



Mudenyio & 2 others (Suing as trustees of Nasio Self Help Group) v Opattah & another (Sued on behalf of themselves and on behalf of Mumias Teachers Housing Co-operative Society Limited); County Government of Kakamega (Interested Party) (Environment & Land Case 107 of 2017) [2022] KEELC 14436 (KLR) (1 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 107 OF 2017**

DO OHUNGO, J

NOVEMBER 1, 2022

BETWEEN

LILIAN SHIBALILA MUDENYO 1ST PLAINTIFF

JOAN JAYVONNE MUDENYO 2ND PLAINTIFF

MELSA OBANDA OSORE 3RD PLAINTIFF

SUING AS TRUSTEES OF NASIO SELF HELP GROUP

AND

WAMBANI WERE 1ST DEFENDANT

BENEDICT OPATTAH 2ND DEFENDANT

**SUED ON BEHALF OF THEMSELVES AND ON BEHALF OF MUMIAS
TEACHERS HOUSING CO-OPERATIVE SOCIETY LIMITED**

AND

COUNTY GOVERNMENT OF KAKAMEGA INTERESTED PARTY

JUDGMENT

1. By amended plaint dated October 30, 2019, the plaintiffs claimed that they are the registered and or beneficial owners of land parcel number S/Wanga/Lureko/2863 and S/Wanga/Lureko/2864 (the suit properties) which are subdivisions of plot number 579, having purchased them in the year 2003 from the late Mzee Hussein Mambo. That the defendants have without colour of right, through their agents, servants and or members, encroached on the suit properties and started construction of permanent structures claiming that they belong to them and registered as LR No 8056/317 Mumias Township.



2. The plaintiff therefore prayed for judgement against the defendants for:
 - a. A declaration that the Plaintiffs are the legally registered and/or beneficial owners of the land parcel Nos S Wanga/Lureko/2863 or S Wanga/Lureko/2864.
 - b. A declaration that the interested party's purported actions of compulsory acquisition were unconstitutional and in contravention of the Plaintiffs constitutional rights under Article 40 (3) and statutory procedures and requirements.
 - c. A declaration that the creation and registration of LR No 8056/317 Mumias Township was null and void *ab initio* and unlawful.
 - d. A permanent injunction directed towards the defendants, the interested party, or any other person claiming through them from trespassing, construction, working, laying claim or in any other way interfering with land parcel nos S Wanga/Lureko/2863 and S Wanga/Lureko/2864.
 - e. An eviction order against the Defendants, their agents, assigns, employees, representatives or any other persons claiming through them from the suit properties.
 - f. An order compelling the OCS under whose jurisdiction the suit properties fall to effect the eviction order.
 - g. Alternatively, an order directing the interested party to provide full compensation to the Plaintiffs at the current market value of the suit properties and improvements thereon.
 - h. Costs of this suit.
3. The defendants filed amended statement of defence and counterclaim dated November 28, 2019 through which they denied the plaintiffs' allegations and averred that the suit properties were acquired by the government in 1972 as indicated by 8 restrictions placed in the land register at Kakamega. That if the plaintiffs purchased the same as alleged, then the said plaintiffs and Mzee Hussein Mambo conspired to re-acquire land parcel No South Wanga/Lureko/579 which was already government land, removed the restriction placed thereon and subdivided it into the suit properties.
4. The defendants further averred that the government compulsorily acquired land parcel number South Wanga/Lureko/579, fully compensated the owner and issued leasehold title grant number 80381 for LR No 8056/317 effective from January 1, 1998 in favour of the defendants. That despite being stopped, the plaintiffs constructed a school known as Noah's Ark Education Centre on the defendants' LR No 8056/317 and further that the plaintiffs fraudulently acquired the suit properties.
5. The defendants therefore prayed for judgement against the plaintiffs jointly and severally for:
 - a. An order of eviction from the portion occupied by Noahs Ark Education Centre and the same be restituted to the [defendants].
 - b. An order of permanent injunction restraining the [plaintiffs] either by themselves, there (sic) agents, servants or assign from entering upon, dealing in any manner, carrying out any academics (sic) activities upon the [defendants'] 2 portions forming part of LR No 80561 317 Mumias township and currently occupied by Naoh Ark Education Centre.
 - c. An order of cancellation of LR. No. South Wanga/lureko/2864 and South Wanga/lureko /2863 and all number 3293, 3294, 3295, 3296 and 3297 thereunder and the parent No South Wanga/lureko/579 existing after the said parcel was acquired by the Government.
 - d. Mesne profit as per paragraph 24 above. (Sic)



