



**Isina v Njuguna & another (Environment & Land Case 15 of 2018)
[2023] KEELC 15891 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15891 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 15 OF 2018
MN GICHERU, J
MARCH 2, 2023**

BETWEEN

NICKSON SIMITIA ISINA PLAINTIFF

AND

HENRY BARNABAS NJUGUNA 1ST DEFENDANT

LEAH KIRIGO NJUGUNA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the Defendants is as follows.
 - (a) A declaration to issue to the effect that the purported transfer and registration of L R Kajiado/Kisaju/1178 to an alleged entity known as Kodes Mines Limited was fraudulent and/or illegal and unprocedural and that the said fraud, and/or illegality and failure to follow procedure vitiated subsequent dealings and transactions regarding the said land and/or subdivisions thereof particularly L R Kajiado/Kisaju/1621.
 - (b) An order that registration of L R No 1621 in the name of the first and second Defendants be canceled and the resultant title thereto in the names of the said Defendants be revoked and/or cancelled.
 - (c) An order that L R 1621 be transferred and/or registered in the name of the Plaintiff or Mariabie Ole Isina Katop (deceased) and subsequently a title deed be issued accordingly.
 - (d) An order that all the necessary transfer instruments be executed by the Deputy Registrar of this court.
 - (e) Costs of the suit and any other order that the Honourable Court may deem fit and just to grant.



2. The Plaintiff's case is as follows. He is the son of the late Miriabi Ole Isina Katopi who died on September 14, 2005 and who was the registered owner of L R Kajiado/Kisaju/1178 (suit land). As far as the Plaintiff is concerned, his deceased father did not sell the suit land to Kodes or Kode Mines Limited or to any other persons during his lifetime.

3. In the year 2015, the first Defendant visited the suit land and said that he was the registered owner thereof.

On inquiry at Kajiado District Land Registry, the Plaintiff found out that the suit land had purportedly been transferred to an entity called Kodes Mines Limited on January 27, 1995 and a title deed issued to the said entity. On February 7, 1997 the suit land was allegedly subdivided into parcels Numbers Kajiado/Kisaju/1621 and 1622 and title deeds issued accordingly. L R No 1621 was transferred to the two Defendants herein. It measured 26.30 hectares. L R No 1622 was transferred to Teresiah Mukami Chege. It measures 2.02 hectares.

Subsequently, L R 1622 has been subdivided and the resultant parcels transferred to third parties.

4. An enquiry at Registrar of Companies Registry by the Plaintiff has confirmed that Kodes Mines Limited has never existed. It is therefore the Plaintiff's contention that the original transfer of land from his deceased father to Kodes Mines Limited is a nullity and the same applies to the subsequent transfers.

Further inquiry at the Land Registry has revealed that the alleged original transfer of the suit land was not even to Kodes Mines Limited but to one Florence Soila. Other irregularities noted include the names and the identity card numbers of Kodes Mines Limited which are not recorded and their signatures are not witnessed.

5. In support of his case, the Plaintiff field the following evidence.

- (a) Witness statement dated October 28, 2016.
- (b) Copy of certificate of death for Meriabi Olesina Katopi.
- (c) Copy of limited grant dated June 22, 2016.
- (d) Copy of title deed for the suit land dated July 9, 1991.
- (e) Copy of register for the suit land showing the transfer of the suit land from the deceased to Kode Mines Limited.
- (f) Copy of Register for L R 1621 showing transfer from Kodes Mines Limited to the Defendants.
- (g) Copy of register for L R 1622 showing transfer from Kodes Mines Limited to Teresia Mukami Chege.
- (h) Copy of register for L R 2046 a subdivision of L R 1622.
- (i) Application for reservation of a company to wit Kodes Mines Limited dated May 10, 2016.
- (j) Copy of the receipt no L00100-05160340156 dated May 10, 2016 issued by Postal Corporation for reservation of company name.
- (k) Letter from the Registrar of Companies dated May 10, 2016 reserving the name Kodes Mines Limited for Registration.
- (l) Copy of demand letter dated June 23, 2016 issued by the Plaintiff's advocates to the Defendants herein.



- (m) Copy of supplementary witness statement by the Plaintiff dated October 7, 2022.
 - (n) Copy of letter dated May 7, 2019 by the Plaintiff's counsel to the Land Registrar Kajiado.
 - (o) Copy of consent of the Land Control Board dated September 13, 1994 to transfer the suit land from the deceased to Florence Soila.
 - (p) Copy of transfer instrument dated January 16, 1995 in regard to the suit land.
 - (q) Copy of the first page only of transfer instrument dated May 20, 1997 in regard to L R 1621.
6. The Defendants were served through advertisement in The Standard Newspaper of November 10, 2017 pursuant to a court order dated November 16, 2017. They did not enter appearance or file a defence. The suit against them proceeded as undefended.
7. At the trial on October 18, 2022, the Plaintiff testified and adopted his witness statements and documents as his evidence. He said that the Defendants have never occupied the suit and it is him and his family who are in actual occupation.
8. Counsel for the Plaintiff filed written submissions on February 7, 2023 in which he raised the following issues.
- (i) When did the cause of action accrue.
 - (ii) Whether the transfers of the suit land and/or subdivisions are tainted with fraud and or illegality.
 - (iii) Whether the Defendants have any burden of proof by dint of Section 112 of the *evidence act*.
 - (iv) The implication of the Plaintiff being in possession and the Defendants not taking steps to take possession of the suit land.
 - (v) Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - (vi) Who should bear the costs of the suit.
9. I have carefully considered the evidence adduced in this case by the Plaintiff, the submissions by learned counsel for the Plaintiff, the issues raised in the submissions and the case law cited. I make the following findings.
- On the first issue, I find that the cause of action arose in 2015 when the Plaintiff saw the first Defendant on the land claiming to be the owner thereof.
10. On the second issue, I find that the transfer of the suit land from the Plaintiff's father to Kodes Mines Limited to have been irregular because Kodes Mines Limited has been proved to have never existed. Secondly, Kodes does not feature anywhere in the transfer documents produced as exhibits.
11. On the third issue, I am not certain that the Defendant has any burden of proof in this case at all. The burden is always on the party who would fail if all the relevant facts are not proved in a balance of probabilities. This is as per Section 108 of the *Evidence Act*. Having found in favour of the Plaintiff in the second issue, I find the third issue superfluous.
- It would have been relevant if the Defendants had participated in the suit and failed to prove their relationship with Kodes Mines Limited. Having not participated in the suit, we do not know, as of now, what would have happened had they participated and what they would have proved or failed to prove.



12. As regards, the fourth issue, I find that it relates to something outside the five prayers at paragraph 18 of the plaint. The Plaintiff is bound by his pleadings. This is not a claim by the Plaintiff to be declared owner of the suit land through adverse possession. It is a totally different claim. Section 7 of the *limitations of Actions Act* does not apply to this case.

For the reasons that Kodes Mine Limited has been proved never to have existed and it being the beneficiary of the suit land from the Plaintiff's father, I find that the Plaintiff has proved his case against the Defendants on a balance of probabilities.

I enter judgment for the Plaintiff against the Defendants as prayed for in the plaint.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF MARCH, 2023.

M.N. GICHERU

JUDGE

