



REPUBLIC OF KENYA



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**Lesrima v Koinange & 6 others (Environment & Land Case 224 of 2013)
[2024] KEELC 7297 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7297 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 224 OF 2013
SM KIBUNJA, J
NOVEMBER 6, 2024**

BETWEEN

SIMEON S LESRIMA PLAINTIFF

AND

JAMES WANGAI KOINANGE 1ST DEFENDANT

MOMBASA ARIGAS DISTRIBUTORS LIMITED 2ND DEFENDANT

ATAN ABSHIR AHMED 3RD DEFENDANT

SAADIA MALELE IBRAHIM 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

NATIONAL LAND COMMISSION 6TH DEFENDANT

**THE ATTORNEY GENERAL (SUED IN HIS CAPACITY FOR AND ON
BEHALF CHIEF REGISTRAR OF LANDS) 7TH DEFENDANT**

JUDGMENT

1. The plaintiff filed this suit through the plaint dated 9th October 2013, as amended on 20th March 2019 seeking for:
 - i. “An order directing the 5th and 6th defendants to rectify the title deed plan in respect of plot No. MN/1/6640, Nyali, Mombasa County so that the particulars on the ground match those in the register.
 - ii. A declaration that the plaintiff is the lawful owner of the property known as plot No. MN/1/6640 Nyali, Mombasa County.



- iii. A declaration that the allocation, grant, transfer, acquisition and registration of the property known as plot No. MN/1/6640 Nyali, Mombasa County in the names of 1st to 4th defendants, was illegal, unlawful, procedural, fraudulent and obtained through corrupt means.
 - iv. An order of cancellation of all entries in the land register of the property known as plot No. LR MN/1/6640, Nyali, Mombasa County in the names of the 1st to 4th defendants, anyone claiming under them or any subsequent interest arising therefrom and rectification thereof to restore or register the name of the plaintiff as the proprietor free from any encumbrances.
 - v. An order of mandatory injunction directing either of 1st to 4th defendant whether by themselves, their servants, agents and or anyone claiming under them or has acquired title of the property plot No. LR MN/1/6640, Nyali, Mombasa County from the said defendants to forthwith or within such time as the court may direct to vacate the said property and in default, the said parties be evicted therefrom.
 - vi. An order of permanent injunction against the defendants whether by themselves, their servants, agents and anyone claiming under them or acquired title to property plot No. LR MN/1/6640, Nyali, Mombasa County from the 1st to 4th defendants from entering, remaining thereon, leasing, charging, selling, transferring, damaging, wasting away, dealing and or in any manner interfere with the property stated hereof.
 - vii. General damages for trespass, negligence and fraud.
 - viii. Costs of this suit.
 - ix. Interests on (vii) and (viii) above at court rates.
 - x. In the alternative to (iii), (iv), (v) and (vi), an order that the 1st to 4th defendants jointly and severally promptly provide and pay the plaintiff in full compensation of the property plot No. LR MN/1/6640, Nyali, Mombasa County, at the market value based on valuation ordered by this court.
 - xi. Any other relief that this honourable court may deem fit to grant.”
2. The plaintiff *inter alia* averred that he is the registered owner of plot No. LR MN/1/6640, Nyali, Mombasa County, the suit property, while the 1st defendant is registered owner of plot No. LR MN/1/6643, Nyali, Mombasa County. That on the 22nd February 2000, the Commissioner of Lands wrote to him claiming that his title for plot No. LR MN/1/6640, Nyali, Mombasa County, had been swapped in error during preparations of the title with plot No. LR MN/1/6643, Nyali, Mombasa County for the 1st defendant, and they should therefore swap position on the ground. That the plaintiff declined to agree and asked that the errors be corrected on the titles. That he later found some strangers on the suit property putting up some developments claiming to have been authorised to do so by the 1st defendant, and he reported to the DCI, land fraud department. That out of the police investigations, he learnt in February 2019, that the Commissioner of Lands and Registrar of Titles had negligently, unlawfully, illegally, fraudulently, unprocedurally, through corrupt means purported to allocate, issue and register a second grant for the suit property on 17th April 2009 and later purported to register a transfer of the said property to 3rd and 4th defendants on 29th October 2009. That the failure by the Commissioner of Lands and or the 5th and 6th defendants to rectify the deed plans is unlawful, illegal, corrupt scheme and fraudulent attempt to dispossess or interfere with the plaintiff’s right of ownership and use of the suit property. That the 1st defendant’s failure to execute and or surrender the original deed plan for the plaintiff’s suit property to the Commissioner of Lands and or the 5th and



