



Mwaura & 2 others v Elesondai & 4 others (Environment & Land Case 33 of 2018) [2024] KEELC 6537 (KLR) (7 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6537 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 33 OF 2018
MN GICHERU, J
OCTOBER 7, 2024**

BETWEEN

**BETH WAMBUI MWAURA 1ST PLAINTIFF
ALBERT P. MWAURA KIERO 2ND PLAINTIFF
WILFRED K. NJENGA 3RD PLAINTIFF**

AND

**IBRAHIM LEI ELESONDAI 1ST DEFENDANT
JOSEPHINE SEKELON KILUSU 2ND DEFENDANT
NATIONAL LANDS COMMISSION 3RD DEFENDANT
REGISTRAR OF TITLES, KAJIADO REGISTRY 4TH DEFENDANT
JOSEPH MWANIKI GITAU 5TH DEFENDANT**

JUDGMENT

1. The plaintiffs seek the following reliefs against the defendants both jointly and severally.
 - a. Specific performance of the agreement dated 14/9/1988 by the 1st defendant in default whereof the Deputy Registrar of this court to execute all such documents and to do all such acts as are necessary to complete this sale and give effect to the terms of the agreement irrespective of the subsequent subdivisions and new parcel numbers of the suit premises arising from Kajiado/Kitengela/ 3716, suit land.
 - b. Defendants be ordered to transfer L.R. 3716 (New Numbers 40429 – 40400 to the 1st and 2nd plaintiffs 10 acres and 3rd plaintiff 1.0 acres.



- c. A permanent injunction restraining the 1st and 2nd defendants by themselves, their agents or servants from selling, alienating, disposing, dealing with and or in any way dealing with the suit land and the new numbers 40429 – 40440.
- d. Costs of this suit.
- e. Any other relief that the court may deem fit in the circumstances.

This is as per the amended plaint dated 23/5/2013.

2. The case for the 1st and 2nd plaintiffs is as follows. They are wife and husband respectively. In the year 1988 they were introduced to the 1st defendant who has many names. They include Ibrahim Lei Sondai, Pesi Ole Suntai and Kirienye. The two plaintiffs wanted to buy land. The 1st defendant told them that he had land to sell. He showed them the land and they liked it. An agreement for sale was signed by the 2nd plaintiff and the 1st defendant. It is dated 14/9/1988. The size of the land was 20 acres and the purchase price was Kshs. 240,000/-. The land was to be excised from Plot No. 159 within Kitengela Group Ranch. Other terms of the agreement were as follows. Kshs. 15000/- was paid to the 1st defendant on the date of the agreement.
 - a. Kshs. 70,000/- before 5/10/1988.
 - b. Kshs. 35,000/- before 3/12/1988.
 - c. Kshs. 120,000/- upon the vendor obtaining consent to transfer the first 10 acres to the purchaser.
 - d. The purchaser to bear the costs of stamp duty.
 - e. The vendor to give vacant possession of 10 acres to the purchaser upon payment of the second instalment.

3. The 1st and 2nd plaintiffs paid Kshs. 70,000/- to the 1st defendant's advocates as agreed and the agreed installments before 3/12/1988. The 1st defendant issued instructions to the surveyor to demarcate 10 acres instead of the agreed 20 acres. The plaintiffs took possession of the land which was 11 acres because 1 acre belonged to the 3rd defendant and by then, the lands office would not issue a title deed for one acre. This is how the 3rd defendant's land became part of the 1st and 2nd defendants' land. The 1st and 2nd plaintiffs fenced all the 11 acres in December 1992. The 1st defendant subdivided L.R. 3035 which he got from the group ranch into three portions which were Kajiado/Kitengela/3716, 3717, and 3718.

