



REPUBLIC OF KENYA



**Nzioka & 5 others v Kioko & another (Environment & Land Case 371 of 2017) [2024] KEELC 4590 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4590 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 371 OF 2017**

**TW MURIGI, J**

**JUNE 5, 2024**

**BETWEEN**

**EDWARD KAVAI NZIOKA ..... 1<sup>ST</sup> PLAINTIFF  
THOMAS NZIOKA ..... 2<sup>ND</sup> PLAINTIFF  
DICKSON MWANTHI NZIOKA ..... 3<sup>RD</sup> PLAINTIFF  
MBUVA NZIOKA ..... 4<sup>TH</sup> PLAINTIFF JAMES KIMENGE  
NZIOKA ..... 5<sup>TH</sup> PLAINTIFF KAMUTI NZIOKA ..... 4<sup>TH</sup> PLAINTIFF  
JONATHAN MUTUNGA NZIOKA ..... 5<sup>TH</sup> PLAINTIFF  
MUTHINI NZIOKA ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**ELIZABETH MWIKALI KIOKO ..... 1<sup>ST</sup> DEFENDANT  
KATUTI NZIOKA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an amended Complaint dated 18<sup>th</sup> May, 2020 the Plaintiffs pray for judgment against the Defendants for:-
  - i. An order of permanent injunction restraining the Defendants from evicting, subdividing, trespassing, encroaching or in any other manner interfering with the Plaintiffs lawful use and occupation of land Parcel No. Nzaui/Kawala/472 and Nzaui/Kawala/170.
  - ii. An order for cancellation of titles for Nzaui/Kawala/472, 993 and 994 and revert ownership to the deceased NZIOKA MUTWANYINGI.
  - iii. Costs of this suit plus interest thereon.



- iv. Any other or further relief as this Honourable Court may deem fit and just to grant.
2. The 1<sup>st</sup> Defendant filed a Statement of Defence and Counterclaim on 28<sup>th</sup> April, 2021 denying the Plaintiff's claim. In her counterclaim, the 1<sup>st</sup> Defendant prays for judgment against the Plaintiffs for: -
  - i. An order of permanent injunction against the Plaintiffs by themselves, servants, agents, employees and/or their children from entering, trespassing, alienating, subdividing or carrying out any wanton works of interfering with the Defendants quiet possession, use and enjoyment of plots Nzai/Kawala/472 and 994 and or in the alternative an eviction order.
  - ii. Costs and interests of the suit.
  - iii. Any other relief as this Honourable Court may deem fit and just to grant.
3. The 2<sup>nd</sup> Defendant filed an amended Statement of Defence on 6<sup>th</sup> October, 2020 denying the Plaintiffs' claim. She urged the court to dismiss the suit with costs.

### **The Plaintiffs Case**

4. The Plaintiffs called two witnesses in support of their case. PW1, Edward Kawai Nzioka, adopted his witness statement dated 18/5/2021 as his evidence in chief. He also produced the documents in the list of documents dated 5/12/2017, 27/11/2020 and 26/5/2021 as PEX Nos. 1 – 7 respectively.
5. PW1 testified that the Plaintiffs are his brothers while the 1<sup>st</sup> Defendant is his sister in law and the 2<sup>nd</sup> Defendant is his step mother. He informed the court that the Plaintiffs are the legal owners of land Parcel No. Nzai/Kawala/472. He testified that he resides in land Parcel No. Nzai/Kawala/170 while the 2<sup>nd</sup> Defendant resides in land parcel No. Nzai/Kawala/472. He further testified that on 17/10/2014, his late father subdivided his land amongst his family members and everyone occupied hi/her respective share. He went on to state that the Defendants instructed their agents to evict them from land Parcel No. Nzai/Kawala/472.
6. He went on to state that they later discovered that the Defendants had subdivided Parcel No. Nzai/Kawala/170 into land parcel No. Nzai/Kawala/993 registered in the name of Nzioka Mutua Nyingi and land parcel No. Nzai/Kawala/994 registered in the name of Elizabeth Kioko while land Parcel No. Nzai/Kawala/472 was registered in the names of the Defendants. That based on the above, they registered a caution against the suit properties.
7. . He urged the Court to cancel the Titles in respect of land parcel Nos. Nzai/Kawala/993 and 994 and register Title Nos. Nzai/Kawala/170 and 472 in the name of his father Nzioka Mutwanyingi deceased.
8. In cross-examination, he testified that his late father subdivided his land amongst his children and not his wives. He admitted that the transfer of land Parcel Nos. Nzai/Kawala/993 and 994 was done during his father's lifetime.
9. He further testified that according his father's will, each son was to get three acres. He contended that the Defendants fraudulently transferred the suit properties to themselves.
10. PW2, Thomas Nzioka, adopted his witness statement dated 18/5/2021 as his evidence in chief. It was his testimony that parcel Nzai/Kawala/170 and Nzai/Kawala/472 initially belonged to his late father. He stated that his father and the sub chief signed the agreement dated 17/10/2014 in the presence of the Plaintiffs and that he was present when his late father subdivided his land. He testified that he resides on Parcel No. Nzai/Kawala/170.



