



REPUBLIC OF KENYA



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**Masua (Suing on Behalf of the Estate of Masua Ngaa Muasya - Deceased)
v Bwosiemo & 2 others (Environmental and Land Originating Summons
13 of 2019) [2024] KEELC 901 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 901 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 13 OF 2019
CA OCHIENG, J
FEBRUARY 26, 2024

BETWEEN

**ATHANUS MUTHOKA MASUA (SUING ON BEHALF OF THE ESTATE OF
MASUA NGAA MUASYA - DECEASED) PLAINTIFF**

AND

ALFRED MOKAYA BWOSIEMO 1ST DEFENDANT

**KATELEMBO ATHIANI MUVUTI FARMING & RANCHING CO-OPERATIVE
SOCIETY LIMITED 2ND DEFENDANT**

DISTRICT LAND REGISTRAR, MACHAKOS 3RD DEFENDANT

JUDGMENT

1. By an Originating Summons dated the 31st January 2019 and filed on 5th February 2019, the Plaintiff sought the intervention of the court for determination of the following questions:-
 - a. Whether the Masua Ngaa Muasya(deceased) was a registered member of the 2nd Defendant and holder of Membership Number 3402 through which he was allocated Land Reference Number Athi River/Athi River Block 1/852 (As Society Plot No. 1307)?
 - b. Whether the said Masua Ngaa Muasya (deceased) in pursuant to the said membership was issued with a Share Certificate on 7th July, 1983 by the 2nd Defendant and this therefore the original, rightful and legal allottee of the said plot?
 - c. Whether the said Masua Ngaa Muasya (deceased) ever extinguished and transferred and or sold and or surrendered his shares with the 2nd Defendant prior to his death on 10th June, 1987?
 - d. Whether the Plaintiff was issued with Letters of Administration in Machakos HCCC Succession Cause No. 563 of 2010 on 13th October, 2010 as joint administrators of the Estate



of Masua Ngaa Muasya (Deceased) with Joseph Muasya Masua and Boniface Mwanza Mbithi and have the said joint administration given him authority to act on their behalf regarding the deceased's Estate?

- e. Whether the 2nd Defendant had any right and power to sell and dispose of the Land Reference Number Athi River/athi River Block 1/852 (As Society Plot No. 1307)?
 - f. Whether the Title Deed issued on 20th November, 2011 to the 1st Defendant in respect of Land Reference Number Athi River/athi River Block 1/852 (As Society Plot No. 1307) is a valid and genuine Title Deed?
 - g. Whether the Sale Agreement entered into between the 1st and 2nd Defendant on 7th August, 1998 is valid?
 - h. Whether the 1st and 2nd Defendants by entering into the Sale Agreement dated 7th August, 1998 committed an act of fraud by colluding to defraud the Estate of the deceased by doctoring documents?
 - i. Whether the Plaintiff is the rightful owner of the plot as per the taskforce report dated 5th November, 2018?
 - j. Whether the Plaintiff should be declared the registered owner of the said plot and issued with a Certificate of Lease?
 - k. Whether the Certificate of Lease issued to the 1st Defendant for the said plot should be cancelled?
 - l. Whether the 3rd Defendant should be ordered by the court to rectify the register and have the said plot registered in the names of Masua Ngala, the Plaintiff's father?
 - m. Whether the Defendants should pay the costs of the suit?
3. The summons were based on the grounds on the face of it and supported by the Affidavit of one Athanus Muthoka Masua. He deposed that his father, the late Masua Ngaa Muasya died on 10th June 1987 and was a member of the 2nd Defendant. Further, he was owner of Land Reference Number Athi River/athi River Block 1/852 (As Society Plot No. 1307), measuring 0.8204 hectares, hereinafter referred to as the 'suit land', through allotment and acquired ownership through a Share Certificate issued on 7th July 1983. He averred that he obtained Letters of Administration jointly with his brother Joseph Muasya Masua and Boniface Mwanza Mbithi on 13th October, 2010, who gave him authority to act on behalf of the Estate and for this particular plot. He explained that he visited the 2nd Defendant and discovered that the suit land had been sold and the title transferred to the 1st Defendant before the Letters of Administration were issued. He claimed to have reported the matter to the Department of Co-operative Development Machakos County and a Taskforce was formed to investigate the dispute. He stated that according to the 2nd Defendant's letter dated the 15th February, 2016, it confirmed that the suit land belonged to his late father. He confirmed that the Taskforce had summoned both the 1st Defendant and himself for a hearing but the 1st Defendant ignored the same and a caveat was registered on the suit land. He reiterated that the Taskforce had conducted a hearing and tabled its report, finding that the said plot was an original allocation for member no. 3402, Masua Ngaa, and recommended that the title held by the 1st Defendant in respect to the said plot, was not available for sale by the 2nd Defendant.
4. The 1st Defendant in opposing the Originating Summons filed a Replying Affidavit dated the 25th March, 2019. He averred that he was not privy to the allegations in the Originating Summons since he



