



Kimani & another (As Administrator of the Estate of John Duncan Mbichi - Deceased) v Meeli & another (Environment & Land Case 108 of 2017) [2024] KEELC 1485 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 108 OF 2017
LC KOMINGOI, J
MARCH 14, 2024**

BETWEEN

**PETER MUNGAI KIMANI 1ST PLAINTIFF
ELIZABETH WANJIKU NJOROGE 2ND PLAINTIFF
AS ADMINISTRATOR OF THE ESTATE OF JOHN DUNCAN MBICHI -
DECEASED**

AND

**BISHOP MOSES MEELI 1ST DEFENDANT
TIMOTHY KIIPAPA MEELI 2ND DEFENDANT**

JUDGMENT

1. By the Plaint dated 7th March 2010, Amended on 1st March 2019 and further Amended on 25th October 2019, the Plaintiffs claim that they are registered owners in equal shares of land Kajiado/Lorngusua/109 having purchased it by way of sale by Public auction from Barclays Bank of Kenya Ltd for a consideration of Kshs. 1 million and issued with a title deed on 15th April 2004. But sometime in 2008 the Defendants started claiming interest in the property and denied the Plaintiffs access. Prior to this, the 1st Defendant had filed a claim before the Kajiado Land Disputes Tribunal on 11th October 2001 claiming unlawful occupation by the Plaintiffs but the Tribunal ruled in favour of the Plaintiffs and asked the Defendants to stop interfering with the property. This award was adopted by the Senior Resident Magistrates Court at Kajiado on 10th September 2002 but the Defendants still continued with the trespass and interference necessitating the filing of this suit in which they sought:
 - a. A declaration that the Plaintiffs are the legal and registered owners in equal shares of the property known as Kajiado/Lorngusua/109 and the defendants have no claim on the land whatsoever.



- b. A permanent injunction restraining the Defendants whether by themselves, their servants, agents or at all from entering, obstructing the Plaintiffs, trespassing, grazing or cutting down or in any way dealing with the vegetation on the suit land, causing development in whatever form and/or interfering with the Plaintiffs' quiet possession of the suit land known as Kajiado/Lorngusua/109 howsoever.
 - c. Costs of this suit and interest thereon at court rates.
 - d. Any other relief as this Hon. Court may deem just and fit to grant.
2. The 1st and 2nd Defendants in their Statement of Defence denied the Plaintiffs' claim stating that the proprietary interests of the suit property had never been transferred. In their Counterclaim against the Plaintiffs, they also joined Henry Moore Kipkurui Arap Lasoi, Barclays Bank of Kenya Ltd and Registrar Kajiado Land Registry as the 3rd, 4th and 5th Defendants respectively. They stated that the late Noah Meeli Ole Ngusa was the registered proprietor of Kajiado/Lorngusua/109 in which the 2nd Defendant was the Administrator. Prior to this, the 3rd Defendant took advantage of the late Noah Meeli, forged his signature and fraudulently registered a Power of Attorney against the suit property misrepresenting to the late Noah and fraudulently transferred the suit property to a fictitious entity known as Freemark Kenya Limited. It was Freemark Kenya Limited that charged the suit property to the 4th Defendant for Kshs. 1,300,000 on or about 14th October 1998. After failing to repay the debt, the 4th Defendant exercised its statutory power of sale and sold the property at a paltry Kshs. 1,000,000 to the 1st and 2nd Defendants in the Counterclaim. As such their title should be invalidated. They seek;
1. A declaration that the transfer of parcel number Kajiado/Lorngusua/109 from Noah Meeli Ole Ngusa to Freemark Kenya Limited was invalid and therefore null and void.
 2. A declaration that the charge created over parcel number Kajiado/Lorngusua/109 by Freemark Kenya Ltd to the 4th Defendant was invalid and therefore null and void.
 3. A declaration that the exercise of statutory power of sale by the 4th Defendant was at a gross undervalue, invalid and therefore null and void.
 4. A declaration that the transfer by charge in exercise of statutory power of sale from the 4th Defendant to the 1st and 2nd Defendant was invalid and therefore null and void.
 5. An order of rectification to compel the 5th Defendant to cancel entries appearing in the green card of parcel Kajiado/Lorngusua/109 to revert the land back to Noah Meeli Ole Ngusa.
 6. General damages.
 7. Costs
3. The Plaintiffs (1st and 2nd Defendants in the Counterclaim) reiterated the contents of their Plaint and sought for dismissal of the Counterclaim with costs.
4. The 3rd Defendant in the counterclaim denied the allegations against him by the Plaintiffs in the counterclaim adding that they lacked capacity to bring the suit against him, the suit was statute barred, incurably defective and should be struck out.
5. The 4th Defendant in the Counterclaim claimed that the Plaintiffs in the counterclaim did not have locus standi to institute the suit and that the suit was time barred as such the suit was fatally defective. It went on to state that at the material time, Freemark Kenya Limited existed as a private limited by liability company and the registered proprietor of parcel Kajiado/Lorngusua/109 with a title deed



