



**Varsani v Kapai & 2 others (Environment & Land Case  
514 of 2017) [2024] KEELC 5357 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5357 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 514 OF 2017  
MN GICHERU, J  
JULY 17, 2024**

**BETWEEN**

**MEGHJI MAINJI VARSANI ..... APPLICANT**

**AND**

**RAPHAEL LERIONKA KAPAI ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KAJIADO ..... 2<sup>ND</sup> RESPONDENT**

**GODFREY KANTAI NTAYIA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The plaintiff seeks the following reliefs against the defendants both jointly and severally as per the amended plaint dated 13/7/2017.
  - aa. A declaration that the plaintiff is the rightful owner of plots numbers 8 (1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 ) Res(Noonkopir T.C, suit land.
  - a. A permanent injunction restraining the defendants either by themselves or by their agents from entering; erecting structures or undertaking any forms of works on the suit land.
  - b. Cancellation of Title No. KJD/Noonkopir/30.
  - c. Costs of this suit.
  - d. Other or further relief as this Honourable Court may deem fit to grant.
2. The plaintiff's case is as follows. In the year 2007 he purchased plots Numbers 7 and 8 Industrial Noonkopir from the late Lalfi Valji Kerai who used to run a limestone business in Kitengela Township. The late L.V. Kerai had bought the two plots from Ngethe Kibuba in the year 1988. Among the documents that L.V. Kerai handed over to the plaintiff was a bundle of documents containing the history and details of the transaction between him and Ngethe Kibuba. The plots were officially



transferred to the plaintiff. Later on, the plaintiff sought and obtained permission to subdivide the two suit plots into 18 smaller plots. He was issued with letters of allotment for the subdivisions. Plot No. 7 was subdivided first and the plaintiff sold some of the resultant parcels to third parties who have built their homes and even a church thereon. Plot No. 8 was subdivided into 14 plots.

All these developments and subdivisions were done with the necessary approvals of the full council of the then Olkejuado County, the entity that the 2<sup>nd</sup> defendant succeeded.

3. In the year 2016, the 2<sup>nd</sup> defendant required the plaintiff to attend a verification exercise to confirm the location and allotment letters of the suit plots. He was also required to make a payment of Kshs. 74, 800/- to the 2<sup>nd</sup> defendant. On 27/5/2016 in compliance with the instructions issued by the 2<sup>nd</sup> defendant, the plaintiff appeared on site and had his allotment letters and plot measurements verified and stamped. He had already paid the required amounts. He was assured everything was in order. On 27/1/2017, the plaintiff was called by a neighbour who was one of the people that he had sold some of the subdivided plots to. He was informed that there was a borehole sinking machine on his land. The plaintiff sent his workers to the site and they were chased by goons hired by the invaders. He made a report at Kitengela Police Station where he was given OB No. 27/14/1/2017. He then went to the suit land and found works going on, on his land. He found the 1<sup>st</sup> defendant on the land and he claimed to have a title deed to the suit land. He gave the plaintiff a copy of the title deed. When he carried out a search, he found that the title deed was official. It is then that the plaintiff found out that the defendants had hatched a scheme to defraud him of his land using fraudulent means. He was never advised that the suit land did not belong to him and he only came to learn of the alleged ownership by the 1<sup>st</sup> defendant after the invasion.
4. The plaintiff's case is that the 1<sup>st</sup> and 2<sup>nd</sup> defendants fraudulently issued a lease to the 3<sup>rd</sup> defendant for the suit land which they renamed Kajiado/Noon Kopir/30. The 1<sup>st</sup> defendant purportedly paid Kshs. 13, 700,000/- to the 3<sup>rd</sup> defendant. Several particulars of fraud have been pleaded on the part of the defendants. They include issuing a certificate of lease to the 3<sup>rd</sup> defendant for a property that was not available for allocation, accepting a stand premium of Kshs. 90,000/- for land that belonged to the plaintiff, conspiring to defraud the plaintiff of his land by issuing a title deed on the same piece of land but on a different L.R. number, accepting payments and issuing official searches on plots in the name of the plaintiff while knowing that a certificate of lease had been fraudulently issued to a third party, failing to disclose to the plaintiff that the suit land had been allocated to the 3<sup>rd</sup> defendant and purporting to issue a title deed to the 1<sup>st</sup> and 3<sup>rd</sup> defendants on land that had been subdivided and alienated with the knowledge and approval of the 2<sup>nd</sup> defendant.
5. In support of his case, the plaintiff filed the following evidence.
  - i. Witness statement by the plaintiff dated 3/3/2017.
  - ii. Documents showing the history of transactions between L.V. Kerai and Ngethe Kibuba.
  - iii. Allotment letters for the suit land issued to the plaintiff by the 2<sup>nd</sup> defendant.
  - iv. Approvals and minutes of the meetings that gave the approvals to the plaintiff over the suit property.
  - v. Payment voucher for Kshs. 74, 800/- made to the 2<sup>nd</sup> defendant on 30/5/2016 for verification.
  - vi. Photographs showing the illegal development on the suit land by the 1<sup>st</sup> defendant.
  - vii. Copy of 1<sup>st</sup> defendant's title deed on the strength of which he has moved onto the suit land.



