



Tipango & 5 others v Maitha (Sued as the Legal Representative of the Estate of Mutuku Maitha, Deceased) & 5 others (Environment & Land Case 668 of 2017) [2024] KEELC 5361 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 668 OF 2017**

**MN GICHERU, J
JULY 16, 2024**

BETWEEN

**SIPOI TIPANGO 1ST PLAINTIFF
RICHARD KOMBE TIPANGO 2ND PLAINTIFF
SELINA TIPANGO 3RD PLAINTIFF
WILLIAM SIASAI TIPANGO 4TH PLAINTIFF
DANIEL LESISA TIPANGO 5TH PLAINTIFF
JAMES LEKINI TIPANGO 6TH PLAINTIFF**

AND

**ROSE MUENI MAITHA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUTUKU MAITHA, DECEASED) 1ST DEFENDANT
ANNA WANGARI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HERMAN KINYANJUI KIMANI, DECEASED) 2ND DEFENDANT
NICHOLUS F.K. MBUGUA 3RD DEFENDANT
PRISCILLA KANYONGO 4TH DEFENDANT
EMILY WAMBUI ISHMAEL 5TH DEFENDANT
WILSON KARIUKI NJACHU 6TH DEFENDANT**

JUDGMENT

1. The plaintiffs seek the following reliefs against the defendants both jointly and severally.



- a. A declaration that the entire parcel of land comprised on title No. Ngong/Ngong 3768, suit land, was upon its registration held by Stephen Oisesoi Tipango, in trust for his siblings as part of their undivided share of inheritance of the estate of their father Oisesoi Tipango.
 - b. A declaration that Stephen Oisesoi Tipango, deceased, had no title, interest or right in the suit land to dispose in any manner to the defendants or to any person whatsoever.
 - c. An order that the side agreements purportedly entered into between Stephen Oisesoi Tipango, deceased, and the defendants are ineffectual to create, extinguish, transfer, vary or affect the estate, right or interest of Oisesoi Tipango, deceased, and his beneficiaries, or the trust thereby created and held by Stephen Oisesoi Tipango, in or over the suit land.
 - d. An order that the sale agreements entered into, purportedly between Stephen Oisesoi Tipango, deceased and the defendants are absolutely void for all purposes.
 - e. A declaration that the defendants having acquired no legitimate right, interest or title over the suit land or any party thereof, are trespassers.
 - f. A permanent injunction do issue restraining the defendants by themselves, their servants or agents or otherwise whomsoever from trespassing, entering or removing on or continuing in occupation or in any other manner utilizing the suit land or any part thereof.
 - g. An order directing the defendants to remove themselves, their families, property and structures from the suit land at their own cost within a time to be specified by the court failure to which the plaintiffs may do so at the defendants costs.
 - h. General damages and costs.
 - i. The OCS Ngong Police Station to ensure compliance with these orders and maintenance of law and order during their execution and in particular prayers (f) and (g) above.
 - j. An order that the closure of the land register for the suit land on 24/10/1979 and the opening of new registers for Ngong/Ngong/ 53886- 5392 all during the pendency of this suit were unlawful.
 - k. That the Land Registrar Kajiado North, do rectify the land registers for L.R. Ngong/Ngong/5386-5392 by cancelling entry No. 13 entered on 2/8/2017 purporting to close that register upon subdivision into Ngong/Ngong/5386-5392 and thereby re-open that land register.
 - l. That the Land Registrar Kajiado North do rectify land registers numbers Ngong/Ngong/5386 to 5392 by cancelling any and all entries made therein and closing them.
 - m. That the Land Registrar, Kajiado do register Richard Kombe Tipango and William Siasoi Tipango as the proprietors of the suit land for their other siblings Viz Sipoi Tipango, Selina Tipango, Daniel Lesisa Tipango and James Lekini Timpango or their estates (whenever deceased). This is as per the amended plaint dated 21/11/2022.
2. The plaintiffs' case is as follows. They filed this case as the beneficial proprietors of the suit land and also as the beneficiaries of the estate of Oisesoi Tipango. On 30/3/1966 Oisesoi Tipango was registered as the proprietor of L.R. Ngong/Ngong/682 which measured 35.0 Hectares (86.45 acres) approximately. The deceased owner of L.R. 682 died on 14/7/1975 and he was survived by the following.