was not party to, neither was he aware of any engagement between the Plaintiff and the 2nd Defendant. He argued that his registration over the suit land was a first one, having purchased the said land from the officials of Katelembo Athiani Muvuti Farming & Ranching Co-operative Society Limited (2nd Defendant) for a consideration. He insisted that the Plaintiff had not proved allegations of fraud and that his title was not extinguishable since he had no prior notice of any other person's interests on the said suit land. He contended that since 1998, he had occupied the land and used it for cultivation to date and that the Plaintiff had no actionable right against him.

5. The matter proceeded for hearing where the Plaintiff called one (1) witness while the Defendants had two (2) witnesses.

Evidence of the Plaintiff

6. PW 1 Athanus Muthoka Masua adopted his Witness Statement as per the Supporting Affidavit dated the 31st January, 2019 as his evidence in Chief and produced the following documents as exhibits: Copies of Death Certificate, Membership and Share Certificate; A copy of Letters of Grant of Administration; A copy of written authority; A copy of letter for sale and receipt both dated 7th August, 1998; A copy of Title Deed and Green Card for the suit land; A copy of 2nd Defendant's letter dated 15th February, 2016; Copies of summons dated various dates in 2015, 2016 and 2017; A copy of an Official Search Certificate showing a Caveat on the suit land registered by the Taskforce and a copy of the Taskforce report dated 15th November 2018.
7. Upon cross-examination by counsel for the 1st Defendant, he stated that the title to the suit land is held by the 1st Defendant. He confirmed that he was not a member of the Society and that he was aware that the members balloted for the land, of which he had the documents to prove that his father was allotted Plot No. 1307. It was his testimony that it was the Taskforce which did the scribbling on the Share Certificate. Upon re-examination, he confirmed that upon mutation of the land, they had been taken to the ground by the 2nd Defendant. He clarified that they had earlier visited the plot in 2015 and that the Taskforce also visited and confirmed the site of suit land, together with a surveyor.

Evidence by the Defendants

8. DW1 was Alfred Mokaya Bwosiemo. He adopted his Replying Affidavit as his evidence in chief. He testified that he was the first registered owner of the suit land as per the Green Card. Upon cross-examination, he stated that he was not a member of the 2nd Defendant and that he purchased the plot from them, in 1998. He stated that he did not know that the Society was buying land for members. It was his testimony that there was no name against Plot No. 1307 as per the Register. He confirmed he had bought land from the Society and had done due diligence but that for the subject purchase he did not undertake due diligence. He further testified that he had sent documents to the Taskforce and had seen their report. He further confirmed that, in the Green Card, it indicated that the suit land was first registered in 1997 and the entry in his name was done in 2011. He insisted that as per the letter dated the 28th October, 2011, the Plot No. 1307 belonged to him and that the Plaintiff's father had been transferred to Plot No. 2717, upon request. He did not know why the transfer was done. It was his testimony that he did not know if the 2nd Defendant was holding any property in trust for the members. On re-examination, he stated that he had not seen any document which allotted Masua Ngaa Plot No. 1307. He produced the Sale Agreement, Certificate of Title to the suit land and receipts as exhibits.
9. DW2 Simon Maithya Mbaluka, who was an Assistant Manager of the 2nd Defendant since 2008, testified that he is in charge of keeping records. He explained that the late Masua Ngaa was member No. 3402 and owned two shares which included Plot No. 1307. It was his testimony that according to



