



REPUBLIC OF KENYA



**Mbuthe v Jalil & another (Environment & Land Case 182 of 2018)  
[2023] KEELC 17379 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 182 OF 2018  
MN GICHERU, J  
MAY 10, 2023**

**BETWEEN**

**SHEILA WANJIRU MBUTHE ..... PLAINTIFF**

**AND**

**ABDALA ABDUL JALIL ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KAJIADO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff seeks the following reliefs against the defendants.
  - a. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as Kajiado/Mailua/555.
  - b. A declaration that the first defendant acted in contravention of article 40 by depriving the plaintiff of a portion of her land by creating an illegal access road.
  - c. An order of certiorari to bring into this court and quash the impugned decision of the second defendant.
  - d. A declaration that the access road indicated on the registered mutation dated January 19, 1993 is the correct road and alternatively that the access road should be at the boundary of Kajiado/Mailua 555 and 556 and the district surveyor do amend the Registry Index Map accordingly.
  - e. General damages (value of the septic tank at the current market value).
  - f. Special damages of trees at Kshs 32,384.20.
  - g. Costs of this suit together with interest thereon at such rate and for such period of time as the court may deem fit to grant.



2. The plaintiff's case is as follows. She is one of the registered owners of LR Kajiado/Mailua/555 which she holds in trust for the beneficiaries of the estate of her deceased husband George Mbuti Njoroge.
3. The plaintiff's husband purchased LR 555, suit land, from one Abdul Jalil Abdul Khan who is the first defendant's father in 1993 and a title deed was issued on January 19, 1993. Since then, the plaintiff has been in possession of the suit land where she has built a hotel where she carries on business.
4. In the year 2002, a dispute arose between the plaintiff's husband and the first defendant's father over an access road at the boundary of LR Kajiado/Mailua/555 and 556. That dispute was taken to the district officer Namanga and it was resolved that both parties should open an access road between parcels 555 and 556.
5. In 2008, the first defendant secretly filed a case before the land disputes tribunal pretending to be his father and suing the plaintiff's husband who had passed away in 2007. He then obtained *ex-parte* orders which the plaintiff successfully revoked through court.  
Again, in the year 2016, the District Land Registry together with his team which included the District Surveyor visited the land and they were unable to convince the parties to settle the matter out of court.
6. According to the mutation registered on January 19, 1993, LR No Kajiado/Mailua/351 was subdivided into parcels Kajiado/Mailua/555 and 556. From that mutation, an access road to Kajiado/Mailua/352 and 353 was excised and the first defendant's father agreed by signing the mutation which was thereafter registered.
7. On October 16, 2018, the District Land Registrar made a decision that disregarded the registered mutation, green cards and title deeds issued by his office and which aggrieved the plaintiff.
8. In late November 2018, the first defendant entered the plaintiff's land where he cut down trees, live fence and excised a road on her land. He also erected a fence that blocked off access to the plaintiff's hotel rooms. This action of the first defendant has occasioned the plaintiff loss and damage.
9. The first defendant and his family have been using a road at the boundary of LR 555 and 556 since 1993 and it is only recently that they started using the paved road. The first defendant is taking advantage of failure by Land Registry to amend the Registry Index Map yet there exists a registered mutation. It is the duty of the Land Registry Kajiado to update their records and their failure to do so is the cause of this dispute.
10. In support of her case, the plaintiff filed the following evidence.
  - i. Her witness statement dated November 26, 2018.
  - ii. Copy of mutation form registered on January 19, 1993 for LR No 352.
  - iii. Copy of letter of consent for LR 555 dated January 12, 1993.
  - iv. Copy of application for consent of the Land Control Board.
  - v. Copy of title deed for LR 555 in the name of George Mbuti Njoroge dated January 19, 1993.
  - vi. Copy of transfer form for LR 555.
  - vii. Copy of decision in tribunal case No 373/2008.
  - viii. Copy of certificate of death for George Mbuti Njoroge showing that he died on October 23, 2007.