- a. Teketi Tipango – widow – deceased.
- b. Stephen Oisesoi – son – deceased.
- c. Sipoi Tipango- son – deceased.
- d. Richard Kombe- son – 8 years old
- e. Selina Tipango – daughter – now deceased.
- f. William Siasai – born in 1978.
- g. Daniel Lesisa – born in 1979.
- h. James Lekini- born in 1982 – now deceased.

William Siasai, Daniel Lesisa and James Lekini, though born after the death of Oisesoi Tipango to his widow of Teketi Tipango were all considered in Masai custom as the children of the deceased. On 24/3/1979 the following entry was made on the register for the suit land. “Stephen Oisasoi Tipango succession as trustee for himself and three brothers”.

On 24/10/1979 title no. Ngong/Ngong/682 was closed upon subdivision and new Title Numbers Ngong/Ngong/3768, 3769, 3916 to 3922 and 4088 opened. Title No. 3768 had the following entry as number 1.

Stephen Tipango P.O. Ngong.

Except under order of the Chief Land Registrar, or the High Court no dealing is to be registered against the title until the registered proprietor transfer to Kombe Oisesoi Tipango, Sipoi Oisasoi Tipango and Siasai Oisasoi Tipango their respective undivided share of land”.

On 31/7/1982 Stephen Oisesoi Tipango died in a road traffic accident before transferring to his three brothers Kombe, Sipoi and Siasoi their respective shares of the suit land and the restriction dated 24/10/1979 remained in place until 2/8/2017. After the death of Stephen Oisesoi, the defendants by themselves and others acting on their behalf started trespassing on the suit parcel. They were resisted by Teketi Tipango, the mother of the plaintiffs and the plaintiffs themselves. The 1st defendant claimed that her late husband had bought 3 ½ acres of land from Stephen on 23/4/1977 while the 4th defendants claimed that her husband George Kanyongo Githuku had bought one acre. The second defendant claimed that her husband had bought 1 acre just like the 3rd defendant while the 5th and 6th defendants claim to have purchased ½ an acre and 6 acres respectively.

3. The defendants further claim that in collaboration, they applied to the Oololaiser Land Control Board for the subdivision and transfer of their respective parcels on 19/2/1982. The consent was issued in a meeting held on 11/3/1982. Due to resistance by the plaintiffs, the defendants were not able to enter the suit land and subdivide it as per approvals by the Land Control Board until the year 2017. On 2/8/2017, when this case was pending all cautions and restrictions were removed and the register closed on subdivision of the suit land into new parcels being Numbers 1586 – 5392. One of the parcels being No. 5387 was created for the plaintiffs by the defendants after they felt pity for them after they were rendered destitute as Stephen Oisesoi had sold off all the land.
4. In the year 2000 some unknown persons filed a Succession Cause in respect of the estate of Stephen Oisesoi being Cause No. 607/2000 at the High Court at Nairobi claiming to be Selina Tipango and William Siasai and then purported to distribute the suit land to the defendants. In the year 2009, the 1st defendant lodged a claim on behalf of her late husband, even though she had not obtained letters of



