



**Said v Nganga & 2 others (Environment & Land Case 296 of 2017)
[2023] KEELC 15972 (KLR) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 296 OF 2017**

M SILA, J

MARCH 8, 2023

BETWEEN

SAID SELEMAN SAID PLAINTIFF

AND

FRANCIS WANJOHI NGANGA 1ST DEFENDANT

THEOPISTY OBURA AMIMO 2ND DEFENDANT

JANE WANJIKU WANJOHI 3RD DEFENDANT

JUDGMENT

1. The land that is in dispute in this case has two titles. One title is held by the plaintiff and describes the land as LR No Subdivision No 572/2 Section III, Mainland North (MN/III/572/2). The other title is held by the 2nd and 3rd defendants after transfer to them by the 1st defendant, and under this title, the land is registered as LR No 5737 Section III Mainland North (MN/III/5737). Save for a portion, the entire land that is covered in this latter title comprises of land within the plaintiff's title.
2. Through a plaint filed on 17 August 2017, and subsequently amended, the plaintiff pleads that he purchased the disputed land from one Sammy Musembi Munyao on 15 July 2016 for the sum of Kshs 8,000,000/= and he was subsequently registered as proprietor. According to the plaintiff his title emanates from a subdivision of the land parcel LR No 572 Section III Mainland North (plot No MN/III/572) which measured 5.250 Ha and was owned by Dee Dee Investments Limited from 31 May 1985. The plaintiff contends that the defendants' title, which identifies the land as LR No MN/III/5737, was irregularly issued. The plaintiff avers that when the defendants' title was procured, his title already existed. He relies on a letter dated 9 November 2016 written by the Registrar of Lands, Mombasa to support his position. In this suit, the plaintiff wants the title of the defendants revoked, general damages for trespass, an order for the defendants to remove their items from the suit land and a permanent injunction against them.



3. The defendants filed defence and counterclaim wherein they asserted that it is their title which is genuine. They pleaded that the 1st defendant got title through a grant from the Government for the title LR No MN/III/5737, which is a 99 year lease from 1 April 1997. It is averred that the 1st defendant obtained a title deed on 1 April 1997 and took possession of the land. The 1st defendant subsequently transferred this title on 22 May 2012 to the 2nd and 3rd defendants. The defendants contend that the plaintiff's title was acquired through fraud by forging a surrendered deed plan. They seek an order for the cancellation of the title of the plaintiff and for general and punitive damages.
4. The plaintiff testified that he is in the real estate business and he buys and sells properties. His evidence was that his title is for a half acre plot which is the Plot MN/III/572/2. He bought this plot from one Sammy Musembi Munyao in April 2016. When he went to develop the plot, he was confronted and informed that the plot is owned by somebody else. It is then that he came to court. He presented the letter dated 9 November 2016 from the Land Registrar giving the history of the plot. He stated that his Deed Plan was issued on 7 March 2008 and the defendants' Deed Plan is one issued in the year 2010. He had the original Deed Plan which he said does not bear the words "surrender". He pointed out that what the defendants have is a copy of a deed plan bearing the words "surrender."
5. The defendant called Edward Marenye Kiguru a licenced surveyor as their first witness. He is a licenced surveyor since the year 1978. He testified that the suit land originates from a subdivision of the plot MN/III/ 572 (also described herein as Plot No 572) which was owned by Dee Dee Investment Limited. In the year 1987, the company, out of benevolence, caused a survey to be done, so as to surrender a portion of 0.2 Ha (1/2 acre) to the Government for public use as a cattle dip. This plot was identified as MN/III/572/2. The survey for this was done by Mr. Kasyi and the survey plan is FR No 184/44. Twenty years later, in the year 2007, Dee Dee Investments Ltd decided to further subdivide the balance of their land. This time, it was him (Mr. Kiguru), who was engaged to do the survey. He conducted the survey through survey plan FR No 472/100. He subdivided the land into 9 plots each approximately 2 acres each. There was a road reserve which he numbered plot MN/III/572/1. He stated that his survey respected the earlier survey done by Mr. Kasyi. He prepared deed plans for the created plots. Deed Plan No 285144 was for the disputed land, described as MN/III/572/2. He was surprised when he got a complaint about ownership of the land, since according to him, this plot No 572/2 was surrendered to the Government. He stated that the trick used was to remove the words "surrender" from the Deed Plan No 285144 and convince the Lands office to process title. In his view, the plaintiff's title is fake as it came forth pursuant to a surrendered deed plan. For the defendants' title he stated that he did survey as a new grant survey after the 1st defendant had obtained a letter of allotment. He sought and received a letter of no objection from the County Council of Kilifi through a letter dated 16 June 2010. The land being surveyed was what had earlier been surrendered as a cattle dip. Upon survey, the title LR No MN/III/5737 emerged through Deed Plan No 316292.
6. Cross-examined, he affirmed that Mr. Kasyi did the first survey in 1987, FR No 184/44. The purpose was to surrender ½ acre to the government as a cattle dip. The plot was identified as MN/III/572/1. When he did the survey in 2007, the road reserve created (to provide access to the subdivisions) was also identified as MN/III/572/1. However, his survey identified the cattle dip as MN/III/572/2. His explanation was that there was confusion in the numbering of the plot. On the survey of the defendants' land, he testified that the 1st defendant held an allotment letter dated 27 March 1997 with an attached plan. The acreage was 0.14Ha. This allotment letter came before he went to do the survey in 2007 to subdivide the remainder of the land owned by Dee Dee Investment Limited. He did the survey for this allotted plot in the year 2010. Upon survey, the 1st defendant got title to 0.1215 Ha which was less than the original 0.2 Ha said to have been surrendered in Mr. Kasyi's survey. He explained that this was because there were some old cattle dip structures.