- ix. Copy of proceedings in miscellaneous application No 16 of 2014.
  - x. Copy of boundary dispute summons dated August 22, 2016.
  - xi. Copy of proceedings and ruling by Land Registrar dated October 16, 2018.
  - xii. Copy of map for the area in which the disputed parcels are situated.
  - xiii. Other relevant documents.
11. The first defendant, through counsel on record filed a written statement of defence dated February 3, 2020 in which he denies the plaintiff averments in the plaint. His defence is that the husband of the plaintiff bought a smaller parcel of land than he claims. He bought 80 x 100 feet and before the transfer process was complete, he fenced a bigger portion which was almost an acre. He also fraudulently obtained a title deed for the unlawfully acquired land.
- Eventually, the land registrar in a ruling dated October 16, 2018 directed that the existing road measuring 9 meters reflected in the Registry Index Map and which serves LR Mailua/352 and 353 is the official road. It is a government utility and it must be maintained by all parties. There is no appeal yet against this ruling. He prays that the plaintiff's suit be dismissed.
12. In support of his case, the first defendant filed the following evidence.
- i. His own witness statement dated May 26, 2019.
  - ii. Four pages of handwritten agreement for the purchase of LR Mailua/352.
  - iii. Copy of letter by District Officer Namanga dated May 20, 2002.
  - iv. Other relevant documents.
13. The honourable the Attorney General filed a written statement of defence dated December 11, 2019 in which the plaintiff's claim is denied.
14. At the trial which lasted from September 27, 2021 to November 22, 2022 the plaintiff testified and called two witnesses who include a documents examiner and a surveyor. According to the surveyor there is a backlog in the amendment of maps. This means that there are land owners with title deeds yet their land does not appear in the official maps.
- According to the documents examiner the known signatures of Abdul Jalil Abdalla in the sale agreements dated December 16, 1992, June 28, 1992, September 23, 1992, July 15, 1992 and April 28, 1992 are similar and indistinguishable from those in the mutation form dated January 19, 1993 and the transfer form dated January 19, 1993. The plaintiff produced her documents as exhibits and she together with her witnesses were subjected to cross-examination.
15. On the other hand, the defendant testified, produced his documents and was also cross examined by the plaintiff's counsel.
16. Only the plaintiff's counsel filed written submissions on April 24, 2023 and again on April 26, 2023. No written submissions were received from either of the two defendants.
- The plaintiff's counsel identified two issues for determination namely:-
- a. Whether the first defendant's father transferred 0.40 hectares being excised from Kajjado/Mailua/351 to the plaintiff's husband?
  - b. Whether the access road could have been changed?



17. I have carefully considered all the evidence adduced by the parties in this case including their witness statements, documents and the testimonies of all the witnesses at the trial.

I have also considered the submissions by learned counsel for the plaintiff dated March 30, 2023. I am in agreement with the plaintiff's counsel that the two issues will determine the dispute. Before I come to the issues however, I find that the suit as presented raises a fundamental question. Is this suit a judicial review or is it an appeal against the decision of the Land Registrar dated October 16, 2018 or is it both?

I pose this question because prayer (c) of the amended plaint is for an order of certiorari which can only be granted in a judicial review proceeding. The question as to whether this is an appeal is prompted by the prayer (d), which seeks an order for the amendment of the Registry Index Map.

Be that as it may, and coming to the two issues identified by the plaintiff's counsel in the submissions, I find as follows.

18. On the first issue, I find the first defendant's father transferred 0.40 hectares to the plaintiff's husband. In making this finding, I have relied on the evidence of in mutation form and the transfer form dated January 19, 1993 which have been proved to have been signed by the first defendant's father. The evidence of the documents examiner is convincing and credible. It is also unchallenged. Even to the naked eye, the signatures on the undisputed documents known to have been signed by the defendant's father are similar to those in the mutation form as well as the transfer form.
19. On the second issue of whether the access road could have been changed, I find that the plaintiff has not adduced evidence on a balance of probabilities to prove that the access road was change. Had the road changed, the official records would be reflecting the same. According to the evidence of the Land Registrar which is in form of the ruling of October 16, 2018, which has been relied upon by both parties, the official road has not changed.

When Mr Kimani the surveyor testified on January 26, 2022 he said that the Registry Index Map was not amended because some data was missing. He also said that there is backlog in amending of maps. Yet, the plaintiff has asked the court to order the amendment of Registry Index Map. Can the court do so when the plaintiff's own witness says there is missing data? The answer to this question is No! The court has no power to order amendment of Registry Index Map Maps. It is the duty of the plaintiff to convince the land registrar that there are good reasons for such an amendment.

20. It is my finding that this suit is essentially a boundary dispute between the plaintiff and the first defendant. It is the Land Registrar who has jurisdiction to determine such boundaries by virtue of section 18(2) of the [Land Registration Act](#) which ousts the jurisdiction of the court. Such determination includes determination of access roads where they border registered land.
21. The Land Registrar having made a determination, the only avenue to challenge his decision was by way of appeal or judicial review. All the seven prayers in the amended plaint were dependent on this single determination. The plaintiff having failed to prove the main prayer, I find that the other prayers are also not proved. Consequently, I dismiss the plaintiff's suit with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 10<sup>TH</sup> DAY OF MAY, 2023.**

**M.N. GICHERU**

**JUDGE**