11. He went on to state that in the year 2017, the Defendants took his father to the lands office and caused land Parcel No. Nzai/Kawala/472 to be registered in their names while Parcel No. Nzai/Kawala/170 was subdivided into land Parcel Nos. Nzai/Kawala/993 and 994. He testified that land Parcel No. Nzai/Kawala/993 is registered in the name of his father while Parcel No. Nzai/Kawala/994 is registered in the name of the 1<sup>st</sup> Defendant and their father.
12. He went on to state that they were opposed to the new titles because they were not involved when the transfers being were effected. PW2 testified that their father was very old when the transfer in respect of the suit properties were effected. He urged the Court to cancel the title deeds and order that the suit properties be registered in the name of their late father.
13. In cross-examination, he insisted that the Defendants did not involve them when they were effecting the transfer in respect of land Parcel No. Nzai/Kawala/170. He testified that the Defendants reside in land parcel No. Nzai/Kawala/472 while his brothers reside on land parcel No. Nzai/Kawala/994.
14. In re-examination, he testified that the subdivision and transfer was done when their father was advanced in age and without their input.

### **The Defendants Case**

#### **The 1<sup>st</sup> Defendant's Case**

15. The 1<sup>st</sup> Defendant, Elizabeth Mwikali Kioko testified as the sole witness in support of her case. She testified as DW2 and adopted her witness statement dated 8/3/2021, as her evidence in chief. It was her testimony that her father-in-law, Nzioka Mutwanyingi subdivided the suit properties in the year 2017 amongst his three wives. She denied the allegations that they fraudulently acquired the titles in respect of the suit property. She testified that land Parcel No. Nzai/Kawala/993 is registered in the name of Nzioka Mutwanyingi and belongs to the first and second wives of Nzioka Mutwanyingi, the mothers to the Plaintiffs herein.
16. She went on to state that she resides on land Parcel No. Nzai/Kawala/472 while the Plaintiffs are in occupation of land Parcel No. Nzai/Kawala/170. She stated that the Plaintiffs have encroached on her land thereby depriving her the use and enjoyment of the same. She urged the Court to order that she gets her land back.
17. In cross-examination, she testified that she was registered as the proprietor of Parcel No. Nzai/Kawala/994 upon the subdivision of land Parcel No. Nzai/Kawala/170. She testified that she attended the Land Control Board meeting when consent to transfer was issued on 1/2/2018 and that her father-in-law transferred to her the suit property.
18. In re-examination, she testified that she was with her father-in-law when he paid the requisite stamp duty fees to effect the transfer.

#### **The 2<sup>nd</sup> Defendant's Case**

19. The 2<sup>nd</sup> Defendant Katuti Nzioka, testified as the sole witness in support of her case. She testified as DW1 and adopted her witness statement dated 29/09/2020, as her evidence in chief. She also produced the documents in the list of documents dated 16/06/2021 as DEX 1-16. She informed the court that she is the third wife of Nzioka Mutwanyingi (deceased) while the 1<sup>st</sup> Defendant is her daughter-in-law. She testified that the suit properties initially belonged to Nzioka Mutwanyingi deceased. That prior to his demise, Nzioka Mutwanyingi subdivided his land and subsequently thereafter, they were issued with title deeds in respect of the suit property.



