



**Mutungi v Nkede (Environment & Land Case 128 of 2018)  
[2024] KEELC 1629 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1629 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 128 OF 2018  
LC KOMINGOI, J  
MARCH 14, 2024**

**BETWEEN**

**PETER NJUNGE MUTUNGI ..... PLAINTIFF**

**AND**

**SANCHOINE ENE NKEDE ..... DEFENDANT**

**JUDGMENT**

1. By the Plaint dated 28<sup>th</sup> January 2016 the Plaintiff claims that suit land parcel Number Kajiado/Elangata-Wuas/514 belongs to him but the Defendant had encroached on it and had refused to vacate. He thus sought for:
  - a. A declaration from the Hon. Court that the Plaintiff is the bonafide owner of land parcel Kjd/Elangata- Wuas/514.
  - b. A mandatory order directing the Defendant to yield vacant possession of land parcel number Kjd/Elangata- Wuas/514 for the exclusive use by the Plaintiff.
  - c. Costs of this suit.
2. The Defendant in her Statement of Defence and Counterclaim contested the allegation on the grounds that her father the late Ole Naipeny Nkede being a member of Elangata Wuas Group Ranch was shown the suit property in the 1980s and moved therein with his family and had been residing there ever since. Upon his demise the Defendant replaced him as a member of the Group Ranch vide minute 3/93 on 2<sup>nd</sup> June 1993. When the Group Ranch demarcated the land, the Defendant parcel was allocated as parcel number 514 measuring approximately 109.3 hectares and she was supposed to be issued with a title deed only to discover that the title deed was issued to the Plaintiff instead. In 2014 the Plaintiff asked her to vacate the suit property but she refused and filed a complaint with the County Land Management Committee demanding issuance of title for parcel number 514. However, the group ranch officials offered her parcel number 794 which she refused as she has always resided on



parcel number 514 and the claim that it belonged to the Plaintiff was malicious. She added that the Plaintiff had another parcel of land where he resided and had developed.

3. She thus sought for the following orders:
  - a. A declaration that the Defendant is the bona fide owner of parcel number Kjd/Elangata-Wuas/514.
  - b. An order that the Title Deed over land parcel declaration that she was the bona fide owner of parcel number Kjd/Elangata- Wuas/514 issued in the name of the Plaintiff be cancelled forthwith by the Land registrar Kajiado.
  - c. An order do issue compelling the District Land Registrar, Kajiado to correct the land register for declaration that she was the bona fide owner of parcel number Kjd/Elangata- Wuas/514 to reflect the Defendant's name Sanchoine Ene Nkede.
  - d. An order that Sanchoine Ene Nkede be issued with a title in respect of parcel No. Kjd/Elengata-Wuas/514 forthwith.
  - e. Costs of this suit.
  - f. Any other order the court may deem fit to grant.
4. The Plaintiff denied the contents of the Defence and Counterclaim stating that he was legally and procedurally allocated the suit property and that after intervention of the group ranch officials and the area chief, the Defendant agreed to move to her new place. He also indicated that prior to the demarcation, no member would claim any portion as theirs and the ownership only emerged after the land was demarcated by the officials and that the subdivision displaced people from the areas they had initially settled on.
5. He thus prayed for the striking out of the counterclaim and judgement entered in his favour.