- 6th defendants action for rectification was intended to defraud the plaintiff of his rights of ownership and use of the said plot. That his title to the suit property was first in time, and any other subsequent allocation to the 1st to 4th defendants without his consent or compensation was unlawful, illegal, fraudulent, unprocedural acquisition by corrupt means, and a nullity as the property was not available for allocation to any other person. The plaintiff set out the particulars of negligence, fraud, illegality, corrupt scheme and procedural improprieties at paragraph 9F of the amended plaint. That the 3rd and 4th defendants have, with the assistance of 1st, 2nd, 5th and 6th defendants, trespassed onto the sui property and purported to build a permanent residential house to his prejudice.
3. The 3rd and 4th defendants opposed the plaintiff's claim through their statement of defence dated the 11th December 2020, inter alia averring that the plaintiff is guilty of sleeping on his rights by failing to dispute in writing or filing a suit in court on being notified that his plot had been swapped, and then waking up 20 years later. That the plaintiff's rights over the suit property if any, had been extinguished by the subsequent transfers done over 20 years ago and title under adverse possession acquired. That they have substantially developed the suit property in the exercise of legal owners, and nobody had laid claim over it for 11 years. That they procedurally acquired the suit property upon transfer dated 27th October 2009 and registered on 29th October 2009 following a purchase from the 2nd defendant. That they are therefore bona fide purchasers for value without notice of any defects on the title, and the plaintiff's suit should be dismissed with costs.
 4. The 5th and 7th defendants opposed the plaintiff's suit through their statement of defence dated the 24th February 2020, inter alia averring that if there was any mistake and or error on the titles, the same was communicated to the concerned parties and both of them were requested to correct the error, but the plaintiff refused, and it cannot be considered as a corrupt scheme on the part of the Land Registrar. The 5th and 7th defendants prays for the suit to be declared bad in law, incompetent, an abuse of the process of the court and be struck out and dismissed with costs.
 5. During the hearing, the plaintiff testified as PW1 and called John Ndeti Kithika who testified as PW2. PW1 adopted the contents of his witness statements dated 9th October 2013 and 20th March 2019 as his evidence in chief. It was his testimony that he was allocated the suit property by the Commissioner of Lands through letter of allotment dated 28th August 1990, and paid for it. The Commissioner of Lands then issued him with the grant in 1993, that was sent vide letter dated 14th March 1994 to the Land Registrar, Mombasa to register. Then on 20th February 2000 the Commissioner of Lands wrote to him and the 1st defendant that there had been an error in respect of their plots and proposing that they either exchange the plots or return the title documents for correction. The plaintiff told the court he did not agree to swap the plots or to surrender the title. PW1 told how he had engaged PW2 to prepare architectural drawings for the development he intended to do on the suit property in 1997, but could not carry it out due to the encroachments by the 1st to 4th defendants. He reported to the DCI but cannot tell the progress of the investigations. That he had paid rent and rates for the suit property, and had not been offered another plot in exchange. In cross-examination, PW1 told the court he had paid the monies set out in the letter of allotment, though he had not brought the receipts to court. He agreed the reference in the letter of allotment and that in the letter dated 14th March 1994 forwarding the grant were different, and added only the Commissioner of Lands could explain it. That though the grant was issued and sent to the Land Registrar's office in 1994, he has not gone there to collect it. That he was issued with the title of the suit property dated 20th February 2000, but had not availed the original to the court. That he has no evidence of the actions he had taken to reclaim his plot before 2013 when he reported to the DCI. That he had not erected any structure on the suit land and had not dealt with the 3rd and 4th defendants. That the letter dated 14th March 1994 is signed by one Ochieng, as Commissioner of Lands, and not for Commissioner of Lands. That to his knowledge there



was no Commissioner of Land known as Ochieng. That the receipt attached to the letter dated 14th March 1994 was dated 18th March 1993. That he had not done any development on the suit property from 1993, when it was allocated to him to the time the Commissioner of lands wrote to on 22nd February 2000 to surrender the title or swap the plot with 1st defendant. That no ground report had been obtained before the plot was allocated to him. That his grant was forwarded to him by the Land Registrar but he had not come with it to the court. That he never filed any restriction against the title even after finding people transacting on it. That he never wrote to or visited the Land Registrar to complain about transactions on the suit property. That he instructed PW2 to do his architectural drawing for his development after finding the 3rd and 4th defendants had taken over the plot. PW2 told the court how he was instructed by PW1 to design some building for him in 1997 for LR/MN/1/6640, which he did using the survey plan, and handed the drawings and his fee note to PW1. Answering questions in cross-examination, PW2 stated that he has been unable to trace the architectural drawings he did for PW1 due to the length of time that has lapsed. That no title documents for the plot were given to him by PW1, but he would have required them had he submitted the drawings for approval

