



**Leshinka v Nyaga & another (Environment & Land Case 447 of 2017)
[2024] KEELC 13500 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13500 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 447 OF 2017
LC KOMINGOI, J
NOVEMBER 21, 2024**

BETWEEN

NICHOLAS LETOYA LESHINKA PLAINTIFF

AND

ROSE NJAMBI NYAGA 1ST DEFENDANT

REGISTRAR OF LANDS KAJIADO 2ND DEFENDANT

JUDGMENT

1. This suit was instituted through the Complaint dated 14th April 2015, was first filed at the Machakos High Court and later transferred to this Court. The Plaintiff claims that he is the registered owner of parcel Kajiado/Ololoitikoshi/Kitengela/89 measuring approximately 2.19 hectares having purchased it from one Kimani Gecau on or about 5th March 1996. Sometime in the year 2014, he subdivided the land into sixteen (16) plots. However, in January 2015, the 1st Defendant herein trespassed into the suit property, interfered with the boundaries and caused temporary structures to be erected on it. Upon conducting a search he discovered that the 1st Defendant had interfered with the Green Card and caused herself to be registered as the owner of the property on the strength of a letter from the Directorate of Criminal Investigation which caused his cancellation as the owner.
2. It is his case that the cancellation was thus fraudulently undertaken, illegal and unlawful because no Court order was obtained as per Section 79 and 80 of the *Land Registration Act*; colluding with the Criminal Investigation Department to cause cancellation of a title; illegally obtaining title to the property. He prayed for:
 - a. An order that the 1st Defendant's act of encroachment on Title No. Kajiado/Ololoitikoshi/Kitengela/89 is wrongful and unlawful;
 - b. A permanent injunction do issue restraining the 1st Defendant, her servants and/or agents or otherwise however from alienating, transferring, entering onto, building upon and/or



interfering with the Plaintiff's peaceful enjoyment and quiet possession of the parcels of land known as Kajiado/Ololoitikoshi/Kitengela/89 pending the hearing and determination of the suit.

- c. A declaration that the transfer from the Plaintiff to the 1st Defendant was fraudulent, null and void.
 - d. A declaration that the cancellation of the Plaintiff's title was wrongful, unlawful and illegal.
 - e. The register and entries made to transfer the title to the 1st Defendant be cancelled and the land registered in the name of the Plaintiff.
 - f. A declaration that the Plaintiff is entitled to ownership and exclusive use, occupation and vacant possession of Kajiado/Ololoitikoshi/Kitengela/89 to exclusion of the 1st Defendant or any person claiming through her.
 - g. General damages
 - h. Costs of the suit.
 - i. Any other relief that this Hon. Court may deem fit to grant.
3. The 1st Defendant in her statement of defence and counterclaim dated 21st October 2021 contested the Plaintiff's claim on the grounds that the said Kimani Gecau lacked capacity to enter into such a transaction having donated and registered his Power of Attorney to one Njeri Gecau on 9th July 1984. Therefore any transaction executed by anyone other than Njeri Gecau was illegal, null and void. She added that the suit property was charged to the defunct Rural Urban Credit Limited who exercised their Statutory Power of Sale and was sold to the 1st Defendant through a public auction, therefore at the time of the purported sale, Kimani Gecau was not the owner of the land. She went on to add that the Chargee attempted to prohibit the transfer to the 1st Defendant through High Court Case No. 2175 of 1995 but the Court ruled in the Chargor's favour and this Court order was duly registered at the Lands Registry.
4. On or about 24th July 1996, the Plaintiff together with others illegally filed another order with the Land Registry purporting to cancel the High Court order which was registered on 13th July 1995 as entry number 7. And on 29th August 1996 an illegal and unlawful entry number 8, transferring the property to the Plaintiff was registered. To conceal this fraud, the Green Card and register was closed on subdivision of the suit property to parcels Kajiado/Ololoitikoshi/Kitengela/74158-74173 on 10th August 2014 as entry number 10.
5. Investigations were conducted by the Director of Criminal investigation regarding this and found that there was fraud perpetuated and that the 1st Defendant was the duly registered owner and thus prayed for:
- a. A declaration that the 1st Defendant followed the legitimate and legal process in purchase of land parcel Kajiado/Ololoitikoshi/Kitengela/89 and is therefore the legal owner of the suit entitled to ownership and exclusive use, occupation and enjoyment of the same.
 - b. A declaration that the records of entry legitimising the 1st Defendant ownership to the suit property should remain as trite and lawful entry thereof in the Green card to Kajiado/Ololoitikoshi/Kitengela/89.
 - c. A permanent injunction do issue restraining the Plaintiff by himself, servants, agents, employees and/or any purported purchaser to the lawful subdivision of Kajiado/



Oloolotikoshi/Kitengela/89 whoever and whatsoever from trespassing, alienating, beaconing, building, subdividing, excising roads, erecting fences and or interfering with the 1st Defendant's use and enjoyment of the suit land.