The 1st and 2nd plaintiffs found the 1st defendant deceitful for a number of reasons. Firstly, he refused to demarcate the 20 acres as per the agreement. Secondly, he lied to the plaintiffs that their fence along the road had been destroyed and instead of the barbed wire and the posts being stolen, he had decided to keep them for the plaintiffs. Thirdly, instead of the title deed for the land being issued in the names of the plaintiffs, it came out in the 1st defendant's name. His explanation was that he was waiting for the owner of the one acre to come up so that he would the transfer the land to both of them once. To kind of re-assure the plaintiffs, he gave them the original title deed even though it was in his own name. He promised to call the plaintiffs as soon as he got hold of the owner of the one acre parcel. He never did. Instead it was the plaintiffs who tried to reach him and when they did he would pretend to be very sick. He employed delaying tactics until the plaintiffs decided to file a suit at the Land Disputes Tribunal. The tribunal case was not favourable to the plaintiffs.

They filed a Judicial Review suit at Machakos High Court. When the plaintiffs dug a 2 feet deep and wide trench around the land in March 2011, the 1st defendant sent emissaries to the plaintiffs to stop



the work but with the assistance of the area chief and the police, the work was completed. Two weeks later the 1st defendant fenced the land at night and cultivated 2 acres thereof. Later, on 20/7/2011, he transferred the suit land to his daughter the 2nd defendant. The land has been cautioned by Philip James Gitata Gatuguta who claims an interest thereto. It is for the above stated reasons that the plaintiffs pray that the suit land be transferred to them.

4. In support of their case, the 1st and 2nd plaintiffs filed the following evidence.
 - i. Witness statements by the plaintiffs dated 24/10/2011.
 - ii. Copy of sale agreement dated 14/9/1988.
 - iii. Acknowledgement receipts for Kshs. 29,600/-, Kshs. 1000/-, Kshs. 70,000/-, Kshs. 2, 300/=, Kshs. 5, 400/-, Kshs. 2, 500/=, Kshs. 2, 500/-, Kshs. 5,400/- and Kshs. 3, 500/- all received between 5/8/1994 and 30/10/1995.
 - iv. Copies of letters dated 26/11/1988 and 24/2/1989.
 - v. Copy of mutation form for L.R. 3035.
 - vi. Copy of title for L.R. 3716 dated 8/6/1993.
 - vii. Copy of certificate of official search dated 25/3/2003.
 - viii. Copy of letter dated 28/6/2010.
 - ix. Copy of caution for L.R. 3716 dated 27/9/2011.
 - x. Copy of letter dated 29/9/2011.
5. The case by the 3rd plaintiff is as follows. In the year 1988 he was introduced to the 1st defendant by James Mwaniki Ngumba who had already bought land from the 1st defendant. On 20/11/1988 the 3rd plaintiff bought one acre of land from the 1st defendant for Kshs. 10,000/- and a sale agreement to that effect was signed by both parties. The 1st defendant requested the 3rd plaintiff to wait for the processing of the title deed for his one (1) acre. In the year 1989, the 3rd plaintiff learnt from his friend James Mwaniki that the land shown to him by the 1st defendant had been fenced together with other land. When the 3rd plaintiff tried to contact the 1st defendant and his family, they could not be traced. He bought fencing materials and fenced the one (1) acre that had been shown to him by the 1st defendant. In the year 1992, the 3rd plaintiff moved to land and built a house therein. Since then he has been pestering the 1st defendant to transfer his one acre to him to no avail. Instead the 1st defendant transferred the one acre and a further 10 acres belonging to the 1st and 2nd plaintiffs to the 2nd defendant who is his daughter. The wife of the 3rd plaintiff was buried on the land in June 2010. His prayer is that his one (1) acres be transferred to him unconditionally.
6. In support of his case, the 3rd plaintiff filed the following evidence.
 - i. Witness statements by him and Elizabeth Wanjiru Mwangi.
 - ii. Copy of sale agreement dated 20/11/1988.
 - iii. Copy of letter dated 28/6/2010 by the Chief of Olorsirkon Sub-Location.
 - iv. Copy of letter dated 28/6/2010 from the 3rd plaintiff's advocate to the 1st defendant.



