



**Kariuki & another v Thondu & 5 others (Environment and Land Case 138 & 146 of 2018 (Consolidated)) [2024] KEELC 5542 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5542 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE 138 & 146 OF 2018 (CONSOLIDATED)  
LC KOMINGOI, J  
JULY 25, 2024**

**BETWEEN**

**GEORGE NGURE KARIUKI ..... PLAINTIFF**

**AND**

**DAVID MAHUGU THONDU ..... 1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, NGONG ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND CONTROL BOARD, NGONG ..... 3<sup>RD</sup> DEFENDANT**

**DISTRICT LAND SURVEYOR, KAJIADO ..... 4<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND CASE 146 OF 2018**

**BETWEEN**

**DAVID MAHUGU THONDU ..... PLAINTIFF**

**AND**

**GEORGE NGURE KARIUKI ..... 1<sup>ST</sup> DEFENDANT**

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**HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. By the Plaint dated 30<sup>th</sup> August 2018, the Plaintiff states that he is the registered owner of property Kajiado/Kipeto/1452 measuring approximately 10 acres from the year 1994 having purchased it from one Sapena Ole Lesapeye. He claims that he took possession, drilled a borehole and fenced the property. On 22<sup>nd</sup> January 2015 in due course of business, he decided to visit the Lands Registry to confirm the status of the property only to find that the records showed it was registered in the name of the 1<sup>st</sup> Defendant. This registration and transfer was fraudulently done which led the Plaintiff to report the matter to the Director of Criminal Investigation Ngong' who placed a restriction on the suit property.
2. The particulars of fraud against the 1<sup>st</sup> Defendant were; causing the property to be transferred without his consent; forging his signature on the documents used; causing the transfer without an agreement or consideration; interfering with the Plaintiff's quiet possession of the property.
3. The particulars of fraud against the 2<sup>nd</sup> Defendant were: transferring and subdividing the property to the 1<sup>st</sup> Defendant without due process being followed; issuing title to property when the other title was still in the Plaintiff's possession; despite a complaint being lodged, the 1<sup>st</sup> defendant allowed continued interference with the property; issuance of intention to remove caution dated 1<sup>st</sup> August 2018 despite the ongoing investigation.
4. The particulars of fraud against the 3<sup>rd</sup> Defendant were: processing a consent without summoning the registered proprietor; issuing consent in absence of the registered owner; issuing consent without following the due process and failing to exercise its mandate.
5. The particulars of fraud against the 4<sup>th</sup> Defendant were: issuing plans to the 1<sup>st</sup> Defendant without the Plaintiff's consent; using forged documents to allow the transfer; and failing to ensure the registry index map, records of survey and beacons tallied with the Plaintiff's ownership.
6. The Plaintiff therefore sought;
  - a. A permanent injunction be issued restraining the 1<sup>st</sup> Defendant, his servants and or agents from trespassing upon, harassing, intimidating, threatening, evicting, constructing structures, selling, allotting, alienating or denying Plaintiff's access to it, and / or in any way whatsoever interfering with the Plaintiffs parcel of land being Kajiado/Kipeto 1452.
  - b. An order directing the land registrar Ngong' to cancel the title number Kajiado/Kipeto 1452 in the name of the 1<sup>st</sup> Defendant or his agents and the title thereof do revert to the Plaintiff and a rectification of the green card accordingly.
  - c. A declaration be issued that the 1<sup>st</sup> Defendant's actions of entering into, transferring, or consents involving the Plaintiff's property being title number Kajiado/Kipeto 1452 without the consent, authority or agreement with the Plaintiff, contravened the rights of the Plaintiff to own and acquire property protected under the *Constitution*.
  - d. A declaration be issued that the acts of the 1<sup>st</sup> to the 4<sup>th</sup> defendants of aiding and / or abetting and the transfers of the title Kajiado/Kipeto 1452 in the name of the 1<sup>st</sup> Defendant are illegal and the same be reversed as they are unconstitutional.
  - e. A declaration be issued that title Kajiado/Kipeto 1452 and nay subsequent subdivisions done by the 1<sup>st</sup> Defendant obtained by fraudulent means and as such null and void and the same



and any subsequent subdivisions and transfers thereafter are null and void as a consequence thereof be cancelled.

