



REPUBLIC OF KENYA



**Maungo v Masindano & 3 others (Environment & Land Case 58 of 2017)  
[2024] KEELC 13327 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13327 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 58 OF 2017  
EC CHERONO, J  
NOVEMBER 21, 2024**

**BETWEEN**

**HAJI ABDUL WEKESA MAUNGO ..... PLAINTIFF**

**AND**

**DAVID KILONGI MASINDANO ..... 1<sup>ST</sup> DEFENDANT**

**MATANDA FRED WEKESA ..... 2<sup>ND</sup> DEFENDANT**

**MATULI SAMSON ..... 3<sup>RD</sup> DEFENDANT**

**PAUL SANDAYA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**a. Introduction And Pleadings**

1. By way of a plaint dated 10/02/ 2017, the Plaintiff seeks the following orders against the Defendant;
  - a. Eviction.
  - b. Costs.
  - c. Any other relief this court may deem just to grant.
2. The plaintiff averred that the defendants who are farmers encroached onto his land measuring 6 ½ acres being part of land parcel no. N.MALAKISI/S.WAMONO/843(hereinafter referred to as the “suit land”). It is also averred that the defendants have refused to vacate from the said portion of land despite demand.
3. After the defendant was served with Summons and failed to enter Appearance and file defence, the matter proceeded ex parte and judgment was entered for the plaintiff as against the defendants on



18/12/2017. However, the said ex-parte judgment was set aside and leave granted to the defendants to file their defence in the ruling dated 18/06/2022.

4. In their joint statement of defence dated 27/09/2021, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants denied the plaintiffs claim in its entirety and averred that they are in possession and occupation of land parcel no. N.MALAKISI/S.WAMONO/843 since their childhood. They averred that the plaintiff obtained registration of the suit land fraudulently and illegally without consideration and by forging the signatures of Ziporah Nanyama, Maungo Sayanda and Samuel Kimungui. They set out particulars of the alleged fraud thereunder. It was further averred that the plaintiff did not obtain consent, misled the land Registrar and obtained transfer while the registered owners had long passed on.
5. The defendants further averred that the plaintiff holds the suit land in trust for them and that the suit herein is time barred. They counterclaimed against the plaintiff and averred that the 1<sup>st</sup> and 3<sup>rd</sup> defendants, being the legal representatives of the estate of one Zipporah Nanyama who is buried on the disputed land was registered as proprietor of the suit land alongside Samwel Kimungui and Maungo Sayanda who are all deceased. It was further averred that the said Zipporah Nanyama, being the last to die amongst the three joint registered owner was entitled to the suit land. The defendants counterclaimed against the plaintiff for the following orders;
  - a. A declaration order that the plaintiff acquired the registration of L.R. No.N.Malakasi/S.Wamono/843 irregularly and fraudulently hence the registration is null and void ab initio and the same be cancelled.
  - b. A declaration that by virtue of Section 60 of the [Land Registration Act](#) and Section 49 of the [Land Act](#), the suit land L.R. No.N.MALAKISI/S.WAMONO/843 be registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants who are the legal and personal representatives of the estate of Ziporah Nanyama Wachangua (deceased).
  - c. Costs
  - d. Any other relief this honourable court may deem just and fit to grant.
6. The plaintiff filed a reply to the defence and counter-claim dated 23/11/2021 denying the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants' claim.
7. Upon compliance with order 11, the parties agreed to proceed with hearing of the suit by way of viva voce evidence with the plaintiff calling one (1) witness and the defendants calling three (3) witnesses

### **Parties Evidence**

8. PW1 Haji Abdul Wekesa Maungo adopted his witness statement dated 01/04/2017 as his testimony-in-chief. He produced into evidence 3 items contained in his list of documents dated 01/04/2017 as PExhibit 1,2 and 3. During cross examination, he testified that he obtained title of the suit land from his grandfather namely Wachanguna as a gift in the year 2002. It was his evidence that Ziporah Nanyama was his grandmother and she signed the transfer documents for him while the 4<sup>th</sup> defendant signed the land consent document. He produced transfer documents signed by Samwel Kimungui, Maungo Sayanda and Zipporah Nanyama and stated that the first two signed in the year 1996 while the third signed in the year 2002. It was his evidence that the change of name was done on 21/01/2001 to correct an error. He stated that he has never been in occupation and use of the suit land despite having obtained title in the year 2002.
9. In re-exam, the plaintiff stated that the suit land was indeed registered in the name of Samwel Kimungi, Maungo Sayanda and Zipporah Nanyama and that the defendants are currently living in