7. The 1st defendant testified that he applied for the suit land from the Commissioner of Lands and he was issued with an allotment letter dated 27 March 1997. He then instructed Mr. Kiguru to survey the land. He received a no objection letter from the County Council of Kilifi dated 16 June 2010 as the land was no longer used as a cattle dip. He was subsequently issued with title on 10 May 2011 which was accompanied by deed plan No 316292 and the title was CR No 52171. He later transferred title to his daughter, the 3rd defendant, and her husband the 2nd defendant. He had earlier bought 5 acres from the original owner next to this plot and he was aware that it was a cattle dip reserve. He subdivided his 5 acres and sold to other people. For the subject allotment letter, he picked it himself from the Commissioner of Lands, Mr. Gacanja, in Nairobi. The Commissioner was personally known to him. There was fees to be paid for the allotment which he claimed to have paid after he got title in the year 2011 despite getting the allotment letter in the year 1997. He fenced the entire former cattle dip plot which was rectangular in shape. The title he holds does not however cover the entire former cattle dip plot but only part of it. The acreage of his plot is 0.1215 Ha whereas the cattle dip was 0.2 Ha.
8. The 3rd defendant also testified. The 1st defendant is her father whereas the 2nd defendant is her husband. She testified that her father transferred to them the title in the year 2012 after they bought it from him. On 6 March 2018, they charged the property while the case was ongoing. The deed plan to their land is No 316292 dated 26 November 2010. She was not familiar with how her father acquired the title. They developed a stone wall and a gate surrounding the whole cattle dip plot. She was not aware that this covered more than the plot allotted to them. Her view was that their title came first in time to that of the plaintiff.
9. With the above evidence the parties closed their respective cases. I invited counsel to file submissions and I have taken note of the submissions filed by Mr. Khalid Salim, learned counsel for the plaintiff, and Mr. Wachira King'ang'ai, learned counsel for the defendants.
10. Before I give my view, let me put in a nutshell the respective positions of the parties. It is common ground that the suit land was previously part of the land parcel MN/III/572 which was owned by Dee Dee Investments Limited. The position of the defendants is that in the year 1987 or thereabouts, through survey plan F/R No 184/44, Dee Dee Investments Limited hived off a portion of 0.2 Ha for purposes of a cattle dip. In his report and evidence, Mr. Kiguru testified that this portion (cattle dip land) came to be identified as MN/III/572/1 and the balance of the land came to be MN/III/1021 or MN/III/572/2. Mr. Kiguru claims to have done a further survey of the balance of the land in the year 2007 to create ten new plots identified as MN/III/572/1, MN/III/572/2 and MN/III/4820 – 4828. This was through the survey plan F/R No 472/100. The defendants contend that part of what was surveyed in the year 1987 as a cattle dip plot was allotted to the 1st defendant through an allotment letter of 1997. They say that survey for this plot was done by Mr. Kiguru in the year 2010 and title No CR 52171 issued in the year 2011 through the deed plan 316292, dated 26 November 2010. The position of the plaintiff is that the title MN/III/572/2 was of Dee Dee Investments Limited who sold the same to Mr. Musembi and transfer effected on 12 September 2012. The plot was then sold to the plaintiff in the year 2016. The title has its basis upon deed plan No 285144 dated 7 March 2008.
11. Unfortunately, none of the parties called a witness from the office of the Director of Surveys who would probably have shed light on the purported surrender of the cattle dip plot. I am left to use my knowledge to discern which of the two competing positions is more probable. I come to the conclusion, that from the evidence, the more credible position is that presented by the plaintiff, and this is why.
12. I find that there was proposal to hive off 0.2 Ha from the parcel No 572, for purposes of having a cattle dip, but I do not believe that this proposal was executed. True, F/R No 184/44 was drawn, but



