



**Kimani & another v Mututo (Environment & Land Case
244 of 2017) [2024] KEELC 5362 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5362 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 244 OF 2017
MN GICHERU, J
JULY 16, 2024**

BETWEEN

MICHAEL GICHANGA KIMANI 1ST PLAINTIFF

BERNARD NJOGU KIMANI 2ND PLAINTIFF

AND

NJOGU MUTUTO DEFENDANT

JUDGMENT

1. The plaintiffs seek the following reliefs against the defendant.
 - a. An order cancelling Title No. Kajiado/Ochoro-Onyore/9365 and all entries and records created by such registration.
 - b. A permanent injunction restraining the defendant, his agents, servants and or anyone claiming to act through him from trespassing onto, laying claim over and in any other manner dealing with the parcel of land known as Kajiado/Ochoro/Onyore/1493.
 - c. Costs of the suit.
 - d. Any other relief the court may deem fit and just to grant.
2. The plaintiffs' case is as follows. They are the registered owners of L.R. 1493, suit land, which they purchased from Olgesi Ole Lendagitu in the year 1988 and which was transferred to them on 28/2/1989. They immediately took possession which they have enjoyed since then. They have never sold the land to any person. The land measures 0.81 hectares (approximately 2 acres).
3. On or about 10/2/2012, the defendant through his advocates wrote a letter to the plaintiffs accusing them of trespassing onto L.R. Kajiado/Olchoro-Onyore/9365. The plaintiffs do not know of the



whereabouts of L.R. No. 9365 because their land is intact and has never been subdivided or sold to anyone. If such a parcel exists, it is as a result of forgery.

4. The plaintiffs have pleaded particulars of fraud which include the following. Creating a new registration number namely L.R. 9365 when L.R. 1493 is in existence, creating a fraudulent mutation form to facilitate the creation of a false number 9365, fraudulently obtaining title deed No. A622775 dated 25/11/2011 for parcel No. 9365 measuring approximately 0.80 hectares when the original land No. 1493 is still valid and in existence in the plaintiffs' names and offering to sell the land L.R. 9365 knowing very well that it did not exist. In January 2012, the defendant trespassed onto the plaintiffs' land claiming that it belonged to him and pointed it out to a would be purchaser.
5. In support of their case, the plaintiffs filed the following evidence.
 - i. Witness statement by Michael Gichanga Kimani.
 - ii. Copies of title deeds and green cards for L.R. 1493 and 9365.
 - iii. Copies of certificates of official search for L.R. 1493 dated 3/11/2009, 25/11/2011 and 9/3/2012.
 - iv. Copy of mutation form for L.R. 1470 which created L.R. 1496, 1492, 1493, 1494 and 1495. The mutation form was registered on 24/8/1988.
 - v. Copies of letters between the plaintiffs' and the defendant's advocates dated 10/2/2012, 20/2/2012 and 6/3/2012.
6. The defendant, through counsel on record filed a defence and counterclaim dated 4/5/2012 in which it is averred as follows. Firstly, the defendant is the registered owner of L.R. No. Kajiado/Olchoro-Onyore/9365 which he has been in possession of since 1988. Secondly, he bought the said parcel from Olgesi Ole Lendagitu who owned L.R. No. 9365 which measures 2 acres. Thirdly, the defendant's land was erroneously named No. 1459 instead of 1493. Fourthly, the owner of L.R. 1459 lodged a complaint with the Land Registrar Kajiado who cancelled the plaintiffs' title deed for L.R. 1459. The defendant was then issued with the correct title deed for his land which is No. 1493. Fifthly, the plaintiffs illegally entered the suit land, that is, No. 9365 in February 2012 and a demand letter was written to them by the defendant's advocate requesting them to vacate but they have not done so. Sixthly, if the plaintiffs hold a title deed to L.R. 1493, then the said title was unlawfully obtained and ought to be cancelled.
7. In the counterclaim the defendant seeks the following orders against the plaintiffs.
 - a. An order that the plaintiffs do vacate the property known as Olchoro-Onyore/9365 forthwith.
 - b. An order cancelling title deed No. 1493 and all entries and records created by such registration.
 - c. Costs of the counterclaim.The defendant's case in the counterclaim is simply that the plaintiffs be evicted from the suit land because they have refused to comply with the notice to vacate dated 10/2/2012.
8. In support of his defence and counterclaim, the defendant filed the following evidence.
 - a. His witness statement dated 2/5/2012.
 - b. Copy of mutation form for L.R. 1470.
 - c. Copy of title deed for L.R. 1459.
 - d. Copy of certificate of official search for L.R. 1459 dated 4/10/2006.