- e. Costs of the suit counterclaim.
6. Following its own application seeking to be joined in the suit, the interested party was admitted into the proceedings on January 30, 2018. The aforesaid amended plaint was triggered by the joinder of the interested party.
7. At the hearing, Joan Taluhe testified as PW1. She stated that she is a member of Nasio Self Help Group, a self-help group which supports orphans, and which is registered under the Ministry of Gender, Children & Social Development. That they purchased two plots from land parcel number South Wanga/Lureko/579 and that the interested party demanded rates which they duly paid. That however, they never obtained a title but were allowed by the interested party to construct a day care centre which currently has over 300 children and that the interested party assists the plaintiffs by giving them food for the orphans. That in the year 2014, upon seeing beacons and a foundation erected by the defendants, the plaintiffs reported the matter to the police and the area chief. She added that the defendants continue to trespass on land parcel number S/Wanga/Lureko/2864 in respect of which the plaintiffs have a title and that the plaintiffs are the owners of land parcel number S/Wanga/Lureko/2863 even though they do not have a title in respect of the said parcel. That if the interested party acquired it then the plaintiffs seek compensation.
8. She further testified that she was not aware the land was compulsorily acquired in 1972 but conceded that she was aware that a task force was established since the landowners held on to their title deeds. That she had not seen the green cards for the suit properties and that after buying the land in 2004, the plaintiffs got title in 2007. She also stated that she did not know how the restriction was removed or whether the seller was compensated. That the plaintiffs have developed S/Wanga/Lureko/2863 wherein they have classrooms, store, and kitchen.
9. The plaintiffs' case was then closed.
10. During defence hearing, Wambani Were Wambwiri testified as DW1. He stated that he is a retired education officer and a former secretary of Mumias Teachers Housing Co-operative Society, a society whose main objective is to develop residential housing for each of its more than 60 members to enable the members sustain themselves through rental incomes. That the society acquired a lease of Mumias Township LR No 8056/317 from the government on 1st January 1998 for a term of 99 years and that the plot measures approximately 6.0 acres and is adjacent to Mumias Township Primary School. That the defendants conducted a survey of the society's land in 2015 and established that there were four encroachers on the society's land who claimed to have valid titles, one of the encroachers being the plaintiffs. He further stated that there was active conspiracy between the seller of South Wanga/Lureko/2863 and South Wanga/Lureko/2864 being subdivisions of South Wanga/Lureko/579 which was compulsorily acquired by the government from Mzee Hussein Mambo who was fully compensated. That the society's plot is government land and that it is surprising that Mzee Hussein Mambo did not surrender his title to enable the land registrar to close the register but was instead busy fleecing unsuspecting purchasers like the plaintiff.
11. DW1 went on to state that the chairman of National Land Commission, went to Mumias in 2015 and the society presented its petition to the chairman's taskforce which deliberated upon the matter and other lands within the 'Mumias Triangle', and it was resolved that all persons falling or residing within the demarcated triangle do vacate as the owners had already been compensated. That on September 12, 2018, the Land Registrar, District Surveyor and County Surveyor in the company of the local administrator visited the site and upon arriving at their findings, informed the plaintiffs that they were on government land and ordered them to vacate or be forcefully evicted as notices had already been issued to that effect.