I do not think that it was given effect. The proposal in that survey plan was of course to subdivide the plot MN/III/572 into two, so that the 0.2 portion is given the number MN/III/572/1 and the balance, which constituted 5.050 Ha (about 12.5 acres), to be given the number MN/III/572/2 or MN/III/1021. That survey plan has no signature on the column 'final approval' and in fact there is a remark "NB: Approval for subd (meaning subdivision) not granted. Only recommended. See comps." I am buttressed in finding that there was never any executed subdivision of the Plot MN/III/572 by the fact that there is no entry in its title indicating any subdivision in the year 1987 or creation of the plot 572/1 from it. The title to plot No 572 is CR No 17219 which was opened on 31 May 1985. If you look at the entries therein, you will not find any subdivision in the year 1987. In fact, the next entry following the first entry (which was creation of the title), is that dated 12 March 2009 which is an entry for a subdivision of that year (an issue that I will elaborate later). There is also no certificate of title that has been presented to me bearing the title number MN/III/1021 and there is no entry in the mother title of Plot No 572 indicating any subdivision MN/III/1021 or creation of plot MN/III/572/2 in the year 1987 or thereabouts (which would be the balance of the mother plot after hiving off the cattle dip). There is even no deed plan that has been supplied to this court bearing the year 1987 or shortly thereafter to cover this alleged subdivision. My finding is that despite F/R No 184/44 being drawn, there was no subdivision done to parcel No MN/III/572 in the year 1987 and that the said survey plan remained a mere proposal.

13. I am persuaded that the actual subdivision of the plot No MN/III/572 took place in the year 2007 following the survey plan F/R No 472/100 done by Mr. Kiguru. If there had been survey of the land in the year 1987, then the survey plan of 2007/2008 would have shown the cattle dip plot as MN/III/572/1, but it did not, and as I have earlier mentioned, there is no deed plan for any subdivision plot prepared in the year 1987. What I deduce is that Mr. Kiguru was surveying the whole of the plot No 572, including what would have been considered as the cattle dip plot, as if there had not been any earlier hiving off of the said plot. This is clearly discernible from his survey plan FR No 472/100. The whole of the plot No 572 is subdivided with the road reserve being given the description MN/III/572/1, then the suit plot being MN/III/572/2, and the other sub-plots follow in the same sequence, being MN/III/572/3 upto MN/III/572/11. The plots No 572/3 – 11 are also identified as Plots No 4020 – 4028 in the survey plan. These subdivisions are shown in the mother title CR No 17219 which also indicates that the subdivisions were sold to various people. It is thus in the year 2007/2008 that the suit plot was created.
14. There is supporting evidence from the letter dated 15 November 2011 which is a subdivision certificate. It says as follows :-