- d. Costs of the suit.
6. The Plaintiff filed a reply to the defence and defence to the counterclaim and sought for its dismissal together with costs.

Evidence of the Plaintiff

7. PW1, Nicholas Letoya Leshinka adopted his witness statement dated 8th December 2023 as part of his evidence and produced eleven documents as exhibits marked as P. Exhibit 1-11. He stated that having conducted due diligence he purchased land known as Kajiado/ Oloolotikoshi/Kitengela/89 from Kimani Gecau on 5th March 1996 for Kshs. 122,000 and the sale agreement was witnessed by an advocate. The transfer was equally executed in presence of the advocate. The advocate lodged the requisite documents with the lands registry and was issued with a title dated 29th August 1996 as per entry number 8 of the green card. He would later subdivide the land and had already sold off six parcels when he was informed that someone was claiming the land. He stated that sometime in 2020 he was summoned at Rongai Police Station where he recorded a statement but he has never been charged with any offence nor was he aware of the results of the investigations. However, entry number 11 on the green card dated 13th January 2015 shows that all his titles were cancelled pursuant to a letter from the Director of Criminal Investigation and registered in favour of the 1st Defendant. He thus sought to have the title revert to him on grounds that he legally purchased the suit property.
8. On cross examination he stated the he was introduced to the owner of the property by a friend. Once they met, they agreed on the purchase price and he visited the lands registry to determine the ownership and upon ascertaining it belonged to Kimani Gecau he instructed his advocate to proceed with the transaction. He did not have a copy of the search or the transfer documents in court. He added that when he purchased it, they did not visit the Land Control Board to seek consent.. He confirmed that the green card, in his list of documents was not signed by the land registrar. He admitted that, the same documents such as the Green card extract in the 1st Defendant's documents had been signed by the Land Registrar. He also confirmed that the 1st Defendant's documents had a discharge of charge from Rural Urban Credit Limited dated 29th August 1996 which he stated that he was not aware of its existence up until 2015. He similarly confirmed that as per the Defendant's documents, the Deed of Indemnity was signed in 2014 and the land transferred to the 1st Defendant on 28th January 2015. The same year, 2015, the 1st Defendant entered onto the property and chased his caretaker who had been residing on the property. She put up a fence as well as other structures. He stated that he was not aware that there was a restriction by the Court barring any dealings on the title which was entry number 6 on the Green Card.
9. On re-examination he stated that Kimani Gecau gave him a copy of the title deed which he used to undertake a search. They then executed a sale agreement and he paid Kshs. 70,000 as deposit for the suit property. Once he got the title, he paid the balance of Kshs. 51,000. He stated that the mutation form and Green Card were signed and certified by the Land Registrar. He also confirmed that the entries in the Green Card in his possession bore no entry of a charge and neither was he informed about this by Kimani Gecau. He maintained that the land was duly transferred and registered in his favour. The land remained registered in his name until 2015 when his title was cancelled following a letter from Director of Criminal Investigation and registered in the 1st Defendant's name.



