



Wainaina & another v Ntakito & 4 others (Environment & Land Case E081 of 2022) [2024] KEELC 1148 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E081 OF 2022
MN GICHERU, J
FEBRUARY 29, 2024**

BETWEEN

WAGITHUKU WAINAINA 1ST PLAINTIFF

CATHERINE MUTHONI WAINAINA 2ND PLAINTIFF

AND

SIRIA ENE NTAKITO 1ST DEFENDANT

SOKOYION OLE KUNTAI PERMESA 2ND DEFENDANT

SERPEPI LESLES 3RD DEFENDANT

DISTRICT LAND REGISTRAR, NGONG 4TH DEFENDANT

HON. ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

1. The plaintiffs seek the following reliefs against the five defendants both jointly and severally.
 - a. A permanent injunction restraining the 1st, 2nd and 3rd defendants or any of them by themselves, their servants employees and or agents from dispossessing the plaintiff of the suit property, entering into, occupying, evicting the plaintiffs agents, employees and or servnats, constructing, fencing, selling, leasing disposing any interest of and/or undertaking any development or in any way interfering with the property and/or the plaintiffs' quiet possession of the suit property known as Kajiado/Loodariak/770, suit land.
 - b. A declaration that the 1st, 2nd and 3rd defendants' purported titles to Kajiado/Loodariak 35921, 35922 and 35923 are illegal, null and void and do not confer any proprietary interest upon the defendants or any other person.
 - c. A declaration that the plaintiffs are the bona fide owners of the suit land.



- d. An order directing the 4th defendant to rectify its register to cancel and nullify the 1st, 2nd and 3rd defendant's registration in respect to L.R. No. 35921, 35922 and 35923 and the same revert to its original registration of L.R. No. 770.
- e. An order of vacant possession against the defendant by themselves, employees, agents and/or servants.
- f. General, exemplary and aggravated damages for trespass into the land and mesne profits.
- g. Costs of the suit and interest thereon.
- h. Any other or further relief this court may deem fit.

This is as per the plaint dated 14/10/2022.

2. The Plaintiffs' case is as follows. They bought the suit land which measures 30.0 hectares from Siria Ene Ntakitu. They entered into a sale agreement dated 23/2/1994 and eventually became registered on 25/3/1994 whereby they were issued with a title deed. They then occupied the suit land.
3. In the year 2012, the family of the first defendant which owns L.R. Kajiado/Loodariak/769 which borders the suit land, filed a boundary dispute against the plaintiffs. The Land Registrar determined the dispute by fixing the beacons so that future boundary disputes would be avoided.
4. In April 2014, the Plaintiffs applied for a loan from the Cooperative Bank of Kenya using the suit land as security. The bank after conducting due diligence confirmed the plaintiffs to be the registered owners and advanced the loan to them. They repaid the loan and the bank discharged the charge in the year 2017.
5. In July 2021, the plaintiffs' son Charles Ndwiga visited the Land Registry to conduct a search in respect of the suit land where he was informed that the green card was missing. Later on, he was informed that the available records showed that the land had been subdivided into three subdivisions namely 35921, 35922 and 35923 in the names of the 1st, 2nd and 3rd defendants. This took the plaintiffs by surprise because they have never sold the land to anyone. They add that the subdivision of their land and the transfer of the resultant parcels to the said defendants is fraudulent and that is why they seek the above orders. Following the discovery of the fraud committed by the defendants, the second defendant was arrested and charged in Criminal Case No. MCCR/E866/2022 at Ngong Magistrates Court.
6. In support of their case, the plaintiffs filed the following evidence.
 - a. Witness statements by the first plaintiff and Charles Ndwiga.
 - b. Copy of sale agreement dated 23/2/1994.
 - c. Copy of title for the suit land in the names of the Plaintiffs.
 - d. Copies of report on the boundary dispute made by the District Surveyor, the District Registrar and the Assistant County Commissioner.
 - e. Copy of certificate of official search for the suit land dated 5/6/2018.
 - f. Copy of register of the suit land dated 25/3/1994 showing the plaintiffs as the registered owners thereof.
 - g. Evidence showing charging and discharging of the title to the suit land by the bank.



- h. Copy of mutation form purporting to subdivide the suit land, copies of the registers for the resultant parcels and subsequent subdivision, transfer forms and many other relevant documents.
7. The defendants, though duly served, did not enter appearance or file any defence. Interlocutory judgment was entered against the defendants on 26/4/2023.
8. At the trial on 26/10/2023, the Plaintiffs adopted their witness statements and documents as their evidence.
9. I have carefully considered all the evidence adduced by the plaintiffs and I find that the following issues arise.
- a. Whether the plaintiffs are the lawfully registered owners of the suit land.
 - b. Whether the plaintiffs transferred the suit land to the defendants or any other person.
 - c. Whether the 1st, 2nd and 3rd defendants got registered as owners of L.R. Numbers 35921, 35922 and 35923 lawfully.
 - d. Whether the plaintiffs are entitled to the orders sought.
10. On the first issue, I find that the plaintiffs are the registered owners of the suit land. In this regard I believe the evidence that they adduced in form of documents. This evidence is uncontroverted by any evidence adduced by the defendants.

Secondly, I find that the plaintiffs did not transfer the suit land to the 1st, 2nd and 3rd defendants or any other person. I relied on their uncontroverted evidence in making this finding. If the plaintiffs had sold the suit land, they would not have filed this suit.

11. Regarding the third issue, I find that the subdivision of the suit land and the subsequent subdivisions are null and void for the following reasons.

Firstly, they were not initiated by the registered owners.

Secondly, they are not supported by genuine documents executed by the registered owners. The missing documents include a sale agreement, application for consent of the Land Control Board, letter of consent of the Land Control Board, transfer form duly executed by the registered owners and evidence of payment of stamp duty. Without all or any of the above and evidence of payment of the purchase price, the purported subdivision of the suit land and the purported transfer of the subdivisions is null and void under Section 26(b) of the *Land Registration Act* (Act No. 3 of 2012) which provides that a certificate of title acquired illegally, unprocedurally or through a corrupt scheme will be subject to challenge. The plaintiffs have successfully challenged the certificates acquired by the 1st, 2nd and 3rd defendants.

12. As regards the final issue, I find that the plaintiffs are entitled to prayers (a), (b), (c), (d), (e) and (g) of paragraph 24 of the plaint dated 14/10/2022. As for prayers (f) and (h), I find that no damages have been proved because no evidence has been adduced of any trespass on the land, how much land has been trespassed upon and for how long. Such evidence is important in proving and assessment of damages. In the absence of such evidence, I find that costs are sufficient compensation.

In summary, I enter judgment in terms of prayers (a), (b), (c), (d), (e) and (g) of the plaint.

It is so ordered.



DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 29TH DAY OF FEBRUARY 2024.

M.N. GICHERU

JUDGE