This is to certify that the proposal to subdivide plot nos 572/MN/III was approved by this Council on February 24th 2009 in conformity with the Physical Planning Act and Council planning by-laws. The resultant subdivisions in respect to the above became plot Nos. 4820-4828/III/MN, 572/2/MN/III, and 572/I/MN/III (public access road).

Yours Faithfully,

C.K Kazungu

For County Clerk.

This certificate was registered against the title on 21 August 2012.

15. I am further supported in the finding that it was the survey of 2007/2008 that brought forth the suit land by the deed plan No 285144 (which is the deed plan for the subject plot) as it bears the date 7



March 2008. I will of course come to this deed plan later for there is some issue on whether or not it was surrendered.

16. The owner of the original land plot No 572 was Dee Dee Investments Limited. It follows that titles to the subdivisions were first issued to Dee Dee Investments. It appears that all the plots were sold, save of course for MN/III/572/1, which is the road reserve. The subject plot, as MN/III/572/2 was sold to Sammy Musembi Munyao and transfer effected on 12 September 2012. There was subsequent transfer to the plaintiff in the year 2016 and that is how the plaintiff got title. The survey plan F/R No 472/100 does seem to suggest that both plot 572/1 (the road reserve) and plot 572/2 (the subject plot) were to be surrendered. It doesn't however say why the plot No 572/2 was to be surrendered because there would be no purpose for a cattle dip. I have already discussed that there is nothing to suggest any surrender of this plot in the year 1987.
17. There is of course controversy whether there was a surrender after the deed plan was drawn on 7 March 2008. Mr. Kiguru insisted that there was surrender. The plaintiff insists there was not. The only entity that would have confirmed a surrender would be the Department of Surveys or the Lands Registry but none was called as a witness. On my part, I am of the view that there was no surrender. I believe that if there was a surrender, it would have been indicated in the mother title, but there is no such indication. The title only shows that MN/III/572/1 is a road reserve but it has nothing special regarding the subject plot as MN/III/572/2 nor any pointer that it is a public utility plot. It is only shown as a subdivision of the mother title.
18. The argument of the defendants is that the 1st defendant got title through the letter of allotment. I do not believe that the 1st defendant obtained good title through the purported allotment letter of 1997. I in fact doubt the authenticity of that letter. You would expect that if the letter of allotment actually came in the year 1997, then the 1st defendant, who is well versed with issues related to land, would have paid for it immediately and then processed title. There was not even evidence of later payment for this allotment letter. The 1st defendant in his evidence said that he paid for it after getting the title. This does not happen. You cannot get title first then pay for whatever is required to be paid in the allotment later. That would be putting the cart before the horse. The procedure is that you first pay what is in the allotment letter then you get title. But as I have said, there is no evidence of any payment, at all, on this allotment letter.
19. Moreover, when you look at the survey plan which prepared the title for the 1st defendant, you will realize that it is a survey done in the year 2009. That survey recognizes a plot No MN/III/5028 as a neighbouring plot. That plot No 5028 was actually curved out of a road reserve next to the suit plot. What was there before was that the disputed plot was a corner plot at a T-junction from the main Mombasa-Kilifi Road. This road was narrowed and the plot No 5028, alongside others, on a straight line following the feeder road, created out of its reserve. All these plots were allotted to the 1st defendant. Now, when Mr. Kiguru did the survey plan subdividing Plot No 572, these plots No 5028 and others had not been created. If they were, they would have been shown in his survey, but they are not so shown. However, when you look at the purported plan attached to the allotment letter, it has these plots No 5028 and the other plots curved out of the road reserve. Shockingly, it even has the plots No 4820 – 4828. This is impossible! It cannot be possible because these plots No 4820-4828, as we have seen, were created in the year 2007/2008 by Mr. Kiguru himself through F/R No 472/100. They were certainly not there in the year 1997 when this purported allotment letter was written. How an allotment letter of 1997 would have a draft plan bearing subdivision that was done ten years later is a mystery. In addition, the allotment letter states that the land being allotted is an unsurveyed parcel of land. If indeed the land had been surveyed and created through F/R No 184/44 in the year 1987 then this would be a plot bearing a title number MN/III/572/1 and it could not be considered as unsurveyed land.