the records, the said plot had been sold to Reuben Ndivo and that Plot No. 1307 was not in the register because it remained unsold. He further stated that some plots remained unallotted so that they could be sold to raise funds to run the Society. He further confirmed that Plot No. 1307 was sold to the 1st Defendant in 1998, and he later obtained a title in his name. He produced a letter from the Chairman of the Society and a copy of the Original Register as exhibits. He reiterated that the Taskforce was wrong in interfering with the allotment by the Society without reverting to the Original Register.

10. During cross-examination, he explained that he had heard about double allocation of plots by the 2nd Defendant, which happened before 2008. He explained that there was a Taskforce that dealt with issues of land at the 2nd Defendant. He clarified that the allotments to members was done from 1997 to 1998 where Masua Ngaa was allocated Plot No. 1317. He further confirmed that Plot No. 1307 was not in the main register.
11. The 3rd Defendant never attended court to participate in the hearing.
The parties filed submissions in support of their case.

Submissions

The Plaintiff's Submission

11. The Plaintiff in his submissions relied on his evidence and insisted that the Estate of Masua Ngaa (deceased) is the rightful owner/original allottee of the subject plot as per the letter dated the 28th October, 2011 which confirmed that his father was the original allottee of the said parcel and this was affirmed by the Taskforce. He disputed the fact that Plot No. 1307 was never allocated to anybody as this was not substantiated by the alleged Register. He submitted that as per the Orange Folder for plots produced by DW2, it indicated that Plot No. 1307 had been allocated to the Masua Ngaa, but it was not clear how his name was removed from the Register. It was his further submission that the 1st Defendant's Title Deed was not procedurally and legally acquired as the Defendants did not table any evidence to prove the sale. Further, that the 1st Defendant had not undertaken due diligence to find out if the land had been allocated to someone else. He reiterated that the court should hence make an order for cancellation of the 1st Defendant's title as by dint of Section 26(1) of the [Land Registration Act](#), since the same could not be protected as it was obtained fraudulently. In support of his arguments, he cited two decisions namely; *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR and *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR.

Submissions by the 1st Defendant

12. The 1st Defendant in his submissions stated that the Plaintiff had no evidence of his land acquisition and purely relied on the Taskforce report, whose legality or mandate has not been demonstrated as there was no evidence of its gazettelement. Further, that neither did it follow the due process since the Society was not represented during the site visit nor did they use the Register of membership from the 2nd Defendant.
13. The 1st Defendant argued that the late Masua Ngaa, being member no. 3402 was allotted Plot No. 1317 and not 1307 as alleged, as Plot No. 1307 was never allotted to anybody. It was maintained that the late owner had sold his Plot No. 1317 to one Reuben Ndivo Mbevi. It was his contention that there was proven mischief between the Plaintiff and the Taskforce, as they had doctored the membership card posthumously and in hand cancelled out the number 1317 and overwrote no. 1307. Further, that the original no. 1317 clearly tallies with membership no. 3402. He reiterated that there was no basis for the court to interfere with his title and cited Sections 79(2) and Section 80(1) of the [Land Registration](#)



Act which requires that a validly acquired title can only be interfered with, if there is fraud on the part of the proprietor. To support his arguments, he relied on the case of Harrison Kiambuthi Wanjiru & Another v District Land Registrar Nairobi & 3 others (2022) eKLR.

