



REPUBLIC OF KENYA



Tutui v Noonchigeni(1st Administrator of the Estate of Syianka Oloiboni Lenooliadat) & 15 others (Land Case 911 of 2017) [2022] KEELC 13457 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13457 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
LAND CASE 911 OF 2017
MN GICHERU, J
OCTOBER 6, 2022

BETWEEN

PARTRICK KOINERY TUTUI PLAINTIFF

AND

RAINGOT SUYIANKA NOONCHIGENI(1ST ADMINISTRATOR OF THE ESTATE OF SYIANKA OLOIBONI LENOOLIADAT) 1ST DEFENDANT

NAIRONI ENE SUYIANKA OLOIBONI (2NDADMINISTRATOR OF THE ESTATE OF SYIANKA OLOIBONI LENOOLIADAT) 2ND DEFENDANT

ATTORNEY GENERAL (SUED ON BEHALF OF THE LAND REGISTRAR AT KAJIADO) 3RD DEFENDANT

SUSAN NAICHANU GITINKA 4TH DEFENDANT

PHILIP SAMUEL ODERA 5TH DEFENDANT

BIPIN JAYANTILAL KANJI PARMAR 6TH DEFENDANT

MEETA HARILAL LALJI CHOHAM 7TH DEFENDANT

THAARA ORCHARDS LIMITED 8TH DEFENDANT

CHRISTINE CHEBAT TIRIONGO 9TH DEFENDANT

PRESTON NGIGI MUKURIA 10TH DEFENDANT

OTUMA SUYIANKA 11TH DEFENDANT

OLOONTAKIUA INVESTMENT LTD 12TH DEFENDANT

MOSES NAROK 13TH DEFENDANT

SAIMON NTASIKOI NOONKANAS 14TH DEFENDANT

DAVID MUKUI KARUNGU 15TH DEFENDANT



JUDGMENT

1. Patrick Koinery Tutui, the Plaintiff seeks the following reliefs against the following sixteen Defendants both jointly and severally;
 - a) All subdivisions emanating from Kajiado/Mailua/862 measuring 131.40 hectares be declared null and void and the subdivisions be reconsolidated to the mother title being Kajiado/Mailua/862 measuring 131.40 Hectares and the same be reverted to the Plaintiff.
 - b) A permanent injunction restraining the Defendants, their agents, servants, employees and anyone claiming through them from entering, possession, alienating, wasting or in any way dealing with the Plaintiff's parcel of land known as Kajiado/Mailua/862 measuring 131.40 Hectares, or in the alternative,
 - c) The Defendants jointly and severally do compensate the Plaintiff the sum of Kshs. 122, 200, 000.00 which is the current market value of the suit land without developments thereon as at 12th October, 2017.
 - d) Interest at Court rates from 4th June, 2009 until payment in full.
 - e) Damages
 - f) Costs of the suit.
 - g) Any other relief the court may deem fit.

The above is as per the amended plaint dated 14th August, 2019. The Defendants are as follows; Raingot Suyianka Noonchigeni (1st Administrator of the estate of Suyianka Oloiboni Lenooliadat), first Defendant. Naironi Ene Suyianka Oloiboni (2nd Administrator of the estate of Suyianka Oloiboni Lenooliadat), second Defendant. The Honorable Attorney General (sued on behalf of the Land Registrar Kajiado), third Defendant.