20. It doesn't take rocket science for one to come to the conclusion that this allotment letter is dubious and a fraud. The original of this allotment letter was never presented. This copy that was being passed off as authentic is a forgery. As I have said, and I will repeat, the 1st defendant did not present anything to show that there was any payment made in respect of this allotment letter. It is a fictitious letter forged with an aim to grab the suit land.
21. This theory that the suit plot was created in 1987, then surrendered, or that it was surrendered in the year 2007/2008 so as to make the said plot public land capable of being allotted, is nothing but a red herring and a smoke screen. I do not even believe that the original deed plan No 285144, the deed plan for the suit land, had the words "surrender" written on it. I am convinced that these words were added later so as to support the grabbing of the land by the 1st defendant. There was definitely a corrupt scheme hatched between the 1st defendant and his surveyor/s to grab the suit plot and make it look as if it is available for allocation by the Government when it was not.
22. The long and short of it is that I am persuaded that the authentic title to the suit land is that held by the plaintiff. I have demonstrated that the title of the defendants was created through a fraudulent scheme. This title, previously held by the 1st defendant, and now held by the 2nd and 3rd defendants, is one for cancellation. I cancel it. I order the Land Registrar Mombasa, to proceed and cancel the register to the title 5737/III/MN, CR No 52171. There should be no further transactions entered using this title. The Director of Surveys should also ensure that the registry index map is amended to remove this title from the survey records. I further order the Land Registrar, Mombasa, at the expense of the 1st defendant, to publish in the Kenya Gazette and in two newspapers of nationwide circulation, of the cancellation of this title LR No 5737/III/MN, CR No 52171. If the defendants do not make the requisite payment, and the plaintiff is forced to do so, any costs incurred be passed to the defendants jointly and/or severally and to attract interest at court rates till payment in full.
23. The only authentic title to the disputed land is that described as MN/III/572/2 which is CR No 57684 depicted in deed plan No 285144. The said title is held by the plaintiff. As the title holder, it is the plaintiff who is vested with rights of use of the suit land. I hereby issue an order directing the defendants to forthwith give vacant possession of the suit land to the plaintiff. If the plaintiff wishes for the defendants to remove any structures, the plaintiff to point this out to the defendants and the defendants to proceed to remove these within 14 days of being notified. Any costs of removal to be shouldered by the defendants jointly and/or severally, and if the plaintiff is forced to pay the same, the plaintiff to claim it jointly and/or severally against the defendants and such expense to attract interest at court rates until settlement in full. In addition, I issue an order of permanent injunction, restraining the defendants from entering, being upon, utilizing, dealing with, or in any other way interfere with the quiet possession of the suit land by the plaintiff.
24. The plaintiff asked for general damages. Considering the size of the land, the location thereof, and the fact that the defendants have been economically deriving benefit from it, including taking loans on it, I award the plaintiff the sum of Kshs 1,000,000/= as general damages for trespass.
25. I have found no substance in the counterclaim of the defendants and it is hereby dismissed.
26. The defendants, jointly and/or severally, will shoulder the costs of the main suit and of the counterclaim.
27. Judgment accordingly.

DATED AND DELIVERED THIS 8 DAY OF MARCH, 2023

JUSTICE MUNYAO SILA



**JUDGE,
ENVIRONMENT AND LAND COURT**