Evidence of the Defendants

10. DW1, Rosemary Wamuyu Mwangi the Land Registrar Kajiado, adopted her witness statement dated 18th October 2023 as part of her evidence in chief and produced three documents marked D. Exhibit 1-3 as exhibits.
11. On cross examination by the plaintiff's counsel she confirmed that entry number 8 dated 29th August 1996 which was in favour of Nicholas Letoya Leshinka was cancelled. She confirmed that there must have been a consent for the property to be transferred adding that the titles was issued and closed on subdivision for parcels 74158 to 74153. She also confirmed that the unsigned letter from the County Criminal Investigation Officer which was entry number 11 which did not have a report on the investigations attached to it, is the letter that the Land Registrar used to cancel the Plaintiff's title. She further stated that the land was then registered in favour of the 1st Defendant as per entry number 12. She also confirmed that she did not have the discharge of charge and transfer by chargee explaining that copies of land documents are stored where they are lodged. She also confirmed that in the documents presented by the 1st Defendant regarding the power of sale, some of them were signed while others were unfilled and unsigned.
12. On Re-examination she confirmed that there was a transfer to the 1st Defendant and a title deed issued which were entries number 12 and 13 respectively. She stated that the transfer was prepared by the official receiver of Rural Urban Credit Limited. She also stated that when investigations are conducted and letters forwarded to the Land Registrar, they do not attach the investigation reports. That following this letter, the Land Registrar deemed it fit to cancel the title because issues of fraud were raised. She also stated that parcel Kaiado/Ololutikoshi/Kitengela/89 was no longer in existence having been closed to subdivision of parcels 91521-91558 registered to Relief Organisation of East Africa.
13. DW2 Rose Njambi Nyaga, the 1st Defendant adopted her witness statement as part of her evidence in chief and produced her bundle and supplementary bundle of documents as exhibits in this case. She testified that in the year 1995, she saw an advertisement in the Daily Newspaper for sale of land by public auction by the Rural Urban Credit Limited for an unpaid loan of Kshs. 30,000 by Kimani Gecau. She bid and emerged the highest bidder at Kshs. 100,000. Upon going back to bank to finalise the transaction, she was informed that Njeri Gecau had stopped the transfer having filed suit High Court 2175 of 1995 which later became High Court 294 of 2013 (Commercial Division) which went on from 1995 to 2014. During this time, there was a restriction put against dealings with the land which was entry number 6 dated 13th July 1995. The case against the bank was dismissed, the restriction lifted and after paying stamp duty and acquiring the Land Control Board consent the land was effectively transferred to the 1st Defendant through the official receiver and liquidator, Bernice Wanjiku Gachegu since the Bank was under receivership.
14. She added that prior to the transfer, she conducted a search dated 15th January 2015 which showed that Kimani Gecau was the registered proprietor as of 2015 and the restriction was still intact. As such, the Plaintiff could not have acquired the property in the year 1996 when the restriction was in place. She thus sought for orders as prayed.
15. On cross examination she stated that she found out about the auction through a newspaper advertisement and the auction took place outside Kenya Commercial Bank, (KCB) Kitengela Branch. Having registered as a bidder with the auctioneers, she bid and became the highest bidder. She then paid 50% of the purchase price using a banker's cheque and also paid the balance but she did not have the receipts in court. She also did not have the Certificate of Sale issued by the auctioneers. On the issue



- of the Power of Attorney, she confirmed that it did not indicate that Njeri Gecau was Kimani Gecau's wife. It was not witnessed by an advocate. She confirmed that she signed the transfer of Charge which was done in presence of an advocate and it was also certified as per the signature on the document. She also stated that she had since sold the land to Relief Organisation East Africa.
16. On re-examination she stated that in 2015 when this suit was filed, parcel 89 was no longer in existence having been sold and subdivided. She confirmed that the Power of Attorney was stamped and registered as number 77 of 1994 and there was confirmation of payment as well. She also stated that the transfer by Chargee was also signed and stamped by the official receiver and the indemnity granted in 2014 was also equally signed by the receiver and herself.
 17. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's submissions

18. On whether the Plaintiff is an indefeasible owner of the suit property having purchased it from one Kimani Gecau, Counsel submitted that the Court order dated 13th July 1995 emanating from suit HCCC NO. 2175 of 1995 was lifted by another Court order dated 24th July 1996 and the Plaintiff was registered as the proprietor following that removal. Counsel went on to submit that this was also done following discharge of the charge registered on 10th July 1984 in favour of Rural Urban Credit Finance Limited as per entry number 4 of the Green Card. There was therefore no encumbrance curtailing sale in favour of the Plaintiff. The Plaintiff thus acquired valid title which was protected by Section 24, 25 and 26 of the *Land Registration Act*. Equally, the Plaintiff had shown how he acquired his title as was held in *Munyu Maina vs Hiram Gathiha Maina* and where there were two titles, the valid title is one that does not break the chain as held in *Hubert L. Martin & 2 others vs Margaret J. Kamar & 5 others* [2016] eKLR. Counsel went on to submit that the 1st Defendant's Green Card produced as evidence did not have Part C which showed the encumbrances which questioned its authenticity. Therefore, she did not discharge the burden of proof to show that the Plaintiff acquired the property illegally and fraudulently citing *Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 others* [2015] eKLR and *Koinange & 13 others vs Koinange* [1968] KLR 23.
19. Counsel also questioned the Director of Criminal Investigations that led to the cancellation of the title stating that the report was never filed and no mention of how the Plaintiff participated in the alleged fraud. This cancellation was therefore invalid and contrary to the right to fair administrative action and Section 79 of the *Land registration Act*. And any cancellation had to be sanctioned by court as per Section 80. Adding that the 1st defendant did not produce evidence of her acquisition by public auction.
20. Counsel also submitted that the 1st defendant sold off the property during the pendency of this suit which was against the doctrine of *lis pendens* and should be invalidated.