- f. Costs of this suit with interest until payment in full.
  - g. Any other relief that this Hon. Court may deem fit and just to grant.
7. The 1<sup>st</sup> Defendant on 26<sup>th</sup> September 2018 then filed ELC case number 146 of 2018 herein consolidated with this suit. He claimed that he is the registered owner of property Kajiado/Kipeto/1452 pursuant to a transfer and title issued on 22<sup>nd</sup> January 2013. That sometime in 2005, he entered into an agreement with George Ngure Kariuki (the Plaintiff in ELC 138 of 2018) for the purchase of properties Kajiado/Kipeto/1573 and 1574 measuring 25 acres for a consideration of Kshs. 2,500,000 and paid Kshs. 1,650,000. George Ngure Kariuki however sold the said properties to a third party and offered him property Kajiado/Kipeto/1452 to cover the amount he had already paid. He then forwarded the duly executed completion documents to the 1<sup>st</sup> Defendant's advocates. The 1<sup>st</sup> Defendant realised that property Kajiado/Kipeto/1452 measured 10 acres and not 15 acres as claimed and refused to lodge the transfer documents. He informed the Plaintiff that he would take legal action against him and in 2012, the Plaintiff then handed him the original title of property Kajiado/Kipeto/1816 measuring 4 acres. In January 2013, the 1<sup>st</sup> Defendant lodged transfer of property Kajiado/Kipeto/1452 using the documents duly executed by the Plaintiff. He enjoyed peaceful possession until February 2015 when he was summoned by the Land Registrar on grounds that he had fraudulently transferred the suit property to himself. The director of Criminal Investigation placed a Restriction against the title pending investigations. He averred that the Plaintiff had no claim over property Kajiado/Kipeto/1452 having received consideration and executed completion documents and thus prayed for:
- a. A declaration that the transfer of title Kajiado/Kipeto/1452 to the Plaintiff was legal;
  - b. An order the District Land Registrar Kajiado North registry does forthwith lift the restriction placed on all dealings with title Kajiado/Kipeto/1452.
  - c. A permanent injunction restraining the 1<sup>st</sup> Defendant whether by himself his agents, servants and or nominees howsoever from entering, occupying, residing on or otherwise claiming title or interest whatsoever in the land known as Kajiado/Kipeto/1452 or any part thereof or otherwise interfering with the Plaintiff's quiet enjoyment of the said property.
  - d. An order of specific performance directing the 1<sup>st</sup> Defendant to transfer 1 acre within the neighbourhood of Kajiado/Kipeto/1452 to the Plaintiff.
  - e. Damages for loss of use of title Kajiado/Kipeto/1452 from November 2014.
  - f. Costs of the suit and interest thereon.
8. In response, the Plaintiff in his statement of defence acknowledged that he sold property Kajiado/Kipeto/1816 to the 1<sup>st</sup> defendant but insisted that Kajiado/Kipeto/1452 was unlawfully transferred and filed a counterclaim seeking the orders sought in the Plaintiff.
9. The 2<sup>nd</sup> to the 5<sup>th</sup> Defendants in their submissions claim that they filed a statement of defence dated 15<sup>th</sup> October 2024 (sic) but this defence is neither in the court file nor on the Judicial Case Tracking System digital portal. That the transfer of the suit property to the 1<sup>st</sup> defendant was done based on the documents presented to the 2<sup>nd</sup> Defendant which the registrar believed to be genuine.



10. On 10<sup>th</sup> March 2021 the 1<sup>st</sup> Defendant herein passed on and his advocates informed court that there were no steps by the beneficiaries to prosecute the suit. Through a court order dated 26<sup>th</sup> April 2023, ELC 146 of 2018 was marked abated. As such, case ELC 138 of 2018 proceeded exparte.