### **Evidence of the Plaintiff**

6. PW1, Geoffrey Kahuria Njenga the Plaintiff's first born son testified on behalf of the Plaintiff who is ailing. He adopted his witness statement as part of his evidence in chief and produced documents marked as P. Exhibit 1-11 as exhibits. He stated that his father had been a member of Elangata Wuas Group Ranch since 1970 and in 1985 the members agreed to subdivide the group ranch. A subdivision was carried out but due to irregularities in the activity, members nullified it and elected new officials who carried out a subsequent subdivision with each member getting 103 hectares of land. The process of subdivision was preceded by payment of subdivision fees. Following this, every member was issued their title deed and the group ranch dissolved. His father was allotted parcel number 514, issued with a title deed, moved into his new parcel, put up structures and had been residing therein to date. He pointed out that during the subdivision, people were displaced from their previously occupied parcels.
7. On Cross examination he stated that the Plaintiff being a member of the group ranch used to attend the meetings although he could not recall his father's membership number. In reference to minutes of 22<sup>nd</sup> January 2015, PW1 confirmed that the complainants were indicated as Geoffrey Likama and George Likama and confirmed that, the Chief's clerk knew him as such, but his correct name was as indicated on the Identify card which was the name he had used in court. He testified that according to the letter of consent from the Land control board, the Defendant's parcel was number 794. He indicated that he was not aware how land was allocated to members by the group ranch but there was payment of fees which his father made though no evidence was adduced. On being shown the area list in the Defendant's bundle, he confirmed that it showed Mutungi Njunge Peter as member



number 233 as having been allotted parcel number 512 measuring approximately 109.3 hectares and that the Defendant being member number 234 was allotted parcel number 514 which was altered to read 794. He confirmed that from record parcel number 794 was reserved as a public utility plot and a member could not be given a public utility plot. He also confirmed that there was nothing on record to show that the demarcation and allocation process started by the first committee was nullified. He indicated that the officials were removed and new ones elected although he was not aware of the process of removal of officials. He also confirmed that the Secretary to the Group Ranch indicated that Peter Njoroge was erroneously issued with title deed for parcel number 514. He also confirmed that the Defendant filed a complaint with the County Land Management Board on 19<sup>th</sup> May 2015 and they were summoned for the dispute resolution although he was not aware of the outcome of the complaint.

8. On re-examination he stated that the officials of the group ranch undertook the subdivision although Daniel Kishil the Secretary of the Group Ranch did not provide any minutes to show that PW1's father had been given plot number 514. He went on to state that in the meeting to resolve the dispute, Daniel Kishil indicated that they were looking for land for the Defendant and they were shown the application to consent to the Land Control Board. He stated that the Defendant later moved to a parcel shown by the officials.
9. PW 2, Joshua Parsitau Pesi, the area Chief Elangata Wuas location testified that on 22<sup>nd</sup> January 2015. He stated that he called for a meeting based on a complaint filed by the Plaintiff, Peter Njunge that the Defendant was occupying his land. The meeting was attended by the Plaintiff, his sons (George and Geoffrey), the group ranch officials including Daniel Kishil, the secretary, old men who have the history of the land, some members of the group ranch and himself. It was his testimony that during the meeting, the Plaintiff indicated that he had asked the Defendant to vacate the land for over three years and Daniel Kishil confirmed that the land belonged to Peter Njunge and that they would give the Defendant another parcel of land. The officials asked for three months to get the Defendant another parcel land and the Defendant thanked Peter for not evicting her. He produced minutes of the meeting as P. Exhibit 11 and the letter as P. Exhibit 4.
10. On cross examination he confirmed that the Defendant had been occupying parcel number 514 even before he became the area chief. He stated that he was born at Elangata Wuas group ranch and both the Plaintiff and defendant were members of the group ranch. He confirmed that the minutes produced as P. Exhibit 11 were recorded by a village elder who is a member of the group ranch. At the meeting Daniel Kishil assured people present that parcel 514 belonged to Peter Njunge and parcel 794 belonged to the Defendant. He confirmed that from the Plaintiff's list of documents the green card for parcel 794 showed that it was reserved as a water point but there was a consent from Land Control Board dated 25<sup>th</sup> January 2016 transferring that land to the Defendant. He went on to add that after this meeting, there was another meeting held at the Nation Land Commission where the officials of the Group Ranch, the Deputy County Commissioner and himself were summoned.
11. On re-examination he stated that the officials of the Group Ranch were to blame for the disputes. He stated that at the meeting at National Land Commission, the officials of the Group Ranch indicated that they would allocate another plot to the Defendant within three months.

