



REPUBLIC OF KENYA



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Ntiapuyok & another v Puffins Investment Limited & 2 others (Environment & Land Case 203 & 222 of 2017 (Consolidated)) [2024] KEELC 3865 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3865 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 203 & 222 OF 2017 (CONSOLIDATED)
MN GICHERU, J
MAY 15, 2024

BETWEEN

KISHORO LEONYO NTIAPUYOK 1ST PLAINTIFF

WILSON WUANTAI KISHORO 2ND PLAINTIFF

AND

PUFFINS INVESTMENT LIMITED 1ST DEFENDANT

LAND REGISTRAR, KAJIADO 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The plaintiffs seek the following reliefs against the defendants both jointly and severally.
 - a. A revocation and or cancellation of the title deed for L.R. Kajiado/Kaputiei-North/1426, suit land, fraudulently and purportedly issued to the 1st defendant.
 - b. A declaration that the 1st plaintiff is the legal proprietor of the suit land.
 - c. An order of rectification directing the 2nd and 3rd defendant to rectify the land register by cancelling the purported name of the 1st defendant as the registered proprietor and restoring the name of the 1st plaintiff as the registered owner of the suit land.
 - d. An order for permanent injunction restraining the defendants, their servants, agents or otherwise from selling, disposing of, transferring, charging, pledging, leasing, wasting, developing or in any manner whatsoever or howsoever from interfering with or dealing with the suit property.



- e. The costs of this suit together with interest thereon at court rates from the date of filing of the suit until the date of payment in full. This is as per the further amendment plaint dated 14/2/2015.
2. The plaintiffs' case is as follows. The first plaintiff is the father of the 2nd plaintiff. In the year 1989, the 1st plaintiff owned L.R. Kajiado/Kaputiei-North/1050 which measured 134.57 hectares. In the same year, he subdivided L.R. No. 1050 into three (3) portions with the intentions of selling one portion of 50 acres. To facilitate this process, he surrendered the mother title to his then advocate by the name of Mr. Kamau. The advocate informed the 1st plaintiff that there was a man of Asian Origin who wished to buy 50 acres of the suit land. The 1st plaintiff tried to get in touch with his advocate so as to sign the sale agreement and sell the 50 acres agreed upon but the advocate could not be traced. The 1st plaintiff was not worried because he was in possession of the land.
3. In the year 2011, the second plaintiff had become of age and had got married. The 1st plaintiff wished to give land to him and when a search was conducted, it was discovered that the suit land is registered in the name of the 1st defendant. This was very surprising because the 1st plaintiff had not sold his land to the 1st defendant or any other person. He had not signed any sale agreement, transfer form or any other instrument. He never received any payment in form of purchase price.
4. Further investigations by the plaintiffs revealed the following. The original parcel No. L.R. 1050 was subdivided into three (3) parcels namely Kajiado/Kaputiei-North/1425, 1426 and 1427. The suit land was illegally transferred to the first defendant through forged documents. Changes were effected in the land register for the original land without valid transfer documents like consent of the Land Control Board or transfer instruments.
5. In support of their case, the plaintiffs filed the following evidence.
 - i. Witness statements by the two (2) plaintiffs both dated 12/3/2012 and 15/8/2012.
 - ii. Copy of mutation form dated 15/7/1991.
 - iii. Copy of caution dated 4/10/2011.
 - iv. Copy of certificate of official search dated 31/10/2011.
 - v. Copy of demand letter dated 7/3/2012.
 - vi. Copy of statutory notice to the Attorney General dated 16/5/2012.
 - vii. Copy of letter by the Attorney General dated 18/5/2012.
 - viii. Copy of the title deed for the suit land in the name of the 1st defendant dated 22/8/1991.
 - ix. Copy of sale agreement between the 1st plaintiff and Kartick K. Shah dated 4/10/1989.
 - x. Copy of transfer of land form dated 25/3/1991.
 - xi. Copies of title deed for L.R. 1425 and 1427.
 - xii. Copies of letter between Nzioka and Company Advocates and Willy Mutunga Advocates dated 6th and 12th November 1992 concerning L.R. No. 1425.
 - xiii. Various receipts showing receipt of money by the 1st plaintiff from Nzioka and Company Advocates and by Kamau and Co. Advocates from the 1st defendant between the years 1989 – 1994.



