



**Tinega (Suing as Legal Representative of the Estate of Nahason
Tinega Kurura) v Mogeni & 2 others (Environment & Land Case
109 of 2021) [2024] KEELC 5598 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 109 OF 2021**

JM KAMAU, J

JULY 25, 2024

BETWEEN

**ABEL KURURA TINEGA (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF NAHASON TINEGA KURURA) APPLICANT**

AND

SHADRACK ORINA MOGENI 1ST DEFENDANT

HEZRON NYANGAU MOGENI 2ND DEFENDANT

EVANS GESORA MOGENI 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 20/9/2007 and amended on 27/10/2014 the Plaintiff sued the Defendants for the following orders: -
 - a. A Declaration that the Defendants are not entitled to enter, remain or use the suit property viz; - Title No Settlement Fund Trustee/Ekerubo/26.
 - b. A permanent injunction do issue to restrain the Defendants whether by themselves, their servants or agents or otherwise howsoever from entering, remaining or using, alienating the suit property and from interfering with the Plaintiff and other Dependants of the Estate of the Deceased quiet possession and enjoyment of the suit property namely Title No Settlement Fund Trustee/Ekerubo/26.
 - c. An order do issue that the Defendants give vacant possession of the part of the suit property they are occupying forthwith in default whereof an order of eviction should issue against the Defendants, their servants and/or agents.
 - d. Damages on the footing of aggravated damages.



- e. Costs of the suit together with interest on (c) and (d) herein.
 - f. Further or other relief.
2. The prayers for the aforesaid reliefs are based on the Plaintiff's claim who has filed the suit in a representative capacity on behalf of the Estate of his late father Nahason Tinega Kurura who died on 9/3/2004 and having been granted letters of administration on 30/08/2012 in Kisii High Court succession Cause No 267 of 2012. The Deceased was the registered owner of Settlement Fund Trustee/ Ekerubo/26 measuring approximately 19.0 Hectares vide Title Deed issued on 2/5/2000. The beneficial owners of the suit land are therefore the Plaintiff and his siblings. The Defendants are said to have trespassed on part of the suit property in 1992 but were repulsed by Ekerubo Farmers Co-operative Society Ltd., the Society that initially owned the land. It is on record that in Criminal case No 951 of 1992 at Keroka wherein the Defendants were charged with malicious damage to property and were acquitted, the Court did find that the suit property belonged to the Plaintiff's Deceased father, Nahason Tinega Kurura. After the Deceased's death the Defendants started occupying ¼ of an Acre of the suit land and also started cultivating 10 Acres of the same forcefully in spite of several demands.
 3. In a joint Defence dated 9/11/2007 and amended on 27/10/2015 introducing a Counterclaim, the Defendants denied all the material facts contained in the Plaintiff's claim. They claim that the Title Deed in respect of the suit property was issued wrongfully and unlawfully to the Plaintiff's father just as other Titles in respect of the other shareholders of Ekerubo Farmers Co-operative Society Ltd in LR No Land Parcel No Ekerubo/999101 in the year 2000 since survey had not been concluded courtesy of a Restriction by the Chief Land Registrar. They also claim that their late father Stephen Mogeni Arita who died on 12/06/2002 was a fully paid up member of the Society and that they have stayed on the Society's land since 1965. They were allocated plot No 25 by the Society which was to be part of their land after survey work is complete.
 4. In their counter claim, the Defendants through Benson Mogeni Arita, the 2nd Defendant in his capacity as the personal Representative of the Estate of Stephano Mogeni Arita, their late father who died on 12/06/2002 having obtained a Grant in respect of the said Estate in Kisii High Court Succession Cause No 706 of 2012 joined the Society, the Chief Land Registrar, County Land Registrar, Nyamira County, County Registrar Nyamira and the Attorney General as Defendants in the counterclaim. But to avoid confusion, I will refer to the Plaintiff in the Counterclaim as 2nd Defendant as christened in the Plaintiff's claim and Ekerubo Farmers Co-operative Society (hereinafter referred to as the Society), the Chief Land Registrar, County Land Registrar, Nyamira County, County Registrar Nyamira and the Attorney General as 4th, 5th, 6th, 7th, 8th and 9th Defendants respectively. He claims that his late father was among the first 100 shareholders of the Society which was formed in 1968 being shareholder No 75. He was allocated the initial 10 Acres of land in Ekerubo Settlement Scheme vide a General Meeting Resolution Minutes No 2(a) and (b) and No 4 out of 45 Acres that each member was to receive. Out of the entire 4500 Acres piece of land. His father was given a further 10 Acres next to his earlier 10, the latter having been surrendered by the 2nd Defendant's uncle, Joram Obiero Arita awaiting 25 Acres so that he could get a total of 45 Acres. The above was rectified by the Society's Management Committee on 29/10/1990 which was met with resistance by a number of shareholders and as a consequence, the Chief Land Registrar stopped the issuance of Title Deeds which confusion the 2nd Defendant attributes to the Land surveyors. Accordingly, the 2nd Defendant prays for Judgment for: -
 - a. A Declaration that the Plaintiff to the counter claim together with all family members of the late Stephano Mogeni Arita are entitled to the initial 20 Acres of land given to the said late Stephano Mogeni Arita by Ekerubo Farmers Society the 2nd Defendant to the counterclaim as



