



M’inyiru v Rukaria (Guardian Ad Litem of Zaverio M’rukaria alias Zaverio M’rukaria Rithara) & 4 others (Environment & Land Case 151 of 1996) [2024] KEELC 4050 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4050 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 151 OF 1996**

CK NZILI, J

MAY 15, 2024

BETWEEN

JUSTUS KANINI M’INYIRU PLAINTIFF

AND

ELIAS MWIRIGI RUKARIA (GUARDIAN AD LITEM OF ZAVERIO M’RUKARIA ALIAS ZAVERIO M’RUKARIA RITHARA) 1ST DEFENDANT
NKANATA M’MWIRABUA 2ND DEFENDANT
DIRECTOR OF LAND ADJUDICATION 3RD DEFENDANT
THE HON. ATTORNEY GENERAL 4TH DEFENDANT
ZAKARY M’MURAA MUTUAMWARI 5TH DEFENDANT

JUDGMENT

1. The plaintiff came to this court through an amended plaint dated 3.9.1999 as the legal representative of the estate of his late brother Evanson Kirimi Rinyiru and the recorded owner of Land Parcel No. 513 Ruiru/Rwarera Adjudication Section measuring 51.80 acres. He complained that the defendants fraudulently and in collusion reduced the land by thirty acres in favor of the 1st & 2nd defendants out of Parcel No’s. 1130 and 1131. The plaintiff prayed for the transfer and or return of Parcel No. 3090, 1130 and 1131 to the deceased estate invalidation of the reduction of Parcel No. 513 by 30 acres and compensation for the loss.
2. The 1st defendant opposed the amended plaint by a defense dated 5.6.2023 denying knowledge of the contents of paragraph 4 of the amended plaint and, in the particular Parcel No. 1130, 1131, and 3090 ever being part and parcel of parcel No. 513 Ruiru/Rwarera Adjudication section. The 1st defendant termed the suit as incompetent, flawed in law, defective, and an abuse of the court process. Additionally,



the 1st defendant averred that the suit disclosed no cause of action against him as it was brought out of malice, greed and lacked merits, since parcel No. 1130 never formed part of the estate of Kirimi Nyiru (deceased).

3. The record shows that the 3rd and 4th defendants were served with the summons to enter appearance dated 30.11.1999 and on 6.12.1999 a memorandum of appearance was filed by M.M O Mirera on 6.2.2001 on behalf of the Hon. Attorney General. By a statement of defense dated 9.7.2001, the 3rd & 4th defendants denied the alleged fraud against them by the plaintiff. They termed the suit defective for lack of notice under Section 13A of the *Government Proceedings Act* (Cap 40) Laws of Kenya as time-barred, filed without consent to sue, raising no cause of action against them and for seeking an untenable order of injunction against them.
4. By an order dated 13.2.2003 before Kasango Mulwa J, parties agreed to maintain the status quo. An order was also made for the area chief Ruiriri/Rwarera to visit the land and ascertain the occupants of parcel no. 1130, 1131, 3090, and 513 to establish whether there was any cultivation if definite boundaries were separating the parcels, and establish if there were houses in the parcels and the occupants. Through a report dated 3.3.2002, the area chief J.K Hingo indicated the following:

Parcel No. Occupant Developments

513 registered to Kirimi Nyiru under cultivation

3090 registered to Zachary M'Tuamwari cultivation, no house 1131 registered to Nkanata Mwirebua structures on it and cultivated