- xiv. Copies of applications for caution dated 6/10/2011 and 26/2/2013 and receipts thereof.
 - xv. Copies of certificates of official search dated 15/3/2013 and 21/1/2014.
 - xvi. 9 copies of letters by the plaintiff's counsel to and from the law firm of Mutunga Advocates, Kajiado Land Registry, East African Portland Housing Sacco Ltd, Purka Land Control Board and Law Society of Kenya.
 - xvii. Certified copy of the green card extract.
 - xviii. Copy of the 1st plaintiff's ID Card.
 - xix. Copy of extract of the standard newspaper of Tuesday, May 2013.
 - xx. Copies of certificates of incorporation of Puffin's Limited and Puffins Investment Limited.
 - xxi. Sample copies of letters of consent from the Land Control Board.
 - xxii. Withdrawal slip dated 7/7/2010 from Equity Bank, Kitengela Branch.
 - xxiii. Withdrawal slips dated 14/2/2013 and 7/1/2014 from Family Bank Kitengela Branch.
6. The 1st defendant filed a written statement of defence dated 9/12/2014 in which it avers as follows.
- Firstly, it is the legal owner of the suit land which it purchased from the 1st plaintiff through one Kartric Shah, one of the directors.
- Secondly, the 1st plaintiff subdivided L.R. No. Kajiado/Kaputiei-North/1050 before selling the suit land to the 1st defendant.
7. In addition to the above mentioned defence, the first defendant filed HCCC No. 83 of 2012 at Machakos against the two plaintiffs and one Leporio Kishoro on 16/3/2012 in which it seeks the following reliefs.
- a. A permanent injunction restraining the defendants and anybody claiming through them from interfering with the plaintiff's quiet possession of the suit land.
 - b. A similar injunction restraining the same parties from entering, trespassing, causing developments in whatever form excavating, cutting and felling trees, flowers, interfering with the general environment of the suit land.
 - c. Establishment of the boundaries of the suit land by the District Surveyor.
 - d. Costs of the suit and interest thereon at court rates.
 - e. Any other relief as this court may deem just and fit to grant.
8. In support of its case, the 1st defendant filed the following evidence.
- i. Witness statement by Kartrick K. Shah dated 15/3/2012.
 - ii. Copy of authority to act on behalf of the company issued to Kartrick K. Shah.
 - iii. Copy of sale agreement dated 4/10/1989 for sale of 100 acres from L.R. Kajiado-Kaputiei/1050.
 - iv. Copy of transfer of land instrument dated 25/3/1991.
 - v. Copy of mutation dated 15/7/1991 relating to L.R. 1050.



- vi. Copy of certificate of official search dated 31/10/2011.
 - vii. Copy of affidavit sworn by the second plaintiff dated 14/2/2013.
9. The second and third defendants filed a written statement of defence dated 18/1/2013 in which they aver as follows.
- Firstly, the 1st defendant holds a title to the suit land and the transfer by the second defendant was effected in the believe that all the transfer instruments and relevant documents were genuine.
- Secondly, if the court finds the transaction to have been fraudulent, then the land can be registered in the name of the rightful owner.
- Finally, the Attorney General prays that the suit against the 2nd and 3rd defendants be dismissed with costs.
- The 1st and 2nd defendants did not file any witness statements or documents to support their defence.
10. At the trial which lasted between 31/10/2017 and 27/3/2023 the two plaintiffs and Clinton Pashile testified. They reinstated that they did not sell the suit land to the defendants and only person that the 1st plaintiff ever dealt with was the advocate called Kamau who is now deceased. The late Kamau Advocate subdivided the original land No. 1050 into three parcels namely 1425, 1426 and 1427. He kept the title deed for L.R. 1426 and gave the 1st plaintiff the other two title deeds. The 1st plaintiff thought the title deed that the advocate kept was for 50 acres. It is only many years later that he learnt that the suit land which measures 100 acres is registered in the name of the 1st defendant whose directors he does not know and had not met until this case arose.
11. The plaintiffs also called a documents examiner by the name of Geoffrey Chania whose evidence is to the effect that the signature on the affidavit sworn by the second plaintiff dated 14/2/2013 is not similar to his known signatures on the documents dated 11/1/2012 and 15/8/2012. In the affidavit discredited by the documents examiner, the 2nd plaintiff says that the case should be withdrawn because his father had received the full purchase price for the 100 acres way back in the year 1989.
12. On the part of the 1st defendant, they called Kartic M. Shall whose evidence is as follows.
- The 1st defendant purchased the suit land through its directors as per the sale agreement dated 14/10/1989. The purchase price was Kshs. 650,000/- for the 100 acres. The 1st plaintiff was represented by Paul Kamau advocate while the 1st defendant was represented by Willy Mutunga Advocate. The land No. 1050 was later subdivided into L.R. 1425, 1426 AND 1427 respectively. It is the 1st plaintiff who applied for the mutation. His signature is on the form together with his ID Card No. 0790573163. The purchase price was paid by two bankers cheques for Kshs. 70,000/- and Kshs. 60,000/- respectively. The rest of the consideration was paid by petty cash vouchers all of which are signed by the 1st plaintiff. All of them were produced as evidence by the 1st plaintiff. At first, the 1st plaintiff would collect money from his own advocate but when his advocate died, he collected directly from the 1st defendant's advocate.
13. Counsel for the parties were to file written submissions by 31/3/2024. They did not comply with this timeline. Even after being reminded by the court assistant to file their submissions on 22/4/2024, none of the counsel complied. As I write this judgment in late April, I am doing so without the benefit of the said submissions.
14. On 8/3/2017, the plaintiffs' counsel filed the plaintiffs' statement of issues which has the following seven (7) issues.



