



**Wainaina v Mungai & another (Environment & Land Case  
382 of 2017) [2024] KEELC 4888 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4888 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 382 OF 2017  
CA OCHIENG, J  
JUNE 20, 2024**

**BETWEEN**

**JOSEPH NJUGUNA WAINAINA ..... PLAINTIFF**

**AND**

**FRANCIS MWAURA MUNGAI ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated the 14<sup>th</sup> September, 2017, which was amended on 26<sup>th</sup> February, 2020 the Plaintiff prays for Judgment against the Defendants jointly and severally for:-
  - a. General damages.
  - b. An order directing the Lands Registrar Machakos to cancel and/or delete the registration of LR. No. Masinga/masinga/5863.
  - c. An order directing the County Surveyor Machakos to remove from the area map of Masinga LR. No. Masinga/masinga/5863 and consolidate the same in LR. No. Masinga/masinga/130.
  - d. Any other or further relief that this Honourable Court may deem fit to grant.
  - e. Costs of this suit.
2. The 1<sup>st</sup> Defendant filed a Defence including Counter-claim where he sought for the following Orders:
  - a. That the Plaintiff's suit be dismissed with costs.
  - b. That judgment be entered in favour of the Defendant to the effect that he is the absolute proprietor of Masinga/masinga/5863.



- c. An order of permanent injunction restraining the Plaintiff, his agents and/or anybody claiming under him from encroaching, entering, developing or in any other manner interfering with Masinga /masinga /5863.
  - d. Costs of the suit.
  - e. Any other relief the court deems fit to grant.
3. The matter proceeded for hearing where each party called one (1) witness.

### **Evidence of the Plaintiff**

4. The Plaintiff as PW1 testified that he is the owner of LR No. Masinga/ Masinga/130 measuring 2.41 hectares, hereinafter referred to as the 'suit land'. He claimed that sometime in 2003, the Defendant started raising objections to his registration, as owner of the suit land without justification. He denied knowing the 1<sup>st</sup> Defendant prior to the year 2003. He was shocked that the 1<sup>st</sup> Defendant was also issued with another title for part of the suit land being LR No/Masinga/Masinga/ 5863.
5. He stated that the 1<sup>st</sup> Defendant had never set foot on the suit land. During cross-examination, PW1 confirmed that they had attempted to resolve the dispute at the Land Adjudication Office but no verdict was given. He explained that they undertook objection proceedings in 2003 where they were directed to continue staying together on the suit land. Further, that the Objector was to get seven (7) acres of land while he was to get one acre, from the disputed land. He further confirmed lodging an Appeal to the Deputy County Commissioner, who directed that he retains parcel No. 130.
6. He insisted that the 1<sup>st</sup> Defendant was registered as owner of land parcel number Masinga/ Masinga/5863 through forgery. The Plaintiff produced the following documents as exhibits: Objection proceedings in Objection No. 549; Proceedings in Appeal No. 230 of 2007; Ref LA/ MKS/261/171 by Eric Aori; Letter by Plaintiff dated the 29<sup>th</sup> December, 2011; Certificate of Official Search and Certificate of Title for Masinga/Masinga/130; Certificate of Official Search for Masinga/ Masinga/5863; Area Map; and Letter dated 3<sup>rd</sup> January, 2017.

### **Evidence of the Defendants**

7. The 1<sup>st</sup> Defendant as DW1 confirmed that he is the registered proprietor of land parcel number Masinga/Masinga/5863. He testified that prior to his proprietorship, he entered into a Sale Agreement with the Plaintiff, through his agent, for sale of Masinga/Masinga/130 which was sold for Kshs. 24, 375/= . He testified that Masinga/Masinga/130 was subdivided after the Plaintiff lodged a claim before the Land Adjudication Officer and this gave rise to Masinga/Masinga/5863 and Masinga/Masinga/130 respectively.
8. It was his testimony that they appeared with the Plaintiff before the Land Adjudication Officer, where they identified the boundaries wherein, he had the greatest acreage. Further, that as a result of the Sale Agreement, Masinga/Masinga/5863 was transferred and registered in his name, while the Plaintiff remained with Masinga/ Masinga/130. He insisted that, the registration of Masinga/Masinga/ 5863 was done regularly in strict compliance with the law. Further, that the Plaintiff has consistently interfered with his quiet possession of Masinga/Masinga/5863, without any reasonable cause.
9. During cross-examination DW1 confirmed that there was no Sale Agreement between the Plaintiff and himself. He explained that Masinga/Masinga/130 was bought by his late brother Ernest Mburu Mungai on his behalf. He insisted that he occupies the suit land. He did not have documents to prove payment for Masinga/Masinga/130. He contended that the Plaintiff's title for Masinga/Masinga/130



is a forgery. He argued that, when Masinga/Masinga/130 and Masinga/ Masinga/5863 are merged, it cannot be eight (8) acres. Further, that he claims 2.25 hectares. He reiterated that he bought Masinga/Masinga/5863 which was subdivided from Masinga/Masinga/130 that belongs to the Plaintiff.

