



**Oyende v Shaiya (Environment & Land Case 54 of 2018)
[2024] KEELC 7406 (KLR) (5 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 54 OF 2018
MN GICHERU, J
NOVEMBER 5, 2024**

BETWEEN

STEPHEN TRUFIMO OYENDE PLAINTIFF

AND

MOHAMMED ABDILLAHI SHAIYA DEFENDANT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendant.
 - a. A permanent injunction restraining the defendant by himself, servants, agents, legal representatives or howsoever from interfering in any manner with the plaintiff's quiet enjoyment of the property known as Kajiado/Kaputiei-North/17352 situated in Kajiado.
 - b. General damages.
 - c. Costs of this suit plus interest.

This is as per the plaint dated 17/4/2018.
2. The plaintiff's case is as follows. He is the registered owner of the suit land which measures approximately 4.05 hectares. The defendant has on numerous occasions encroached onto the suit land and caused wanton destruction of the property thereon. The damaged property includes a fence. When the plaintiff reported the damage to Isinya Police Station, the police said that they would only take action if directed by the court. Despite demand and notice of intention to sue being issued to the defendant, he refused to make good the plaintiff's claim making the filing of this suit necessary.
3. In support of his case, the plaintiff filed the following evidence.
 - a. His witness statement dated 17/11/2018.
 - b. Copy of title deed for the suit land dated 10/8/2007.



- c. Copy of mutation form for L.R. No. 1129.
 - d. Copy of certificate of official search dated 13/12/2017.
4. The defendant, through counsel on record, filed a written statement of defence and counterclaim dated 2/11/2018 in which he avers as follows. Firstly, the plaintiff's claim is denied generally in its entirety. Secondly, L.R. No. 17352 does not exist as it is a fabrication, fictitious and a fraud purely designed to create a non-existent proprietary interest in favour of the plaintiff in violation of the existing land laws. Many particulars of fraud are pleaded. They include collusion between land officials in Kajiado to create an illegal parcel of land, purporting that the mutation form that created L.R. Nos. 5931 and 5932 also created a non-existent L.R. No. 17352, purporting that a non-existent L.R. No. 17352 is a subdivision of L.R. No. 5931 when the same has never been subdivided, purporting that the non-existent suit land borders L.R. No. 5932 owned by the defendant, colluding with lands and surveying officers to falsify and fabricate documents and alter maps to create the non-existent suit land and illegally and fraudulently claiming ownership and encroaching on L.R. No. 5932. Thirdly, the defendant denies having damaged any fence belonging to the plaintiff and concludes his defence by averring that the plaintiff's suit does not disclose any cause of action and is frivolous, vexatious and an abuse of the court process.
5. In the counterclaim, the defendant seeks the following orders against the plaintiff.
1. A declaration that the defendant is the absolute proprietor of L.R. Kajiado/Kaputiei-North/5932
 2. A declaration that the plaintiff has no proprietary right or interest over L.R. No. 5932 and that it does not border L.R. 5932.
 3. L.R. No. 17352 neither borders L.R. No. 5932 nor does it exist on the ground.
 4. A permanent injunction restraining the plaintiff whether by himself, his servants, employees and/or agents or anyone else claiming to act under instructions or authority from the plaintiff from encroaching, wasting, damaging, trespassing, alienating, selling and/or in any way interfering with L.R. Kajiado/Kaputiei-North/5932.
 5. A sum of Kshs. 300,000/-
 6. Damages for trespass/mesne profits.
 7. Punitive and exemplary damages.
 8. Interest in (5), (6) and (7) above at court rates.
 9. Costs of this suit.
 10. Interest in (a) above at court rates.
 11. Any further or other relief that this court may deem fit to grant.
6. The defendant's case in the counterclaim is as follows. One, he is the registered owner of L.R. No. Kajiado/Kaputiei-North/5932 located within 12 kilometres from Kitengela Town and approximately 11 Kilometres from the main Namanga Road. Two, in September 2017, he decided to engage a land surveyor to mark out the boundaries of his land and place beacons in accordance with the official maps. Three, the plaintiff trespassed onto the defendant's land and removed the beacons on his land and also destroyed part of a fence erected by the defendant. Four, when the plaintiff obtained an order of injunction on 12/7/2018, he again trespassed upon the suit land towards the end of July 2018



and destroyed the fence erected by the defendant earlier. In this regard, the defendant claims Kshs. 300,000/- being the costs of fence. Finally, the defendant repeats the same particulars of fraud pleaded in the defence.