12. DW1 further stated that the defendants obtained a grant in respect of the whole of the land from the government in the 1980's and was issued with a certificate of lease. That the lease was issued on January 1, 1998 in favour of the defendants. That the defendants were using the land as at the date of his testimony and that a restriction was registered against the land in 1987 had not been removed. He added that their lease was never cancelled, and it predated the title deed.
13. The defence case was then closed.
14. During the hearing of the interested party's case, Ezekiel Buguru Nandwa, a surveyor employed by the interested party, testified as IPW1. He relied on defendants' exhibits and stated that 1.84 acres of South Wanga/Lureko/579 were compulsorily acquired, that compensation was paid to Mzee Hussein and that letters of allotment were later issued followed by lease. That according to the interested party's records, the defendants have been paying rates and that the lease in respect of LR No 8056/317 still exists and has more weight than the plaintiffs' title. That he prepared a survey report following a field visit on September 12, 2018 in respect of LR No 8056/317 and South Wanga/Lureko/2864. That when they went to the ground, parcels 2864 and 2863 were not there on the ground. That South Wanga/Lureko/579 is government land which has now been put in the lands of the defendants following compulsory acquisition done from 1971 to 1973.
15. The interested party's case was then closed. Parties thereafter filed and exchanged written submissions.
16. The plaintiffs argued that they are the registered and beneficial owner of the suit properties following purchase from Mzee Hussein Mambo. The plaintiffs further submitted that they were duly registered and hold a title deed dated January 15, 2007 and that the defendants did not prove their allegations of fraud. Regarding whether there was any valid compulsory acquisition, the plaintiffs submitted that there was no valid compulsory acquisition of South Wanga/Lureko/579 and that no valid documents from the Ministry of Lands or the interested party were produced to show any valid compulsory acquisition. The Plaintiffs relied on Articles 40 and 65 of the *Constitution* as well as Sections 107 to 133 of the *Land Act 2012* and the case of *Commissioner of Lands & Another vs Coastal Aquaculture Ltd* Appeal No 252 of 1996 KLR.
17. In conclusion, the plaintiffs submitted that if any compulsory acquisition of parts of South Wanga/Lureko/579 was ever undertaken by the government, then the suit properties did not form part of what was acquired and as such the plaintiffs remain fully registered owners of the suit properties. They therefore urged the court to allow their case as prayed in the amended plaint.
18. The defendants submitted that the plaintiffs produced only a title in respect of South Wanga/Lureko/2864 and that the register or green card for South Wanga/Lureko/579 shows acquisition by the government. That, consequently, the creation of the suit properties without any lifting of the restriction on South Wanga/Lureko/579 is suspect and that the plaintiffs were deceived by the person who sold them the land.
19. The defendants further argued that the plaintiffs did not produce any evidence to show that Mzee Hussein Mambo ever raised any complaint to the government after his South Wanga/Lureko/579 was compulsorily acquired and he was compensated. That the defendants have shown that they are owners of land reference number 8056/317 which was registered in their names on January 1, 1998 for a term of 99 years and that their title has not been challenged by the plaintiffs. That, consequently, the plaintiffs are trespassers on the defendants' parcel of land. The defendants therefore urged that the plaintiffs' suit be dismissed with costs and that the defendants' counter claim be allowed as prayed.
20. On its part, the interested party argued that the plaintiffs obtained title while the interested party's lease was already in place and that consequently, the plaintiffs cannot ask the court to ratify their title which



was unprocedurally obtained. That the plaintiffs' case is bad in law for failure to join the National Land Commission and that the plaintiffs' seller had no good title to pass to them. The interested party therefore urged the court to dismiss the plaintiffs' claim.

21. I have considered the parties' pleadings, evidence, and submissions. The issues that arise for determination are whether the plaintiffs have valid titles over the suit properties, whether the plaintiffs have demonstrated encroachment on the suit properties, whether the defendants have a valid title to land reference number 8056/317 and whether the reliefs sought should issue.
22. The plaintiffs conceded that they do not hold any title document in respect of South Wanga/Lureko/2863. Indeed, no title document in respect of the said parcel was exhibited by any party. As regards South Wanga/Lureko/2864, the plaintiffs exhibited a copy of a title and certificate of search both of which show that the said parcel is a subdivision of South Wanga/Lureko/579 and that Nasio Self Help Group became the registered proprietor on January 15, 2007. A perusal of the register in respect of South Wanga/Lureko/579 shows that Musee Hussein became the registered proprietor of the said parcel on January 9, 1967. The parcel measured 1.46 acres and its register was closed on January 15, 2007 upon its subdivision into South Wanga/Lureko/2863 and South Wanga/Lureko/2864. The same register also shows that a restriction was registered on June 11, 1987 stating: "no dealing until the matter of compulsory acquisition is sorted out by the chief valuer". Yet another restriction was registered on June 10, 2006 stating: "no dealing without the consent of the Commissioner of Lands". The register further shows the following entry at its Part A: "1.84 AC Acquired by the Govt Ref No 1CS/73/III/214 of 15.1.07".
23. I am therefore persuaded that the whole of the 1.46 acres of South Wanga/Lureko/579 was acquired by the government as of January 15, 2007. The process of compulsory acquisition seems to have been captured in the register as far back as June 11, 1987 when the first restriction was registered. Whether compensation was paid is a matter between Musee Hussein and the government.
24. Restrictions are provided for under Section 76 (1) of the *Land Registration Act, 2012*. Their purposes include prohibiting or restricting dealings with any land due to compulsory acquisition, the prevention of any fraud or improper dealing or "for any other sufficient cause." Under Section 77 (2) of the Act, an instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the registrar.
25. Beyond waving their title in respect of South Wanga/Lureko/2864, the plaintiffs have not demonstrated how South Wanga/Lureko/579 was subdivided, how they purchased the land in 2004 and how they became registered proprietors notwithstanding the two restrictions and the compulsory acquisition. The register does not have any evidence of removal of the restrictions. On the contrary, the restrictions firmly remained in place. A valid subdivision and transfer could not have taken place with the restrictions in place.
26. The law is that a registered proprietor whose title is under challenge must do more than merely waving the impugned title. In the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, the Court of Appeal stated as follows:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on



the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellants' testimony..