- e. Copy of letter dated 13/9/2010 by defendant's then counsel.
 - f. Copy of letter by Geomatics Services.
 - g. Copy of letter by the defendant to the Land Registrar dated 16/2/2010.
 - h. Copy of boundary dispute summons dated 6/5/2011.
 - i. Copy of mutation form for L.R. 1493 dated 16/2/2010.
 - j. Copy of application for consent and consent of the Land Control Board for transfer for L.R. 1459 dated 7/2/1989.
 - k. Copy of certificate of official search for L.R. 9365 dated 6/9/2017 showing that the same is registered in the name of the defendant.
 - l. Copy of application for registration for L.R. 1459 dated 18/7/1989.
9. Vide an order dated 18/4/2018, the court directed that the District Surveyor and the District Land Registrar to write a joint report on L.R. 1493 and 9365. A joint report dated 2/7/2018 was filed on 3/7/2018. It reads as follows in part.

“1) Land Parcel No. 1493 is 0.81 Hectares and was on 24/8/1988 registered in the name of Orgesi Ole Lendagitu as the 1st proprietor. On 28/2/1989 it was transferred to Bernard Njogu Kimani and Michael Gichanga Kimani. To date it is registered as so.

(2) Land Parcel No. 9365 is 0.80. Records show that it was created out of a resurvey of L.R. No. 1493. It was registered in the name of Njogu Mututo on 25/11/2011 as the 1st proprietor. To date it is registered as so. A caution was registered against it on 28th December, 2011 in favour of Peter Mburu Njogu claiming purchaser's interest.

Note:

- 1. That Parcel No. 9365 was a resurvey of 1493. So far 9365 to have been registered 1493 should have been closed. This was not the case.
- 2. For the re-survey of 9365 to have been initiated the proprietor should have been the same. This was not the case since 1493 was in the names of Bernard Gichanga Kimani while the mutation was in the name of Njogu Mututo.

10. Counsel for the parties were to file and exchange written submissions by 27/11/2023. Only the plaintiffs' counsel filed written submissions dated 20/11/2023. Unfortunately, the plaintiffs' counsel did not identify the issues for determination. I find that the following issues will determine the dispute.
- i. Whether L.R. 9365 was created out of L.R. 1470 which belonged to Orgesi Ole Landagitu?
 - ii. Whether the plaintiffs have ever initiated a resurvey of L.R. 1493 or any other activity?
 - iii. Whether a resurvey can be initiated by a person other than the registered owner.
 - iv. Whether the plaintiffs can trace their title deed to the original registered owner?



- v. Whether the defendant can trace his title deed to the original registered owner?
11. I have carefully considered all the evidence adduced in this case by the two parties including the witness statements, documents and testimony at the trial. I have also considered the written submissions by Learned Counsel for the plaintiffs. I find as follows.
- On the first issue, I find that L.R. No. 9365 was not created out of L.R. 1470 which belonged to Orgesi Ole Lendagitu. Only five parcels were created out of L.R. No. 1470. They were L.R. 1492, 1493, 1494, 1495 and 1496. Land reference 1493 was then transferred to the plaintiffs by the then registered owner and this is supported by the requisite documents like the consent of the Land Control Board dated 10/1/1989, transfer form dated 27/2/1989 and evidence of payment of stamp duty.
12. On the second issue, I find that the plaintiffs being the registered owners of L.R 1493 did not initiate a resurvey of their land. It is only they or the Land Registrar who could initiate such an exercise. In both instances, the plaintiffs had to be informed of the resurvey and its purpose. The plaintiffs did not initiate any other activity in relation to their land.
13. On the fourth issue, I find that the plaintiffs can trace their title deed to the original owner of L.R. 1470 Orgesi Ole Lendagitu. The mutation form and the transfer documents show this history. As for the defendant L.R. No. 9365 cannot be traced to Orgesi Ole Landagitu and L.R. 1470. Neither is it supported by the necessary documents like transfer form or consent of Land Control Board.
14. Finally, the report by the District Surveyor and the District Land Registrar dated 2//7/2018 clearly shows that only the plaintiffs' title deed is traceable to the seller of the land while that of the defendant is not traceable to him.

For the above stated reasons, I find that the plaintiffs' case is proved to the required standard. I enter judgment as prayed for in the plaint. I find no merit in the defendants counterclaim which I dismiss with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF JULY 2024.

M.N. GICHERU

JUDGE

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