The 1st Defendant's submissions

21. Counsel for the 1st defendant submitted that the investigations carried out by the Director of Criminal Investigations were instituted by the Land Registrar on suspicion of fraud regarding the suit property. And following the investigations, the Land Registrar was directed to register the 1st Defendant as the owner. The suit property was then consequently sold off to Relief Organisation of East Africa and title issued on 17th March 2016 who were not joined in the suit. The 1st Defendant was therefore wrongly sued because she was no longer the registered owner of the suit property.



22. Counsel also submitted that the alleged Court order on 24th July 1996 that removed the restriction placed by Court order 13th July 1995 was invalid because no such Court order was ever issued and it was not produced in evidence. That the suit 2175 of 1995 was filed by Kimani Gecau the registered owner of the suit property who was dissatisfied with the public auction that took place on 6th July 1995. On 13th July 1995, the Court issued restraining orders against the suit property and on 15th October 2014, Justice J. Kamau found that this suit was wrongly filed by Kimani and was thus dismissed. Following this dismissal, an application was filed to lift the orders dated 13th July 1995 and this application was allowed and orders granted dated 2nd December 2014. Following this lifting, the 1st Defendant was registered as the owner on 28th January 2015 and sold it off to Relief Organisation East Africa on 14th December 2015. Therefore the 1st Defendant was the duly registered owner and had shown the root title of her ownership citing Dina Management Ltd vs County Government of Mombasa & 5 others.
23. Counsel went on to submit that fraud against the 1st Defendant had not been proved and it was the transaction to the Plaintiff that was fraudulent citing *Macfoy vs United Africa Co. Ltd (1961) 3 ALL ER* and *Five Forty Aviation Ltd vs Erwan Lanoe (2019) eKLR*.
24. On the issue of cancellation, counsel submitted that the Land Registrar was proper in cancelling the title because the Plaintiff did not have a clean title.
25. It appears the 2nd Defendant did not file any written submissions.

Analysis and Determination

26. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
 - i. Who is the lawful owner of property Kajiado/Ololoitikoshi/Kitengela/89;
 - ii. Whether the Plaintiff is entitled to the orders sought in the plaint;
 - iii. Whether the 1st Defendant is entitled to the reliefs sought in her counterclaim;
 - iv. Who should bear costs of the suit?
27. The contention relating to property Kajiado/Ololoitikoshi/Kitengela/89 begins from its acquisition. The Plaintiff claims that he purchased it from the registered proprietor one Kimani Gecau in 1996 and a title issued in his favour of 29th August 1996. However, the 1st Defendant contests this on the allegation that she purchased the property on 6th July 1995 following a successful public auction, but the dealings in respect of the property were halted by a Court order dated 13th July 1995 following the filing of suit HCCC NO. 2175 of 1995 by the said Kimani Gecau. That this order was still valid at the time the Plaintiff purports to have purchased it. It is indeed settled that in matters of land, the history of title all the way from the root is as good as the title itself as was held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina [2013] KECA 94 (KLR)*

“...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...”
28. It is not in contention that Kimani Gecau, was the registered owner of property Kajiado/Ololoitikoshi/Kitengela/89. The Plaintiff produced a sale agreement dated 5th March 1996 between



him and the said Kimani Gecau for the purchase of the suit property for a consideration of Kshs. 121,000 and the said agreement is duly executed and he became the registered owner as per the title deed dated 29th August 1996. The 1st Defendant has however contested this on grounds that there was a restriction against any dealings of the suit property dated 13th July 1995.

29. From the Green Card produced by the parties, it is evident that entry number 6 was a court order dated 13th July 1995. Entry number 7 dated 24th July 1996 indicates that there was another Court order which lifted the order dated 13th July 1995. This was submitted the Counsel for the Plaintiff. However, looking through the documents in the Court file, there was no evidence of this order dated 24th July 1996. The Plaintiff has failed to discharge his evidential burden of proof being he who alleges must prove as per Section 107 of the *Evidence Act* which provides:

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.