Analysis and Determination

14. Upon consideration of the Originating Summons, Replying Affidavit, Testimony of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:
 - a. Who is the owner of the suit land?
 - b. Whether the 1st Defendant's title is valid or not?
 - c. Whether the Plaintiff is entitled to orders sought in the Originating Summons.
 - d. Who should bear the costs of the suit.
15. As to who is the owner of suit land and whether the 1st Defendant's title is valid or not.
16. It is not in dispute that the late Masua Ngaa was member no. 3402 in the 2nd Defendant and that he was allocated a parcel of land like every other member. It is further not in dispute that the 2nd Defendant entered into a Sale Agreement dated the 7th August, 1998 with the 1st Defendant in respect to the sale of the suit land. The Plaintiff has alleged that the suit land was allotted to his father but later sold to the 1st Defendant but the 2nd Defendant insists that the said suit land had not been allotted to any member. PW1 who was the Plaintiff in his testimony insisted that his father Masua Ngaa, who was member number 3402 was allocated Plot No. 1307. He claimed they were shown the said plot on the ground. He admitted that the initial entry in the Member Card in respect to the plot indicated member No. 3402 was initially allotted Plot No. 1317. He further admitted that the number 1307 had been changed by the Taskforce Surveyor in 2015. Further, that he only took members of the Taskforce to Plot No. 1307. He also admitted having sold the suit land to one Urbanus Mulwa. He confirmed that any entry made in the member's card used to be signed in the office of the 2nd Defendant. DW2 who was an Assistant Manager from the 2nd Defendant insisted that the deceased Masua Ngaa was allotted Plot No. 1317 which he later sold to Reuben Ndivo. He argued that the Taskforce findings did not tally with the 2nd Defendant's Register. DW2 explained that Plot No. 1307 was not in the Register because it was initially not allotted to any member. DW1 in his testimony confirmed he bought the suit land from the 2nd Defendant in 1998, paid in instalments and later his title was processed. The Plaintiff has claimed the 1st Defendant obtained the suit land fraudulently. I note as per the Letter dated the 28th October, 2011, from the 2nd Defendant, addressed to the Land Registrar, it confirmed the suit land belonged to 1st Defendant but the deceased Masua Ngaa was transferred, upon his request to Plot No. 2717 now Machakos Block 3/1016. I note as per the Certificate of Title for land parcel number Athi River/Athi River Block 1/852, it was issued on 7th November, 2011 in the name of the 1st Defendant. What is baffling is that there is yet another letter dated the 15th February, 2016 signed by the officials of the 2nd Defendant, issued five (5) years after the 1st Defendant had acquired title to the suit land, where they indicate that the suit Plot No. 1307 belongs to Masua Ngaa according to the Taskforce. What is interesting to note is that the said letter was written during the period the Taskforce was still undertaking their hearings on the disputed plot as indicated in the notices dated the 1st December, 2016 and 12th January, 2017 respectively issued to the 1st Defendant as well as Taskforce findings dated the 15th November, 2018. The Plaintiff did not explain why he took so long to seek the suit land and only went to the Task force much later, after the 1st Defendant had received his title. As per the member card which the Plaintiff produced, Masua Ngaa Member No. 3402 held two shares with the 2nd Defendant and was actually originally allotted plot 1317 and not 1307 as claimed. Further, as per letter dated the



7th August, 1998 from the 2nd Defendant written by its Chairman, it confirmed Plot No. 1307 was sold to the 1st Defendant. From the excerpt of the 2nd Defendant's Register, it is clear member no. 3402 was allotted Plot No. 1317 and a second column then indicates Reuben Ndivo Mbevi. The Register of Members and their allotted parcels as per page 8 indicate that member No.1307 was Nthenya Mutuku and on the side the name of Masua Ngaa is also included, with the subject plot number 799. There is no explanation given for this entry yet the late Masua Ngaa was member no. 3402. DW2 however confirmed that from the dispatch register which was forwarded to the Land Registrar, indicating Plot No. 1307 belonged to the deceased, Masua Ngaa, it was a mistake.