Susan Naichanu Gitinka - 4th Defendant

Philip Samuel Odera - 5th Defendant

Bipin Jayantilal Kanji Parmar - 6th Defendant

Meeta Harilal Lalji Choham-7th Defendant

Thara Orchards Limited - 8th Defendant

Christine Chebet Tiriongo - 9th Defendant

Preston Ngigi Mukuria- 10th Defendant

Otuma Suyianka - 11th Defendant

Oloontakiva Investment Limited -12th Defendant

Moses Nanok- 13th Defendant

Simon Ntasikoi Noonkanas -14th Defendant

David Mukui Karungu – 15th Defendant



Felistas Wangari Njoroge – 16th Defendant

2. The Plaintiff's case is as follows. On 17th October, 1997, in Succession Cause No. 454 of 1996, at the High Court of Kenya in Nairobi, he was awarded 131.40 hectares of land out of L.R Kajiado/Mailua/376. This was in the estate of the late Suyianka Oloiboni Lenooliadat. He got the land as a beneficiary of the estate of the deceased.
3. In the said succession, the first and second Defendants were the administrator and administratrix of the estate of the deceased. L.R Kajiado/Mailua/376 comprised of approximately 638.42 hectares. The beneficiaries were as follows;
 - i. The plaintiff
 - ii. Sabore Pakine
 - iii. Raingot Suyianka
 - iv. Nairino Suyianka
 - v. Moombi Suyianka
 - vi. Parorit Suyianka
 - vii. Njoge Suyianka
 - viii. Olupe Suyianka
 - ix. Milia Suyianka
 - x. Pardiyo Suyianka
 - xi. Nairinoi Suyianka and Moombi Suyianka as trustee for their sons
 - xii. Moombi Suyianka as trustee for Otuma Suyianka, Oitu Suyianka and Ntotok Suyianka.
4. The first and second Defendants subdivided the estate into several parcels which included L.R. Kajiado/Mailua/862 measuring 131.40 hectares which was meant to be transferred to the Plaintiff. Instead of transferring the suit land as expected, the first and the second Defendants subdivided it as follows;
 - a. Kajiado/Mailua/1890 which was sold to the fourth and fifth Defendants.
 - b. Kajiado/Mailua/1915 which they sold to the sixth and seventh Defendants.
 - c. Kajiado/Mailua/1918, 1919, 2072 and 3042 which they sold to the eighth Defendant a company whose directors are Charles Theuri Maina and Jane Njeri Maina. It also has the following non director shareholders, Michael Maina Theuri, Maureen Muthoni Maina, Alice Wambui Maina and Tobyn Wangui Maina.
 - d. Kajiado/Mailua/2328 which they sold to the ninth Defendant.
 - e. Kajiado/Mailua/1917 which they sold to the tenth Defendant
 - f. Kajiado /Mailua) 2071 which they sold to the eleventh Defendant
 - g. Kajiado/Mailua 863 which they sold to the twelfth Defendant
 - h. Kajiado/Mailua/866 and 873 which they sold to the thirteenth Defendant



- i. Kajiado/Mailua /868 which they sold to the fourteenth Defendant
 - j. Kajiado/Mailua 2071 which they sold to the fifteenth Defendant
 - k. The sixteenth Defendant is also a seller of two of the resultant parcels namely Kajiado/Mailua/3041 and 1917.
5. It is the Plaintiff's case that the grant issued in Succession Cause Number 454 of 1996 awarding him a share of Kajiado/Mailua/376 has never been annulled or revoked.

When, on 5th August, 2009, the Plaintiff lodged an application for registration in the office of the Land Registrar, Kajiado, he was advised by one Wilfred Nyandoro Nyaberi that parcel Number Kajiado/Mailua/376 had been closed on subdivision. Nyandoro was the District Land Registrar Kajiado at the time.

On 10th August, 2009, the same land registrar, Kajiado advised the Plaintiff to pay stamp duty amounting to Kshs. 70, 010 which he duly did.

On further scrutiny of the green card by the Plaintiff, he found out that Kajiado/Mailua/862 was closed on subdivision when an application he had filed on 4th July, 2018 for transfer of the suit land to himself was pending. The register was closed on 4th June, 2008.

In addition to the above, on 15th July, 2009, the Plaintiff placed a restriction against L.R. Kajiado/Mailua/1890. This is because the parcel was a subdivision of the suit land.

On 11/9/2009, the said restriction was removed by the third Defendant at the instigation of the first and second Defendants even though there was a court order dated 30th June, 2009.

The above are a few of the many aspects of fraud that the Plaintiff has pleaded.

6. In support of his case, the Plaintiff filed a total of 92 documents which included the few that I will highlight below;
- a. Proceedings and certificate of confirmation of grant in Nairobi Succession Cause Number 454 of 1996.
 - b. Copy of court order dated 10th February, 2009 directing the first and second Defendants to distribute the estate within 30 days.
 - c. Copy of the court order dated 2/7/2009 directing the first and second Defendants to transfer the suit land to the Plaintiff within 10 days.
 - d. Copy of receipt dated 10/8/2009 showing that the Plaintiff paid Kshs. 70, 010/= as stamp duty for the transfer of the suit land to himself.
 - e. Copy of register for L.R 862 dated 15/7/2009 showing that the title for the suit land was closed on 4/6/2009 new numbers 1890 – 1892 created.
 - f. Many other documents.

In addition to the above, the Plaintiff filed a valuation report dated 23/8/2017 by David K. Ndungu. The report puts the value of the suit land at Kshs. 112, 200, 000/= (Kshs One Hundred and Twenty Million, Two Hundred Thousand only).

7. The first Defendant filed an affidavit dated 25/6/2018 in which he admits that the suit land belongs to the Plaintiff as per the certificate of confirmation dated 17th October, 1997 in Succession Cause No. 459 of 1996.