- administration. The District Land Disputes Tribunal purported to hear and determine in her favour directing that a title be issued to her and all cautions to be removed. These are the orders that were adopted by the Magistrates Court and which the defendants including those not parties to the Tribunal Case used to enter the suit land to divide it up.
5. Believing that the suit parcel still formed part of the estate of their deceased father, Oisesoi Tipango, some of the plaintiffs were appointed as administrators of his estate in Succession Cause No. 526 of 2011 at Machakos High Court where the grant was confirmed on 6/6/2013 distributing the said estate to the children of the deceased. The defendants filed summons for the revocation of that grant claiming purchasers interest whereupon the grant was revoked. In the meantime, the defendants had entered the suit land and erected structures therein. It is for the above and other reasons that the plaintiffs filed this suit because they have been deprived, without lawful reason or justifiable cause of the quiet, peaceful and profitable use of their land and they have suffered and continue to suffer loss and damage.
 6. In support of their case, the plaintiffs filed the following evidence.
 - i. Witness statements by Selina Tipango, William Siasoi and Richard Kombe Tipango.
 - ii. Copies of certificates of death for Oisesoi Tipango, Stephen Oisesoi Tipango and Teketi Tipango.
 - iii. Copies of green card for LR. Ngong/Ngong/682 and 3768.
 - iv. Copy of grant of letters of administration dated 1/2/2012 and certificate of confirmation dated 10/6/2013.
 - v. Copy of affidavit of Rose Mueni Maitha dated 21/6/2013 together with annexures which include application for consent of the Land Control Board, letter of consent, sale agreement dated 26/5/2009, award of the Kajiado District Land Tribunal Award among others.
 - vi. Affidavit of Mary Nyambura Kinyanjui sworn on 24/6/2013 and an amended certificate of confirmation of grant intestate of Herman Kinyanjui Kimani.
 - vii. Affidavits sworn by Nicholas F.K. Mbugua, George Kanyongo Githuku, Emily Wambui Ishmael and Wilson Kariuki Njachu all dated 24/6/2013.
 - viii. Copy of green card for the suit land dated 28/8/2017.
 - ix. Copy of certificate of official search dated 28/8/2017.
 - x. Copies of letters by plaintiffs' counsel to the Land Registrar dated 20/11/2021, 21/6/2023 and 16/9/2022 requesting for records of the suit land.
 - xi. Copy of letter by Land Registrar Ngong dated 20/9/2022.
 7. The defendants through their counsel on record filed an amended statement of defence and counterclaim dated 2/3/2023 in which they aver as follows. Firstly, they generally deny the plaintiffs claim in its entirety. Secondly, it is averred that the plaintiffs have no locus standi to institute this suit and only filed it to circumvent the summons for revocation and annulment of a fraudulent grant which is number 14 of 2015 at the High Court at Kajiado. Thirdly, the title deed for L.R. 682 was closed on 24/10/1979 and new title deeds issued which included 2 acres registered in favour of the plaintiffs. Fourthly, the consent of Oololaiser Land Control Board was lawfully granted and it resulted in the subdivision and transfer of the suit land. Fifthly, the 3rd plaintiff is just a busy body whose interest in the suit land cannot hold. Sixthly, the plaintiffs have used hooligans to cause violence against the 1st defendant destroying her home in a bid to evict her.



Owing to the frustrations mentioned above, the 1st defendant was compelled to institute a dispute which is No. NTC 042/07/2008 at Kajiado District Land Disputes Tribunal whereby an award and a decree were issued in her favour. The plaintiffs have failed to disclose that they filed a Judicial Review Suit at Machakos which was No. 215 of 2011 which they withdrew after the 1st defendant filed an objection thereto. Finally, the defendants aver that they have occupied the suit land for over 40 years and they have built permanent houses in addition to paying valuable consideration to the registered owner of the suit land.

8. In addition to the defence, the defendants have a counterclaim in which they seek the following reliefs.

- i. A declaration that they are bonafide purchasers of L.R. Ngong/Ngong/5386, 5387, 5388, 5390, 5391 and 5392 all excised from the suit land.
- v. A permanent injunction restraining the plaintiffs, either by themselves, servants or agents, nominees or otherwise whoever from taking the title from the defendants, trespassing, entering, alienating, evicting or assuming or in an other way interfering with the quiet possession of the defendants respective portions being parcel numbers Ngong/Ngong/5386, 5387,5388, 5390,5391 and 5392.
- vi. Costs of the counter claim plus interest.
- vii. Further or other relief deemed just.