6. On behalf of the 3rd and 4th defendants, Saadia Malele Ibrahim, the 4th defendant testified as DW1. She adopted the contents of her joint statement with the 3rd defendant as her evidence in chief. In cross-examination, DW1 told the court they have been on the suit property since 2012 having got registered as owner on 27th October 2009, after buying it from Mombasa Afrigas. She told the court she does not know the directors of Mombasa Afrigas, and cannot tell whether it was still in operation. She further told the court that she has been paying rates for the plot since 2009, and added that parcel 6641 is also her's.
7. The 5th and 7th defendants called Ojwang Omollo Patroba, Assistant Director Land Administration, who testified as DW2. It was his evidence that after receiving summons in this suit, they traced the correspondence files numbers 127313 and 263035 for the plaintiff and defendants' respectively, but no original records. The witness testified that he was briefed by his seniors that the plots allocated to the plaintiff and 1st defendant were on allocation at different places, but the plaintiff surveyed that for the 1st defendant. That a letter dated 22nd February 2000 was done to the plaintiff and 1st defendant informing them that the plaintiff plot 6640 was where 1st defendant's plot 6643 was on the ground, and 1st defendant plot 6643 was the plaintiff's plot 6640 was. The letter asked the two to do cross transfers or surrender the title documents to the office, but they did not comply. During cross-examination, DW2 told the court that he cannot tell who was registered with plot 6643, and that the plaintiff's title over plot 6640 was never cancelled and reissued to 1st defendant. The witness confirmed that the letter date 14th March 1994 does not talk about the plaintiff having surveyed the wrong plot, but rather that the plots were swapped at the titling stage and therefore it was the Commissioner of Lands that needed to correct the error. That plot 6640 was registered with 2nd defendant after an informal transfer of the allotment letter by the 1st defendant. That he could not tell whether the plaintiff surrendered his title documents for plot 6640. That neither the plaintiff nor the 1st defendant responded to the letter of 14th March 2000, and no title had been issued over plot 6643. That he does not know the ground positions of the plots 6640 and 6643.
8. The learned counsel for the plaintiff, 3rd & 4th defendants, and 5th & 7th defendants filed their submissions dated the 30th April 2024, 16th July 2024 and 22nd July 2024 respectively that the court has considered.
9. The following are the issues for determinations by the court:
 - a. Who was the first person to be lawfully allocated MN/1/6640, the suit property.



- b. Whether there was an error in the registration and issuance of grant over the suit property to the plaintiff.
 - c. Whether the allocation of the suit property to the 1st defendant conferred upon him good title.
 - d. Whether the subsequent transfer of the title to the suit property to 2nd and thereafter to the 3rd & 4th defendants conferred upon them good title, or alternatively put, whether the 3rd & 4th defendants are innocent purchasers for value and without notice.
 - e. Whether the plaintiff has made a reasonable case for rectification of the register orders sought to issue in his favour. Alternatively, whether an order to compensate the plaintiff at current market rate of the suit property would be a reasonable relief.
 - f. Whether the plaintiff has met the threshold for the mandatory and permanent injunction orders sought to issue.
 - g. Whether the plaintiff is entitled damages, and if so, how much.
 - h. Who pays the costs.
10. The court has carefully considered the pleadings by the parties, oral and documentary evidence tendered by PW1, PW2, DW1 and DW2, submissions by the learned counsel for the parties, superior courts decisions cited thereon, the record and come to the following conclusions:
- a. From the evidence tendered by the plaintiff, especially the copies of the documents filed through his list of documents dated 9th October 2013, and produced as exhibits, among them the allotment letter reference 31500/XV111/336 dated 28th August 1990, confirms that the plaintiff was allocated un-surveyed residential plot 113- Nyali Mombasa, measuring 0.21 hectares. Also annexed are copies of receipt No.564231 for Kshs.157,129 with a date of 18th March 1992 for unsurveyed residential plot 113 Mombasa, and another No. 505790 of 14th March 1994 for Kshs.32,864 for LR. MN/1/6640, which I take to be payments made by the plaintiff in respect of the suit property. There is also attached a grant on MN/1/6640, measuring 0.2055 hectares in the plaintiff's name. There is also a copy of a drawing that I take to be an approved PDP dated 19th January 1994 showing the position of MN/1/6640 to be fronted on two sides by a road, and on the other two sides are plots MN/1/6641 and 6643. The defendants, especially the 5th and 7th defendants have not disputed that all these documents were genuine and were issued and or processed through their offices. That on the face of the ownership documents presented by the plaintiff, there is nothing *prima facie* to suggest he acquired or obtained the ownership of the suit property without following the due process.
 - b. The Commissioner of Lands wrote the letter dated 22nd February 2000, under reference 127313/25 headed "erroneous preparation of titles MN/1/6640 and MN/1.6643" to the plaintiff and 1st defendant, informing them that:

“ The fact is that you now hold title deeds for both plots but the deed plans have been erroneously swapped during the preparation of your titles.