### **Evidence of the Defendant**

12. DW1, Sanchoine Ene Nkede adopted her witness statement as part of her evidence in chief and produced documents as D. Exhibit 1- 8 as respectively. She stated that together with her four sisters they were born and raised on the suit land. Her deceased father was given the land parcel No. 514 by Elangata Wuas Group ranch by dint of being a member. She stated that while residing there she was informed that her land had been joined with someone else's land and she did not know what this



- meant. That when the titles came out parcel number 514 was in the Plaintiff's name. She stated that parcel number 794 was neither her land nor did she know its location.
13. On cross examination she stated that she was born in 1971 on the suit land and after her father passed away his name was cancelled from the register of members and replaced with her name as per D. Exhibit 1. She reiterated that parcel number 794 was never her land and acknowledged that prior to the subdivision and titling, no one could claim any portion of land as theirs. She confirmed that there had been change of officials although she was not aware why some were removed before their term ended. She indicated that the officials were in charge of subdividing and titling the land and confirmed that during the subdivision some members were displaced from their initial parcels of land. She also confirmed that during the subdivision, members were making payments which she did. However she did not have evidence of the payment in court. She stated that she was not ready to move from the suit land which was her father's land. She noted that when the dispute arose, she reported the matter to the Land Adjudication Committee and a meeting was held at the Chief's office to resolve the dispute. In attendance was Daniel Kishil, who confirmed that the land belonged to her.
  14. On re-examination she confirmed that from the area list her parcel number had been indicated as 514 then cancelled to 794. She also confirmed that she became a member of the ranch after her father's demise by replacing him which was a common occurrence in the group ranch. Children would replace their deceased parents. She stated that after subdivision members retained the parcels they had been residing on and Peter Njunge Mutungi ought to have been given title for the land he had been residing on.
  15. DW2, Daniel Kishil the secretary Elangata Wuas Group Ranch adopted his witness statement as part of his evidence in chief.
  16. On Cross examination he stated that he was part of the group of officials that led the subdivision and titling of parcels of land at Elangata Wuas Group Ranch. He stated that the second group of officials had subdivided bigger portions of land and that would not be enough for all the members. So when they came to office, they nullified that subdivision. He indicated that he was still in office and that the officials were in charge of issuing members with titles to land and that each member was allotted 103 hectares of land. He confirmed that the Defendant paid the surveyors' fees as required. However, when titles were issued, she did not get a title and that the Title issued to Peter Njunge Mutingi was as a result of a typing error. They tried to reach him so that he could return that title and be given another one but he said he had lost it. He did not have minutes to show that the title was erroneously issued to Peter Njunge Mutungi. He confirmed that parcel number 794 was a public utility land whose title was with the group ranch and was more than 270 acres. He also confirmed that the document produced by the Defendant showing parcel number 514 as her land was only signed by the treasurer and not other officials.
  17. On re examination he stated that they gave members titles according to where they had been residing. Peter Njunge Mutungi resided on parcel number 514 and the Defendant on parcel number 514. But when they asked Peter to return the title for parcel 514 he refused.
  18. DW3, Jonathan Loontasati the former treasurer of the group ranch adopted his witness statement as part of his evidence in chief. He stated that he was among the first officials to distribute land at Elangata Wuas from 1987 to 1996. He confirmed that the Plaintiff and the Defendant were both members of the group ranch and that the suit land belonged to the Defendant's father and she has been residing on it.
  19. On cross examination he confirmed that during his time, they distributed land to members and placed beacons. He confirmed that they gave members land according to where they had been residing and



the Defendant was given a beacon certificate for her land although it had not been produced in court. He concluded by stating that the Defendant should retain the land she had been residing on.

20. On re-examination he stated that the next group of officials completed the subdivision process by issuing titles and confirmed that the land was subdivided according to where members had been residing.
21. At the close of the oral testimonies, parties tendered final written submissions.