### **Evidence of the Plaintiff**

11. PW1, George Ngure Kariuki adopted his witness statement as part of his evidence in chief and produced documents marked as P. Exhibit 1-6. He stated that he was the registered owner of Kajiado/Kipeto/1452 having purchased it in 1994. He thus sued the 1<sup>st</sup> Defendant for fraudulently transferring the property to himself, the 2<sup>nd</sup> Defendant for issuing title uprocedurally. He sought that the entries in the green card be cancelled and rectified and the 1<sup>st</sup> Defendant's Estate be restrained from interfering with the property as well as all the other prayers in the Plaint. During cross examination he acknowledged having transferred property Kajiado/Kipeto/1816 to the 1<sup>st</sup> Defendant and acknowledged that the signature on the transfer documents for said property including the application for consent from the Land Control Board was his but the one on transfer documents for Kajiado/Kipeto/1452 was forged. He stated that the Land Registrar ought to have taken into consideration that his signature on documents for Kajiado/Kipeto/ 1452 was not witnessed by an advocate and should have also asked for the original title to the property. He did not produce the original title to property 1452 in court. He also confirmed that he did not have evidence of purchase of the suit property from one Ole Sapena in court.
12. On re-examination he stated that the signature was for the transfer of property Kajiado/Kipeto/1816 and not Kajiado/Kipeto/1452. Therefore, the suit property was transferred illegally. He confirmed that the signature on the consent from the Land Control Board was his although it did not specify the property that was being sold. He stated that he did not attend any meeting at the Land Control Board.
13. This marked the close of the Plaintiffs' case. The Plaintiff tendered final written submissions.

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

14. Counsel submitted that it was not in issue that the Plaintiff is the registered owner of the suit property Kajiado/Kipeto/1452 and his proprietorship was protected by Article 40, 60(1)(b) and 64 of the *Constitution*, as well as Sections 24, 25 and 26 of the *Land Registration Act*. And the certificate of title was conclusive evidence of the said ownership as held in: *Wreck Motors Enterprises v The Commissioner of Lands & others* [1997] eKLR and *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR. Counsel also submitted that no evidence was tabled to challenge this and the 1<sup>st</sup> Defendant did not support its case. Therefore, the Plaintiffs case was unchallenged as held in: *Motex Knitwear Ltd v Gopitex Knitwear Mills Ltd* [2009] eKLR, *Trust Bank Ltd v Paramount Universal Bank Ltd & 2 others* [2012] eKLR and *Karuru Munyororo v Joseph Ndumia Murage & another* [1988] eKLR.
15. On whether the transfer and registration of title can be processed without title, sale agreement and land control board consent, counsel submitted that the documents lodged neither had consideration nor payment of stamp duty and there was no sale agreement between the parties. Therefore, any transfer undertaken was un-procedurally done citing *Patrick Tarzan Matu & another v Nassim Shariiff Abdulla & 2 others* [2009] eKLR and *Trust Bank Ltd v Paramount Universal Bank Ltd & 2 others* (*supra*).
16. The Plaintiff should thus be granted orders sought together with costs.



## The 2<sup>nd</sup> – 5<sup>th</sup> Defendants submissions

17. Counsel submitted that the plaintiff did not produce evidence to prove the allegation of fraud against the 2<sup>nd</sup> to 5<sup>th</sup> Defendants.
18. On the issue of ownership, counsel submitted that no evidence was produced by the 1<sup>st</sup> Defendant to refute the Plaintiffs claim that he acquired title to the property illegally. Therefore, the court should look at the history of title to determine who had a better title.

## Analysis and Determination

19. I have considered the pleadings, the evidence on record, the written submissions and authorities cited. The issues for determination are:
  - i. Whether the Plaintiff is the lawful owner of property Kajiado/Kipeto/1452.
  - ii. Is he entitled to the orders sought.
  - iii. Who should bear costs of the suit?
20. The Plaintiff's case is that property known as Kajiado/Kipeto/1452 had been continuously registered in his name and remained under his possession until 2015, at which time he discovered that the 1<sup>st</sup> Defendant had fraudulently transferred the property to himself without his knowledge and/or consent. The Plaintiff acknowledged that he sold property Kajiado/Kipeto/1816 to the 1<sup>st</sup> Defendant but vehemently contested any claim of having sold property Kajiado/Kipeto/1452. The 1<sup>st</sup> Defendant, in his defence, made adverse claims concerning the acquisition of both properties. Unfortunately, he passed away before prosecuting his suit, and he was not substituted, resulting in the suit to abate.
21. There is no dispute that property Kajiado/Kipeto/1452 originally belonged to the Plaintiff. A certified copy of the green card dated 22<sup>nd</sup> January 2015, produced as evidence, indicates that the Plaintiff was issued the title to the suit property on 18<sup>th</sup> October 1994, and on 22<sup>nd</sup> January 2013, the property was transferred to David Mahugu Thondu, and a title issued. The Plaintiff however claims that the signature on the transfer instruments and the Land Control Board consent forms which effected this transfer was forged.
22. Despite this suit proceeding *ex parte*, the legal doctrine of 'he who alleges must prove' must be upheld, regardless of whether the evidence is contested or not. The burden of proof lies with the party who stands to lose if the opposing party provides no evidence. This is etched in Section 107 to 109 of the [Evidence Act](#) replicated hereunder:

“Section

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.



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
23. The Plaintiff also produced a letter dated 2<sup>nd</sup> August 2018 addressed to the Land Registrar Kajiado, in which he states: “... However, what I suspect happened is that I had sold Mr. David Thondu Mahugu my parcel of land Kajiado/Kipeto/1816 around 24<sup>th</sup> February 2015 and 25<sup>th</sup> May 2015. I had bought this parcel of land from Mr. George Kamau Mbugua in 2006 and after going through the due process of land consent board and transfers I was issued with a new title deed on 28<sup>th</sup> August 2007... In the process of consent and land transfer I signed the respective documents for Mr. Mahugu transferring Kajiado/Kipeto/1816 to him. He however asked my secretary M/s Lilian Wahito blank signed transfer and consent papers stating that he has lost earlier one. She obliged and got me to do the needful...”
24. In civil proceedings, the burden of proof, which is based on the balance of probabilities, requires the court to determine what is most likely to have occurred, considering all factors. This was voiced by the Court of Appeal in *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR: “In making such a determination we need to examine whether the appellant discharged its burden of proof on a balance of probability to prove ownership of the motor-vehicle. The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities.”
25. I am satisfied that the Plaintiff has proved his case as against the Defendant’s in a balance of probabilities. The 1<sup>st</sup> Defendant’s counter claim is therefore dismissed.
26. Accordingly Judgement is entered for the Plaintiff as against the Defendants as follows;
- a. That a permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant, his servants and or agents from trespassing upon, harassing, intimidating, threatening, evicting, constructing structures, selling, allotting, alienating or denying Plaintiff’s access to it, and / or in any way whatsoever interfering with the Plaintiffs parcel of land being Kajiado/Kipeto 1452.
  - b. That an order is hereby issued directing the land registrar Ngong’ to cancel the title number Kajiado/Kipeto 1452 in the name of the 1<sup>st</sup> Defendant or his agents and the title thereof do revert to the Plaintiff and a rectification of the green card accordingly.
  - c. That a declaration is hereby issued that the 1<sup>st</sup> Defendant’s actions of entering into, transferring, or consents involving the Plaintiff’s property being title number Kajiado/Kipeto 1452 without the consent, authority or agreement with the Plaintiff, contravened the rights of the Plaintiff to own and acquire property protected under the *Constitution*.
  - d. That a declaration is hereby issued that the acts of the 1<sup>st</sup> to the 4<sup>th</sup> defendants of aiding and / or abetting and the transfers of the title Kajiado/Kipeto 1452 in the name of the 1<sup>st</sup> Defendant are illegal and the same be reversed as they are unconstitutional.
  - e. That a declaration is hereby issued that title Kajiado/Kipeto 1452 and any subsequent subdivisions done by the 1<sup>st</sup> Defendant and transfers thereafter are null and void as a consequence thereof be cancelled.
  - f. That costs of this suit to be borne by the 1<sup>st</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25<sup>TH</sup> DAY OF JULY 2024.**



**L. KOMINGOI**

**JUDGE.**

In the presence of:

Ms. Mwikali for Mr. Murimi Murango for the Plaintiff.

Mr. Otiende for the 1<sup>st</sup> Defendant.

Ms. Nyawira for the 2<sup>nd</sup> to 5<sup>th</sup> Defendants.

Court Assistant – Mutisya.