issued on 15th April 1998. Freemark Kenya Limited was then granted a loan security which was secured by a charge over the suit property registered on 14th October 1998 and after defaulting in its payment the 4th Defendant exercised its statutory power of sale and legally disposed it off. As such, the suit against them should be dismissed with costs.

Evidence of the Plaintiff

6. PW1, Peter Mungai Kimani adopted his witness statement as part of his evidence in chief and produced documents marked as P. Exhibit 1-15 as exhibits. He stated that he together with the late John Duncan Mbichi purchased land parcel number Kajiado/Lorngusua/109 but sometime in 2007 some people entered thereon and denied him access which resulted to the filing of the instant suit. He stated that they saw an advertisement on the Daily Nation Newspaper (produced as P.Exhibit 12) for sale of the suit property advertised by Barclays Bank of Kenya Limited, they bid and won the bid thus paying Kshs. 1,000,000 as purchase price for the property. Upon the fall of the hammer, they paid 25% and executed the agreement and a memorandum of sale was issued produced as P. Exhibit 10. They later paid the balance and the auctioneers executed a transfer in their favour. He testified that prior to the purchase, they conducted a search and found that the suit property existed and had been charged to Barclays Bank of Kenya Limited who were selling it in exercise of their Power of Sale. He stated that following the encroachment by the 1st and 2nd Defendants on the suit property, a complaint was filed with the Kajiado Land Disputes Tribunal and it was decided that the suit property belonged to the Plaintiffs and the Defendants were asked to stop interfering with their possession. He thus sought for declaration that they were the lawful owners of the suit property and that the Defendants be stopped from interfering with it as well as costs of the suit.
7. On Cross examination he confirmed that he paid the purchase price for the suit property although the bank statement was not produced in court. He stated that they did due diligence and the certificate of official search as well as the green card showed the history of the land including initial owners and the initial owner was known as Noah Meeli. He went on to indicate that he did not visit the property before the auction but the late John Mbichi did and he guided PW1 on the process since he was in the real estate business. After the purchase they visited the land and were shown beacons. The suit property is in Kajiado touching the Kajiado Namanga road on the east side. Thereafter the Defendants invaded the property and cut down trees. He confirmed that the land belonged to the Defendants before it was charged but they lived on a different parcel of land not on land number 109 which measured approximately 55.29 hectares. He confirmed that the issue was resolved by the Land Dispute Tribunal's ruling dated 17th January 2002 and that he was not aware that the decision had been quashed vide JR No. 415 of 2013. He stated that he was aware that the Defendants were claiming the land in the counterclaim.
8. He stated that they could not sue the bank because after the auction and payment, the bank processed all documents including the consent from Land Control Board and transferred the suit property to them. Therefore, the suit was against the Defendants who were claiming ownership and had invaded the property.
9. On re-examination he stated that he had visited the suit property a few times and was threatened by the Defendants although there was no one living on that particular land.
10. PW 2, Elizabeth Wanjiku Njoroge the wife and Administrator of the Estate of the late John Duncan Mbichi adopted her witness statement as part of her evidence in chief and produced 11 documents which were similar to the documents produced by PW1. She stated that land parcel number Kajiado/Lorngusua/109 was purchased by the 1st Plaintiff and her late husband through a public auction by the Barclays Bank of Kenya Limited for Kshs. 1,000,000. After the purchase they signed a memorandum