per the resolution of the Society. Further the Plaintiff claims against all the Defendants jointly and severally is for Declaration that the Plaintiff, his brothers, sisters and all the family members are entitled to occupy, possess and use the 20 Acres of land initially given to the late Stephano Mogeni Arita by the Society and then he was to be added 25 Acres of land to make a total of 45 Acres which they are entitled.

- b. An order directing the Defendant to the counterclaim jointly and severally and especially the 2nd Defendant to re-survey the said entire parcel of land so as to provide for the said initial 20 acres of land given to the said Plaintiff's late father as his first entailment as per the Society resolution.
 - c. An order declaring that the 20 Acres of land were wrongly and unlawfully included in LR No Ekerubo Settlement Scheme/26.
 - d. An order directing the 2nd Defendant to the counterclaim to resurvey its land in such away that it does not affect the current position of the 20 acres of land on the ground and the settlement, occupation, possession and user by the Plaintiff and the entire family of late Stephano Mogeni Arita being the initial 20 Acres of land given by the society to the late Stephano Mogeni Arita and add to the said 25 Acres to make the 45 Acres being his (the late Stephano Mogeni Arita entitlement.)
 - e. An order of cancellation of the sub-division of the 2nd Defendants to the counterclaim's land and specifically the cancellation of the (new) numbers 24, 25 and 26.
 - f. A permanent injunction to restrain the 1st Defendant to the counterclaim by himself, his agents, servants, assigns from in any way or manner whatsoever interfering with the peaceful occupation, possession and use of the 20 Acres of land currently the Plaintiff to the counterclaim and the family of the late Stephano Mogeni Arita are occupying using and possession.
 - g. Any other relief(s) this Honourable Court shall deem fit to grant in the circumstances of this suit.
 - h. Costs of this counterclaim together with the interest thereon.
5. The Chief Land Registrar, being the 4th Defendant by a Defence dated 8/12/2015 denied the entire contents of the counterclaim and prayed that the same be dismissed with costs. The Society equally denied the contents contained in the Defence and counterclaim in a Defence dated 15/12/2015.
 6. The Society clarified that the Plaintiff's father was allocated plot No 26 while the 2nd defendant's father was allocated Plot No 25 in Ekerubo Settlement Scheme on 4/1/1991 and Title Deeds were to be issued to that effect. A complaint filed by the dissatisfied shareholders including the 2nd Defendant's father was dismissed by the Co-operative Tribunal vide an award delivered on 6/11/1992 in Tribunal Case No 29 of 1991.
 7. An Appeal to the commissioner of Co-operatives vide Case No .5 of 1992 was equally unsuccessful on Appeal delivered on 8/8/1994. The Minister equally upheld the said Decision just as the High Court in Kisii High Court Judicial Review Case No 1659 of 1999 on 6/12/2000. Among the orders denied was the prayer for Mandamus to compel the Director of Surveys to resurvey Land Parcel No Ekerubo/999101, the parent land and therefore the issue has been concluded.