- the land. He stated that he is not aware that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the sons of Zipporah Nanayama and that his acquisition of the suit land was through intergenerational equity.
10. DW1-David Kilongi Wachanguna Testified that he is the plaintiff's uncle and that Zipporah Nanyama was her mother. He adopted his witness statement dated 02/01/2022 as his testimony-in -chief. He referred to a list of documents containing 11 items dated 02/01/2022 but produced only nine as D-Exhibit 1-7 and 10 to 11 while items no. 8 & 9 were marked for identification as MF1-8 and 9 respectively.
  11. On cross examination, he stated that the suit land was solely registered in the name of the Ziporah Nanyama Wachanguna and that Maungo Sayanda who is the plaintiff's father was the owner of plot NO.842. He stated that the said Ziporah Nanyama had complained of losing her title and that he could not tell whether indeed she signed the transfer forms as alleged by the plaintiff. He stated that he reported the plaintiff to the area chief and the police but no action had been taken. It was also his testimony that they have not filed successions proceedings for the estate of Zipporah Nanyama
  12. In re-examination, he clarified that they have only obtained a limited grant for the estate of Zipporah Nanyama. He testified that the transfer forms indicate that the parties in the transfer appeared before a lawyer in the year 2002 yet some of them were deceased at the time.
  13. DW2 Samson Sammy Wachanguna adopted his witness statement dated 02/01/2022. On cross-examination, the witness testified that the plaintiff was his nephew. He stated that he did not know whether the initial owners of the suit land transferred it to the plaintiff and whether the signatures appearing therein belong to them. When cross-examined by the court, he testified that the suit land was acquired by their mother in the year 1977.
  14. DW3 Josphat Wafula Mkenya testified that he knew the chief of Lwandayi Location, having previously served as an assistant chief in Chepkut sub-location. He produced a letter dated 12/10/2020 and 14/07/2020 (as D-Exhibit 8 and 9). He testified that Laban Maungo Sayanda was the plaintiff's father while Samuel Kimungui was the plaintiff's elder brother and they all died in the year 1997. He testified that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein are the children of Zipporah Nanyama and one Wachanguna and that there is no blood relation between the plaintiff and the said Zipporah. It was his evidence that the plaintiff has a separate land from the land in issue. He added that the said Zipporah Nanyama who died in 2017 has never complained to her during her lifetime that her land had been grabbed.

### **Parties Submissions**

15. After the close of their respective cases, directions were taken and the parties agreed to file submissions.
16. The plaintiff filed submissions dated 28/03/2024 where he submitted on two issues. On the first issue, the plaintiff submitted that he had proved his case to the required standard. He relied on the provisions of Section 26(1) and 24 of the LRA, 2012 and the case of Katende vs. Harodas & Company limited (2008) EA 173, R.G.Patel vs. Lalji Makanji (1957)EA 314 and Evans Otieno Nyakwana vs. Cleophas Bwano Ongaro (2015)eKLR.
17. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant filed their submissions dated 08/08/2024 in which they contend that this suit is time barred, having been filed 15 years after the title was obtained and is therefore in contravention of section 7 of the Limitation of Acts Act. Reliance was placed on the case of Sohan Laldurgadaaa Rajput & Another vs. Divisional Integrated Development Programs Co. Ltd (2021) eKLR and Patrick Kirimi M'Nganabu vs. Njeru Muchai (2021) eKLR among other cases.
18. The defendant also submitted that the plaintiff did not explain how he acquired ownership of the suit land, either through purchase or gifting. They relied in case of Willy Kimutai Kitilit vs. Micheal Kinbet



(2018) eKLR. It was further submitted that the late Zipporah Nanyama who died last amongst the registered owner was entitled to the suit land which was a joint tenancy thus her legal representatives ought to be registered as the owners. Reliance was placed in the case of Taracira Micere Njuki vs. Anthony Gachuki & 3 Others (2017) Eklr.

19. It was the defendant's case that the plaintiff acquired registration of the suit land fraudulently by forging the signatures of the initial registered owners and misleading the land Registrar into issuing him with a certificate of title. They averred that they have all along been in occupation and use of the suit land to the exclusion of the plaintiff and that they are entitled to the suit land by virtue of being the children of Zipporah Nanyama who was the last survivor among the initial joint registered owners.

#### **Analysis And Determination.**

20. I have carefully considered the pleadings by the parties, the evidence adduced and the written submission and find that the issues for determination are as follows;
1. Whether the plaintiffs' suit is time barred.
  2. Whether the plaintiff is entitled to the orders of eviction
  3. Whether the defendants are entitled to the prayers sought in the counter claim.
  4. Who will bear the costs of the suit.

