



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Mayoni (Suing as legal representative of the Estate of Saginoi Ole Ndetuka  
aka Sagindi ole Nduntuka (Deceased)) v Mwai & 4 others (Civil Suit  
51 of 2018) [2022] KEELC 14802 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14802 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
CIVIL SUIT 51 OF 2018  
MN GICHERU, J  
NOVEMBER 15, 2022**

**BETWEEN**

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

**AND**

**ANTHONY MWANIKI MWAI ..... 1<sup>ST</sup> DEFENDANT  
WILLIAM KOIPITAT MAYON ..... 2<sup>ND</sup> DEFENDANT  
PAUL MUSAU MWANGANGI ..... 3<sup>RD</sup> DEFENDANT  
COUNTY LAND REGISTRAR, KAJIADO ..... 4<sup>TH</sup> DEFENDANT  
EQUITY BANK LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Joseph Silemi Mayon, suing as the legal representative of Saginoi Ole Ndetuka aka Sagindi Ole Ndetuka seeks the following orders against Antony Mwaniki Mwai, William Koipitat Mayon, Paul Musau Mwangangi, County Land Registrar, Kajiado and Equity Bank Limited (referred to as the first, second, third, fourth and fifth Defendants respectively).
  - i. An order revoking transfer of L.R. Kajiado/Kaputiei North/1650 (suit land), to the second Defendant, the said transfer having been effected without letters of administration of the deceased's estate.
  - ii. An order revoking and or declaring that transfer of the suit land, from the second to the first Defendant was illegal and fraudulent and was incapable of passing good title.



- iii. An order declaring the subdivision carried out on 5/7/2005 partitioning the deceased's property into two thus Kajiado/Kaputiei –North 20234 and 20235 (resultant parcels), null and void and a further order directed to the 4<sup>th</sup> Defendant to reopen the title records for the suit land in the name of the deceased.
  - iv. An order revoking the transfer of L.R. 20235 (subdivision of 1650) on 17/9/2007 from the first defendant to the third defendant.
  - v. An order directed to the 4<sup>th</sup> defendant to revoke and or cancel title deed number Kajiado/Kaputiei/North/20235 held by the 3<sup>rd</sup> defendant and charged to the 5<sup>th</sup> defendant.
  - vi. An order directed to the 4<sup>th</sup> defendant to cancel and revoke any charge held by the 5<sup>th</sup> defendant on title number Kajiado/Kaputiei North/20235.
2. The plaintiff's case is as follows. He is legally appointed by the court as the sole administrator of the estate of the late Saginoi Ole Ndetuka.
- The deceased owned L.R. 1650, the suit land which measures 26.69 hectares or 60 acres. The deceased died intestate on June 8, 1992.
- Between the date of the deceased's death and 26/7/2016 when the plaintiff was appointed the sole administrator, no other letters of administration were issued concerning the estate of the deceased.
- Before the plaintiff could be appointed as the legal representative of the estate of the deceased, the first and second defendants jointly connived and used corrupt and unprocedural means to subdivide and transfer the suit land.
- The suit land was first transferred to the second defendant and later to the first defendant. The first defendant later transferred L.R. 20235 measuring 50 acres to the third defendant who was issued with a title deed on 24/9/2007.
- Subsequently, the third defendant charged the land twice with the fifth defendant on 29/6/2010 and 13/9/2007.
- The fourth defendant was a party to the transfers and other activities even though no letters of administration and consent of the Land Control Board were availed by the first, second and third defendants.
3. In support of his case, the plaintiff filed the following evidence.
- i. Witness statement dated 16/8/2016.
  - ii. Limited grant and litem under section 54 and 5<sup>th</sup> Schedule dated 26/7/2016.
  - iii. Copy of the register for L.R. 20235 running from 5/7/2005 to 29/6/2010.
  - iv. Copy of mutation form for L.R. 1650 registered on July 5, 2005.
  - v. Copy of register for L.R. 1650 running from 14/5/1991 to 5/7/2005.
  - vi. Copy of letter dated 17/6/2016 to the Land Registrar, Kajiado from the Plaintiff's counsel requesting for copies of the register for L.R. 20234 and 202235.
  - vii. Copy of letter similar to the one in (vi) above asking for copy of register for L.R. 1650.
  - viii. Copy of gazette notice no. 9388 of November 11, 2016.
  - ix. Copy of certificate of death for Sagindi Ole Ndetuka.