9. The defendants' case in the counterclaim is as follows. Firstly, between 1977 and 1982, the defendants entered into sale agreements with Stephen Oisesoi Tipango who was the registered owner of the suit land. Secondly, the defendants paid the purchase price in full to Stephen Oisesoi. They also occupied their respective parcels. Thirdly, in July 1982, the registered owner of suit land died before he could transfer their parcels to them or subdivide the suit land. Fourthly, in the year 2000, the plaintiffs applied for letters of administration in the High Court at Nairobi in Cause No. 607 of 2000. Even after they got the letters of administration, they refused to transfer to the defendants their respective parcels. This made it necessary to file the aforementioned Tribunal Case which was in favour of the defendants. Fifthly, a decree was issued at SRM Kajiado Case Numbers 26, 36, 44, 45, 50, 51 and 52 all of 2009.

While aware of the decree in Tribunal Case, the plaintiffs filed Succession No. 526 of 2011 at Machakos which was later transferred to Kajiado where it is No. 14 of 2015. They did so secretly with intent to deceive and circumvent justice. This prompted the defendants to have the grant revoked when they learned about it. Finally, the 1st defendant avers that she has already sold her portion of the suit land after being frustrated by the plaintiffs and this is within the plaintiffs' knowledge.

10. In support of the defence and counterclaim, the defendants filed the following evidence.

- i. Witness statements by Nicholas Mbugua, George Kanyongo Githuku, Emily Wambui Ishmael and Wilson Kariuki Njachu.
- ii. Application for consent of the Land Control Board and letter of consent.
- iii. Copy of letter dated 14/11/1985 from the Ministry of Lands.
- iv. Copy of decree dated 13/9/2011 in favour of each defendant.
- v. Copies of letters dated 19/9/2011, 24/4/2012 and 17/8/2012 from the Ministry of Lands.
- vi. Copy of affidavit sworn by Saisoi Tipango dated 23/9/2011.



- vii. Copy of ruling dated 10/7/2020 in Civil Application No. NAI. 129 of 2019 by the Court of Appeal, copy of the application and copy of the ruling dated 7/11/2017.
 - viii. Certified copy of ruling dated 14/10/2016 in Kajiado Succession Cause No. 14 of 2011 and copy of the objection.
 - ix. Certified copy of proceedings in Machakos District Magistrates Civil Case No. 1976.
 - x. Copy of the defendants' compliant letter to Kenya Anti Corruption Commission dated 24/6/2013.
 - xi. Other relevant documents.
11. At the trial on 22/5/2023 and 24/10/2023 Richard Kombe and William Siesai testified on the part of the plaintiffs. They did so by adopting their witness statements and documents before they were cross-examined by the defendants' counsel. On the part of the defendants, paramount Chief Wilson Tulitu Ole Mollel testified by producing a report dated April 2009 which resolved the dispute between the plaintiffs and the defendants. The other witnesses included Wilson Kariuki Njachu (6th Defendant) Nicholas F.K. Mbugua (3rd defendant) and Emily Wambui Ishmael (5th defendant). The testimony of the witnesses was a restatement of their witness statements recorded earlier.
12. Counsel for the parties filed written submissions on 26/1/2024 and 24/4/2024 respectively. They identified the following issues for determination.
- i. Whether the defendants have any registrable or recognizable interest over the suit parcel Ngong/Ngong/3768.
 - ii. Whether the defendants are bona fide purchasers for value without notice of any defect in title on the part of the seller.
 - iii. Whether the consent of the Land Control Board was obtained within 3 months of the sale agreement.
 - iv. Whether the suit is time barred.
 - v. Whether some suit parcels were transferred during the pendency of this suit.
13. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and testimony at the trial. I have also considered the written submissions by learned counsel for the parties including the issues and the case law cited. I make the following findings on the five issues raised.
14. On the first issue, I find that the defendants have a registrable right over the suit land recognized by law. I say so because I am convinced that the defendants are in occupation of the portions of the suit land that they bought from Stephen Oisesoi Tipango. There are reasons for this finding. Firstly, in Tribunal Case No. 065/01/09 at page 16 of the plaintiffs documents it is stated as follows under issues summarized.