8. The Plaintiff in Reply to Defence and Defence to Counterclaim denied the 2nd Defendant's claim and repeated the contents of the Plaint and further averred that if indeed the father to the first 3 Defendants was a member of the Society, then he was initially only entitled to 10 Acres and not 20.
9. On 28/6/2018 Justice Mutungi ordered that the Land Registrar, Kisii and the County Surveyor, Nyamira do visit LR No Ekerubo Settlement Scheme/25 and 26 to establish the physical boundaries on the ground and file a Report within 90 days with all the parties being at liberty to be represented by their independent respective surveyors. The Report was filed in Court on 14/3/2019.
10. The Court held that the same did not resolve all the issues raised in the pleadings and could therefore not be the basis of a Judgment. But the Reports affirmed the status of occupation and utilization of the disputed parcels of land. They could also be used and admitted as part of the record by either party and any of the authors of the Reports could be called as witnesses to produce the Reports.
11. The case then proceeded for Hearing on 1/10/2020 with Abel Karura Tinega, the Plaintiff, taking to the witness box first. He said that his father was a shareholder with Ekerubo Farmers Co-operative Society where he was allocated Land Parcel No 26. He produced a Grant of Letters of Administration in respect of the Estate of his late father Nahason Tinega Karuri who died on 9/3/2004. The same was obtained from Kisii High Court in Succession Case No 267 of 2012 on 30/8/2012. It was granted to Simon Omesa Tinega who died while the Succession case was going on and the Plaintiff herein substituted him vide Court order dated 7/7/2014 in Kisii High Court Succession No 267 of 2012 and subsequently in the case at hand on 15/10/2014. He equally produced a list of the allottees of Ekerubo Farmers Co-operative Society Ltd and their plot numbers showing that Nahason Tinega Karura was allocated Plot No 26 while Stephano Mogeni Arita got Plot No 25. The same bears the Rubber stamp of the Society. He also produced a copy of the Judgment in the Co-operatives Society Tribunal Arbitration Case No 29 of 1991 between Harun Nyakoe and 14 others versus Ekerubo Farmers' Co-operative Society Ltd.
12. The Court ruled on 6/11/1992 that all the shareholders should possess the 10 initial Acres allocated to each one of them and the complaint by the 15 shareholders who included the Defendant's father was therefore dismissed. There is a copy of Judgment from the Commissioner for Co-operatives Development by Appeal Case No 5 of 1992 which confirmed the Judgment of the Tribunal and further ordered that the District Land Registrar, Nyamira do issue Title Deeds to members whose plots did not have encumbrances. This was on 8/8/1994.
13. The Minister reversed the Decision on 14/12/1999, but which was quashed by the High Court in Miscellaneous Application No 1659 of 1999 Kisii for want of jurisdiction. The Commissioner of Co-operatives' Decision was upheld.
14. Consequently, as shown in the Green Card issued on 12/11/2014 Parcel No 26 was first registered in the name of Nahason Tinega Kurura on 2/5/2000 and a Title Deed issued the same day. The same measures 19 Hectares and as late as 28/10/2014 when a certificate of official search was issued the same remained so. On cross-examination, the witness said that he was born on the suit land and that their homestead has remained in the same place since his birth. Plot No 25 is registered in the name of Settlement Fund Trustees. He also said that the Defendants have never contested their (the Defendants') allocation of Plot No 25.
15. PW2, Charles Mwendwa Mutua, the Land Registrar, Nyamira produced his Report dated 28/1/2019 made jointly with the County Surveyor after visit to the suit land. He testified that Parcel No 25 is still registered in the name of Ekerubo Settlement Scheme. He said that Plot No 26 is occupied by both the Plaintiff and the Defendants. But their mandate did not include establishing the ownership of plot



No 26. The County Surveyor Mr. Robert Atika Torori testified that there is encroachment of 25 acres (8.5 Hectares) or thereabout on Plot No 26 by the owners of Plot No 25 and that he did not measure the acreage of parcel No 26 after the encroachment. He also did not measure the acreage of plot No 25.