#### **Whether the plaintiffs' suit is time barred.**

21. The plaintiff in this case claimed that he was the registered owner of the suit land and that the defendants who had encroached thereon had no right to be in use and occupation of the land and sought to have them evicted. In his plaint, the plaintiff averred that the defendants encroached onto the suit land sometimes back in the year 2002. The defendants argued that the plaintiffs case was time barred under Section 7 of the Limitations of Actions Act, CAP 22 Laws of Kenya which provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

22. In *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, the Court of Appeal held as follows;

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

23. From the court record, it is clear that the plaintiff was issued with a certificate of title to the suit land in the year 2002. It is also clear from the pleadings and the testimony of the witnesses that the defendants have been in use and occupation of the suit land even before the year 2002. The current suit was filed on 20/04/2017 which is 15 years since the alleged acquisition and registration occurred. This period is well over 12 years which is the statutory period. Further, I have looked at the Plaint dated 10<sup>th</sup> April, 2017 and note that fraud is neither pleaded nor particularized. I find and hold that Section 26 of the *Limitation of Actions Act* is not applicable in this matter as no fraud is pleaded nor proved by the Plaintiff. As such, his claim is clearly caught up by the doctrine of latches.



### **Whether the plaintiff is entitled to orders of eviction**

24. From the foregoing disposition, it follows that a suit barred by limitation is a claim barred by operation of law and the Court cannot therefore grant the relief sought. In the case of *Iga v Makerere University* [1972] EA, the Court had this to say on the Law of Limitation;

“A Plaintiff which is barred by limitation is a Plaintiff barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

25. Further, In *Bosire Ogero v Royal Media Services* [2015] eKLR R.E. ABURILI J stated that: ‘The law of Limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them’.

She further stated that “.....The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of *Pauline Wanjiru Thuo vs David Mutegi Njuru* [CA 2778 of 1998](#).’...

### **Whether the defendants are entitled to the prayers sought in their counter claim.**

26. The defendants in their counter-claim averred that the title in the plaintiff’s name was obtained fraudulently and irregularly and that the same ought to be declared null and void and cancelled. It was further their case that they were all children of one Zipporah Nanyama Wachanguna while the 1<sup>st</sup> and 3<sup>rd</sup> defendants were the legal and personal representatives of her estate. It was also averred that the suit property was registered in the joint names of the said Zipporah, Samuel Kimungui and Maungo Sanyanda who are all deceased having died in the years 2017, 1997 and 1997 respectively. They averred that the said Zipporah having survived the other registered proprietors, her estate was entitled to the suit land. They therefore sought to have the title fraudulently issued to the plaintiff cancelled and the same to be registered in the name of the 1<sup>st</sup> and 3<sup>rd</sup> defendants who are administrators of her estate.

27. In support of their case, they produced a green card of the suit land which indicated that the suit land was first registered in the names of Mrs. Zipporah wife of Wachanguna, Wamaungo son of Wachanguna and Kimungui son of Wachangula on 03/05/1977. The names of the proprietors were later changed to Zipporah Nanyama, Maungo Sanyanda Maungo and Samwel Kimungui on 24/01/2001 and a certificate of title subsequently issued. The green card further reveals that the plaintiff Haji Abdul Wekesa Maungo was registered as the owner of the suit land on 09/04/2002 and a certificate of title issued on the same date. The defendants contend that the manner in which the plaintiff acquired title to the suit land was suspect as it is not clear whether the same was given as a gift or acquired through a sale.

28. The defendants also produced a copy of transfer forms and application for consent to transfer land which indicate that the plaintiff was gifted the suit land by the registered owners and that the initial registered proprietors signed the said forms before an advocate on 10/04/2002 and was issued with a consent to transfer dated 26/03/2002.



29. The plaintiff in response to the defendant's counter-claim had filed a reply to defence dated 23/11/2021 where he averred that the suit land was transferred to him by Zipporah Nanyama, one of the registered owners after he bought the same. The plaintiff produced a copy of certificate of search showing he is the registered owner of the suit land, a copy of transfer forms and application for Land Control Board consent.

30. The issue for determination is therefore whether defendant's have proved fraud on the part of the plaintiff. To succeed in a claim based on fraud, the defendants not only need to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in the case of Kuria Kiarie & 2 Others –vs- Sammy Magera [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

31. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, this court in the case of Kinyanjui Kamau – vs George Kamau [2015] eKLR expressed itself as follows:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –vs- Ndolo [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

32. Where a person's title is under attack, he must of necessity give an account of how he acquired the same. In the case of *Munyu Maina –Vs- Hiram Gatbiha Maina, Civil Appeal No.239 of 2009*, the Court of Appeal held as follows: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

33. In proving fraud, the defendant questioned how the plaintiff acquired title to the disputed land, arguing that the green card did not clarify this. The defendant submitted documents, previously



referenced in this judgment, to support their case. I have considered these documents, particularly the transfer forms, the application for LCB consent, and the consent letter. It is not in dispute that the suit land was originally registered in the names of Zipporah Nanyama Maongo, Sayanda Maongo, and Samwel Kimungui, who passed away in 2017 and 1997, respectively. Notably, the plaintiff's transfer documents are dated 10/04/2002 and 26/03/2022, which raises suspicion, as two of the registered owners were deceased by then and could not have signed these documents.