### **The Plaintiff's Submissions**

22. Counsel submitted that the Defendant could not claim that she had exclusive possession of the suit property before subdivision because it was community land owned communally by members as held by Munyao Sila, J. in *Beja Mnyika v Haranga Nyiro & 2 others* [2020] eKLR. On the issue of subdivision counsel submitted that the subdivision done by the first group of officials was nullified by members due to corruption and a subsequent subdivision was carried out which allotted the Plaintiff the suit land. This fact was apparently confirmed by the Defendant during the meeting held at the Chief's camp in January 2015 and there was no evidence to show that the suit land was ever allocated to her citing *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR. The suit land having procedurally allocated to the Plaintiff and the title deed processed in his name he was thus protected by Sections 24, 25 and 26 of the [Land Registration Act](#) and his title should prevail. Counsel prayed for dismissal of the Defendant's defence and counterclaim with costs to the Plaintiff.

### **The Defendant's Submissions**

23. Counsel for the Defendant submitted that according to the Group ranch's area list, the Plaintiff's parcel of land was 512 and the Defendant's 514 and the Plaintiff had been residing on his parcel while the Defendant had been residing on parcel 514. The Plaintiff was thus trying to unjustly dispossess the Plaintiff of her property and the argument that her land was parcel 794 should not be allowed because parcel 794 was land reserved for public utility. And it was on evidence that the Plaintiff had been issued with title for parcel 514 erroneously. Therefore as per Section 80 of the [Land Registration Act](#) the court should order for rectification of the said title to reflect the Defendant as the lawful owner since it was not obtained procedurally as was held in *Mary Ruguru Njoroge vs John Samuel Gachuma Mbugua & 4 others* [2014] eKLR, *Daudi Kiptugen vs Commissioner of Lands Nairobi & 4 others* [2015] eKLR, *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others* [2015] eKLR and by the Supreme Court in *Dina Management Ltd vs County Government of Mombasa & 5 others* [2022] KESC 24 (KLR). As such, the Defendant is entitled to the prayers sought in the counterclaim together with costs.

### **Analysis and Determination**

24. I have considered the pleadings, the evidence on record, the submissions, and the authorities cited. The issues for determination are:
  - i. Who is the bona fide owner of property LR No. Kajido/Elangata Wuas/514;
  - ii. Whether the Plaintiff is entitled to the orders sought;
  - iii. Whether the Defendant is entitled to the orders sought in her counterclaim;
  - iv. Who should bear costs of the suit?
25. It is the Plaintiff's case that he was allocated the suit land Kajido/Elangata Wuas/514 after it was subdivided. He states that after the subdivision, some people were displaced from the lands they occupied initially and him together with the Defendant were among those who were displaced and



given new parcels. It is his case that Defendant was given a different parcel number 794. The Plaintiff also claims to have moved into the new parcel where he resides.

26. The Defendant's claim is that the parcel of land belonged to her father and later to her and has been residing on it. And that even after subdivision she was still allocated that same parcel of land and the Plaintiff was allocated a different parcel but he wanted to unjustly take away her parcel. She indicated that she was never allocated parcel number 794 and was still in occupation of the suit parcel.
27. The witnesses called gave contradictory evidence as to who resided on the suit property. PW2 who is the area Chief stated that the suit property belonged to the Plaintiff. While DW2 the secretary of the group ranch who was part of the officials involved in the subdivision testified that the suit land belonged to the Defendant and that the title deed was erroneously registered in the Plaintiff's name. He also indicated that the Plaintiff had another portion of land where he resided and had put up permanent structures. DW3 the former treasurer of the group ranch also testified that the land belonged to the Defendant.
28. The issue is who is the legitimate owner of the suit property?. Section 107 and 108 of the [Evidence Act](#) stipulates that the person who claims a particular set of facts must prove them.

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

29. It is also the position that the standard of proof must be on a balance of probabilities. Has the Plaintiff's case met this threshold?
30. The Plaintiff claims to be a bonafide owner of the suit property protected by Section 24, 25 and 26 of the [Land Registration Act](#). He produced his certificate of title as evidence. He also produced copy of minutes of the meeting held to resolve the Land Dispute on 22<sup>nd</sup> January 2015. The minutes marked as P. Exhibit 3 to show there was an attempt to resolve the dispute with a conclusion that the Defendant was to vacate the suit land within three months. The minutes also show that the Defendant thanked the Plaintiff for allowing her to reside on his land. However, the part of the minutes which the Defendant apparently thanked the Plaintiff bears a different handwriting. On cross examination PW2, the area Chief attempted to explain this variance in handwriting by asserting that the minutes were recorded by two different people because the initial person who took the minutes left before the meeting came to an end.
31. Whereas, the registration of a person as the proprietor of land vests in him absolute ownership of that land, registration is impeachable if it was procured illegally, fraudulently or un-procedurally. Section 26 of the [Land Registration Act](#) provides:

“(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.”