- i. Whether the plaintiffs have been in constant occupation of and possession of the suit land at all material times.
 - ii. Whether the suit land was part of L.R. 1050 which belonged to the 1st plaintiff.
 - iii. Whether the 1st defendant legally purchased the suit land from the 1st plaintiff.
 - iv. Whether the purchase is null and void.
 - v. Whether the registration of the suit land in the name of the first defendant was obtained fraudulently.
 - vi. Whether the plaintiffs have been lawfully and rightfully in ownership, possession and occupation of the suit property.
 - vii. Who should pay the costs of the suit.
15. The 1st defendant filed a list of four (4) issues on 10/5/2017 as follows.
- i. Whether the agreement dated 4/10/1989 between the plaintiff and Kartrick K. Shah is valid.
 - ii. If the subsequent processes leading to the acquisition of the title deed in favour of the 1st defendant were legal.
 - iii. If the answer to (i) and (ii) above is in the affirmative, whether the plaintiffs are entitled to the prayers sought in the further amended plaint dated 24/2/2015.
 - iv. Who bears the costs of this suit.
16. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and testimony at the trial. I make the following findings on the issues raised.
17. On the first issue of possession and constant occupation of the suit land, I find that neither the plaintiffs nor the defendants have adduced sufficient evidence to enable me reach the conclusion as to who between them is in occupation. No evidence in form of photographs or documents to show money spent on infrastructure on the land was ever adduced by any of the parties. All that we have is the plaintiffs' word that they occupy the land and the 1st defendant's word to the same effect. More credible and tangible evidence of actual possession was required and it is clearly lacking.
18. Regarding the second issue of whether the suit land was part of L.R. 1050, which belonged to the 1st defendant, I find it was. The evidence to prove this is to be found in the copy of mutation form dated 15/7/1991. I am satisfied that the said mutation form was signed by the 1st plaintiff.
19. When it comes to third issue, I find that the 1st defendant legally purchased the suit land from the 1st plaintiff. It is not credible that the 1st plaintiff who needed to sell land in 1989 never sold it as intended. It is not credible either that he could have given his title deed for the suit land to his advocate Paul Kamau in 1989 and kept quiet for 22 years until the year 2011 when his son discovered that the suit land was transferred to the 1st defendant. Why did he not complain to his lawyer? The other question that the 1st plaintiff has not answered is why he was receiving money from Willy Mutunga, Nzioka and Kamau advocates between the years 1989 and 1994. I find that it is the 1st plaintiff who received the money and it was consideration for the suit land.
- Furthermore, the Land Registrar testified that the transfer documents available at the registry are sufficient proof of the transfer.



20. For the fourth issue, the purchase is proper for reasons already given in paragraph (19) above.
21. When it comes to the 5th issue, I find that fraud has not been proved on the part of the defendants. Fraud, where pleaded must be proved to a standard higher than one on a balance of probabilities. In the case of Elizabeth K. Ndolo –versus- George Matata Ndolo, Civil Appeal No. 128 of 1995, it was held as follows.

“...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 cases, namely, proof on a balance of probabilities, but the burden of proof on the respondents was certainly not one beyond reasonable doubt as in Criminal Cases”.

In the further amended plaint dated 24/2/2015, the plaintiffs have pleaded nine (9) particulars of fraud at paragraph 12. Those are the particulars that require prove to a level higher than the ordinary one. The 1st defendant has disproved fraud by producing a sale agreement, a mutation form and many petty cash vouchers all signed by the 1st plaintiff. No fraud is proved by the plaintiffs.

22. My findings on the 6th of the plaintiffs’ issues will be similar to the one on the first issue. It is that no evidence of occupation and possession has been adduced in this case. The reasons for this finding are to be found in paragraph (17) above.
23. When it comes to the defendants’ issues, I find that they necessarily follow from the above findings. I find the agreement dated 4/10/1989 between the 1st plaintiff and Kartrick M. Shah is valid because it is supported by cash payments to the 1st plaintiff for a period of five (5) years from 1989 to 1994 from three (3) different law firms. I find that all the processes leading to all acquisition of the title deed in favour of the 1st defendant were legal.
24. Even though the issue of the 1st plaintiff’s signature on the sale agreement dated 4/10/1989 was not raised in the issues identified by counsel for the parties for determination, I find that I should decide on it because it arose in the proceedings. I find that the signature on the sale agreement as well as the ones in the petty cash vouchers belong to the 1st plaintiff. It is the 1st plaintiff who would fail if it is not proved that the signatures in question are not his. Yet the 1st plaintiff did not offer any evidence other than his mere denial. The thumbprint in the withdrawal slip dated 7/7/2010 is not sufficient prove that just because the 1st plaintiff thumb printed the said slip in 2010, then it necessarily follows that he could not have signed the sale agreement and other documents in the years 1989 – 1994.
25. For the above stated reasons, I find that no merit in suit 203 of 2017 (formally Machakos ELC 75 of 2012). I find merit in suit No. ELC 222 of 2017(formerly Machakos ELC 83 OF 2012). I dismiss the former suit and in the latter suit, I enter judgment for the plaintiff as prayed for in the plaint dated 15/3/2012.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 15TH DAY OF MAY 2024.

M.N. GICHERU

JUDGE