of sale and subsequently they were issued with the title. When they tried to visit the land, her husband informed her that one Bishop Meeli who was one of the Defendants in this suit denied them access. When the matter was taken to the Land disputes Tribunal her husband informed her that the Defendants were asked to leave the property and when they refused, the Plaintiffs filed this suit. The suit was first filed in Machakos as HCC 62 of 2011 but was later transferred to this court.

11. On cross examination she indicated that she was not sure how much each Plaintiff contributed into the purchase price of the land although she was aware that they held the property in equal shares based on the information she received from her husband. She stated that she was not aware what proprietors in common meant adding that she had never visited the suit property neither did she attend the public auction. She however confirmed that her husband's signature was on the Memorandum of sale. She confirmed that her husband informed her that the Land Disputes Tribunal ordered the Defendants to vacate the land but she was not aware that the decision was set aside by the High Court. She pointed out that the auction took place in 2003 and that between the year 2003 and 2008 the Defendants had not occupied the suit property.
12. On re-examination she confirmed that the suit land was owned by PW1 and her husband in equal shares, the Memorandum of sale and transfer was signed by both of them and duly witnessed.

Evidence of the Defendants

13. Counsel for the 1st and 2nd Defendants sought an adjournment to prepare for the Defence hearing and file an expert report. Court granted the adjournment with costs. However when the matter came up later for hearing, counsel for the 4th Defendant in the counterclaim sought for another adjournment due to bereavement which was allowed and a later date given. When the matter came up, all parties save for the 1st and 2nd Defendants were present. Counsels for the Plaintiffs, 3rd and 4th Defendants in the counterclaim sought for dismissal of the defence and counterclaim against their clients for want of prosecution noting that the hearing date had been taken by consent of all parties. The 1st and 2nd Defendants defence and counterclaim was thus dismissed for want of prosecution with costs to the Plaintiffs, 3rd and 4th Defendants.
14. On the 4th December 2023, the 1st and 2nd Defendants filed a Notice of Motion dated 4th December 2023 seeking to reinstate their defence and counter claim. The Duty Judge upon considering the said application gave directions that the same be mentioned on 14th December 2023.

On the 13th December 2023 when the matter came up for mention to confirm filing of submissions, the 1st and 2nd defendants counsel were absent. The court then gave a date for Judgement upon dismissing the Notice of Motion dated 4th December 2023 for non-attendance.
15. At the close of the Oral testimonies parties tendered final written submissions
16. By the time of writing this Judgment the 1st Plaintiff's submissions are not on record.

The 2nd Plaintiff's Submissions

17. Counsel submitted that the Defendants having failed to prosecute their case means that the Plaintiffs case was uncontroverted citing *Odunga J. in Linus Ng'ang'a Kiongo & 3 others vs Town Council of Kikuyu (2012) eKLR*. And that the Plaintiffs being the holders of certificate of title for the suit property were absolute owners of the said property as provided by Sections 24, 25 and 26 of the [Land Registration Act](#). Counsel submitted that there was evidence that the suit property was purchased through a public auction by Barclays Bank of Kenya Ltd and a transfer by charge effected in equal



shares. Therefore the 1st Plaintiffs allegation that he owned 90% of the suit property was a false allegation.

18. On whether the court should issue a permanent injunction against the Defendants from interfering with the suit property, counsel submitted that the Plaintiffs being the legal owners of the suit property should not be stopped from enjoying their property which is their Constitutional right under Article 40 of *the Constitution*. As such, the court should grant the orders issued with costs.