- x. Copy of limited grant dated 26/7/2016.
4. The second defendant filed a memorandum of appearance dated 20/9/2017 through counsel on record and nothing more. The first Defendant did not file any memorandum of appearance or defence. The third defendant like, the first defendant, filed nothing at all. The case against the three Defendants proceeded as undefended.
5. The fourth defendant filed a defence dated 24/10/2018 which is a general denial of the averments in the plaint.
6. The fifth defendant filed a defence dated 22/6/2017. In the defence, it is admitted that the 3<sup>rd</sup> Defendant has charged L.R. 20235 for a loan which he is servicing.

Secondly, the 5<sup>th</sup> defendant avers that before the registration of the charge, it was verified that the third defendant was lawfully registered as the owner of the land.

Finally, the 5<sup>th</sup> defendant says the plaint as drawn does not disclose any reasonable cause of action against it and the suit should be dismissed with costs.

7. At the trial 18/11/2021, 17/5/2022, the Plaintiff testified by adopting his witness statements and documents as his evidence. He was cross-examined by the counsel for the 4<sup>th</sup> and 5<sup>th</sup> defendants.

In addition to the plaintiff, Rosemary Wamuyu, Land Registrar testified and produced the parcel files for the land parcels 20234 and 20235.

The parcel file contains the following documents.

- i. Copy of register for L.R. 20234 running from 5/7/2005 to 18/8/2015.
  - ii. Copy of representation book for 16<sup>th</sup> and March 17, 2015.
  - iii. Copies of transfer documents for L.R. 20234 between Lydia Wanjiru Kaniu and Ackim Investments Limited which are undated.
  - iv. Copies of blank application for consent of Land Control Board form which are undated, and blank.
  - v. Copy of title for L.R. 20234 in the name of Lydia Wanjiru Kaniu dated 5/7/2005.
  - vi. Copy of mutation form for L.R. 1650 dated 5/7/2005 together with copy of consent of the Land Control Board dated 8/6/2005, copy of application for consent, copy of certificate of official search dated 27/6/2005, copy of title deed in the name of the first Defendant, copy of presentation book for 5/8/2004, copy of presentation book for 29/6/2010 and 17/9/2007.
  - vii. Copy of register for parcel number 1650 running from 14/5/1991 to 5/7/2005.
  - viii. Copy of title deed in the name of the first defendant dated 5/7/2005.
  - ix. Copy of ID for the 3<sup>rd</sup> defendant.
  - x. Copy of P.I.N. certificate for the third defendant.
  - xi. Copies of application for consent of the Land Control Board, consent of the Land Control Board, transfer form and payment receipt between the first and third defendants dated August and September, 2007.
8. Counsel for the parties filed written submission between 22/7/2022 and 28/9/2022.



9. The plaintiff issues as can be discerned from the submissions dated 28/7/2022 are as follows.
- i. Whether the deceased was the registered owner of plot no. 1650 at the time of his death on 18/6/1992.
  - ii. Whether the second defendant took letters of administration for the estate of the deceased.
  - iii. Whether the transfer of the suit land from the deceased to the first defendant was procedural.
  - iv. The implication of failure by the first, second and third defendants to defend the suit.
10. The fourth defendant in submissions dated 31/8/2022 raised the following issues.
- i. Whether the fourth defendant was engaged in any fraudulent activities.
  - ii. Whether the fourth defendant should bear the costs.
  - iii. Whether the plaintiff is coming to court with clean hands.
11. The fifth defendant in submissions dated 15/7/2022 raised the following issues.
- a. Whether the transfer of the suit property to the third defendant was illegal and fraudulent.
  - b. Whether the fifth defendant holds a valid title, charge and further charge on the suit property.
  - c. Whether the title, charge and further charge over the suit property should be revoked.
12. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents and oral testimony at the trial.

