indemnity of April 8, 2010. He is the second signatory in the indemnity and a beneficiary of the Kshs 300,000/= that the first Defendant paid out.

On the fourth issue, I find that the Plaintiff is estopped from denying the validity of the first Defendant's title when he has participated in validating it, by accepting his money and the fact the land was sold to him by the real and original owner, Saginoi Ole Ndetuka.

Regarding the issues raised by the second Defendant, I find all of them in the affirmative because, like I have also said before, his case is similar to that of the first Defendant in all the material facts.

Finally as regards the fourth Defendant, I find that the Plaintiff has failed to prove even a single instance of fraud just like he has failed in respect to the three other Defendants.

It is trite law that fraud where pleaded must be proved to a standard higher than in an ordinary cases. The authority of *Central Bank of Kenya Limited -versus- Trust Bank Limited and 4 Other* (1996), eKLR is good law for this proposition.



Finally on costs, I find that the Plaintiff having filed a case that he could not prove has to bear the costs.

In summary, I dismiss the Plaintiff's case with costs to the Defendants.

**Dated signed and delivered virtually at Kajiado this 13<sup>th</sup> day of October, 2022.**

**M.N. GICHERU**

**JUDGE**

**HON. JUSTICE M.N. GICHERU JUDGMENT ELC NO. 756/2017 8**