1130 Zaverio M'Rukaria structures on it and cultivated
5. As to the hearing of the suit, it started with the coram of 6.11.1996. Interlocutory applications were handed by AG A Etyang J, J U.O Juma J, Osiemo J, G.A Omwitsa Commissioner, Assize, W.K Tuiyot J, Kasango Mulwa J, D.A Onyancha J and Ruth Sitati J, W.Ouko J, Mary Kasango J, J. A Makau J, P.M Njoroge J, L. Mbugua J, and Cheroni J.
6. At the hearing, Justus Kanini M'Nyiru, the plaintiff, initially testified before Ruth Sitati J on 9.11.2004. He told the court that he was bringing the case as a legal representative for the estate of his late brother Kirimi M'Nyiru, who died on 30.3.1985, pursuant to a limited grant dated 31.1.1996 issued in Succession Cause No. 6 of 1996 and confirmed on 12.11.1997. The produced the grant, death certificate, and proceedings thereto as P. Exh No's. (1), (2) & (3).
7. PW 1 told the court that his late brother left behind two sons in parcel No. 513 Ruiriri Rwarera, then minors. He said he visited the Land Adjudication offices in 1987 after people started interfering with the land and obtained a tracing map showing the entire acreage as 51.80 acres made from their records as A7 & A8.
8. PW 1 said the invaders, namely the 1st, 2nd and 5th defendants as beneficiaries, subdivided the land into three portions, 1130, 1131 & 3090, totaling 30 acres. PW 1 produced the tracing map copy of the register, a letter showing the land acreage dated 17.11.1995 as MF I 1-3, and a response dated 13.10.1992 as MFI No. (6). PW 1 said that a complaint was made to the DLASO, after which he filed the suit since the subdivisions were made after his brother had passed on. He said that the family of the deceased was not involved or compensated for the 30 acres illegally hived off from the initial parcel of land.



9. PW 1 relied on a letter dated 3.4.1991 from the provincial land adjudication officer and a consent to sue dated 3.10.1995, all marked as MFI 7 (a) & (b). He urged the court to order the return of the land illegally demarcated to the 1st, 2nd, and 5th defendants.
10. In cross-examination PW 1 told the court he used the limited grant to file the suit and that he was in agreement with the report of the chief marked as MFI D (6). As to criminal case No. 11 of 1998, PW 1 told the court that the accused was the 1st defendant. Further, PW 1 confirmed that there were pending Arbitration Cases No. 516 and 539. Additionally, PW 1 told the court he was not aware of the DLASO letter dated 4.3.1996 and the ruling by the arbitration committee that Parcel No. 1130 & 1131 belonged to the 1st & 2nd defendants.
11. Moreover, PW 1 told the court that he had appealed against the outcomes. He said that he visited the ground and found some boundaries fixed therein and uprooted. If PW 1 told the court that he was absent when the deceased required the land as per the letter dated 17.11.1995. He said that the deceased parcel of land was affected by committee Case No's. 516 & 531 of 1994. PW1 said that after establishing the irregularities, he wrote a complaint dated 29.10.1995 to the land adjudication officer. He admitted that the document required from the land adjudication officer had no sheet map number or a figure of 51.80 acres. PW 1 said that the fraud occurred in 1987 and 1992. Even though PW 1 told the court he made a report to the police, he admitted that he had no O.B. number to that effect. As to P. Exh No. (5), PW 1 confirmed that it had no relation with the suit parcels of land. He said that he could not ascertain who uprooted the original beacon to Parcel No. 513, nor did he make any report to the police. Similarly, the plaintiff confirmed that it was his late brother who gave him a letter on the acreage of his land before he passed on, only to realize it had been reduced through illegal subdivision in 1994. He said that his late brother was utilizing the entire 51.80 acres before he passed on.
12. Ibrahim M'Rimbere M'Ikiugu testified as PW 2, relying on his written witness statement dated 29.7.2015. He said that he was among the committee members who handled the arbitration cases involving the parties herein. PW 1 He said he was confident that the plaintiff owned 51.80 acres as per the adjudication records or register since he was the chairman of the land committee in 1969.
13. Paul Kibanga M'Imana Arigua testified as PW 3 and adopted his witness statement dated 29.7.2015 as his evidence in chief. He told the court that he knew as a fact that the deceased owned parcel No. 513, measuring 51.80 acres since he was a land committee member between 1983 and 1985 when he oversaw the replacement of the beacons on the land. He said that there was collusion and fraud after he left the office of the chair in 1985, since, as per the register then the plaintiff's land was 51.80 acres and not 21.80 acres.
14. Following directions on 30.9.2021, this court took over the hearing of this matter from where its predecessors had reached. Additionally, directions were given for the joinder of a guardian to the 1st defendant after a reported mental illness.
15. M'Nkanata Mwirebua, the 2nd defendant, testified as DW 1 and adopted his witness statement dated 8.5.2017 as his evidence in chief. He produced a sale agreement dated 3.5.1991 between the 1st and the 5th defendant as D. Exh No. (1) a copy of a consent dated 3.10.1995 from the land adjudication officer as D. Exh No. (2), a statement of defense by the 1st & 2nd defendant in Meru CMCC No. 815 of 1995 as D. Exh No. (3), ruling thereof dated 15.11.1995 as D. Exh No. (4), plaint and a decree thereof as D. Exh No. 5 (a) & (b) a copy of a chief's report dated 3.3.2003 as D. Exh No. (6), a consent order dated 13.2.2003 as D. Exh No. (7), judgment in Meru CM Cr. Case No. 1194 of 1998 as D. Exh No. (8), a letter from the land adjudication officer Meru dated 4.3.1996 as D. Exh No. (9), committee proceedings committee land case No. 516, 539 of 1994 as D. Exh No. (10) & (11) a land adjudication