To cancel the same titles will be an expensive process both to you and to the Government. If you have no development on those plots, it would be easier for you to swap positions on the ground other than surrender your titles for new ones.

May I have your comments as soon as possible.”



There is nothing in this letter to suggest, as DW2 tried to, that the error had been caused by the plaintiff surveying the wrong plot. The plaintiff's evidence is that he did not survey the wrong plot, and was not agreeable with the Commissioner of Lands proposals. Under *sections 107 to 109 of the Civil Procedure Act*, chapter 80 of Laws of Kenya, it was the responsibility of the Commissioner of Lands to tender evidence that indeed the plaintiff was to blame for the error. If it was true that the plaintiff had surveyed the wrong plot hence leading to the alleged error, the court would have expected the 5th and 7th defendants to avail a witness and or the relevant survey documents and plot ground reports to confirm it. The failure to call such evidence can only be taken to mean it was going to be prejudicial to their case.

- c. It is instructive that the 1st and 2nd defendants did not file any defence in reply to the plaintiff's claim against them, and judgements have been entered against them. The failure by the 1st and 2nd defendants to come forward and defend their title over the suit property means the plaintiff's allegations against them remains unchallenged, and it makes the 3rd and 4th defendants' attempt at defending their title, on the basis of innocent purchasers for value, an impossible task.
- d. From the testimony given by DW2, neither the plaintiff nor 1st defendant responded to the Commissioner of Lands letter dated the 22nd February 2000. However, and strangely, DW2 reported that the 1st defendant informally transferred his allotment to the 2nd defendant, who then sold the suit property to 3rd and 4th defendants. I say strangely because there is no disclosure how and when the 1st defendant got allocated with the suit property, when the plaintiff already held the title over the same. From the testimony of DW2, the plaintiff's title to the suit property has never been cancelled, and therefore the land was not available to have been allocated to the 1st defendant as is alleged. If indeed the Commissioner of Land purported to allocate the suit property to the 1st defendant while the plaintiff held title over it and without his consent or concurrence, then the allocation was irregular, illegal, invalid and void ab initio. I have perused the court record and have not seen any copy of the allotment letter over the suit property issued to the 1st defendant, upon which he could have effected the alleged informal transfer in favour of the 2nd defendant.
- e. Even though I have seen the grant CR. 45383 dated 7th April 2009 in the name of 2nd defendant that was filed with the 3rd and 4th defendants documents, it follows that as the 1st defendant did not get a good title over the suit property, the 2nd defendant did not equally get a good title over the suit property. Further, the purported transfer of the suit property, by the 2nd defendant to the 3rd and 4th defendants did not also confer a good title to them. I have again perused the court record and have not seen any copy of title documents of the suit property in the names of the 3rd and 4th defendants to confirm that they held title over the land.
- f. If indeed, the Commissioner of Lands was genuine in their proposal of 22nd March 2000, and that neither the plaintiff nor the 1st defendant agreed with the options given, and the Commissioner was desirous of rectifying the error, the court would have expected the plaintiff would still be registered with one of the two plots. What the court was told by DW2 is that MN/1/6640 was informally transferred by the 1st defendant, though no information is given how he got allocated with the plot, and that MN/1/6643 was allocated to another person. All that happened when parcel MN/1/6640 was registered with the plaintiff, and without formally cancelling or revoking his title. That process must have been irregular, illegal and



through a corrupt scheme to disentitle the plaintiff of his proprietary rights over the suit property contrary to Article 40 of *the Constitution*. The plaintiff has therefore proved his case and is entitled to the declaratory, injunctive and rectification orders sought.

- g. On general damages, the plaintiff told the court he had not taken possession of the suit property at any one time. He only instructed PW2 to do his architectural drawing in 1997 after learning that some trespassers were on the land. Indeed, there is no evidence that the architectural plans were ever submitted for approval, and the plaintiff has therefore failed to show what loss or damages he has sustained, and no general damages will be awarded.
- h. Under section 27 of *Civil Procedure Act*, chapter 21 of Laws of Kenya, costs follow the events unless otherwise ordered for good cause. In this case, I find the plaintiff is entitled to costs.
1. Flowing from the foregoing, I find the plaintiff has proved his case against the defendants to the standard required of balance of probabilities. The court enters judgement for the plaintiff against the defendants in the following terms:
 - a. Prayers (i), (ii), (iii), (iv), (v) and (vi) of the amended plaint dated 20th March 2019 are granted.
 - b. Plaintiff's costs to be paid by the defendants.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 6TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : Mr Kahindi

Defendants : M/s Anyiko for Abdiaziz for 3rd and 4th Defendants.

Leakey – Court Assistant.

