



Melubo & another (Suing as Personal Representatives of Melubo ole Tiapapushia) v Ole Mbatiae Holdings Limited (Environment & Land Case E027 of 2021) [2024] KEELC 7034 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E027 OF 2021
LC KOMINGOI, J
OCTOBER 24, 2024**

BETWEEN

PAYIATON ENE MELUBO 1ST PLAINTIFF

JACK MULUBO SANE 2ND PLAINTIFF

SUING AS PERSONAL REPRESENTATIVES OF MELUBO OLE TIAPAPUSHIA

AND

OLE MBATIAE HOLDINGS LIMITED DEFENDANT

JUDGMENT

1. By the Plaint dated 27th April 2021 and Amended on 7th October 2022, the Plaintiffs claim that property Kajiado/Loodariak/217 measuring approximately 220 hectares at all times belonged to the late Melubo Ole Tiapapushia having been allocated the same by the Loodariak Group Ranch in the 1980s. He neither sold it nor caused it to be transferred to anyone else and prior to his demise he was issued with a title deed dated 31st July 2015.
2. It is the Plaintiffs that the Defendant fraudulently, illegally and irregularly caused it to be transferred to itself without evidence of an executed sale agreement, transfer or consent from the Land Control Board. The Plaintiffs therefore sought:
 - a. A permanent injunction to issue restraining the Defendant herein, its servants, agents or any other person authorised by or claiming through it from trespassing into, entering, selling, subdividing, leasing, depositing building materials, constructing, building, cultivating or by any other means using the parcel of land known as Kajiado/Loodariak/217 within Kajiado County which is owned by the late Melubo Ole Tiapapushia.



- b. A declaration that the late Melubo Ole Tiapapushia is the rightful owner of land known as Kajiado/Loodariak/217 within Kajiado County.
 - c. Any title deed of land known as Kajiado/Loodariak/217 within Kajiado County, registered in the name of the Defendant, Ole Mbatiae Holdings Limited or any other person authorised by or claiming through it, be revoked and/or cancelled by the Land Registrar, Kajiado North.
 - d. Costs of the suit and interest thereon.
 - e. Any other relief that this Hon. Court may deem fit to grant.
3. The Defendants in its Statement of Defence and Counter Claim contested the Plaintiffs claim and stated that the suit property was acquired by the late Lee James Mbatia Wanjui on 31st May 1990 after he purchased it from the late Melubo Ole Tiapapushia. The late Melubo was however left on the suit property as a caretaker and in the year 1994 he testified as a witness in the case Appeal No. 891 of 1994 where the late Lee James Mbatia had sued one Tauta Ole Kamwasi for trespass on the suit property. In the last Will and Testament of Lee James Mbatia dated 17th May 2003, he bequeathed the suit property to his children. After grant of letters of administration, the children incorporated the Defendant as a Company and transferred the property to it. The title held by the Plaintiffs dated 31st July 2015 was therefore illegal and a scheme to deprive them of the suit property because by this time the Defendant was in possession of the original title to the property. They therefore prayed for:
- i. The suit against it be dismissed;
 - ii. A declaration that the purported title in the custody of Melubo Ole Tiapapushia was obtained fraudulently;
 - iii. An order revoking the title deed in custody of Melubo Ole Tiapapushia.

Evidence of the Plaintiffs

4. PW1, Jack Mulubo Sane, the 2nd Plaintiff, adopted his witness statement as his evidence in chief and produced his bundle of documents which were marked as P. Exhibit 1-4. He testified that his father, Melubo Ole Tiapapushia was the owner of the suit property having been a member of Loodariak Group ranch. The parcel was allocated to him in the 1980s after the group ranch was subdivided. He produced a title deed dated 31st July 2015 as evidence of his ownership. He stated that his father resided on the suit property and was therefore not in a rush to get the title deed although he also lacked funds required to process the same. It was until PW1 cleared high school that he nudged his father to follow up on acquiring the title deed. During this process, they found that several title deeds had been issued in respect to the suit property and most of the illegally issued titles were cancelled except the one in possession of the Defendant. The Land Registrar summoned the Defendant's counsel, Frank Mbatia and Lucy Mbatia as well as the PW1 for a meeting to discuss the issue. At the meeting, they claimed that the land was purchased from his father and they were asked to avail the documents confirming the transaction but no documents were availed. Following this, the Land Registrar issued PW1 with the title deed.
5. In 2018, he also visited the Land Adjudication Office and found that there were some documents in the name of the Late Lee James Mbatia. The proceedings of the Land Adjudication Committee, showed that Mbatia's title indicated that the land was 220 hectares equivalent to about 500 acres although he had purchased 400 acres. The decision made was that he was to be given 300 acres and the remaining 243 acres be left with the late Melubo.