16. Having the Plaintiff's case closed, the Defendants' case commenced with DW1, Evans Matena Mogeni testifying by first adopting his witness statement dated 24/9/2013. He testified that he is the son of Stephano Mogeni Arita who was a shareholder of Ekerubo Farmers' Co-operative Society being shareholder No 75 and having joined the Society in 1968. He was initially allocated 10 Acres at a time the Society owned 5000 Acres with a membership of 100 who were to share the land equally after settling the loan with Settlement Funds Trustees. Each member was to get a total of 45 Acres. The member had been promised to get a further 35 Acres where the initial 10 Acres were. But his father did not get the 35 Acres and was told to relocate to another place and demolish his semi-permanent house. He was told to move to Plot No 25, 21 Acres of which was rocky. He then got additional 10 Acres from his brother Joram Obiero Arita who moved elsewhere. He contends that the Plaintiff's registered land measuring 20 Acres belongs to them. The Witness then produced:

1. Minutes of Ekerubo Farmers Society of 5th December, 1983.
2. Official searches in respect to Ekerubo Settlement Scheme Nos. 24,25,26 and 27.
3. Proceedings and Ruling of Co-operative Arbitration case No 29 Of 1991.
4. Appeal case No 5 of 1992.
5. Court's order dated 15th July 1999 issue don 22/7/1999 in Nairobi Misc. Application No 1413 of 1998.
6. Courts Order dated 21st August, 2006 in Nairobi HC Misc. Application No 611 of 2005.
7. Proceedings in Arbitration case No 33 of 1995.
8. The Chief Land Registrar's letter Dated 20th February ,2991.
9. Various correspondences between the department of settlement Farmers Ekerubo FCS Ltd Ministry of Lands and Survey of Kenya.
10. Public meeting proceedings of 18/1/2007.
11. Certificate of death of Callolin Nyakerario Mogeni issued on 14/3/91.
12. Allocation of plots of members of Ekerubo FCS LTD.
13. Surveyor's report of 19th May 1995.
14. Registry Map.
15. Various forms issued by Ekerubo FCS LTD to its farmers.
16. Stephen Mogeno's letter dated 30/12/1990 to the Chairman Ekerubo FCS LTD.
17. Mutation Forms and survey plans of -Ekerubo Farm.
18. Certified copies of the Register in respect of Ekerubo Settlement Scheme/25 and 26.
19. Letters of Ekerubo FCS LTD dated 25th June, 1981.
20. Ekerubo Reaching F.C.S Ltd Minutes (2.9.80)
21. Minutes of Special General Meeting of Ekerubo FCS Ltd dated 29/9/1985.