20. She asserted that the Plaintiffs did not want her to get a share of the suit property. She went on to state that her late husband had summoned the clan together with the chief for a meeting but the Plaintiffs refused to attend. She stated that members of the clan were present during the survey exercise. She went on to state that her late husband denied the agreement dated 17/10/2014 when they were summoned by the District Commissioner. She insisted that the Plaintiffs were always aware that they were issued with the title deeds in respect of the suit properties.
21. It was her testimony that the Plaintiffs encroached and planted orange trees in her land when they discovered that her husband had allocated to her the land.
22. In cross-examination, she testified that Nzioka Mutwanyingi subdivided his land on 21/10/2017 amongst his three wives. She testified that she attended the Land Control Board meeting together with her daughter-in-law and asserted that Nzioka Mutwanyingi transferred land Parcel No. Nzaiu/Kawala/472 to her and the 1<sup>st</sup> Defendant.
23. In re-examination, she testified that the Plaintiffs did not attend the Atangwa Clan meeting which was called by their late father when he wanted to subdivide the suit properties.
24. After the close of the hearing, the parties agreed to file and exchange their written submissions.

### **The Plaintiffs' Submissions**

25. The Plaintiffs submissions were filed on 12/05/2023.
26. On their behalf, Counsel identified the following issues for the court's determination: -
  - i. Whether the subdivision of land Parcel No. Nzaiu/Kawala/170 was done procedurally?
  - ii. Whether the transfers in regard to the disputed parcels of land were done in accordance with the law?
  - iii. Whether the late Nzioka Mutwanyingi was in the right mental state when conducting the subdivisions and the transfers in regard to the disputed parcels of land?
27. Counsel submitted that the application for consent clearly shows that land Parcel No. Nzaiu/Kawala/170 was intended to be subdivided into three portions but the same was subdivided into two portions which was a serious error that could not be explained by the Defendants.
28. Counsel further submitted that the letter of consent dated 1/2/2018 issued to the 2<sup>nd</sup> Defendant in respect for land Parcel No. Nzaiu/Kawala/994 was a glaring illegality as it was issued before the title deed had been created.
29. Counsel contended that the court cannot interrogate the authenticity of the title in respect of land Parcel No. Nzaiu/Kawala/472 because the Defendants did not tender any evidence to show how it was transferred to them from Nzioka Mutwanyingi. Counsel further submitted that the Plaintiffs have demonstrated that the process of subdivision of the mother title and the subsequent transfers was illegal.
30. Counsel further submitted that Nzioka Mutwanyingi deceased was not in his right mental state during the commencement of Makindu Criminal Case No. 971 of 2017. It was submitted that the trial magistrate observed that the deceased could not testify in the case against the 1<sup>st</sup> Plaintiff due to his advanced age. Counsel submitted that the Defendants effected the subdivisions and subsequent transfers, during the pendency of the criminal proceedings which clearly explains the illegalities in acquiring the title deeds in respect of the suit properties.



31. Concluding his submissions, Counsel submitted that the Plaintiffs have proved their case and urged the court to grant the orders as sought in the Plaintiff. None of the authorities cited by Counsel were availed for the Court's perusal.

### **The Defendants Submissions**

32. The Defendants' submissions were filed on 8/9/2023.
33. On their behalf, Counsel submitted that the subdivision and transfer of land Parcel Nos. Nzai/Kawala/993 and 994 arising from parcel No. Nzai/Kawala/170 were done by Nzioka Mutwanyingi deceased during his lifetime. Counsel further submitted that the Plaintiffs did not sue the legal representatives of the Estate of the deceased Nzioka Mutwanyingi.
34. Counsel submitted that the Plaintiffs have not proved their case on a balance of probabilities to warrant the cancellation of the titles held by the Defendants. Counsel urged the court to dismiss the Plaintiffs' suit with costs and enter judgment as prayed in the counterclaim. None of the authorities cited by Counsel were availed for the Court's perusal.