I have also considered the submissions filed by the learned counsel for the parties, the issues raised therein as well as the case law and statutes cited. I make the following findings on the issues.

On the first of the plaintiff's issues, I find that the deceased was the registered owner of L.R. 1650 at the time of his death on 18/6/1992.

On the 2<sup>nd</sup> issue, it is not certain from the evidence adduced whether the second defendant took out letters of administration in respect of the estate of the deceased.

The Plaintiff has averred so in his pleadings but he has not proved it. It was part of his burden of proof expected under sections 107 and 108 of the Evidence Act. In any case section 32 of the Law of Succession Act, (chapter 160, Laws of Kenya) exempts Kajiado County from the application of intestacy law.

It provides;

“The provision of this part shall not apply to-

- a. Agricultural land and crops thereon; or
- b. Livestock, in various District set out in the schedule  
West Pokot Wajir  
Turkana Garissa  
Marsabit Tana River  
Samburu Lamu  
Isiolo Kajiado



This may explain the absence of letters of administration.

On the third issue, I find that in the absence of any evidence from the plaintiff save for the averment in the plaint, the transfer of the suit land from the deceased to the first defendant was procedural in view of section 32 of the [Law of Succession Act](#).

On the final issue of failure by the first, second and third defendants to defend the suit, I find that this does not shift the burden of proof from the plaintiff, neither does it affect the standard of proof. The plaintiff has to prove his case against the defendants as required. He must preponderate that burden before the court orders anything in his favour.

13. Coming now to the fourth defendant's issues, I find that there is no evidence from the plaintiff to prove that the fourth defendant was engaged in any fraudulent activities. Unless the fourth defendant was informed of unlawful activities, they would not know. There is no evidence of any complaint made by any person before the transfers in this case were effected. In fact, the evidence produced by Rosemary Wamuyu, the Land Registrar, proves that the transactions had all the requisite documents to back them. At the trial she produced many documents in evidence.

On the second issue, I find that the fourth defendant should not bear the costs because no fault has been shown to attach to that party.

On the final of the fourth defendant's issues, I find that the plaintiff has not come to court with clean hands for the following reasons.

Firstly, in his testimony in court on 18/11/2021, he said that the deceased was his father. In his witness statement dated August 16, 2016, he has not explained his relationship with the deceased. It is only in paragraph 5 of the submissions dated 28/7/2022 where it first emerges that the deceased was in fact his uncle. It reads;

“The plaintiff's case is that the second defendant is his brother. He knows very well the deceased who was an uncle died sometime in 1996...”

If the deceased was his uncle, this raises questions such as why should he inherit his uncle's property ahead of the uncle's family and even ahead of the deceased's brothers if the deceased had no wife or children.

This should have been explained in a detailed manner in the witness statement dated 16/8/2016.

Secondly, the two letters of administration are not certified true copies of the original and one was produced after cross-examination had exposed the inadequacy of the first letter. The acquisition of the second limited grant when this case was pending is not well explained.

Thirdly, the plaintiff has not explained if he was ever in occupation of the suit land and why it took him about 24 years to obtain the limited grant after the death of the deceased yet some many activities were taking place on the land.

Finally, on this issue, the plaintiff has not explained why it should be him and not his brother William Koipiat Mayon who should inherit the deceased's property.

14. On the fifth defendant's issues, I find that the transfer of the suit property to the third defendant was lawful and not fraudulent at all. All the necessary conveyancing documents to back his transfer were produced by the Land Registrar when she testified in court on 17/5/2022.



On the second issue, I find that though the fifth defendant did not file any documents in this case, the charge is clearly noted in the copy of the green card produced as the plaintiff's second exhibit.

Finally, on the third issue, I find no reason at all for revoking the title deed, the first or the second charge over the suit property for the reasons already given.

For all the above stated reasons, I dismiss the plaintiff's case with costs to the fourth and fifth defendants.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**M.N. GICHERU**

**JUDGE**