7. In support of his case, the defendant filed the following evidence.
 - i. His witness statement dated 2/11/2018.
 - ii. Copies of title deed for L.R. 5932 in the name of the defendant dated 2/12/2013 and in the name of Mercy Wangari Muiruri dated 26/9/2005.
 - iii. Copy of sale agreement dated 15/12/2011.
 - iv. Copy of certificate of official search for the suit land dated 5/6/2012.
 - v. Copy of register/green card for L.R. 5932.
 - vi. Copy of mutation form for L.R. No. 690 and 1129.
 - vii. Copy of mutation form allegedly creating LR. No. 17352.
 - viii. Report by Marik Development Company Limited.
8. At the trial on 2/3/2023, 14/11/2023 and 23/4/2024, the plaintiff, the defendant and two surveyors testified. The surveyors were Peter Mathenge and Zablon Adega. In his case, the plaintiff reiterated what is in his pleadings and did not change his script even after intense cross-examination. He insisted that he owns the suit land. On the part of the defendant he insisted that he owns L.R. 5392 and the plaintiff's land cannot be traced to have mutated from any known land. The district surveyor on his part said that the plaintiff's land is enveloped inside the defendant's land. This means that the person who sold the plaintiff L.R. No. 17352 did not show him the correct position of L.R. No. 17352 on the ground.
9. Although counsel said that they had filed written submissions, I did not see any such submissions on record.
10. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and testimony at the trial. I find that one issue arises in this case.

i) Does L.R. No. 17252 exist on the ground.

11. I find that the suit land does not exist on the ground for the following reasons. Firstly, the plaintiff was not able to prove that he obtained the suit land lawfully. He has no evidence of a sale agreement, payment of purchase price, Consent of the Land Control Board, transfer instruments from the seller or payment of stamp duty. The only documents that he could avail were the title deed, copy of mutation for L.R. No. 1129 and certificate of official search. These documents are not sufficient evidence especially because of the strong defence by the defendant. Secondly, the mutation form that the plaintiff produced is highly suspicious not only because of the cancellations thereon but more because the defendant was able to produce the genuine mutation for L.R. No. 1129 which created only two parcels namely L.R. 5931 and 5932. I find that the suit land did not mutate from L.R. No. 1129 as purported by the plaintiff. Thirdly, it has been proved by the district surveyor that the suit land does not exist on the ground and if it does, then it is not within the defendant's land. This evidence by the district surveyor is not controverted by any evidence from the plaintiff yet it is the plaintiff who has the burden of proof under Sections 107 and 108 and who would fail if his claim against the defendant is not proved on a balance of probabilities.



12. Regarding the defendant's defence and counterclaim, I find that he has adduced credible and consistent evidence which shows that he bought the suit land from Mercy Wangari Muiruri who bought from Jackson Lairumpe who bought from Agnes Silantoi Shonko and her two brothers Joel Papu and Joshua Supeyo who bought from Kapiti Dairies. The concatenation of transfers leading to the defendant's ownership of the land is all clear from the copy of green card produced by the defendant as an exhibit. The green card is supported by other documents.

13. For the above stated reasons, I find no merit in the plaintiff's case and I dismiss it with costs.

Conversely and for the reasons given above, I find the defendant's counterclaim proved to the required standard and I enter judgment for him against the plaintiff as per prayers 1, 2, 3, 4, 5, 9 and 10. As for prayer 8, interest will only be in regard to prayer 5.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY 5TH DAY OF NOVEMBER 2024.

M.N. GICHERU JUDGE

JUDGMENT

ELC NO. 54/2018