27. The issue as between the parties in this case is not so much whether the compulsory acquisition was done and completed in accordance with the law, but whether the plaintiffs obtained valid title in view of the entries which subsisted in the register as at the time the plaintiffs claim to have obtained title. In view of the foregoing, I find and hold that the plaintiffs do not have valid titles over the suit properties.
28. As regards whether the plaintiffs have demonstrated encroachment on the suit properties, it follows that in view of their failure to establish title to the suit properties, they cannot accuse the defendants or anyone else of trespass or encroachment on land that they do not have a valid title over. Further, I note that Ezekiel Buguru Nandwa, a surveyor employed by the interested party was emphatic in his testimony that when he, the district surveyor and the land registrar conducted a field visit on September 12, 2018 in respect of the properties in dispute, parcels 2864 and 2863 were not in existence on the ground. I find that the plaintiffs have not established any encroachment on parcels South Wanga/Lureko/2863 and South Wanga/Lureko/2864.
29. In view of the foregoing discourse, the plaintiffs are not entitled to the reliefs that they have sought.
30. On the question of whether the defendants have a valid title to land reference number 8056/317, the defendants produced a copy of certificate of title showing that pursuant to grant number IR 80381, they hold a lease from the Government of the Republic of Kenya in respect of land LR No 8056/317 measuring 2.346 hectares and situate in Mumias Township for a term of 99 years with effect from January 1, 1998. The defendant's title is earlier in time compared to the plaintiffs' title and is also supported by entries in the register of South Wanga/Lureko/579. Based on the material on record, I am persuaded that the defendants have a valid title to land reference number 8056/317.
31. As regards reliefs sought by the defendants, I note that the plaintiffs' witness testified that the plaintiffs constructed a day care centre on the property that they were accusing the defendants of trespassing on. Survey map filed in court by the Land Registrar and District Surveyor also confirms that both South Wanga/Lureko/2863 and South Wanga/Lureko/2864 fall within land reference number 8056/317. The defendants are thus entitled to an eviction order and a permanent injunction. Since the plaintiffs are operating a children's institution on the property, I will give an extended period to enable the plaintiffs exit in an orderly manner.
32. The defendants also sought cancellation of South Wanga/Lureko/2864 and South Wanga/Lureko/2863 and parcels 3293, 3294, 3295, 3296 and 3297. Under Section 26 of the [Land Registration Act](#), the court is required to accept a certificate of title as proof of ownership. Nevertheless, a title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

"26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—



- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."
33. A copy of a mutation in respect of South Wanga/Lureko/2863 dated May 12, 2010 produced by the defendants suggests that the said parcel was subdivided into parcel numbers 3293, 3294, 3295, 3296 and 3297. The mutation lists registered proprietors as at the time of survey as Ibrahim Mzee Mambo, Idris Khamala Mzee, Ali Onyango Mzee, Zena Matini Mzee and Busia Ebenezer Academy. The said persons were not joined to this suit. I am unable to grant orders of cancellation of title in respect of South Wanga/Lureko/2863 without being sure that the registered proprietors have been given a hearing.
34. Regarding South Wanga/Lureko/2864, the plaintiffs produced a certificate of search showing that as of May 17, 2017, the registered proprietor of the said parcel was Nasio Self Help Group, the plaintiffs herein. As discussed above, the title was issued notwithstanding the restrictions and the evidence of compulsory acquisition that were on the register of South Wanga/Lureko/579. I am persuaded that the defendants have made a case for cancellation of the plaintiffs' title in respect of South Wanga/Lureko/2864.
35. In the result, I make the following orders:
- a. The plaintiffs' case is dismissed.
 - b. Nasio Self Help Group's or the plaintiffs' title in respect of South Wanga/Lureko/2864 is hereby cancelled.
 - c. The plaintiffs and Nasio Self Help Group to vacate LR No 8056/317 situate in Mumias Township within six (6) months from the date of this judgment. In default, the defendants shall be at liberty to evict the plaintiffs and Nasio Self Help Group from the said parcel.
 - d. A permanent injunction is hereby granted restraining the plaintiffs, Nasio Self Help Group either by themselves, their agents, servants or assigns from entering upon, dealing in any manner, carrying out any academic activities on LR No 8056/317 situate in Mumias Township. The permanent injunction shall come into operation six (6) months from the date of this judgment or upon the plaintiffs and Nasio Self Help Group handing vacant possession to the defendants, whichever occurs earlier.
 - e. The plaintiffs shall bear the defendants' and the interested parties costs of the suit and the counterclaim.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF NOVEMBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



Mr Tolle for the plaintiffs

No appearance for the defendants

Mr Okali holding brief for Ms Muleshe for the interested party

Court Assistant: E. Juma