30. I note that the High Court Case Number 2175 of 1995 was between Kimani Gecau vs Rural Urban Credit & Wimaden Enterprises Auctioneers. Therefore, it means that the previous owner of the suit property was aware of the existence of that suit as well as the sale by way of public auction at the time of executing the sale agreement dated 5th March 1996. The order dated 12th July 1995 produced by the 1st Defendant shows that the Court stopped the transfer of the suit property until further orders. No other orders have been produced by any of the parties. The suit filed by the previous owner being High Court Commercial Court case 294 of 2013 was dismissed on 15th October 2014 by Justice J. Kamau. Cited as *Kimani Gecau v Rural Urban Credit & Wimaden Enterprises Auctioneers (Civil Suit 294 of 2013)* [2014] KEHC 8727 (KLR) on Kenya Law reports. Following this, the High Court in its order dated 19th February 2015 lifted the order dated 13th July 1995 as follows:

‘That the Land Registrar be and is hereby ordered to forthwith delete endorsement number 6 entered on 13th July 1995 as per the orders in this matter formerly High Court Civil Case No. 2175 of 1995 over LR No. Kajiado/Ololoitikoshi/Kitengela/89.’

31. Upon the dismissal of the suit and the lifting of the orders, it followed that the public auction transaction which took place on 6th July 1995 was valid and the 1st Defendant was able to demonstrate so. Even on matters of time, this transaction took precedence over the sale executed in March 1996.

32. The 2nd Defendant stated that following investigations carried out by the Directorate of Criminal Investigations (DCI) and their letter dated 13th January 2015, the Land Registrar cancelled all entries in favour of the Plaintiff in respect of the suit property. The said letter from Director of Criminal Investigations shows that the Land registrar sought for investigations parcels of land Kajiado/Ololoitikoshi/Kitengela/74158-74173 which were subdivisions of Kajiado/Ololoitikoshi/Kitengela/89 in favour of the Plaintiff. The Plaintiff claimed that this cancellation was irregular and contrary to the process outlined under Sections 79 and 80 of the *Land Registration Act*.

33. It is indeed accurate that Section 79(1) of the *Land Registration Act* provides circumstances in which the Land registrar may rectify the land register stipulating that such rectification should be with the consent of the proprietor. However this is not a requirement where there is fraud or mistake perpetrated by the proprietor as per Section 79 (2) which provides:

2. No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor’s consent unless—



- a. the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
- b. it would for any other reason be unjust for the alteration not to be made.

Section 80(2): The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

34. The allegation of fraud has not been proved as per the required threshold espoused by the Court of appeal in *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR. It is not clear what necessitated the Land registrar's inquiry into the suit property and no evidence of investigations and fraud has been adduced save for the letter from the Director of Criminal Investigation. However, this Court having determined that there was no evidence as to how the Court order dated 13th July 1995 was lifted, means that it was lifted illegally. As such, there was no error on the part of the Land Registrar in cancelling entries number 5, 7, 8 and 9 regarding property Kajiado/Ololoitikoshi/Kitengela/89 in favour of the Plaintiff which there is no evidence of the grounds in which they were entered.
35. Similarly in the case of *Teleposta Pensions Scheme Registered Trustees Vs. Inter counties Importers and Exporters Limited and 4 Others* (2016) eKLR the court held as follows;

“It is trite law that whoever alleges fraud must prove. It was therefore incumbent upon the Plaintiff to prove 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.....”

I find that the Plaintiff failed to discharge this burden.

36. Having determined that there is evidence of a public auction of the suit property in 1995 which has never been set aside by the Court, then the alleged sale between the Plaintiff and Kimani Gecau in March 1996 was invalid and irregular.
37. As such, the Plaintiff's case fails and the suit is dismissed.
38. Consequently 1st Defendant's Counterclaim succeeds. Accordingly judgment is entered for the 1st Defendant as follows.
 - a. That a declaration is hereby issued that the 1st Defendant legally and validly acquired the suit property; Kajiado/Ololoitikoshi/Kitengela/89;
 - b. That a declaration is hereby issued that the records of entry legitimising the 1st Defendant's ownership to the suit property are lawful entries in the Green Card of Kajiado/Ololoitikoshi/kitengela/89
 - c. The Plaintiff by himself, his servants and or agents are hereby restrained from trespassing, interfering or in any way dealing with property Kajiado /Ololoitikoshi/ Kitengela/ 89 or its subsequent subdivisions and or interfering with the 1st Defendant's use and enjoyment of the land.
 - d. That costs of the suit shall be borne by the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF NOVEMBER 2024.



L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Otieno Ombati for the Plaintiff.

Mr. Kalwa for the 1st Defendant.

N/A for the 2nd Defendant.

Court Assistant – Mutisya.

