



Monirei & another (Suing on Behalf of the Estate of Lekiremu Ole Monirei) v Waiyaki & 2 others (Environment and Land Case Civil Suit 205 of 2017) [2023] KEELC 20326 (KLR) (3 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20326 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 205 OF 2017
MN GICHERU, J
OCTOBER 3, 2023**

BETWEEN

**WILLIAM MONIREI 1ST PLAINTIFF
DAVID MONIREI 2ND PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF LEKIREMU OLE MONIREI**

AND

**DR. MUNYUA WAIYAKI 1ST DEFENDANT
LAND REGISTRAR, KAJIADO 2ND DEFENDANT
THE ATTORNEY GENERAL 3RD DEFENDANT**

JUDGMENT

1. The Plaintiffs seek the following reliefs against the three defendants both jointly and severally.
 - a. A revocation and or cancellation of the title deed fraudulently issued to the first defendant In respect of title number Kajiado/Olchoro-onyore/1327, suit land.
 - b. A declaration that the plaintiffs are the legal owners of the suit land.
 - c. An order of rectification directing the second and third defendants to rectify the land register by cancelling the name of the first defendant as the registered proprietor and restoring the names of the plaintiffs as the registered owners of the suit land.
 - d. An order of permanent injunction restraining the defendants jointly and severally whether by themselves their servants, agents or otherwise from selling, disposing of, transferring, charging, pledging, leasing, wasting, developing or in any manner whatsoever or howsoever interfering with or dealing with the suit property.



- e. The costs of this suit together with interest thereon at court rates from the date of filing of the suit until the date of payment in full.
2. The plaintiff case is as follows. Both of them are sons of the Late Lekiremu Ole Monirei who died intestate in the year 1996. Their deceased father was the original owner of land known as Kajiado/Olchoro-onyore/83 and now Kajiado/Ochoro-Onyore/1327 measuring approximately 230 acres. Throughout their lives, the plaintiffs and their siblings have always resided on the suit land and continue with such occupation to date. They have lived on the suit land ever since they were children. As far as they know, their father did not sell the suit land to anybody including the 1st defendant. The land is currently valued at Kshs 460 million.
3. In the year 2011, the plaintiffs discovered that the suit land is registered in the name of the first defendant. Since their father did not sell the land to the first defendant, they accused him and District Land Registrar Kajiado of fraud. The particulars of fraud include causing the said land to be illegally transferred to the first defendant, disregarding the plaintiff's interest in the suit land, transferring the land without a sale agreement or paying consideration, taking advantage of the illiteracy of the deceased to transfer the land without a transfer instrument. The fraud on the part of the Land registrar includes effecting charges in the register without valid sale agreement, transfer instrument and Land Control Board consent.
4. Upon discovering the transfer and registration of the suit land in favour of the first defendant, the plaintiffs filed tribunal case No 224 of 2010 at Kajiado District Land Disputes Tribunal which found in favour of the first defendant. The plaintiffs then filed an Appeal at the Appeals Committee which is appeal case No 34 of 2011 which is still pending.
5. In support of their case the plaintiffs filed the following evidence.
 - i. Their own witness statements dated May 16, 2012.
 - ii. Copy of grant dated March 21, 2001.
 - iii. Copy of proceedings before the tribunal, memorandum of appeal to the Appeals Committee, copy of award by the Kajiado Magistrate's Court dated May 10, 2011, copy of order dated June 7, 2011 issued in Judicial Review case No 141 of 2011 at Machakos, copy of letter by District Surveyor Kajiado dated September 15, 2011 and copy of demand letter dated May 17, 2012.
 - iv. Copy of notice to the Attorney General dated May 16, 2012.
 - v. Copy of Identity Card for Lekiremu Ole Monirei.
 - vi. Copy of mutation form for LR Olchoro-Onyore/83 which gave rise to the suit land and LR 1326.
 - vii. Copy of title deed in the name of the first defendant.
 - viii. Copy of register for the suit parcel.
 - ix. Copy of the original map of the area.
 - x. Copy of letter dated August 17, 1984 from the District Commissioner Kajiado to Lekiremu Monirei.
6. The first defendant in a defence dated February 24, 2015 denies the plaintiffs claim generally. He avers that he bought the suit land from the late Lekiremu Ole Monirei for Kshs 920,000/= which he paid in full. He then got registered as the owner on October 28, 1985. He then occupied the suit land where he