### **Analysis And Determination**

35. Having considered the pleadings, the evidence on record and the respective submissions, the following issues fall for determination: -
- i. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff?
  - ii. Whether the 1<sup>st</sup> Defendants is entitled to the orders sought in the counterclaim.
  - iii. Who is entitled to the costs of the suit?
36. It is not in dispute that: -
- i. The suit properties, land Parcel Nos. Nzai/Kawala/472 and 170 were originally registered in the name of Nzioka Mutwanyingi deceased;
  - ii. Land Parcel No. Nzai/Kawala/170 was subdivided into two portions namely Parcel Nos. Nzai/Kawala/993 and 994
  - iii. Nzioka Mutwanyingi, the 1<sup>st</sup> Defendant in the plaintiff dated 5/12/2017, died on or about 20/5/2018;
  - iv. The Plaintiffs' claim against Nzioka Mutwanyingi deceased abated in accordance with the provisions of Order 24 Rule 4 of the Civil Procedure Rules;
  - v. Land Parcel No. Nzai/Kawala/993 measuring approximately 12 hectares is registered in the name of Nzioka Mutwanyingi deceased;
  - vi. Land Parcel No. Nzai/Kawala/994 measuring approximately 3.8 hectares is registered in the name of Elizabeth Mwikali Kioko;
  - vii. Land Parcel No. Nzai/Kawala/472 measuring approximately 3.8 hectares is registered in the names of Katuti Nzioka and Elizabeth Mwikali Kioko;

### **Whether the plaintiffs' are entitled to the orders sought in the plaintiff**

37. The Plaintiffs are challenging the subdivisions and subsequent transfers of the suit properties to the Defendants on the grounds that they were carried out fraudulently.



38. It is trite law that any allegations of fraud must be specifically pleaded and strictly proved.
39. Black's law dictionary defines fraud as:-  
“ A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”
40. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) held as follows: -  
“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
41. Similarly, in the case of *Kinyanjui Kamau Vs George Kamau* [2015] eKLR the Court of Appeal held that;-  
“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo Vs Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. 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 civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”
42. The Plaintiffs must discharge their burden of proof as required by Section 107 (1) and (2) of the [Evidence Act](#) which stipulates as follows:  
(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’.
43. Although the standard of proof is not beyond reasonable doubt it is higher than proof on a balance of probabilities.
44. The Plaintiff produced the certificate of title (PEX5) and the certificate of official search (PEX6), which clearly demonstrates that the suit property is registered in the names of the Defendants.
45. The sanctity of title to land is protected under Section 26 of the [Land Registration Act](#) 2012. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property and can only be impeached under circumstances spelt out in Section 26 (1) of the [Land Registration Act](#), which provides as follows;  
“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.”

46. At the heart of this suit is a dispute over the subdivision and subsequent registration of the suit properties. In order to determine whether the title to the suit property was acquired fraudulently, this court of called upon to determine the root of the title for the suit properties. In so finding I am persuaded by the case of Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal number 239 of 2009, where the court 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.”

47. To prove that the Defendants acquired the titles by fraudulent means, the Plaintiffs listed particulars of illegality and malice on the part of the Defendants as follows:-

- a. Colluding to deprive the Plaintiffs their piece of land
- b. Failing to facilitate the Plaintiffs quiet possession of their land.
- c. Subdividing and registering the land without the Plaintiffs input.

48. The Plaintiffs alleged that the Defendants fraudulently subdivided the suit properties and caused the same to be registered in their names. It is the Plaintiffs case that on 17/10/2014, their late father subdivided his land amongst his sons and not amongst his wives. In this regard, the Plaintiffs produced an agreement dated 17/10/2014 between Nzioka Mutwanyingi and his ten sons. The subdivision is alleged to have been witnessed by the Assistant Chief Ndovea Sub Location.

49. The Defendants on the other hand denied the Plaintiffs allegations and insisted that the deceased subdivided his land amongst his three wives. They contended that due process of the law was followed in the issuance of the titles. The Defendant produced the minutes of the meeting held by Atangwa clan on 21/10/2017 where the clan subdivided the land in accordance with the deceased wishes. It was their evidence that the subdivisions and subsequent transfers were done during the lifetime of Nzioka Mutwanyingi and that the Plaintiffs were aware of the same. In this regard, the 1<sup>st</sup> Defendant produced a duly stamped consent DEX No. 2, to show that consent was issued on 21/8/2017 to Nzioka Mutwanyingi by the Nzau Land Control Board to subdivide Parcel No. 170, a quotation of Kshs. 15,000/= from the District Surveyor, Makueni County for subdivision of Parcel No. 170 into two portions DEX No. 1. The subdivision exercise that was done on 21/10/2017 yielded parcel Nos. Nzau/Kawala/993 and 994.