The second Defendant on her part did not file any defence or memorandum of appearance. All that he did was to file a notice of appointment dated 4th May, 2018 and a notice of Preliminary Objection of the same date. All the same, she was heard by the Court.

The third, fourth, fifth, eighth, ninth, tenth, twelfth, thirteenth, fifteenth and sixteenth Defendants did not file any memorandum of appearance or defences. The suit against them proceeded as undefended.

8. The sixth and seventh Defendants through their counsel on record filed a written statement of defence dated 21st February, 2019 in which they aver that they bought land reference Kajiado/Mailua 1915 from the fourteenth Defendant and not from the first and second Defendants.

They add that the land they bought does not belong to the Plaintiff.

In support of their defence the two Defendants filed a witness statement by the sixth Defendant in which he says that he was not aware that the Plaintiff had been awarded the land in Succession Cause No. 454 of 2016. He carried out due diligence and established that the land was registered in the name of the fourteenth Defendant before he bought it.

In addition to the witness statement, the two Defendants filed a copy of the sale agreement, copy of the cheque and title deed.

9. The eleventh Defendant in a written statement of defendant dated 6th December, 2019 avers that he inherited the land registered in his name from the first and second Defendants. He however, denied knowledge of fraud.

In support of his defence, he filed a witness statement dated 26/8/2021 in which he states that he inherited three parcels namely Kajiado/Mailua/1917, 2021 and 3041 through his father and sold them to third parties. He was not aware that the Plaintiff had been given any land in Succession Cause No. 454 of 1996 at Nairobi High Court.

He concluded by saying that the Plaintiff has not sued some of his siblings who got land through the same Succession Cause.

10. The fourteenth Defendant filed a written statement of defence dated 29th May, 2018 in which he denied the Plaintiff's claim or knowledge that there was any illegality in acquisition of the land by the one who sold it to him.

In addition to the above, he filed a witness statement in which he says he bought the land no. 868 from Zinger Properties Limited.

He then bought L.R. 1890 from the first and second Defendants and sold it to a third party. Later on, he bought L.R. Kajiado/Mailua/ 2328 and 3041 from third parties who had bought from the eleventh Defendant.

Finally, the fourteenth Defendant says that he bought L.R. Kajiado/Mailua/2072 from Olubi Suyianka which he sold to a third party. According to him, the Plaintiff has not mentioned other property that was a result of the subdivisions including that held by Mr. Narok. He denied any knowledge on his part, of the Plaintiff's ownership of the land that he bought and avers that he has no claim over the same as he has sold it to third parties.

In addition to the witness statement, the fourteenth Defendant filed a copy of title deed for L.R. Kajiado/Mailua/868 dated 2/2/2001, a copy of agreement for sale dated 2/5/2011. The land was No. 2072 and the agreement is dated 2/5/2011.

11. At the trial, the Plaintiff testified and called one witness, DK. Ndung'u, a valuer before closing his case.



On the other hand, the sixth Defendant, the eleventh and the fourteenth Defendants testified by adopting their witness statements and documents before they were cross –examined.

12. Counsel for the parties filed and exchanged written submissions between 25th April, 2022 and 6th June, 2022. The following issues arose in all the submissions;
- i. Whether the Plaintiff has locus standi to bring this suit?
 - ii. Whether the Plaintiff has proved fraud as averred in the amended plaint?
 - iii. Whether the Plaintiff is entitled to the orders sought?
 - iv. Whether it is this Court or the High Court with jurisdiction in this case?
 - v. Whether the sixth and seventh Defendants are innocent purchasers for value without notice of fraud on the part of the first and second Defendants?
 - vi. Whether the grant was absolute?
 - vii. Whether the first and second Defendants acquired L.R. Kajiado/Mailua/862 lawfully?
 - viii. Whether the 4th to 16th Defendants acquired good title to the subsequent subdivisions of L.R. 862?
 - ix. Whether the third Defendants action of removing restrictions against L.R. 1890, 1891 and 1892 was procedural and lawful?
 - x. Legal effect of failure by third, fourth, fifth, eighth, fifteenth and sixteenth Defendants to file defence.
 - xi. The effect of second Defendants written submissions even though she filed neither appearance nor defence.
 - xii. Whether the 11th and 14th Defendants could buy and sell land for profit without being licensed?
 - xiii. Who should pay for costs?

13. I have carefully considered all the evidence adduced in this case by both sides as well as the submissions by their learned counsel. I agree that the issues as identified will resolve the dispute. I make the following findings;

On the first issue, I find that the Plaintiff has locus standi to institute this action. Even though the Plaintiff was never registered as the proprietor of the 131.40 hectares awarded to him by the Succession Court, that award has not been annulled or revoked by any court of law. He has interest in the land that is sufficient to give him capacity to sue.