- viii. Copy of search certificate done on 1<sup>st</sup> defendant's title.
  - ix. Copies of certificates of search on the plaintiff's allotment letters and the receipt for the payment.
  - x. Survey report by Geomatics Survey Consultants Limited dated 26/11/2022.
  - xi. Copies of agreements for sale between the plaintiff and Go- Ye Worship Centre, Jaresh Otieno Ongos, Beatrice Afande Mukhola and one between Peter G. Karinge and Jane Wambui Njoroge dated 20/12/2018, 3/10/2008, 8/1/2009 and 19/2/2008 respectively.
6. The 1<sup>st</sup> defendant, through counsel on record filed a written statement of defence dated 1/8/2017 in which he avers as follows. Firstly, he is the bona fide owner of L.R. Kajiado/Noonkipir/30 measuring approximately 0.5865 hectares which he acquired through purchase from the 3<sup>rd</sup> defendant and followed due process in such acquisition which was sanctioned by the second defendant. Secondly, he has a certificate of lease dated 19/9/2012 issued by the Land Registrar Kajiado. Thirdly, it is him who has possession and not the plaintiff. Fourthly, in 2016 when the validation exercise took place, he was out of the country but on 18/1/2017 a verification exercise took place and on 15/5/2017 he was issued with a letter validating his ownership of Plot No. Kajiado/Noonkopir/30 and at the same time declaring the validation of Plot Numbers. 540 (a) to 540 (n) null and void. Fifthly, the documents presented by the 1<sup>st</sup> defendant to the court are genuine and authentic and they prove that he acquired the land for valuable consideration.

For the above and other reasons, he prays for the dismissal of the plaintiff's suit with costs.

7. In support of his case, the 1<sup>st</sup> defendant filed the following evidence.
- i. Witness statement by the 1<sup>st</sup> defendant and Achieng Betty Atieno.
  - ii. Copy of letter dated 8/10/2012 forwarding documents to the 1<sup>st</sup> defendant.
  - iii. Copy of sale agreement for L.R. Kajiado/Noonkopir/30 between the 3<sup>rd</sup> defendant and the 1<sup>st</sup> defendant.
  - iv. Copy of transfer of lease to the 3<sup>rd</sup> defendant.
  - v. Copy of certificate of lease for L.R. 30 in favour of the 3<sup>rd</sup> defendant.
  - vi. Copy of letter dated 15/8/2012 forwarding the lease documents.
  - vii. Copy of lease in favour of the 3<sup>rd</sup> defendant.
  - viii. Copies of logbooks, national ID, and P.I.N. certificate for the 1<sup>st</sup> defendant.
  - ix. Photograph of the 1<sup>st</sup> defendant's infrastructure on the suit land.
  - x. Copy of certificate of lease for L.R. 30 in favour of 1<sup>st</sup> defendant dated 27/1/2014.
  - xi. Copy of hydro geological assessment report in favour of the 1<sup>st</sup> defendant.
  - xii. EIA project report for the proposed bore hole on L.R. 30.
  - xiii. Photograph showing the complete borehole.
  - xiv. Copy of application for official search for L.R. No.30 and the payment therefor.
  - xv. Copy of letter dated 15/5/2017 from the 2<sup>nd</sup> defendant to the County Land Registrar, Kajiado.



8. The 2<sup>nd</sup> defendant filed a written statement of defence dated 7/6/2022 in which it avers as follows. Firstly, the plaintiff's claim is denied generally. Secondly, the property in dispute is Plot No. 40 Noonkopir as per the plan and survey of Kenya not industrial plots number 7 and 8. Thirdly, the lease held by the 2<sup>nd</sup> defendant is lawful and legal and it denies any fraud attributed to it. For the above stated reasons, it prays for the dismissal of the plaintiff's suit.
9. In support of its case, the second defendant filed the following evidence.
  - i. Witness statement by Joshua N.Lemaikai, County Director of Survey.
  - ii. Copy of survey report dated 14/2/2022 accompanied by records dating back to the year 1988.
10. The third defendant, filed a written statement of defence dated 30/1/2018 in which is the plaintiff's claim is denied generally. Secondly, it is averred that the plaintiff's claim is time barred. In support of the defence, the 3<sup>rd</sup> defendant filed a witness statement dated 30/1/2019 in which the 3<sup>rd</sup> defendant states that he sold Plot No. Kajiado/Noonkopir/30 to the 1<sup>st</sup> defendant in 2012 and he took possession. It was not until 5 years later that this suit which is time barred, was filed.
11. At the trial on 2/5/2023 and 28/11/2023 the plaintiff, the 1<sup>st</sup> and third defendants and a witness for the 2<sup>nd</sup> defendant testified by adopting their witness statements and documents. They were then subjected to cross examination by counsel for the opposing side.
12. Counsel for the parties were to file and exchange written submissions but the only submissions on record are those by the counsel for the 1<sup>st</sup> defendant. Counsel for the other parties did not file any submissions by 15/4/2024 and if they did, they were not brought to my attention. The 1<sup>st</sup> defendant's counsel identified the following issues for determination.
  - i. Whether the plaintiff has proved his case as pleaded to the required standard.
  - ii. Whether the reliefs sought should be granted.
  - iii. Who bears the costs.
13. I have carefully considered all the evidence adduced in this case by all the parties including the witness statements, documents and testimony at the trial. I have also considered the written submissions by learned counsel for the 1<sup>st</sup> defendant. I find that the three issues identified by learned counsel for the 1<sup>st</sup> defendant will determine the dispute. I make the following findings on the three issues.
14. On the 1<sup>st</sup> issue, I find that the plaintiff has proved his case to the required standard of proof beyond a balance of probabilities and below proof beyond reasonable doubt as set out on the case of *Ndolo – versus- Ndolo* Civil Appeal No. 128 of 1995 (2008) eKLR. The ratio decidendi in that case was that where fraud is pleaded, then the plaintiff must prove fraud to a standard higher than in ordinary civil cases.