22. Minutes of Joint meeting of Ekerubo Farmers C0-operative Society Ltd dated 26-8-87.
 23. Letter from Ekerubo FCS Ltd to T. Ombwori dated 30/5/1991.
 24. Letter from the District Officer, Borabu Division to the Director of lands and Housing dated 4/10/1991 with the list of farmers.
 25. Letter from Ekerubo FCS Ltd to Stephano Mogeni Arita dated 16/12/1994.
 26. Letter from the Ministry of lands and Settlement to Haron Nyakoe dated 12/6/1996 and cautions dated 16/11/1999.
 27. Caveat (forbidding registration of dealings with land) dated 3/3/2003.
 28. Baraza held at Ekerubo FCS Ltd by District Commissioner Nyamira dated 18/1/2007. Crop damage assessment Report dated 19/1/2006.
 29. Surveyor's report dated 29/01/2015.
 30. Surveyor's report dated 21/02/2019.
17. On cross-examination by Mr. Ochwangi he said that his father ought to have been allocated Plot No 26 and not No 25 which is being occupied by someone else. He admitted in re-examination that he occupies 21 Acres within parcel No 26 since 1968. They were initially allocated part of parcel No 26.
 18. DW2, Nelson Gichana Mabeya, a neighbour who knew both parties' fathers said there were 100 shareholders of the Society. He said that he surrendered his parcel to Stephano Mogeni Arita to make it 20 Acres. Joram then surrender his 10 Acres to Mogeni. However, he could not tell what parcel numbers were surrendered.
 19. A Private Surveyor with Prime Land Surveyor, Solomon Njoga appeared as Dw3. He said that parcel No 26 ought to be owned by Nahason Tinega's family according to the Society minutes but that on the ground the same is occupied by Mogeni's family. Mogenis' occupy almost 21 Acres of parcel No 26. On cross-examination he said that Plot No 25 belongs to Stephano Mogeni Arita and No 26 to Nahason Tinega Kurura. He admitted that on the ground both families occupy Plot No 26 but that plot No 26 belongs to the family of Tinega.
 20. DW4 who said that he was not an official of the Society testified that Plot No 25 belonged to Stephano Mogeni Arita while Plot No 26 belonged to Nahason Tinega Kurura but that Charles Tinega was staying on Plot No 25.
 21. DW5, County Surveyor Josephat Gesure testified that the 1st, 2nd and 3rd Defendants occupy 21 Acres out of Ekerubo Society/26. Ekerubo Settlement Scheme/25 measures 48.5 Acres whose 10 Acres are arable and 39 Acres are rocky. Parcel No 26 measures 48 Acres. Parcel No 26 is all arable.
 22. The last witness, Shadrack Omwenga Oriku an 82-year-old male adult testified that each person was given 10 Acres but that some people refused to move to where they were told to move to.
 23. This is the evidence adduced in Court.
 24. The issue before the Court is the sanctity of the Title Deed held by the Plaintiff in respect of the parcel of land known as Ekerubo Settlement Scheme/Ekerubo/26 held by the Plaintiff and whether the Defendants have occupied part of the same and if so, is the occupation lawful. To begin with, it is settled law that Title to land is prima facie evidence that the Title holder is the lawful proprietor of the said land. However, this is a rebuttable presumption. Whoever would wish to challenge the



legality of the said Title must produce evidence and prove on a higher burden than the ordinary balance of probability that the parcel of land is unlawfully registered in the name of the Title holder. The other way to disregard the Title and deny the Title Holder the ownership is by way of adverse possession. From the evidence produced in Court, it is not in dispute that the father of the Plaintiff, one Nahason Tinega Kurura was member number 75 of Ekerubo Farmers Co-Operative Society Ltd and who was entitled to 45 Acres out of the parcel of land known as Ekerubo Settlement Scheme where he was allocated parcel No 26, initially 10 Acres and later 35 like every other shareholder thereof. The Defendant's father Stephano Mogeni Arita was allocated the next parcel of land being Plot No 25. There was dissatisfaction by 15 shareholders of the Society who included the father to the Defendants who referred the complaint of the allocation of the said parcels to the Co-operative Tribunal but lost and did not succeed on Appeal to the Commissioner of Co-operatives but only got temporarily reprieve on appeal to the minister which reprieve was overturned by the High Court in Judicial Review Miscellaneous Civil Application Number 1659 of 1999 in Kisii High Court.