Being aggrieved by the Defendants failure to distribute land he was entitled to, he has full capacity and legal standing to institute this suit. It is not right to say he is nonexistent. He exists because he appeared in court on 11/2/2021 and testified.

On the second issue, I find that fraud has been proved against the second and third Defendants. The second Defendant sold land that belonged to the Plaintiff. He has not given any explanation as to what became of the Plaintiff's land. He as the administrator, was expected to transfer land to the Plaintiff. He never did so.



On the part of the third Defendant, he advised the Plaintiff to pay stamp duty. He duly complied yet he got no land. A restriction in respect of L.R. 1890 was removed by the third Defendant on 11/9/2009 when there was a valid court order dated 30/6/2009 that was in force.

Nothing done in flagrant disobedience of a lawful court order can be lawful. This is what the Land Registrar Kajiado did. This was fraud.

On the issue of jurisdiction, I find that this court has jurisdiction. What the Plaintiff seeks in paragraph 62 (a) of the amended plaint is, inter alia,

...the mother title being Kajiado/Mailua/862 measuring 131.40 Hectares and the same be reverted to the Plaintiff”.

Clearly, what he seeks is title to land No. 862. Under Article 162 (2), (b) of the Constitution, this Court has power to hear disputes relating to “the Environment and the use and occupation of, and title to, land”. The same jurisdiction is to be found in Section 13 (2) (d) of the Environment and Land Court Act.

On the issue of whether or not the grant was absolute, I find that it was. It has never been annulled or revoked. No evidence has been adduced or even an averment made by the second Defendant to the effect that the grant dated 17th October, 1997 has ever been varied.

On the acquisition of L.R. Kajiado/Mailua/862 by the first and second Defendants, I find that it was not lawful. The land belonged to the Plaintiff having been lawfully awarded to him by a court of law.

On whether the fourth to the sixteenth Defendants acquired L.R. 862 lawfully, I find that they did not. As I have already found, nothing done in disobedience of a court order can be lawful. While the Constitution, under Article 40 protects the right to property, sub article (6) of the same Article provides as follows;

The rights under this Article do not extend to any property that has been found to have unlawfully acquired”.

On the removal of restrictions against L.R. 1890, 1891, and 1892, I have already found that it was unprocedural and unlawful.

Failure by some of the Defendants to file defence or file memorandum of appearance does not necessarily mean that they are liable because the Plaintiff has to formally prove his case on a balance of probabilities. He has to preponderate his case to the required standard.

Regarding failure by the second Defendant to file a memorandum of appearance and defence, and whether or not his submissions should be considered, I find that the court cannot lock him out. Previously, the second Defendant has been heard through his submissions when he raised the preliminary objection dated 4th May, 2018. Having been heard, then, the second Defendant cannot be locked out. This would be a derogation of the right to a fair hearing enshrined in Article 50 (1) of the Constitution.

A proper construction of Order 10, Rule 7 of the Civil Procedure Rules, in my view, means that a party who has appointed an advocate who is properly on record, may be heard on submissions even if he has not filed a defence.

Objection to the audience of the second Defendant owing to the absence of a defence should also have been raised at the earliest possible opportunity, so that, it could have been addressed then. Maybe the second Defendant could then have been allowed time to put his house in order. It is now too late in the day to raise the issue.



On whether or not the 11th and 14th Defendants could buy and sell land without estate agents licenses, I find that they could do so. In his testimony in court, on 9/3/2022, the fourteenth Defendant said he would buy land and then sell. He did not say that he was selling land on behalf of others.

I think when one sells land that he owns, he is not in breach of Section 2 of the *Estate Agents Act*. He would only be in breach if he sold land on behalf of other people without the requisite licence.

On the issue of whether the sixth or seventh Defendants are innocent purchasers for value without notice of any defect in the first and second Defendant's title, I find that they are not. As I found earlier on, Article 40 (6) does not protect property that is unlawfully acquired.

Though this file is very bulky and voluminous, the Plaintiff's pleadings and evidence have not brought out the fact of whether all the 131.40 hectares have been alienated by the first and second Defendants. Had this been clear, I would have apportioned how much land is to revert to the Plaintiff and the remainder which would have attracted the current market value.

Be that as it may, because I have found all alienation to have been unlawful, I will enter judgment for the Plaintiff as prayed for in the plaint against all the Defendants jointly, and severally. As against the first Defendant, there will be no order as to costs because he admitted liability at the earliest possible opportunity after he was served with summons to enter appearance.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6TH DAY OF OCTOBER, 2022.

M.N. GICHERU

JUDGE