- officer letter dated 9.9.1997 confirming ownership of parcel No. 1130, 1131, and 513 as D. Exh No. (12), a letter to DLASO letter from the 1st defendant's lawyers dated 11.12.1999 as D. Exh No. (13) and a sketch map as D. Exh No. (14).
16. DW 1 told the court that in Meru CMCC No. 815 of 1995, the court visited the site, and each of the parties pointed to three parcels on the ground; eventually, it dismissed the suit. Further, DW 1 told the court that the Ruiru Rwarera Adjudication section was a schem land to which he requested the then Minister for Lands. Hon. J Angaine for some portion. He said that he was given a letter by the minister to take to the lands office, who allocated him Parcel No. 1131. DW1 said that in 1978, a land surveyor accompanied him and showed him the land on the ground. He said the land was natural bush, which he took possession of, cleared, fenced off, and erected manyatta houses that exist to date.
 17. Similarly, DW 1 said that no one complained of the use or occupation of the land until 1995, when he was summoned by the area land committee following a complaint by the plaintiff, only for the complaint to be dismissed, leading to an appeal. DW 1 denied knowing or occupying land belonging to the plaintiff's deceased brother. DW 1 also termed the consent to sue held by the plaintiff as defective, since it related to an order of status quo, pending the determination of an appeal. He termed the distribution of the subject of his parcel by the plaintiff through a succession cause while this suit was pending as erroneous.
 18. Additionally, DW 1 told the court that the title deeds for the area had been issued though he was yet to collect his copy. He denied that the plaintiff's brother acquired his land in 1969 since both were separate and distinct parcels of land. D.W. 1 was categorical that this land, as acquired in 1978 was 15 acres. Further, D.W. 1 reiterated that his parcel of land was never a subdivision of Parcel No. 513.
 19. Joseph Githinji, a District Land and Settlement Officer testified as DW 2. He told the court that Parcels No 513, 3090, 1130, and 1131, whose acreage was 21 acres, respectively, were recorded for Kirimi Rinyuri, Zakayo Moraa M'Mwari, Zeberia M'Rinkanya and M'Nkanata Mwirebua. Similarly, DW 2 produced the record of existing rights and committee proceedings as D. Exh No. 15-19, respectively.
 20. In cross-examination, DW 2 told the court that title deeds for the area had already been issued to the respective titleholders, including the plaintiff and the defendants, since no restriction had been placed on the title registered. He could not confirm if Parcel No. 513 was initially more than 21.80 acres. Further, DW 2 was unable to confirm if Parcel No. 1130 was a subdivision of Parcel No. 3090. DW 2 was emphatic that what he had produced before the court was the original demarcation records. Likewise, DW 2 said he had not produced any land committee case proceedings regarding Parcel No. 1130; otherwise, it had been produced as D. Exh No. (1).
 21. In cross-examination by the plaintiff, D.W. 2 denied that Parcels No 1130, 1131, and 3090 were subdivisions of parcel No. 513, initially thirty acres in size, since there was on record to that effect. He termed the four parcels of land as separate, distinct, and independent of each other. DW 2 said that apart from the committee stage cases, there were no other objections before then. Further, he said that title deeds were issued in line with the original demarcation records.
 22. Elias Mwirigi Rukaria testified as DW 3 and adopted his witness statement dated 5.6.2023, and that of his late father dated 8.5.2017 as his evidence in chief. He associated his evidence with that of the 2nd defendant and the documents produced as D. Exh No 1-4. He confirmed that his late father had sold 3 acres of Parcel No. 1130 to the 5th defendant. He denied that Parcel No. 1130 was a subdivision of Parcel No. 513, since his late father was allocated the land measuring 15 acres in 1969 and 1978, respectively.