build two houses and reared sheep. The sheep were stolen by local morans and the houses vandalized for word. The plaintiffs were all along aware of the purchase of the suit land by the first defendant and they never complained during the lifetime of their father. The plaintiffs had in Kajiado North Land Disputes Tribunal Case No 224/10/2010 acknowledged that they were aware of the transaction between their father and the first defendant but they were saying that the first defendant paid for 100 acres instead of 230 acres. The wife of the late Monirei confirmed at the hearing that the full purchase price had been paid. The tribunal found in favour of the first defendant and since then the plaintiffs have filed frivolous suits like Machakos Judicial Review Case No. 141 of 2011 and others none of which has been prosecuted even after the court ordered that they proceed to full hearing. For the above stated reasons, the first defendant prays for the dismissal of the plaintiffs suit with costs.

7. In support of his case, the first defendant filed the following evidence.
 - i. Witness statement by Elizabeth Wairimu Waiyaki dated July 13, 2018.
 - ii. Copy of submissions dated January 4, 2011 filed in the Kajiado Land Disputes Tribunal case.
 - iii. Copy of replying affidavit dated March 31, 2015 sworn by Dr Munyua Waiyaki and filed in Judicial Review Application No 141 of 2011.
8. The second and third defendants in a written statement of defence dated September 10, 2012 deny any fraud on the part of second defendant and pray for the dismissal of the plaintiffs case against them. In addition to the written statement of defence, the Attorney General filed a total of thirty one (31) documents which include the following.
 - i. Copy of notification of charge of LR Kajiado/Olchoro-Onyore/83 dated April 1, 1981.
 - ii. Copy of transfer instrument from the late Lekiremu Ole Monirei to the first defendant dated October 10, 1985 showing that the deceased sold the suit land to the first defendant for Kshs 920,000/=
 - iii. Copy of consent to transfer the suit land to the first defendant dated October 1, 1985.
 - iv. Copy of letter of consent dated September 3, 1985 for the subdivision of LR Kajiado/Olchoro – Onyore/83.
 - v. Copy of application for consent of the Land Control Board.
 - vi. Copy of Stamp duty assessment dated October 28, 1985.
 - vii. Other relevant documents.
9. At the trial the two plaintiffs testified and were cross –examined by the counsel for the first defendant and the Attorney general. On the side of the defendants the Land Registrar and Elizabeth Wairimu Waiyaki testified and they were cross-examined by counsel for the rival parties. The parties also produced the documents as exhibits.
10. Counsel for the plaintiff filed written submissions on October 12, 2022 while the first defendant’s filed his on May 9, 2022. He again filed supplementary submissions on February 22, 2023. The second and third defendants counsel filed his on 23/1/2023.

The plaintiffs’ counsel identified the following issues for determination.

- i. Whether the plaintiffs are the legal administrators of the estate of Lekirremu Ole Monirei (now deceased) and entitled to bring the suit herein?



- ii. Whether the plaintiffs together with their siblings have been in constant occupation and possession of the suit property at all material times?
- iii. Whether the first defendant has ever been in occupation of the suit property?
- iv. Whether the first defendant legally purchased the suit land from the deceased?
- v. Whether the purchase is null and void?
- vi. Whether the registration of the suit land in the name of the first defendant was obtained fraudulently?
- vii. Whether any consideration was paid by the first defendant to the deceased.
- viii. Whether there was a contract of sale?
- ix. Who should pay the costs?

I find that the above issues will determine the suit and they also largely include the issues raised by the counsel for the defendants.