6. On cross examination he stated that the title deed dated 31st July 2015 was issued to him by the Land Registrar. He also confirmed that there was a meeting held in April 2015 where a lawyer from T.T. Ng'ang'a advocates was present together with Frank Mbatia, Lucy Mbatia, PW1 and his father. During his meeting, the Land Registrar asked the advocate to avail documents to confirm the transaction. He stated that another meeting was scheduled for 10th June 2015 but the Defendant did not attend. He confirmed that as per the green card the entries were: entry number one dated 31st May 1990 in favour of Lee James Mbatia, entry number two dated 25th March 2015 in favour of Josephine Naiseiya and Lucy Mbatia, and entry number 3 dated 25th March 2015 in favour of Ole Mbatiae Holdings. He confirmed that his father was the owner of the suit property and there was no evidence that he ever sold it to Lee James Mbatia. He also stated that he was not aware of any dispute between Lee James Mbatia and one Ole Kamwasi.
7. On re-examination he indicated that as per the Adjudication Committee proceedings his father sold 300 acres but the acreage on the title deed held by the Defendant was 543 acres.

Evidence of the Defendants

8. DW1 Francis Wanjui Mbatia a businessman and one of Lee James Mbatia's sons adopted his witness statement as his evidence in chief and produced his bundle of documents as exhibit marked as D. Exhibit 1-7. He testified that in the year 1990 when his father purchased the suit property from Melobu he was 30 years old. His father was issued with a title deed which had neither been cancelled nor revoked. After his father's demise they filed a Succession Cause in the year 2013 and thereafter incorporated a company for the benefit of the beneficiaries. As per his father's Will, the suit property was to devolve to the children of the 1st and 2nd wives. Thereafter, they were issued title deed in the name of the Defendant on 16th April 2015. He stated that, Melobu had occupied the land as a caretaker and was also a family friend. He also stated that Melobu was a witness in a suit his father filed against Ole Kamwasi. He stated that they had tried to resolve the matter amicably but the Plaintiffs were not willing. He told the court that the title in the name of Melobu should therefore be cancelled since they (plaintiffs) had no claim to the property.
9. On cross examination he confirmed that there was an attempt to resolve the dispute at the Land Registrar's office although they did not serve PW1 with a notice to attend the meeting. He stated that although they had not developed the land, there was a caretaker who was not a witness in this case. He confirmed that the title deed indicated that the suit property measures 220 hectares or 543 acres, but as per the adjudication records the Adjudication Committee found that it was 400 acres that had been sold.
10. On re-examination he stated that the meeting at the Land Registrar's office was between his father and Ole Kamwasi about a boundary dispute.
11. DW2 Elizabeth Wekesa, a Civil Servant and a Land Adjudication and Settlement Officer at Kajiado. She testified that the letter dated 6th February 2023 showed that the Loodariak was an adjudication section comprising of three Group ranches: Elangata Oltepes and Loodariak. A dispute would then arise regarding the suit property between Melubo, Ole Tiapapushia and Lee James Mbatia. Melubo filed a claim in the year 1989 whose verdict was delivered on 27th February 1989, where Lee James Mbatia was awarded a portion of parcel number 119 which belonged to Melubo following the acknowledgement that he had purchased the same. The said parcel 119 was then subdivided to give rise to parcel 217. Melubo contested the acreage given to Lee James Mbatia and the adjudication committee ordered that 100acres be deducted from parcel 217. There was no objection regarding that finding and the Adjudication Committee forwarded the documents to the Land Registry for issuance of titles. She



added that since Lee James Mbatia was the first registered owner of the property, there was no need for a Land Control Board consent.