7. The 1st and 2nd defendants though their counsel on record filed an amended statement of defence which is undated but which was filed on 9/10/2015. In the defence they aver as follows. Firstly, the generally deny the plaintiffs' claim. Secondly, they say that the sale agreement dated 14/9/1988 does not constitute a sale agreement for the sale of a portion of 20 acres out of Kitengela Group Ranch Plot No. 159 or at all. Thirdly, the plaint is bad in law and incompetent for violating Section 3 (3) of the *Law of Contract Act*. Fourthly, the suit is statutory barred by virtue of the Law of Limitation. Fifthly, the suit does not disclose any cause of action as against the 2nd defendant who was a minor in 1988 and incapable of entering into any contract. Sixthly, the defendants aver that payments for the suit land were never made or completed as per the sale agreement dated 14/9/1988. Seventhly, no consents were obtained for the sale of the ten acres as regards the 1st and 2nd plaintiffs as required by the *Land Control Act*. Eighthly, the plaintiffs have never taken possession or fenced their portions of the land under supervision of the 1st defendant and neither have they been in cultivation of the suit land. Ninthly, other parties have acquired title to the suit land. Tenthly, JR. Case No. 4 of 2009 filed in Machakos between the 1st plaintiff and the 2nd defendant does not exist. Eleventhly, the verifying affidavit by the 1st plaintiff is false and no authority signed by the 2nd plaintiff has been filed as required by Order 4 rule 1(3) Civil Procedure Rules rendering the suit fatally defective. Finally, no claim at all is advanced by the 3rd plaintiff.

For the above and other reasons, the entire suit ought to be dismissed with costs.

8. The 5th defendant filed a written statement of defence dated 4/6/2015 in which he avers as follows. Firstly, he generally denies the plaintiffs' claim against him. Secondly, he denies that the plaintiffs ever fenced their portions. Finally, his defence is more like that of the 1st and 2nd defendants in a number of respects.

9. In support of their case, the 1st, 2nd and 5th defendants filed the following evidence.

- i. Undated witness statement by the 1st and 5th defendants filed on 10/12/2018.
- ii. Copy of Kenya Gazette Notice No. 4143 of 23/4/2010.
- iii. Copy of tribunal award dated 28/8/2008.
- iv. Payment of transfer receipts.
- v. Copy of certificate of official search.
- vi. Copy of certificate of official receipt No. 5562012 dated 9/4/2010.
- vii. Copy of mutation form for L.R. Kajiado/Kitengela/3716.
- viii. Copy of sale agreement dated 3/1/2011.
- ix. Copy of consent of the Land Control Board dated 11/11/2012.
- x. Copy of transfer instrument.
- xi. Copy of title deed in the name of the 5th defendant dated 24/11/2012 for L.R. 40436.
- xii. Copy of title for L.R. 40437 in the name of the 5th defendant dated 15/1/2011.
- xiii. Copy of cheque for Kshs. 15,000/- dated 3/1/2012.

10. The 4th defendant filed a written statement of defence dated 16/11/2020 in which it is averred as follows. Firstly, it is averred that the 4th defendant issued title deeds based on documents presented



to the Land Registry and on the belief that the said documents were genuine. Secondly, it is the 4th defendant's case that the mandatory notice of intention to sue the Attorney General was not issued contrary to the provisions of Section 13A of Government Proceedings Act. Finally, the plaintiffs' claim is generally denied.