Analysis and Determination

19. I have considered the pleadings, the evidence on record, the written submissions, and the authorities cited. The issues for determination are:

SUBPARA i.

Who are the bona fide owners of property LR No. Kajiado/Lorngusua/109;

ii. Whether the Plaintiff is entitled to the orders sought;

iii. Who should bear costs of the suit?

20. It is the Plaintiffs' case that they purchased Land Registration Number Kajiado/Lorngusua/109 from Barclays Bank of Kenya Limited through a public auction held on 16th October 2003 for a valuable consideration of Ksh. 1,000,000 as evidenced by copy of the newspaper advertisement of the public auction dated 6th October 2003 marked P. Exhibit 3, Memorandum of Sale dated 16th October 2003 marked as P. Exhibit 6, transfer by charge in exercise of power of sale dated 20th January 2004 marked as P. Exhibit 7 and was consequently issued title to the property on 15th April 2004 produced as P. Exhibit 1. However, the 1st and 2nd Defendants had been interfering with the suit property and denied them possession.
21. From the list of documents produced by the Plaintiffs, it is evident that the Plaintiffs became owners of the suit property vide a public auction by the then Barclays Bank of Kenya Limited as chargors of the suit property from Freemark Kenya Limited. There being nothing to show that the public auction was contested or an order of court impeaching the said auction, means that the Plaintiffs were bonafide purchasers of the suit property for value as held by Nambuye JA in *Martevé Guest House Limited v Njenga & 3 others* [2022] KECA 539 (KLR) where it was stated;

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“ 44. Black's Law Dictionary, 8th Edition defines a bona fide purchaser as “one who buys something for value without notice of another claim to the property and without actual or constructive notice of any defects in or infirmities, claim or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims”

Elements/ingredients for qualification of a party as a bona fide purchaser, and which I fully adopt are those distilled in the case of *Lawrence P Mukiri Vs. Attorney General & 4 Others* [2013] eKLR, namely, proof that the claimant:

- a) He holds a certificate of Title;
- b) He purchased the Property in good faith;
- c) He had no knowledge of the fraud;



- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;
- f) He was not party to any fraud.”

22. As such the Plaintiffs are duly registered as the absolute owners of the suit property as espoused by Section 24 and 26 of the [Land Registration Act](#) which provides that;

“24 (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...

26 (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...”

- 23. If the 1st and 2nd Defendants were aggrieved with the sale vide public auction then there is a legal process to follow to air their grievances.
- 24. In dismissing the Defendants’ counterclaim, this court ordered the 1st and 2nd Defendant to pay costs of the Counterclaim to the Plaintiffs, 3rd and 4th Defendants. The costs shall be borne as ordered.
- 25. In conclusion, I find that the Plaintiffs’ have proved their case as against the 1st and 2nd Defendants, on a balance of probabilities.
- 26. Accordingly Judgement is entered in favour of the plaintiffs as against the 1st and 2nd Defendants as follows;
 - a. That a declaration is hereby issued that the Plaintiffs are the legal and registered owners in equal shares of the property known as Kajiado/Lorngusua/109;
 - b. That a permanent injunction is hereby issued restraining the 1st and 2nd Defendants whether by themselves, their servants, agents or at all from entering, obstructing the Plaintiffs, trespassing, grazing or cutting down or in any way dealing with the vegetation on the suit land, causing development in whatever form and/or interfering with the Plaintiffs’ quiet possession of the suit land known as Kajiado/Lorngusua/109.
 - c. That costs of the Counterclaim awarded to the Plaintiffs, 3rd and 4th Defendants.
 - d. That the Plaintiffs shall have costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF MARCH 2024.

L. KOMINGOI
JUDGE.

IN THE PRESENCE OF:

N/A for 1st Plaintiff.

Ms. Radol for the 2nd Plaintiff.

N/A for the 1st & 2nd Defendants.



N/A for the 3rd Defendant (in the counter claim)

Ms Karanja for the 4th Defendant (in the counter claim)

Court Assistant; Mutisya.

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