32. The need for procedural propriety in land acquisition cannot be overstated as pronounced by the Supreme Court of Kenya in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) where it was held;

“ 110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...”

33. The Defendant while challenging the Plaintiff’s claim and in support of her counterclaim, produced an area list marked as D. Exhibit 4 which showed the Plaintiff’s land as parcel number 512 and the Defendant’s land as parcel 514. This entry was however cancelled to indicate the Defendant’s land as 794. During the testimony, PW1 also confirmed that the area list showed Mutungi Njunge Peter member number 233 as having been allocated parcel number 512 and that the Defendant being member number 234 was allocated parcel number 514 which was later altered to read 794. He confirmed that from record, parcel number 794 was reserved as a public utility plot and a member could not be given a public utility plot. PW2 the area Chief also confirmed that from the record, parcel number 794 was a public utility land reserved as a water point although there was an Land Control Board consent transferring the land to the Defendant. DW2 however stated that the Plaintiff was issued title for parcel 514 erroneously and it ought to have been issued to the Defendant.

34. The court notes that from the area list, no other parcel of land on the area list has any cancellation. Is it possible that out of the hundreds of names on the area list, only one entry had an error requiring rectification or cancellation? Moreover, from the area list, the Plaintiff’s land was indicated as parcel number 512. There is no entry showing his land as 514. The court has not been told what happened to parcel number 512 since the Plaintiff is claiming that parcel 514 is his land. Is it possible that the Plaintiff was allotted two parcels of land?

35. The courts have explained that when determining the evidentiary burden of proof on a balance of probability, courts ought to look at what occurrence is more probable to have occurred. The Court of Appeal in *Samuel Ndegwa Waithaka v Agnes Wangui Mathenge & 2 others* [2017] eKLR held:

“ 12. In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not...”

36. From the above analysis, is it probable that the Plaintiff was allocated two parcels of land? Parcel 512 and 514? I think not. Is it possible that the Defendant was allotted parcel 794 which was land reserved for public utility? The court is in doubt. Has the Plaintiff thus discharged his burden of proof that he is the bona fide owner of parcel number 514? This courts finds that he has not.



37. DW2 the Secretary to the Group Ranch explained to court that issuance of title to the Plaintiff was a mistake on their part which the Plaintiff refused to have corrected. From the evidence on record, this is the most probable explanation of what transpired.
38. I find that the Plaintiff has not proved his case on a balance of probabilities that he is the legal owner of the suit property Kajiado/Elangata Wuas/ 514 but the Defendant has.
39. In conclusion I find that the Plaintiff's case fails and the same is dismissed. Consequently the Defendant's counter claim succeeds.
40. Accordingly I enter Judgement in favour of the Defendant as follows:
  - a. That a declaration is hereby issued that the Defendant is bonafide owner of parcel Number Kajiado/Elangata – Wuas 514.
  - b. That the Land Registrar is hereby directed to issue a title in the name of the defendant , Sanchoine Ene Nkede for the said parcel Kajiado/Elangata Wuas 514 within Ninety (90) days from the date of this Judgement.
  - c. That the Land Registrar is hereby ordered to rectify the Land Register for parcel number Kajiado/Elangata Wuas 514 to reflect the name of the defendant Sanchoine Ene Nkede in place of the Plaintiff and that the one in the Plaintiff's name be cancelled within Ninety (90) days from the date of this Judgement.
  - d. That the Defendant shall have costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14<sup>TH</sup> MARCH 2024.**

**L. KOMINGOI**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Ajulu for Mr. Kuria for the Plaintiff.

Mr. Sankale for the Defendant.

Court Assistant Mutisya.

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