25. Accordingly, Title Deeds were issued and Settlement Fund Trustee/ Ekerubo/26, measuring 19 Hectares was issued to Nahason Tinega Kurura on 2/5/200 as shown in the Title Deed and a copy of certificate of official search dated 25/10/2014. Before then, the Title was in the name of Settlement Fund Trustee since 3/7/1991. The same has no encumbrances after the Restriction by the Chief Land Registrar placed over the land on 20/2/2001 was removed on 6/4/2004 vide order of Kisii Misc. Civil Application No 1659 of 1999. On the other hand, the Defendants wish to challenge the Title Deed by urging that the Court cancels the Title by arguing that the same was issued wrongfully and unlawfully to include 20 Acres in LR No Ekerubo Settlement Scheme/26 which belong to them.
26. In the first place there are no particulars of fraud and none was proved. The Plaintiff's father got a clean Title and the Court cannot fault it nor impeach it.
27. It is also on record that in Keroka Criminal case No 951 of 1992 wherein the Defendants were charged with malicious damage to property and were acquitted, the Court did find that the suit property belonged to the Plaintiff's Deceased father, Nahason Tinega Kurura.
28. This observation of a competent Court was not appealed against.
29. Section 24(a) of the *Land Registration Act*, 2012, provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. Under 26(1) of the said Act the certificate of Title issued by the Land Registrar upon registration to a purchaser of land upon transfer 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 thereof. As the absolute proprietor of the suit property, the holder of the Title Deed is entitled to enjoy rights and privileges associated with such ownership which include exclusive use, possession and enjoyment thereof without interference by any third party.
30. Under Section 25 of the *Land Registration Act*, 2012), no Title shall be impeached until fraud shall have been established in accordance with section 26 (1) of the *Land Registration Act* 2012 which provides as follows:
 - (1) 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.”

31. Before any order may be made in terms of Article 40 (6) of the Constitution of Kenya 2010 and section 26 (1) (a) of the Land Registration Act 2012 that the Title to land was acquired by fraud, misrepresentation and/or illegally and it is therefore not protected by the Constitution, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein was not proved.
32. On the other hand, the Declarations and Orders sought in the Counterclaim are the direct converse of what is claimed in the Plaint. Having found that the 2nd Defendant did not prove that the suit land was registered in the name of Nahason Tinega Kurura fraudulently or illegally or through any malpractice howsoever and that the Plaintiff's father/the estate of Nahason Tinega Kurura is the rightful owner of the parcel of land known as Title No Title No Settlement Fund Trustee/Ekerubo/26 having obtained a clean Title thereof, the case for the 2nd Defendant in the main Suit (Plaintiff in the Counterclaim) against the Plaintiff as set out in his Counterclaim dated 9/11/2007 and amended on 27/10/2015 has not been proved and can therefore not stand. The same is hereby dismissed with costs to the Plaintiff.
33. In the premises, I do not find any grounds of denying the Estate of Nahason Tinega Kurura of a fairly and lawfully acquired Title to land and the Plaintiff succeeds in this Suit and I hereby enter judgement in his favour in the following terms: -
- a. A Declaration do hereby issue that the estate of Nahason Tinega Kurura is the rightful owner of the parcel of land known as Title No Title No Settlement Fund Trustee/Ekerubo/26.
 - b. The Land Registrar, Nyamira is hereby ordered to ensure the property known as Title No Title No Settlement Fund Trustee/Ekerubo/26 remains in the name of Nahason Tinega Kurura pending the process of Succession and distribution to its rightful Dependants.
 - c. A Declaration do issue that the Defendants are not entitled to enter, remain or use the suit property known as Title No Settlement Fund Trustee/Ekerubo/26.
 - d. A permanent injunction do issue to restrain the Defendants whether by themselves, their servants and/or agents or otherwise howsoever from entering, remaining or using, alienating the suit property and from interfering with the Plaintiff and other Dependants of the Estate of the Deceased quiet possession and enjoyment of the suit property namely Title No Settlement Fund Trustee/Ekerubo/26.
 - e. An order be and is hereby issued that the Defendants do vacate the suit property Title No Settlement Fund Trustee/Ekerubo/ 26 forthwith and in default thereof an order of eviction do issue against the Defendants, their servants and/or agents.
 - f. The prayer for General Damages for trespass is disallowed for want of proof.
 - g. The Counterclaim dated 9/11/2007 and amended on 27/10/2015 be and is hereby dismissed in its entirety with costs to the Plaintiff.
 - h. On the issue of costs, the same follow the event and I accordingly order that the Defendants do pay the costs of this suit to the Plaintiff in addition to those of the Counterclaim.



JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF JULY, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Kennedy

Applicants' Counsel: Mr. Momanyi Aunga.

Respondents' Counsel: Ms. Moeche