I find fraud proved on the part of the three defendants for the following reasons. Firstly, it is the plaintiff and not the 3<sup>rd</sup> defendant who has a better history of the suit land. The plaintiff has proved that he bought the suit land from Lalji Valji Kerai who bought it from Ngethe Kibuba. These two transfers were approved by the 2<sup>nd</sup> defendant's predecessor in office. They are therefore official and not disputed by the 2<sup>nd</sup> defendant.
15. In contradistinction, the third defendant has no history of how he acquired the land called Plot No. Kajiado/Noonkopir/30. In his written statement of defence dated 30/1/2018 and in his own witness statement dated 30/11/2019, he is very brief. He only says that he sold the land to the 1<sup>st</sup> defendant.



He does not say how he acquired it. There is no evidence of sale whatsoever. The evidence from the 2<sup>nd</sup> defendant does not offer any assistance to the 3<sup>rd</sup> defendant. He suddenly appears at the scene on 19/9/2012 with a lease and overtakes the plaintiff who traces his ownership to the year 1988, 24 years earlier. The plaintiff's ownership goes to the root of the title while the 3<sup>rd</sup> defendant's claim does not go far.

16. Secondly, the plaintiff has proved that he subdivided the original suit land with the approval of the 2<sup>nd</sup> defendant and sold it to third parties with the approval of the 2<sup>nd</sup> defendant. This means that the 2<sup>nd</sup> defendant is estopped from denying that the plaintiff is the owner of the suit land under the general estoppel under Section 120 of the Evidence Act which provides as follows.

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or is representative, to deny the truth of that thing”.

17. In this case, the 2<sup>nd</sup> defendant and its predecessor authorized the transfer of the suit land from Ngethe Kibuba to Lalji Valji Kerai and then to the plaintiff. They also accepted the plaintiffs' rates and validation fees. They cannot now deny that he owns the suit land. They are estopped from doing so. They have not explained how the suit land lawfully owned by the plaintiff came to be lawfully owned by the 3<sup>rd</sup> and 1<sup>st</sup> defendants. Thirdly, as has been held in many cases including Benya Properties –versus- H.H. Dr. Sijedna Mohamed Burhannudiu Sabied and others Civil Appeal No. 79 of 2007 in case of double allocation, the allocation which is earlier in time prevails against the latter one.

18. Fourthly, under Section 4 of Fair Administrative Action Act, every person has the right to administrative action which is fair and where such action is likely to affect his fundamental rights he is entitled the following.

- a. Prior and adequate notice of the nature and reason for the purported administrative action.
- b. An opportunity to be heard and to make representation in that regard.
- c. Notice of a right of review or internal appeal against an administrative decision, where applicable.
- d. A statement of reasons pursuant to Section 6.
- e. Notice of the right to legal representation, where applicable.
- f. The right to cross-examine, where applicable.
- g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

In this case, it has been confirmed by the 2<sup>nd</sup> defendant's witness in his evidence in court on 28/11/2023 that the plaintiff was not present when the decision to award part of the suit land to the 1<sup>st</sup> defendant was made. He was not given the reasons for the decision to take away his land, he was not given a right of appeal *etcetera*. There was no compliance with basic requirements of the law and the plaintiff was condemned unheard and his property taken away.

19. From the foregoing in paragraphs 14, 15, 16, 17 and 18, it is clear that the defendants are guilty of fraud and the plaintiff is entitled to all the orders sought in the plaint. The upshot is that the plaintiff is successful in this case and is entitled to all the prayers that he seeks and I allow prayers (aa), (a), (b) and (c) as per the amended plaint dated 13/7/2017.



It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 17<sup>TH</sup> DAY OF JULY 2024.**

**M.N. GICHERU**

**JUDGE**