11. In support of the defence the 4th defendant filed the following evidence.
 - i. Witness statement by Rosemary W. Mwangi, Land Registrar Kajiado.
 - ii. Certified copies of green cards for L.R. Kajiado/Kitengela/3716 and 40429 – 404440.
 - iii. Copy of gazette notice extract No. 4143 of 23/4/2010.
 - iv. Certified copies of presentation book for 20/8/2010, 20/7/2011, 14/12/2011 and 17/01/2012.
12. At the trial on 25/11/2021, 21/2/2023 and 27/2/2024 the 1st and 3rd plaintiffs, the 1st and 5th defendants and the Land Registrar testified. All the five witnesses adopted their witness statements and documents and reiterated the case in their pleadings generally. They did not deviate from what has been summarized above even after intense cross-examination by counsel for the adverse parties.
13. In his written submissions dated 30/7/2024 counsel for the 1st and 2nd defendants identified the following issues for determination.
 - i. Whether the sale agreement dated 14/9/1989 is valid and enforceable.
 - ii. Whether the plaintiffs obtained the consent of the Land Control Board.
 - iii. Whether the suit is time barred.
 - iv. Which party is in possession.
 - v. The effect of the decision of the Land Disputes Tribunal in Tribunal Case No. 406/8/007.
14. The plaintiffs' counsel filed written submissions dated 11/9/2024 in which two (2) issues were identified for determination as follows.
 - a. Whether L.R. No. 3716, suit land, was fraudulently and illegally transferred by the 1st defendant to the 2nd defendant?
 - b. Whether the transfer and registration of L.R. No. 40436 and 40437 on 15/12/2017 and 24/1/2012 was fraudulent and illegal?
15. I have carefully considered all the evidence adduced in this case including the witness statements, documents and testimony of the five witnesses who testified at the trial. I have also considered the written submissions by learned counsel for the parties. Ideally, the plaintiffs' counsel who filed his submissions after the counsel for the 1st and 2nd defendants should have replied to the five issues identified by the 1st and 2nd defendants' counsel. This is the essence of Order 18 rule 2 (2) Civil Procedure Rules which provides for the order of submissions. Be that as it may, I make the following findings on the issues identified by the parties.
16. On the first of the defendants' issues, I find that the sale agreement dated 14/9/1988 is valid and enforceable for the following reasons. It is not correct to say that the 1st plaintiff needed the authority of the 2nd and 3rd plaintiffs to file this suit on their behalf because they themselves are parties in this case. If they gave authority to the 1st plaintiff such authority was unnecessary and superfluous. The 2nd plaintiff filed a witness statement in this case while the 3rd plaintiff did the same and even testified on



25/11/2021. The suit was not therefore filed on behalf of the 2nd and 3rd plaintiffs as they are active parties in it. Secondly, the sale agreement of 14/9/1988 is signed by the seller and the buyer of the suit land in the presence of L.S. Sane Advocate who has signed and stamped it. The sale agreement between the 3rd plaintiff and the 1st defendant dated 20/11/1988 is also valid because it is signed by both of them and witnessed by Peter Muchiri for the 1st defendant and James Ngumba for the 3rd plaintiff (buyer).

Section 3(3) of the [Law of Contract Act](#) provides as follows.

- (3) ‘No suit shall be brought upon a contract for the disposition of an interest in land unless –
- a. the contract upon which the suit is founded -
 - i. is in writing.
 - ii. is signed by all the parties thereto’ and
 - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by party”.

The defendants have not pointed out by evidence or in the written submissions which parts of the sale agreement fall short of the requirements of Section 3(3) of the [Law of Contract Act](#). Thirdly, I find that the contrary to what the 1st defendant has stated on his witness statement, he received the full purchase price and that is why he allowed the plaintiffs to occupy the suit land and even gave the original title deed in his name to the 1st plaintiff. He could not have done this if he had not received the full purchase price. Fourthly, in the defence dated 7/12/2011, the 1st defendant has not said anything about not receiving the full purchase price. That defence mentions about the suit being bad in law and incompetent for violating the [Law of Contract Act](#), the [Limitation of Actions Act](#) and the [Land Control Act](#). It also talks of Judicial Review Case No. 4 of 2009. It is only in 2018 in his witness statement when the 1st defendant abruptly brings up the issue of non-payment of the full purchase price. I find this story to be an afterthought and false. It is inconsistent with the original defence and there is overwhelming credible evidence from the plaintiffs to prove payment of the full purchase price. The sale agreements dated 14/9/1988 being valid are therefore enforceable.