10. The 1<sup>st</sup> Defendant produced the following documents as exhibits: Title Deed; Objection Proceedings; Letters dated 15<sup>th</sup> May, 1994; 7<sup>th</sup> February, 1995; 27<sup>th</sup> January, 2012; 8<sup>th</sup> November, 1993 and Letter referenced LA/MKS/268/171.

### Submissions

11. The Plaintiff in his submissions provided the background of the dispute herein, relied on the evidence presented and argued that he did not require to seek consent under Section 30(1) of the Land Adjudication Act, before filing this suit, as title deeds had already been issued. He further submitted that, this suit is not res judicata as the 2<sup>nd</sup> Defendant was not a party to these proceedings. Further, that he is properly before Court as the issues in dispute had not been dealt with. He reiterated that the 1<sup>st</sup> Defendant acquired the land through an illegitimate and illegal process and therefore not deserving of the orders sought in the Counter-claim as he never proved the root of his title.
12. He further submitted that, he had adequately discharged the requirements for proving prescriptive rights over the suit land by right, adversely and operation of law. Further, that Masinga/Masinga/5863 was illegally sequestered from the suit land. To buttress his averments, he relied on the following decisions: Lynette Kageha Kisiswa v Enos Cheptim Chebowoi & Another (2014) eKLR and Munyu Maina v Hiram Gathiba Maina (2013) eKLR.
13. The 1<sup>st</sup> Defendant in his submissions also provided a background of the dispute herein and relied on the evidence as presented. He insisted that he had acquired his land through a legal and legitimate titling process. He argued that the ownership dispute herein had been heard and determined through the Land Adjudication processes. Further, that the Objection proceedings made the determination in his favour. He further submitted that the Plaintiff appealed to the Minister and a decision was made upholding the Land Adjudication Officer's verdict which awarded him land, to be hived off, from Masinga/Masinga/130. Further, that the Plaintiff did not challenge the Minister's decision.
14. He averred that Masinga/Masinga/130 was subdivided into two being Masinga/Masinga/5863 and 130 respectively. He reiterated that he duly acquired his title. He reaffirmed that a Certificate of Title can only be impeached and/or challenged if it was acquired through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. Further, documents produced clearly show that the transaction was above board and past the threshold provided under section 26 of the Land Registration Act. To support his averments, he relied on the following decisions: Kuria Kiarie & 2 Others v Sammy Magera (2018) eKLR; Nyangate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & National Bank of Kenya Ltd; Mellen Mbera v James Theuri Wambugu (2020) eKLR.

### Analysis and Determination

15. Upon consideration of the Amended Plaintiff, 1<sup>st</sup> Defendant's Defence including Counter-claim, testimonies of the witnesses, exhibits and rivaling submissions, the following are the issues for determination:
  - a. Whether the 1<sup>st</sup> Defendant legally acquired land parcel number Masinga/ Masinga/ 5863.
  - b. Whether the Plaintiff is entitled to the Orders sought in the amended Plaintiff.
  - c. Whether the 1<sup>st</sup> Defendant is entitled to the Orders sought in the Counter-claim.