12. On cross examination she confirmed that she was the author of the letter and the findings were based on the Group ranch demarcation book. She also confirmed that Melubo's contention was for 100 acres to be deducted from the 400 acres registered to Lee James Mbatia and it was for the Surveyor to determine the acreage. Lee James Mbatia would remain with 100 acres.
13. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiffs' Submissions

14. Counsel submitted that the County Adjudication and Settlement Officer's report produced by DW2 shed light on the transactions between the late Melubo and Lee James Mbatia. She confirmed that there was a transaction between the deceased parties sometime in the year 1989. The Committee case number 13/89 delivered its verdict on 27th February 1989 giving Lee James 400 acres being parcel 217 (the suit property) which was hived off Melabu's parcel number 119. He added that Melabu appealed this decision as Objection case number 174 claiming 100 acres from the 400 acres given to Lee James and the same was allowed. The 100 acres were to be demarcated from the 400 acres forming parcel 217 and added to Melubo's parcel 119. Counsel submitted that the 543.632 acres registered against parcel 217 were therefore illegally acquired. As such, the court should exercise its powers as per Section 80 of the [Land Registration Act](#) and order that the extra 243.632 acres be excised from the Defendant's title and be registered in the name of the Late Melubo Ole Tiapapushia.

The Defendant's submissions

15. On who the legal owner of the suit property was, counsel submitted that it was in evidence the County Land Adjudication and Settlements officer's letter dated 6th February 2023 had conclusively addressed this issue by affirming that Lee James was the first registered owner of the suit property having purchased it from Melubo's. This was also resolved in the dispute case No. 13 of 1989 between Melubo and Lee James and a verdict issued on 27th February 1989. Melubo objected and appealed against the decision and another decision dated 15th September 1989 was made. Therefore, the Plaintiffs' claim that the Late Melubo was the registered owner of the property was baseless and no evidence was produced.
16. Counsel added that there was no history of how the title deed issued in the year 2015 was acquired without revocation or cancellation of the previous title in their possession. The Plaintiffs had also not evidenced the history of title as held in *Herbert L. Martin & 2 others vs Margaret J. Kamar & 5 others* (2016) eKLR and *Munyu Maina vs Hiram Gathiha Maina*. Counsel also submitted that the issue that Lee James was not a member of the Group ranch was a non issue because the property was legally registered to him from Melubo. He therefore held good title and the Plaintiffs had not discharged their burden of proof to support their allegations. Counsel also submitted that the court did not also have jurisdiction to determine and challenge a title that was issued over 30 years ago. Therefore, the Plaintiffs' suit should be dismissed and an order of cancellation of the title held by the Plaintiffs issued.

Analysis and Determination

17. I have considered the pleadings, the evidence on record, the rival submissions and the authorities cited. I find that the issues for determination are:
 - i. Who is rightful owner of land known as Kajiado/Loodariak/217;?



- ii. Whether the Plaintiffs are entitled to the prayers sought in the Amended Plaintiff.
 - iii. Whether the Defendant is entitled to its prayers in the Counter Claim;
 - iv. Who should bear costs of the suit?
18. The Plaintiffs, as the legal representatives of the estate of the late Melubo Ole Tiapapushia, claim that the suit property was unlawfully and wrongfully registered in the Defendant's name, arguing that the land originally belonged to their late father. They allege that after a series of irregular transfers, the Land Registrar's dispute resolution process culminated in the issuance of a title deed to their late father on 31st July 2015, prior to his death in 2017. However, the Defendant contends that the land in question was lawfully purchased by the late Lee James Mbatia, and after his demise, the property devolved to his beneficiaries.
19. The Plaintiff produced land adjudication records dated 27th February 1989 for case number 3/89 between Lee James Mbatia as the Plaintiff and Melubo Ole Tiapapushia as the Defendant. From this record, it shows that the late Lee James Mbatia was claiming 400 acres of land purchased from Melubo. Melubo acknowledged that he sold 300 acres of land to Lee James Mbatia hence he wanted 100 acres back. One of the witnesses in the committee meeting confirmed that when Lee James Mbatia and Melubo went to them to confirm the issue of land, Melubo confirmed that he had sold 300 acres of land to Lee James Mbatia and given him 100 acres for free. The Committee awarded the Plaintiff the 400 acres and asked the beacons be maintained as planted by the committee. This adjudication decision is material to the case because it confirms that the late Melubo had, by his own admission, transferred the land to Lee James Mbatia.
20. The burden of proof is on the Plaintiffs to prove their case on a balance of probabilities. Section 107 of the *Evidence Act* provides;
- “Burden of proof (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.”
- Section 109 of the *Evidence Act* provides;
- “Proof of particular fact 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.”
21. The title deed produced by the Plaintiffs for the suit property was issued on 31st July 2015, twenty five (25) years after the late Lee James Mbatia's title which was issued on 25th July 1990. According to Section 26(1) of the *Land Registration Act*, a title deed is deemed to be conclusive evidence of proprietorship unless it is proven that the title was obtained fraudulently or through a corrupt scheme. In this case, the Plaintiff failed to produce evidence of any fraudulent or illegal conduct on the part of the Defendant or its predecessor in title, thereby failing to challenge the validity of the Defendant's title under the statutory presumption of ownership.