17. On the second issue of failure by sale agreement to be supported by the consent of the Land Control Board, I find that it was not the fault of the plaintiffs that such consent is lacking. It is the 1st defendant’s fault because he was the one to obtain the consent and not the plaintiffs. Contrary to the submissions by the defendants’ counsel at page 11 of the written submissions dated 30/7/2024, the ratio decidendi in the case of Willy Kumutai Kitilit –versus- Michael Kibet (2018 eKLR) is that the consent of the Land Control Board, is not necessary for a purchaser who occupies land with the consent of the seller and the seller refuses to obtain the consent of the Land Control board. This is because the doctrines of constructive trust and proprietary estoppel apply. At paragraph 24 of the judgment, the Court of Appeal had this to say.

“There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the [Land Control Act](#). By Article 10(2) (b) of [the Constitution](#) of Kenya, equity is one of the national values which binding the courts in interpreting any law (Article 10(1) (b)...the Land Control Board Act should be constructed with the alterations, adaptations, and exceptions necessary to bring it into conformity with [the constitution](#)”.

Since the 1st defendant seeks to benefit from his own wrong doing and in view of the doctrines of proprietary estoppel and constructive trust, I find that the consent of the Land Control Board was not necessary because the plaintiffs are in possession.



18. In relation to the 3rd issue, I find that the suit is not time barred. In the amended plaint dated 23/5/2013, the plaintiffs are seeking the execution of the transfer documents for the suit land and an injunction to restrain the defendants and their agents from dealing with the suit land. They have lost the land. It is the title documents that they seek. Section 7 of the Limitations of Actions Act refers to a party who is not in possession of land. It does not apply to parties in possession.
19. On the issue of possession, I find that it is the plaintiffs who are in possession of the suit land. In the case of the 3rd plaintiff, he is even in actual occupation of the suit land. He moved to the land in 1992 and built a house thereon. His wife was buried on the land after a big struggle with the 1st defendant. In the case of the 1st and 2nd plaintiffs, I find that they are in possession. They took possession when they fenced the land in December 1992 together with one acre belonging to the 3rd plaintiff. Soon thereafter, the 1st defendant handed over the title deed for the eleven acres to them. The demarcation of the land involved the 1st defendant's surveyor by the name of Peter Obunga Kabwao. Finally, there was the digging of a trench around the entire eleven (11) acres. All the above actions of the plaintiffs amount to possession and occupation of the suit land. They all happened with the consent and knowledge of the 1st defendant. I believe and find that the plaintiffs are in actual occupation in the case of the 3rd plaintiff, and possession in the case of the 1st and 2nd plaintiffs even though the 1st defendant has been illegally cultivating on the 1st and 2nd plaintiffs 2 acres out of the 10 that they are in possession of.

In making this finding, I was convinced by the consistent and credible evidence adduced by the plaintiffs. This evidence is very detailed and was given boldly. In contrast, the 1st defendant's evidence was mere denial not supported by any other evidence. Even in his testimony, the 1st defendant denied everything from the sale agreement, his signature on the sale agreement, his own written statement of defence, his advocate in the transaction, L.S. Sane and many other things that were obvious. He was evasive and untruthful. He was very dishonest in his dealings with the plaintiffs.

20. Under Section 116 of the [Evidence Act](#), possession is ownership. The Section provides as follows.

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner”

Since the plaintiffs are in possession, the burden is on the defendants to prove that they are not the owners. Section 30 (g) of the Registered [Land Act](#), (cap 300) now repealed, provides as follows.