16. As to whether the 1st Defendant legally acquired land parcel number Masinga/Masinga/5863.
- The Plaintiff as PW1 claimed the 1<sup>st</sup> Defendant illegally acquired his title for land parcel number Masinga/Masinga/5863 which was subdivided from land parcel number Masinga/Masinga/130. PW1 in his testimony denied knowing the 1<sup>st</sup> Defendant nor transferring the said land to him. PW1 insisted that the 1<sup>st</sup> Defendant had illegally acquired the suit land. During cross examination, PW1 confirmed that the suit land had been subject to the Land Adjudication Officer's Objection proceedings. Further, he filed an Appeal to the Minister that upheld the Land Adjudication Officer's verdict. He further confirmed that he never sought to quash the decision of the Minister through a Judicial Review process.
17. On perusal of the Objection proceedings No. 549 for Masinga Adjudication Section for parcel No. 130 between Francis Mwaura Mungai (Objector) and Joseph Njuguna Wainaina (Respondent), the Land Adjudication Officer on 19<sup>th</sup> June, 2003, made the following decision:
- “Objection allowed. The Objector to get seven acres and the Respondent to remain with one acre; while retaining original number and Objector issued new number.”
18. As per proceedings and Judgment in Appeal Case No. 230 of 2007 for parcel No. 130 Masinga/ Masinga Adj. Section, before Deputy County Commissioner (DCC) on 8<sup>th</sup> February, 2017 – Joseph Njuguna Wainaina (Appellant) and Mwaura Mungai (Respondent), the DCC's verdict was that:
- “The Appellant to retain parcel No. 130 and Respondent to retain portion he was awarded during objection hearing.”
19. Further, vide a letter dated the 27<sup>th</sup> January, 2012, written by the District Land Adjudication Officer Mr. Eric Onchana Aori, addressed to Joseph Njuguna (Plaintiff herein), in respect to a complaint filed by the Plaintiff, he stated as follows:
- “On 29<sup>th</sup> November, 2011, officers identified a field query and arranged to visit the ground on 6<sup>th</sup> December, 2011 to verify and re – establish the boundaries. The boundaries were re – established as indicated on the map.”
20. Further, vide a letter referenced LA/MKS/268/171 addressed to Francis Mwaura Mugai 5863 and Joseph Njuguna Wainaina 130, reference Objection No. 170 P/No. 130 Masinga Adjudication section, the author Eric Onchana Aori, District Land Adj & Sett Officer, stated thus:-
- “I refer to your above issues and state that the record held in this office indicates that objection was allowed. FRANCIS MWAURA MUNGAI to get 7 acres and JOSEPH NJUGUNA WAINAINA to get 1 acre retaining old number.”
21. I note the title for Masinga/Masinga/130 measuring 2.41 hectares was issued in the name of Joseph Njuguna Wainaina on 12<sup>th</sup> January, 2015 while title for Masinga/Masinga/5863 measuring 2.25 hectares, in the name of Francis Mwaura Mungai was issued on 19<sup>th</sup> January, 2015 respectively. The Plaintiff has claimed the 1<sup>st</sup> Defendant fraudulently acquired his title. Further, that the root of his title is challenged. However, from my analysis above, I note the dispute in respect to Plot No. 130 Masinga Adjudication Section had exhaustively been dealt with by the Land Adjudication Officer, who was legally mandated to deal with it, under the *Land Adjudication Act*. Further, both the Land Adjudication Officer and DCC awarded the 1<sup>st</sup> Defendant seven acres out of Plot No. 130 while the Plaintiff was awarded one (1) acre, therefrom. It was directed that the Plaintiff was to retain the old number 130 while the 1<sup>st</sup> Defendant was to be issued with a fresh number. I note the Plaintiff never



sought to quash the decision through Judicial Review hence the verdict stands. What is not clear is that, if the Plaintiff had been awarded one acre of land, at both the objection proceedings and Appeal to the Minister, then how did he again acquire a Certificate of Title for Masinga/Masinga/130 measuring 2.41 hectares, which is clearly more than one acre.

22. On proof of ownership of land, I wish to make reference to Sections 24(a) and 26(1) of the [Land Registration Act](#). Section 24(a) of the [Land Registration Act](#) states that:-

“Subject to 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...”

23. While Section 26(1) of the [Land Registration Act](#) stipulates thus:-

“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.”

24. In Civil Appeal No. 246 of 2013 Arthi Highway Developers Limited Vs West End Butchery Limited and Others, the Court of Appeal expressly stated thus:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the [Land Registration Act](#) set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

25. While in [Munyu Maina v Hiram Gatbiha Maina](#), Civil Appeal number 239 of 2009, the Court of Appeal held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”



26. Based on the facts as presented including the exhibits produced while associating myself with the decisions quoted, I find that the 1<sup>st</sup> Defendant actually acquired a legal title as the dispute was properly handled through the adjudication process. In my view, it is actually the Plaintiff's title that presents a challenge because of the acreage therein.
27. In the circumstances, I find that the Plaintiff is hence not entitled to the orders as sought in the Amended Plaint. Further, I find that it is actually the 1<sup>st</sup> Defendant who is entitled to the orders as sought in the Counter-claim.
28. In the foregoing, I will proceed to dismiss the Plaintiff's suit as he has not proved his case on a balance of probability and enter Judgment in favour of the 1<sup>st</sup> Defendant as per the Counter-claim. I proceed to make the following final orders:
1. That the Plaintiff's suit be and is hereby dismissed with costs.
  2. That judgment be and is hereby entered in favour of the 1<sup>st</sup> Defendant to the effect that he is the absolute proprietor of Masinga/masinga/5863.
  3. An order of permanent injunction be and is hereby issued restraining the Plaintiff, his agents and/or anybody claiming under him from encroaching, entering, developing or in any other manner interfering with Masinga/masinga/5863.
  4. The Costs of the suit including the Counter-claim is awarded to the 1<sup>st</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20<sup>TH</sup> DAY OF JUNE, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Musyimi for 1<sup>st</sup> Defendant

Ms. Makau for Mutia for Plaintiff

No appearance for 2<sup>nd</sup> Defendant

Court Assistant – Simon/Ashley