17. In the Court of Appeal case of Kinyanjui Kamau vs George Kamau [2015] eKLR while dealing with allegations of fraud held that:-

“ ... It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

18. While in the case of Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR it was held that:-

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

19. In this instance, the 1st Defendant is duly registered as the owner of the suit land. Whereas the Plaintiff has alleged fraud on the part of the 1st and 2nd Defendants in the transfer of the suit land, the 1st Defendant did produce a Sale Agreement for the suit land including payment receipts as proof of consideration paid for the land. Further, the 2nd Defendant that held the mother title to the Society land, where the suit land emanated from, admitted selling the said suit land to the 1st Defendant. Based on the facts before me while associating myself with the decisions cited and applying it to the circumstances at hand, I find that the Plaintiff except for relying on the Taskforce Report, did not bring any witness from the Taskforce nor furnish any Legal Instrument establishing it. From the documents presented by the Plaintiff and with PW1 admitting that the change to Plot No. 1307 was made by the Taskforce; Further, noting that DW2 admitted that it is the 2nd Defendant who sold suit land to the 1st Defendant, I find that the Plaintiff has not proved allegations of fraud as against the 1st Defendant to the required standard.

20. As to whether the 1st Defendant's title to the suit land is valid or not.

21. The Plaintiff has claimed the 1st Defendant fraudulently acquired the title to the suit land and sought for its cancellation. The Plaintiff has relied heavily on the Taskforce findings and insisted in his submission that the root of the 1st Defendant's title was fettered, hence it should be cancelled. On validity of a title, Section 24(a) of the *Land Registration Act* stipulates that:-

“Subject this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”



22. While Section 26(1) of the [Land Registration Act](#), 2012, provides that:-

- “(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.”

23. From the evidence presented, I note 1st Defendant produced the Sale Agreement, Receipts confirming payment of consideration, Letter from 2nd Defendant confirming he owned suit land as well as a Certificate of Title issued before the Taskforce deliberated on his title. It has further emerged that the 1st Defendant’s title was a first registration.

24. In the case of Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR Justice J.M. Mutungi stated that:-

“The Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the [Land Registration Act](#) entitled to the protection of the law.”

25. In the foregoing while associating myself with the decision cited and relying on the legal provisions I have quoted, insofar as the Plaintiff has claimed the 1st Defendant never undertook due diligence, I note the 2nd Defendant confirmed selling the said land to him and I opine that there being no entry of any encumbrance on the title, prior to registration of the 1st Defendant, there was only much that he could do to prove due diligence on the ownership of the land, especially with the assurance from the Society that the land was not allotted to anybody. In the circumstances, I hold that the 1st Defendant did not illegally and unprocedurally acquire the suit land as claimed. I am hence unable to declare the Plaintiff as the registered owner of the suit plot nor issue him with a Certificate of Lease as sought. It is my considered view that the 1st Defendant’s title hence stands valid and the Plaintiff’s remedy if any lies with the 2nd Defendant to pursue the rights of his late father.

26. On the issue of costs, since the Plaintiff and 1st Defendant are the inconvenienced parties, I find that they are entitled to costs.

27. It is against the foregoing that I find the Plaintiff has not proved his case on a balance of probability against the 1st Defendant and will dismiss it with costs.

28. I further find that the Plaintiff has proved his case against the 2nd Defendant and will allow it with costs. I direct the Plaintiff to pursue the 2nd Defendant for the plot that had been allocated to the deceased Masua Ngaa.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF FEBRUARY, 2024



CHRISTINE OCHIENG

JUDGE

In the presence of;

Namada for 1st Defendant

Plaintiff in person

No appearance for 2nd Defendant

Court Assistant – Simon/Ashley