34. Additionally, in paragraphs 3 and 5 of his defense to the counterclaim, the plaintiff alleged to have purchased the suit land from Zipporah Nanyama, who later transferred it to him. However, in his oral testimony and the transfer documents presented, the transfer is described as a gift. This inconsistency reveals contradictions in the plaintiff's statements, undermining the credibility and reliability of his case. For these reasons, I am inclined to believe that the plaintiff acquired title to the suit land illegally, unprocedurally or through a corrupt scheme for which it is liable to be rectified. Having held that the whole process of acquisition of the certificate of title for the suit land was marred with fraud, illegalities and procedural irregularities, this Court cannot close its eyes on the face of such illegalities and the plaintiff cannot be allowed to benefit from those irregularities and illegalities.
35. The power to revoke and /or rectify title under Section 80 and Section 26 of the *Land Registration Act* is meant to achieve justice for the true owners of title. In view of the aforesaid, I am inclined to invoke the provisions of Section 80 (1) of the *Land Registration Act* No. 3 of 2012 which provides as follows:
- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
36. The question that now remains for determination is whether the registration of the three initial owners was a joint tenancy or tenancy in common. The defendants argued that the suit property was a joint tenancy and since Zipporah Nanyama survived the other proprietors, she became entitled to the suit property and that the same should now go to her estate.
37. As earlier stated, the suit land was first registered on 03/05/1977 and a change of name was effected later on 24/01/2001 and the nature of co-tenancy is not indicated. The Registered *Land Act*, Cap 300, (RLA) was the operative law. Section 101 (1) of the said Act (Registered *Land Act*) provided as follows:-
- “ 101.
- (1) An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-
- (a) whether those persons are joint proprietors or proprietors in common; and
- (b) where they are proprietors in common, the share of each proprietor.”
38. It is apparent that when parliament enacted the RLA, it did not contemplate a situation where there would be several proprietors, without it being disclosed in the register whether they are joint proprietors or proprietors in common. The characteristics of these two kinds of proprietorship is defined in Sections 102 and 103 of the Registered *Land Act*. In a nutshell, these provisions provide that, where proprietorship is joint, the persons do not have any separate shares in the land, and therefore if one proprietor dies, his interest automatically vests upon the surviving proprietor. Therefore, if land is owned jointly by A and B, and A dies, B now becomes the sole proprietor of the land and does not hold it in trust for the estate of A. In other words, there are no separate shares for the proprietors. Where



land is owned in common, each proprietor has a separate share, only that the same is undivided and held together with the other proprietor/s as one whole. Consequently, if one proprietor dies, his share does not vest in the surviving proprietor, but vests in his estate.

39. In *Moses Bii v Kericho District Land Registrar & another* [2015] eKLR Munyao Sila J held as follows;

“My view is that if the register does not reflect whether land is held jointly or in common, the fallback position should be to presume that the land is held in common. Joint proprietorship, where the same has not been explicitly indicated, should only be presumed in the clearest of circumstances, where there can be no shred of doubt that the contemplation of the parties was to have the property held jointly. I for myself cannot think of such a state of affairs other than where the proprietors are spouses, though I cannot rule out other situations, but they really must be so clear as to obviate debate on it.”

40. From my analysis and the above decision which I find persuasive, I find that the interest of justice demand that the registration of the suit land is to revert to the names of Zipporah Nanyama Maongo, Sayanda Maongo and Samwel Kimungui (now deceased).

41. Ultimately, I grant the following consequential orders;

- a. The plaintiff’s case is dismissed for being time barred.
- b. The defendants counterclaim partially succeed and the same is allowed as follows;
  - i. It is hereby declared that the plaintiff acquired the registration of L.R. No.N.Malakasi/S.Wamono/843 illegally, fraudulently,unproedurally or through a corrupt scheme hence, the registration is null and void ab initio and the same be and is hereby cancelled.
  - ii. It is hereby declared that registration of the suit land L.R. No.N.Malakasi/S.Wamono/843 shall revert to the names of Zipporah Nanyama, Maongo Sayanda Maongo and Samwel Kimungui as tenants in common.
  - iii. The plaintiff shall bear the costs of the dismissed suit and counter-claim.

42. It is so ordered.

**DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024.**

.....  
**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Were for the defendant.

Mr. Wekesa for the plaintiff.

Bett C/A.