The Court of Appeal in the case of *Munyu Maina Vs. Hiram Gathiha Maina* (2013) eKLR stated thus;

“... We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of



title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”

22. I find that the Plaintiffs’ claim that the suit property belongs to their late father is not supported by any evidence. It is on record that the said Melubo Ole Tiapapushia sold the same to Lee James Mbatia. DW2 confirmed that the said transaction was in the 1980’s.
23. The Plaintiff’s in paragraph 12 of the Amended Plaint have set out the particulars of fraud against the Defendant.

It is trite law that whoever alleges fraud must prove the same. In the case of *Teleposta Pensions Scheme Registered Trustees Vs. Inter counties Transporters and Exporters Ltd & 4 Others* (2016) eKLR the court held as follows;

“It is trite law that whoever alleges fraud must prove. It is therefore incumbent upon the Plaintiff to prove the fraud allegations against the Defendants to the requisite standard. The standard of proof in fraud cases is higher than that in ordinary civil cases, it is higher than on a balance of probability. As was observed in *Njuwangu Holdings Ltd Vs. Langata KPA Nairobi & 5 others*.

The standard of proving fraud in civil cases, the courts have consistently held, is higher than on a balance of probabilities. An allegation of fraud is a serious indictment against a party to whom it is made and though the standard of proof is not beyond a reasonable doubt as in criminal cases, it is no doubt near there but it is certainly higher than on a balance of probability and thus when a party in a civil matter makes an allegation of fraud against a party he should be prepared to adduce evidence to prove the allegation to the required standard. In the present case, I am afraid the fraud allegations against the 1st Defendant have been generalized and lack specificity and are generally unproved.... Thus mere suspicion of fraud cannot suffice. It is court’s finding that besides generalisations, the Plaintiff has not proved that the 1st Defendant acquired the title illegally or through a corrupt scheme. More particularly, there is no proof of the fraud allegations against the transferee, the 1st Defendant as to warrant the cancellation of the title.”

24. I am of the view that the Plaintiffs have failed to prove that the title held by the Defendant was obtained fraudulently. It is actually the title in the name of Melubo ole Tiapapushia, issued on 31st July 2015 which was obtained fraudulently. The Plaintiffs did not tender any other documents to support this title deed.
25. Counsel for the Plaintiff, in his submissions asked court to exercise its powers as per Section 80 of the [*Land Registration Act*](#) and order that the extra 243.632 acres be excised from the Defendant’s title and be registered in the name of the Late Melubo Ole Tiapapushia. Indeed Section 80(1) of the [*Land Registration Act*](#) empowers the court to order rectification if it is satisfied that a registration was obtained by fraud, mistake, or other illegality. Whereas the Land Adjudication Officer testifying as DW2 indicated that once the late Melubo objected the Adjudication Committee’s ruling, and a decision was made that 100 acres be excised from the late Lee James Mbatia’s parcel, no evidence supporting this statement was made. This notwithstanding, it is trite law that a person is bound by his



own pleadings, a principle that was echoed by the Supreme Court of Kenya in Independent Electoral and Boundaries Commission & another v Mule & 3 others [2014] KECA 890 (KLR):

“ 11. As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”

26. The upshot of the matter is that the Plaintiffs have failed to prove their case as against the Defendant on a balance of probabilities. In essence the Plaintiffs suit is dismissed in its entirety.

27. In conclusion I find that the Defendant's counter claim succeeds.

28. Accordingly Judgement is entered in favour of the Defendant as against the Plaintiffs as follows;

- a. That the Plaintiffs suit is dismissed.
- b. That a declaration is hereby issued that the title in the names of Melubo Ole Tiapapushia was obtained fraudulently.
- c. That the Land Registrar is hereby directed to cancel and/or revoke the title in the name of Melubo Ole Tiapapushia issued on 31st July 2015 within sixty (60) days from the date of this Judgement.
- d. That costs of the suit be borne by the Plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24TH DAY OF OCTOBER 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Taliti for the Plaintiffs.

Mr. Nganga for the Defendant.

Court Assistant – Mutisya

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