- 11. On the first issue, I find that the plaintiffs are indeed the administrators of the estate of the deceased Lekiremu Ole Monirei and the copy of grant dated March 21, 2001 is prima facie evidence of this fact.
- 12. On the second issue, I find that the plaintiffs have failed to prove that they have been in constant occupation and possession of the suit land at all the material times. This is because they are the ones who allege this and therefore shoulder the burden of proof. There is credible evidence to prove that the 1st defendant occupied the suit land by building two houses and rearing sheep. This evidence which I believe is not controverted by the plaintiffs. They have not adduced any evidence of even a single structure. I believe that the plaintiffs only came to court after the death of their father and that they never complained about the first defendant's occupation of the suit land during their father's lifetime. This finding also covers the third issue.
- 13. On the fourth issue, I find that the first defendant legally purchased the suit land because evidence has been adduced to prove that he is the registered owner and that he occupied the land. Under Section 27 of the *Registered Land Act* (Cap 300, now repealed) the interest conferred by registration confers on the owner absolute ownership of the land together with all rights and principles, belonging or appurtenant thereto. Again under Sections 25 and 26 of the *Land Registration Act* (Act No 3 of 2012) the certificate of title issued upon registration shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner. The burden of proof is on the person who avers that the land was not legally purchased. The plaintiffs have been very inconsistent on the issue of the first defendant's purchase of the suit land. In the tribunal proceedings which they produced as one of their exhibits it is recorded as follows at paragraphs 2 of page 2

“The claimants are aware that their late father sold his land in 1985, however the claimants allege that the objector did not pay full amount for the 230 acres claiming that the objector only paid for 100 acres although they could not confirm this allegation in any form whatsoever. But the objector also confirms also claims to have paid for the property in full at a price of Kshs.4,000 per acre which was confirmed by one late Monirei wife who has been present at all the hearings....”



In paragraph 5 of the plaintiff's affidavit dated May 7, 2010 it is stated as follows'

“That before our father passed away in 1996, he was claiming that he was not through with payments from Dr Munyua for the purchase of his land in title deed No KJD/Olchoro OnyorE/83”. In paragraph 11 of the witness statement dated May 16, 2012, the first plaintiff has this to say,

“...my deceased father never sold the suit property to anyone including the defendant herein...”

From the above, it is obvious that the plaintiffs are not being truthful about the sale of the suit land. It is the defendants who are both consistent and truthful. I believe the defendants testimony and evidence and disbelieve the plaintiffs.

14. Regarding the fifth issue, I find that the purchase is proper for reasons already given. At paragraph 8 of the amended plaint, it is pleaded that the District Land Registrar registered the suit land in favour of the first defendant without valid transfer documents and without the necessary consent of the Land Control Board. All these documents have been produced by the second defendant even though the burden was on the plaintiffs to prove that they did not exist and which they failed to do.

15. As for the sixth issue, I find that the burden was on the plaintiffs to prove fraud. It is trite law that the burden to prove fraud is on a standard higher than proof on a balance of probabilities. See *Elizabeth K Ndolo v George Matata Ndolo* Civil Appeal No 128 of 1995 where it was held as follows;

“...since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary cases, namely proof upon a balance of probabilities, but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.....” I find that fraud has not been proved at all owing to the inconsistencies by the plaintiffs mentioned earlier and also lack of tangible evidence to prove any of the particulars of fraud.

16. Coming to the seventh issue, I find the plaintiffs have previously contradicted themselves in this regard both at the tribunal, in the affidavit in support of the caution in their witness statements. Yet the burden was on them. I do not believe the plaintiffs. I believe the defendants that all due consideration was paid before transfer of the suit land.

17. On whether there was a sale agreement, I find that there was. It was upon the plaintiffs to prove that there was no such agreement. No evidence was adduced in this regard.

I am satisfied that the Land Registrar was satisfied that all documents were in order before registering the land.

Finally on the ninth issue, I find that it is the loser in litigation who should pay the costs. In this case, it is the plaintiffs who filed this suit and they have failed to prove it to the required standard. They must therefore pay the costs.

For the above stated reasons, I find no merit in the plaintiffs' suit and I dismiss it with costs to the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 3RD DAY OF OCTOBER, 2023.

M.N. GICHERU



JUDGE.

IN THE PRESENCE OF:

Miss Kipruto for the Plaintiffs present.

Miss Kala for the 1st defendant present.

N/A for 2nd and 3rd Defendants.