23. Zakaria M'Muraa testified as DW 4 and adopted his witness statement dated 8.5.2017 as his evidence in chief. He similarly associated himself with the testimony of the 2nd defendant and DW 3. He confirmed that vide a sale agreement produced as D. Exh no. (10 he paid Kshs.21,000/- to acquire land from the 1st defendant on 3.5.1996 and was eventually issued with a title deed on 22.6.2023. He said that there was no restriction or objection raised against the transfer or registration of the land in his name at the time he bought the land since there was no pending case against the parcel in 1991. DW 4 said that he took vacant possession of the land and that no land committee cases were filed after he had bought and occupied the land. He said that at the time he bought the land, there were no requirements for land control board consent. DW 4 denied that his land had any relationship with Parcel No. 513. With the close of the defence case parties were directed to file and exchange written submissions by 18.4.2024.
24. The issues calling for my determination are:
- i. If the plaintiff has capacity to file the suit,
 - ii. whether the plaintiff exhausted the internal dispute mechanism under the law before filing the suit.
 - iii. If the court has jurisdiction to hear and determine the issues raised in the amended plaint.
 - iv. If the plaintiff has proved, his claim to the required standard to be entitled to the reliefs sought.
 - v. What is the order as to costs?
25. The primary pleadings by the plaintiff are the amended plaint dated 3.9.1999 and the reply to the defence.
26. The major complaint, as captured in paragraph 5A of the amended plaint, is that the defendants fraudulently caused Parcel No. 513, which was given to the late Kirimi Rinyiru in 1969 as measuring 51.80 acres to be reduced by 30 acres and allocated as Parcel No's. 1130 and 1131, measuring 15 acres each to the 1st & 2nd defendants.
27. The particulars of fraud as pleaded were that the defendants appropriated and converted the deceased thirty acres of land, altered the maps and plans, failed to notify, inform, or compensate the estate of the deceased, and failed to follow the laid down procedure on acquiring the portions of land.
28. To sustain the suit, the plaintiff produced a grant of letters of administration intestate dated 12.11.1996 and confirmation of grant dated 12.11.1997 issued in High Court of Kenya Nairobi Succession Case No. 6 of 1996 as P. Exh No's. (1) and (2). Further, he produced a certificate of death dated 15.5.1985 showing that the late Evanson Kirimi M'Nyiruu passed on 30.3.1985. He also relied on a consent to sue dated 3.10.1995 by G.G Gitonga a DLASO.
29. The consent to sue related to Parcel No. 1130 & 1131 Ruiru Rwarera Adjudication Section authorizing the court to determine the status quo and injunction regarding the developments on the Suitland, pending ownership cases, awaiting hearing by the adjudication organs. The consent was particular that the plaintiff should sue Zaveria M'Rukaria and Nkanata Mwirebua. None was sought to cover the rest of the defendants in the suit.
30. In the initial plaint dated 6.10.1995, the plaintiff had not indicated the capacity he was bringing the suit. However, by an application dated 13.5.1999, the plaintiff sought and was allowed on 10.11.1999 to amend the plaint to include three more defendants. He subsequently filed and amended the plaint on 6.9.1999. In paragraph 1, the plaintiff described himself as a legal representative of the estate of