50. The 2<sup>nd</sup> Defendant produced an application for consent for transfer of Parcel No. Nzau/Kawala/994 as DEX No. 10. The subsequent consent by the Land Control Board Nzau dated 1/2/2018 was produced as DEX No. 11. Stamp duty on the transfer documents was then paid and a KRA payment slip was issued to the deceased on 13/4/2018. The payment slip was produced as DEX No. 9. The



title deeds for Parcel Nos. Nzai/Kawala/993 and 994 were eventually issued on 25/5/2018 as per DEX Nos. 12 and 13. Stamp duty for the transfer of Parcel No. 472 was also paid on 13/4/2018 and a payment slip issued as per DEX No. 8. It is crystal clear that the Defendants have explained the root of their titles.

51. From the evidence on record, the Plaintiffs have failed to demonstrate a case of fraud and illegality in the subdivision and subsequent transfer of land Parcel Nos. Nzai/Kawala/170 and 472. The Defendants adduced cogent evidence which confirms that they followed due process in acquiring their titles. In the circumstances, the Plaintiffs' suit must collapse.
52. It is crystal clear from the evidence on record that the titles in respect of the suit properties were issued during the lifetime of Nzioka Mutwanyingi deceased. The Plaintiffs alleged that their late father was not in his right mental state when the titles in respect of the suit property were issued. The Plaintiffs did not adduce any evidence to show that Nzioka Mutwanyingi was incapacitated or mentally unfit when the subdivision and transfers were being effected.
53. This court therefore finds and holds that the subdivisions and subsequent transfers were effected procedurally and in accordance with the law. I also find that the titles held by the Defendants do not fall under the category of titles that must be impeached.
54. Having found that the subdivision and subsequent transfers were effected procedurally, I find that the Plaintiffs are not entitled to the orders.

#### **Whether the 1<sup>st</sup> defendant is entitled to the orders sought in the counterclaim**

55. The 1<sup>st</sup> Defendant sought for an order of permanent injunction restraining the Defendants from trespassing, alienating, subdividing or interfering with their quiet possession of land parcels Nos. Nzai/Kawala/472 and 994. The 1<sup>st</sup> Defendant explained the root of her title. The court has already held that the subdivisions and subsequent transfer of the properties was done in accordance with the law. The 1<sup>st</sup> Defendant has demonstrated that she is the bona fide legal proprietor of land Parcel No. Nzai/Kawala/994 and the joint proprietor of Parcel No. Nzai/Kawala/472. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides as follows;

Subject to this Act;

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.

56. Section 25 of the [Land Registration Act](#) provides for the rights of a proprietor. It provides as follows:
  - I. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;
57. Having established that the 1<sup>st</sup> Defendant is the registered owner of the suit property, I find that she is entitled to all the rights, interest and privileges belonging thereto. The 1<sup>st</sup> Defendant is therefore entitled to an order of permanent injunction as sought in the counterclaim.
58. On costs, the general rule is outlined in Section 27 (1) of the [Civil Procedure Act](#) which provides as follows: -



1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

59. In view of the fact that the parties herein are closely related I hereby direct that each party bears its own costs.

70. In the end, I find that the Plaintiffs' have not proved their case against the Defendants on a balance of probabilities as required. I also find that the 1<sup>st</sup> Defendant has proved her counterclaim as required. Accordingly, the Plaintiffs suit is hereby dismissed. I enter judgment for the 1<sup>st</sup> Defendant against the Plaintiffs in the following terms:-

- i. An order of permanent injunction is hereby issued against the Plaintiff by themselves, servants, agents, employees and/or their children from entering, trespassing, alienating, subdividing or carrying out any wanton works of interfering with the Defendants quiet possession, use and enjoyment of plots Nzai/Kawala/472 and 994 and or in the alternative an eviction order.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF JUNE, 2024.**

In the presence of:

Kithuka for the Plaintiffs.

Wasolo for the Defendants.

Court assistant Alfred.

