



Nkoitiko (Suing as the administratrix of the Estate of Mutae Ene Nkoitiko (Deceased) v Mangori & 2 others (Environment & Land Case 530 of 2017) [2023] KEELC 20445 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 530 OF 2017
MN GICHERU, J
OCTOBER 4, 2023**

BETWEEN

HELLEN NYOTE NKOITIKO (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF MUTAE ENE NKOITIKO (DECEASED)) PLAINTIFF

AND

KIMANKUSI OLE SETOYA MANGORI 1ST DEFENDANT

DISTRICT LAND REGISTRAR KAJIADO 2ND DEFENDANT

HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The plaintiff, suing on behalf of her deceased mother seeks the following reliefs against the four defendants jointly and severally.
 - a. A declaration that the alleged sale, sub-division and transfer of LR. Kajiado/Kaputiei Central/949 is illegal and of no effect for want of the letters of administration and Land Control Board consent.
 - b. An order that title Nos. Kajiado/Kaputiei Central 1825 and 1826 be cancelled and the property remains in the name of Mutae ene Nkoitiko Lenayia.
 - b) (i) An order that the fourth defendant herein withholds any compensation that may fall due in respect of LR. 1826 for the Standard Gauge Railway Project until further orders of this court.
 - c. A declaration that no land transaction between the parties was legally permissible for want of Grant of Letters of Administration for the deceased estate.
 - d. Costs of the suit.



- e. Any other or further relief that this court may deem fit and just to grant. This is as per the amended plaint dated 29/10/2014.
2. The plaintiff's case is as follows. Her mother was the registered owner of LR. Kajiado/Kaputiei Central/949. The mother is now deceased. In the year 2010, the plaintiff and the first defendant engaged in negotiations whereby the first defendant was to purchase 44 acres out of the suit land. The negotiations failed due to the first defendant's fault. The plaintiff rescinded the intended sale. This prompted the defendant to file a case at the land Disputes Tribunal which ruled in favour of the defendant. The plaintiff filed judicial review proceedings but she discovered that the first defendant had managed to have the suit land sub-divided into two parcels namely 1825 and 1826 respectively whereby the plaintiff carved out the disputed 44 acres for himself. On 5/11/2010, the first defendant was registered as the proprietor of LR.1826 while the other parcel NO.1825 was registered in the name of the plaintiff. The plaintiff avers that there was fraud on the part of the first and second defendants. The fraud on the part of the first defendant includes hoodwinking the plaintiff who is illiterate into signing an agreement saying that she had received payment when she had not. The fraud on the part of the second defendant entails transferring the suit land while the registered owner was deceased and yet no letters of administration had been issued. Secondly, the Land Registrar effected the transfer without the necessary consent of the land control board.
3. In support of her case, the plaintiff filed the following evidence.
 - i. Her own witness statement.
 - ii. Copies of title deed for LR. Kajiado/Kaputiei Central 1825 and 1826, copy of register for LR.949, Certificate of death for Mutae ene Nkoitiko, affidavit by Francis Lesinko alleged agreement between the plaintiff and the first defendant, grant of letters of administration ad Litem and Notice of intention to sue issued to the Attorney General.
4. The first defendant, through counsel on record filed a written statement of defence dated 6/12/2013 in which he states as follows.

Firstly, at the time of the sale agreement, the plaintiff was the registered owner of the suit land having been registered on 29/10/2004.

Secondly, the letters of administration alluded to in the plaint were not necessary since the plaintiff's mother was not the registered owner.
5. Thirdly, the first defendant moved to the land disputes tribunal when the plaintiff became reluctant to transfer the 44 acres which he had paid for in full. At the tribunal, the first defendant was advised that it was the right forum to deal with the dispute after which the plaintiff voluntarily sub-divided the original parcel and then transferred the 44 acres to the first defendant after signing all the relevant documents including the mutation form, the application for the consent of the Land Control Board and the transfer instrument.
6. Fourthly, LR. No. Kajiado/Kaputiei Central/949 did not belong to the plaintiff's deceased mother. The records held by the second defendant show that the disputed parcel was a result of sub-division of Kajiado/Kaputiei/434 which was registered in the name of the plaintiff on 29/10/2004. The other two parcels namely 947 and 948 were registered in the names of the plaintiff's sisters who are Emily Ntilale Nkoitiko and Kamonon ene Nkoitiko. For all the above reasons, there is no fraud on the part of the defendants and the plaintiff is not being truthful because Machakos Misc. Application No.160 of 2011 which she filed is still pending. He prays for the dismissal of the plaintiff's case.
7. In support of his case, the first defendant filed the following evidence:



- i. Witness statements by himself, Francis K. Lesinko, Kamonon ene Nkoitiko and Emily Ntilale Nkoitiko.
- ii. Copy of agreement dated 23/7/04 and supporting documents.
- iii. Copy of title deed for LR 949 in the name of the plaintiff and dated 29/10/2004.
- iv. Copies of mutation for LR.949, Certificate of official search, registers for LR Nos. 947,948 and 949, court order issued in Machakos HC Misc. Case No.160 of 2011 and dated 7/7/2011 and ID's for the defendants, Francis Kasirikua Lesinko, Kamonon ene Nkoitiko and Emily Ntilaale Nkoitiko.

The second and third defendants did not enter appearance or file any defence.

8. At the trial, the plaintiff did not turn up to prosecute her case. Neither did her counsel. The court deemed the plaintiff's case as closed in order that the issues raised in the entire case would be dealt with once and for all.

The first defendant who was present with his counsel and witnesses testified on oath, produced his documents and called one witness by the name Emily Ntilaale Nkoitiko. His evidence is that he bought the land and occupied it after paying the fully purchase price. The plaintiff filed this suit when she realized that the plaintiff would be paid compensation because the Standard Gauge Railway. She wanted a share of the compensation and the entire suit serves no other purpose.

9. Counsel for the parties filed written submissions on 19/1/22 and 2/5/2023 respectively. The plaintiffs' counsel did not identify any issues for determination. The first defendant identified two issues namely;
 - a. Whether the plaintiff's suit is tenable?
 - b. Who bears the costs?

I have carefully considered all the evidence on record including the witness statements and documents filed by both parties, the testimony at the trial, the submissions filed by the counsel for the parties and issues and the law in the submissions. Further to this, I have considered the issues raised in the pleadings and I find them to be as follows:

- i. In whose name was the suit land registered at the time of the disputed sale agreement?
 - ii. Whether it was necessary for the plaintiff to obtain letters of administration before entering into the agreement?
 - iii. Whether the requisite procedures were complied with before the first defendant was registered as owner of the 44 acres?
 - iv. Who has the burden of proof and it has been discharged?
 - v. Who bears the costs?
10. On the first issue, I find that the suit parcel was registered in the name of the plaintiff on 29/10/2004 and not in the name of her mother. It was therefore not necessary that the plaintiff should have obtained any letters of administration to deal with land that was already in her name.
 11. On the third and fourth issues, I find that it is the plaintiff who has the burden of proof because she is the one alleging fraud and the standard of proof is higher than the ordinary one of proof on a balance



of probabilities. In the case of *Elizabeth. Kamene Ndolo v George Matata Ndolo*, Civil Appeal No 128 of 1995, the Court of Appeal had this to say,

“We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. 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 civil 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”.

In this case, the plaintiff alleged fraud at paragraph 11 of the amended plaint. She has not proved any of the three pleaded particulars of fraud. She has merely alleged. This is especially so because the first defendant, who had no burden of proof, has proved that he paid for the suit land fully as per the evidence of the plaintiff's own sister. It was incumbent upon the plaintiff to prove that the procedures of sub-division and transfer were not complied with but she has not done so.

12. For the above stated reasons, I find that the plaintiff's suit has no merit at all and I dismiss it with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 4TH DAY OF OCTOBER 2023.

M.N. GICHERU

JUDGE

In The Presence Of:

Musyoka for the Plaintiff present.

Sankale for the 1st Defendant present.

N/A for 2nd Defendant.

Court Assistant – Mpoye.