- Evanson Kirimi Rinyiru. In the 1st defendant's statement of defence dated 17.11.1999, the issue of capacity to sustain the case was not pleaded or raised.
31. Similarly, in the statement of the defense by the 3rd & 4th defendants, the issue of legal capacity to sue was not raised. Moreover, in the 5th defendant's statement of defense dated 29.8.2002, paragraph (1) of the amended plaint was admitted as regards the description of the parties.
 32. In a ruling delivered on 9.11.2004 by Sitati AG, J determined the issue of the limited grant. It was after this that the plaintiff proceeded to obtain a grant, which was eventually produced as exhibits. My finding, therefore, on the first issue is that the suit is properly before the court, and the plaintiff has the requisite capacity to sue.
 33. The next issue is whether the court has jurisdiction to hear the suit. In Tobias Ochola Osidi & 13 others vs. Cyprianus Otieno Ogola & 6 others (2013) eKLR, the court addressed itself on the role of a court under the [Land Adjudication Act](#) and the [Land Consolidation Act](#). The court said that the court's role remains supervisory in nature including the interpretation of the law and establishment as to whether the adjudication process adheres to the letter and spirit of the law.
 34. In Amarnath (suing on behalf of the estate of the late Amarnath Guptal vs. Kazungu & 2 others (civil appeal E033 of 2021 (2023) (KECA 1280 (KLR) 27th October 2023 (Judgment) at issue was whether a Minister's finding under Section 29 of [Land Adjudication Act](#) could be challenged by way of a plaint and whether an unprocedurally acquired title could be challenged in court. The court observed that any person aggrieved by a decision made under Section 26 of the act must follow the process under Section 29 and appeal to the Minister and that once a Minister decides his order is final, which cannot be appealed whether under the Act or in court except by way of judicial review process under Article 47 of [the Constitution](#) and the Fair Administrative Actions Act.
 35. The court cited Julia Kaburia vs Kabeera & others (2007) eKLR that the jurisdiction of the court is ousted once the adjudication process starts until the register is made final. The court said the process of land adjudication, once it has come to an end could not be re-opened otherwise than in the manner contemplated by the law. The plaintiff herein, however, raised issues regarding illegalities or fraud allegedly perpetuated during the adjudication process. He did not plead on whether he had filed a valid appeal during the time he moved to court. No records were produced by either party to show that the plaintiff had mounted parallel processes, hence abusing the court process.
 36. The plaintiff claimed that the 1st, 2nd & 5th defendants' parcels of land were created out of Parcel No. 513, initially measuring 51.80 acres. In support of these averments, PW 1 told the court that he visited the land adjudication officer on 17.6.1985 and obtained a sketch map that was marked as MFI "1" and a tracing map marked as MFI "2". It is this piece of evidence that the plaintiff relied upon to say that it showed that parcels No. 1130, 1131, and 3090 were taken away from Parcel No. 513 and given to the 1st, 2nd, and 5th defendants. Further, the plaintiff relied on a copy of a register to show that the deceased was allocated 51.80 acres in 1969. The same was marked as M.F.I No. "3". The plaintiff also relied on a letter dated 17.11.1995 from the DLASO. It was marked as M.F. 1 No. (4). Additionally, the plaintiff relied on a certificate of search marked as MFI No. "5" and a reply to his complaint by DLASO dated 13.10.1992 marked as MFI "6" and a copy of a letter dated 3.4.1991 from the Provincial Land Adjudication Officer Nairobi marked as MFI 7 (a) and (b). The consent to sue was also marked as MFI No. "8".
 37. It is a trite law that fraud, illegality, and acquisition of land through corrupt schemes must be specifically pleaded and proved to the required standards. See Arthi Highway Developers Limited vs West End Butchery Limited & 6 others (2015) eKLR and Vijay Morjaria vs Nansingh Madhusing