“...the Land Tribunal found that the late husband of the complainant Mr. Jacob Mutuku Maitha (deceased) has lived on the disputed land for many years without being interrupted, he build a semi house, tank, he fenced the compound and planted trees...”

Secondly, prayer (g) of the amended plaint seeks that “the defendants to remove themselves, their families, property and structures from the suit land”. Finally, the defendants in their witness statements



say that they are in occupation of the suit land where they have put up permanent structures. There is no evidence from the plaintiffs to the contrary. There is no doubt therefore that the defendants occupy the suit land and have done so for long. Under Section 30(g) of the Registered Land Act, Cap 300 (now repealed) the rights of a person in possession or actual occupation are overriding interests. It provides as follows.

30 “Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register (a) the rights of a person or actual occupation of land to which he is entitled in right only by such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

This was the applicable law when the defendants occupied the suit land. The same law is now to be found in Section 28 of the Land Registration Act where trusts are interests that override the title. In the case of Isaack M. Inenga Kiebia –versus- Isaya Theuri M’Linturi and another Petition No. 10 of 2015 (2018) eKLR, the Supreme Court of Kenya had this to say about overriding interests at paragraph 58 of the judgment –

“...it is now clear that customary trusts, as well as other trusts, are overriding interest. These interests being overriding interests, are not required to be noted in the register...”

This means that for a person in possession, the register is inferior to his interests which are not affected by the register as he enjoys a superior right to the register.

15. On the second issue, I find that the defendants are bona fide purchasers for value without notice of any defect in the title of the seller. That the seller Stephen Oisosai Tipango acted together with his mother Teketi Tipango is confirmed by her fingerprints as a witness. This was on 24/3/1977 when Stephen received Kshs. 5,000/- from Jacob Mutuku Matha, the husband of the 1st defendant. The sums received by Stephen with the knowledge of his mother who is also the mother of the plaintiffs are hefty. For example the 6th defendant paid Kshs. 92,000/- for the six acres in 1981. Those were the days when the Kshs. 8/- could buy one US dollar school fees in High Costs Schools was less than Kshs. 2000/- per year. I take judicial notice of this under Section 60 1 (0) of the Evidence because these are matters of general and local notoriety.
16. Regarding the third issue of obtaining of the consent of the Land Control Board within 3 months of the sale agreement, I find that to be immaterial in view of the overriding interest enjoyed by the defendants. It has been held in the case of Willy Kitilit –versus- Michael Kibet Civil Appeal No. 51 of 2015 (2018) eKLR that where the doctrines of constructive trust and proprietary estoppel are applicable, they supersede the Land Control Act where a transaction relating to an interest in land is void and unenforceable for lack of the consent of the Land Control Board. See paragraph 25 of the judgment dated 17/5/2018.
17. On whether the suit is time barred, I must say that with the scanty facts available I am not certain. I have seen proceedings dating back to 1976 before the District Magistrate at Machakos. Stephen Oisesoi Tipango was a party. These proceedings are defendant’s exhibits. It is not clear how they tie up with this case. The other proceedings that I can see as exhibits were in the year 2009. I do not know for sure if there were any appeals because the parties have not said much about this aspect of the case. The question that lingers is why the plaintiffs remained quiet for many years from the eighties to suddenly litigate in 2013. Had there been tangible facts, I would make a definite finding on the issues of limitation. With the limited facts, I make no finding on that issue.



18. As for the final issue of alienation of some of the suit property, I find myself in the same situation as in preceding issue of limitation. The reason for this is the existence of Kajiado Succession Cause No. 14 of 2015 involving the same parties and the same subject matter. I do not know what orders the High Court may have given in the Succession Cause. If I had all the facts concerning the High Court Case, I would be on a better position to make concrete finding. I therefore make no finding on this final issue.
19. For the reasons given hereinbefore, I find that the plaintiffs' case is not proved on a balance of probabilities and I dismiss it with costs. Secondly, I find that the defendants have proved their counterclaim and I allow it in terms of prayers (i), (v) and (vi).

It is so ordered.

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

M.N. GICHERU

JUDGE