- 30 “Unless the contrary is expressed in the register, all registered land shall be subject to such of the overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(g) the rights of a person in possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

The same provision is to be found in Section 28 (b) of the [Land Registration Act \(Act No. 3 of 2012\)](#).

My understanding of the above provisions of law is that the person in occupation enjoys a right superior to the person whose name is noted in the register. To override means to be superior to. An overriding interest takes precedence over the title. The interests of the plaintiffs being overriding interests must therefore prevail over the rights of any person who is registered as the owner of the land that the plaintiffs are in possession of. In Petition No. 10 of 2015 the case of Isack M' Inanga Kiebia –versus- Isaya Theuri M' Linturi and Isack Ntongai M' Lintari, the Supreme Court of Kenya had



occasion to deal with the question of overriding interests. At paragraph 56 of the judgment the court had this to say –

“...it is now clear that customary trusts, as well as other trusts, being overriding interests are not required to be noted in the register...”

It is my finding that when the 1st defendant took the plaintiffs’ purchase price in the year 1988 and put them in possession of the land that he sold them, then a trust was created and this trust overrides the registers which may be showing that other persons have been registered as owners of the suit parcels. It is immaterial that such other registered owners are not parties to this suit so long as they trace their land to the 1st defendant.

21. Coming to the 5th issue of the effect of the decision in the Land Disputes Tribunal Case No. 406/8/007, I find that though the plaintiffs should have appealed against it as required by Section 8(1) of the Land Disputes Tribunal Act, this failure does not take away the jurisdiction of this court. By dint of Article 163 (7) of *the Constitution* of Kenya, and the doctrine of stare decisis, only decisions of the Supreme Court of Kenya and the Court of Appeal bind this Court. The decision of the Land Disputes Tribunal does not bind this court. That decision did not take into account that the plaintiffs were in occupation of the suit especially the 3rd plaintiff who not only had a house thereon but also the grave of his wife. The decision has not stated what the market price was for an acre of land in 1988 when the 1st defendant sold the suit land to the plaintiffs. It did not say how much land the 1st defendant owned to reach the conclusion that his family would be left homeless.

It has turned out that the 1st defendant has attempted to sell the same land to other parties and going by the land records availed by the Land Registrar, the entire land has been transferred to third parties. The order of the tribunal that the land reverts to the 1st defendant so that his family is not rendered landless has been rendered futile by the 1st defendant’s actions and those of his daughter the 2nd defendant of transferring the same land to other parties. It is a fact that the suit land was a subdivision of L.R. No. Kajiado/Kitengela/3035 which was subdivided into parcels Numbers 3716, 3717 and 3718. The 1st defendant therefore has other land and did not sell all his land because he was left with L.R. Nos. 3717 to 3718.

22. It is my finding that the transfer of the suit land by the 1st defendant to the 2nd defendant and any other subsequent transfers are null and void for not respecting the proprietary rights of the plaintiffs acquired through payments of valuable consideration and possession. Such rights as we have seen above are recognized by the law even though the plaintiffs have do not have the title documents to the suit land.
23. Finally, I find that the plaintiffs are entitled to the order of specific performance because they have satisfied all the prerequisites to the grant of such an order which include clean hand, no laches or delay and no hardship will be occasioned to the defendants because the 1st defendant was paid the purchase price by the plaintiffs in the year 1988. Under Article 40(6) of *the Constitution* of Kenya, it is provided as follows.

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

The second defendant and any other persons that she may have sold the suit land or part thereof to, did not acquire such land lawfully.

24. In conclusion, I enter judgment for the plaintiffs against the defendants jointly and severally as prayed for in the amended paint dated 23/5/2013 specifically in terms of prayers (a), (b), (c) and (d). I revoke



any title deeds issued to the second defendant, fifth defendant and any other person claiming through them.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 7TH DAY OF OCTOBER 2024.

M.N. GICHERU

JUDGE