- Darbar & another (2000) eKLR. Fraud cannot be inferred or assumed. It must be pleaded and proved with tangible and cogent evidence on a balance higher than on a balance of probability but below balance beyond reasonable doubt, for it touches on criminality.
38. The plaintiff had made serious allegations on the tampering of land adjudication records by the 3rd & 4th defendants in favor of the 1st, 2nd & 5th defendants. He alleged that the initial adjudication record reflected Parcel No. 513 as measuring 51.80 by the time his late brother passed on which turned out to be 21.80 acres in 1986.
 39. The burden was upon the plaintiff under Sections 107, 111 of the *Evidence Act* to establish as a matter of fact that his late brother was recorded as owner of the scheme land in 1969 as Parcel No. 513, measuring 51.80 acres. Further, the plaintiff had the burden to prove that parcels No 1130, 1131, and 3090 were later recordings and as a matter of fact, were created out of Parcel No. 513.
 40. The plaintiff had the burden to prove that the manner in which parcels No. 1130, 1131, and 3090 were created was fraudulent and a result of collusion between the 1st, 2nd, and 5th defendants and the officers of the 3rd and 5th defendants.
 41. The plaintiff's documents, as indicated above, relating to the suit parcels of land were all marked for identification and were never produced by their makers as exhibits. The plaintiff closed his case without causing the makers of the documents and especially the officers from where they were issued to come and shed light on their authenticity, veracity, legality and probative value.
 42. Marking of documents for identification is not synonymous with their production as exhibits. Marking documents for identification does not make them exhibits. See *Kenneth Mwigie vs Austin Kiguta & others (2015) eKLR*. Such documents have no evidential value. Even though documents were filed in the list of documents dated 29.7.2015, they do not form part of the court records. Filing a list of documents does not absolve a party from producing them as exhibits.
 43. DW 2, a District Land Adjudication Officer, testified on behalf of the 2nd & 4th defendants and produced what he called the original demarcation records as D. Exh No. 15-18. He confirmed that Parcel No's. 1530, 1131, and 3090 were independent, separate, and distinct from Parcel No. 513. The plaintiff did not object to the production of the original adjudication record or put it to the said witness that the said adjudication records were different or altered to reflect an incorrect acreage as opposed to such adjudication record or duplicate held by the DLASO in 1969 and or 1986.
 44. PW 1 had initially relied on MF I No's. 1, 2, 3, 4, 6, 7 (a) & 7 (b) allegedly issued by the DLASO. All these documents were not displayed to DW 2, and the questions raised that whatever evidence he was tendering was at variance with whatever information was contained in these letters contradicting the alleged adjudication records he was producing before the court.
 45. There is the presumption of regularity and legality over official or public records arising from government offices under the *Evidence Act*. In this suitcase, the burden was on the plaintiff to raise questions on fraud, illegality, alteration, and tampering with land adjudication records to DW 2. A critical issue was when the alleged alterations and fraudulent activities occurred. The plaintiff's averments were and remain general and not specific as to who among the officers of the 3rd & 4th defendants, colluded with the 1st, 2nd, and 5th defendants, to reduce his acreage and share out 30 acres among the 1st, 2nd, and 5th defendants. The time frame within which this occurred was critical as it pertains to when a suit against the 3rd and 4th respondents, regarding fraud should have been filed; otherwise, it would have been caught in time.



46. The 3rd & 4th defendants have pleaded that the suit against them was time-barred, no cause of action had been disclosed, and that notice to sue had not been issued. The burden was upon the plaintiff to establish when and how he discovered the fraud or illegality and the remedial measures that he took to complain to the 3rd & 4th defendants.
47. Notably, the 1st, 2nd & 5th defendants have produced evidence that there were pending land committee cases as well as a Minister's appeal at the time the plaintiff lodged court cases elsewhere and eventually before this court. The plaintiff did not dispute DMF 2-11, which were put to him during cross-examination and eventually produced as D. Exh No. 14.
48. Given the preceding, my finding is that the plaintiff failed to discharge his burden of proof on fraud, illegality, and acquisition of title numbers by the 1st, 2nd & 5th defendants in collusion with the 3rd and 4th defendants. He is, therefore, not entitled to the reliefs sought. The case is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 15TH DAY OF MAY, 2024

In presence of

C.A Kananu

Parties

Kurauka for the plaintiff

Nyamu Nyaga for the 1st, 2nd & 5th defendants

HON. C K NZILI

JUDGE

