



**Kili v Maiyo & 4 others (Environment & Land Case E014 of 2023)
[2024] KEELC 13237 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E014 OF 2023
MN MWANYALE, J
NOVEMBER 14, 2024**

BETWEEN

ARON KIPTANUI KILI PLAINTIFF

AND

ELIZABETH JELEL MAIYO 1ST DEFENDANT

ROSA KARONEI 2ND DEFENDANT

THE LAND REGISTRAR, NANDI 3RD DEFENDANT

THE COUNTY SURVEYOR (NG), NANDI 4TH DEFENDANT

SOLOMON KIPROP 5TH DEFENDANT

JUDGMENT

Background

1. Vide his amended Complaint dated 3rd May 2023 the Plaintiff Aaron Kiptanui Kili sued the 1st to 5th Defendants Namely Elizabeth Jelet Maiyo, Rosa Karonei, the Land Registrar Nandi and the County Surveyor (NG) Nandi and Solomon Kiprop seeking;
 - a. Declaration finding and determination that he is the true legal and bonafide owner of the suit property parcel number Nandi/Kombe/745 and has a right of exclusive and unimpeded right of possession occupation and user. The 1st and 2nd Defendant whether by themselves or their representatives' servants, agents, nominees or otherwise howsoever claiming through them are not entitled to claim.
 - b. Cancellation of the mutation of parcel number Nandi/Kombe/43 that was improperly, irregularly and fraudulently prepared so as to cause and or to disappear or wipe out and/or erase from the map the Plaintiff's parcel Nandi/Kombe/745.



- c. Order directing the 3rd and 4th Defendants to re-establish the boundaries of mutation created on subdivision of parcel number Nandi/Kombe/728.
 - d. An order of declaration finding and determination that the 1st and 2nd Defendants are trespassers on the suit parcel and be evicted with a further order of a permanent injunction restraining them whether by themselves or their representatives, servants, agents or nominees or otherwise howsoever acting on their instructions from entering being upon, doing anything, act or thing to detriment of the Plaintiff or in any way removing or evicting the Plaintiff from parcel Nandi/KombeR/745 “the suit property” is also being sought.
 - e. Mesne profits to be assessed and/or be determined on valuation through an order of the Court.
 - f. Value of the cut down trees and uprooted tea together with expected earnings as assessed by the Forester and an Agricultural Extension Officer by the 1st, 2nd and 5th Defendant
 - g. Costs of the suit
 - h. Any other or further reliefs that the Court may deem fit so to grant.
2. On 25/01/2024, a request for judgment against the 1st, 2nd and 5th Defendant was endorsed by the Honourable Deputy Registrar and the Court allowed the matter to proceed as undefended.
 3. On the first hearing date, the Plaintiff's Advocate withdrew the suit against the 3rd and 4th Defendants namely the Land Registrar and County Surveyor as he wished to convert the said Defendants as his witnesses and the Court recorded the withdrawal of the said Defendants, hence the suit proceeded undefended against the 1st, 2nd and 5th Defendants.

No further amended plaint was filed to reflect withdrawal of the 3rd and 4th Defendants.

Plaintiff's Case: -

4. It is the Plaintiff's case that he is the registered proprietor of all that parcel of Land known as Nandi/Kombe/745 measuring 1.20 hectares having purchased from the 1st Defendant who had subdivided Nandi/Kombe/728 into 3 parcels namely Nandi/Kombe/743, 744 and 745.
5. It is the Plaintiff's further case that he took possession and occupation after the sale purchase and developed the said property with mature tea and trees. That the 1st and 2nd Defendants moved in his said property and harvested his trees on the strength of a fraudulent subdivision of parcel Nandi/Kombe/743 which was wiped out from the map, and caused the disappearance of Nandi/Kombe/745 which had been created from the mutation of Nandi/Kombe/728 and the 1st and 2nd Defendants uprooted the Plaintiff's tea, and mature trees.
6. The Plaintiff further claims that the subsequent mutation of Nandi/Kombe/743 was wiped out from the RIM and caused the disappearance of parcel number Nandi/Kombe/745 from the original mutation of Nandi/Kombe/728 and moved parcel no. Nandi/Kombe/744 to the position of parcel number Nandi/Kombe/745 was fraudulently done, thus from the year 2000 Nandi/Kombe/745 disappeared from the RIM of the Kombe Registration Section.
7. That it is the Plaintiff's further case that the 5th Defendant did in April of 2023 harvest his mature blue gum trees on parcel Nandi/Kombe/745 on the strength of having purchased the same from the 1st Defendant, yet the Plaintiff had acquired the suit land more than 30 years ago in 1994 and taken possession of it.



8. The Plaintiff pleaded and particularized fraud on the part of 1st Defendant as well as on the 2nd and 5th Defendants.
9. That as a result of the fraudulent activities particulars whereof were particularized, the Plaintiff averred that the 1st and 2nd Defendants were wrongful in occupation of his parcel of land, Nandi/Kombe/745 and that the harvest of his tea and blue gums trees caused him loss and damage.
10. On the strength of the above, the Plaintiff prayed for judgment against the Defendants in terms as set out at paragraph 1 of this judgment.

Defence Case: -

11. The 1st, 2nd and 5th Defendants did not enter appearance not filed defence while the suit against the 3rd and 4th Defendants was withdrawn, hence this suit proceeded as undefended.

Plaintiff's Evidence: -

12. It was the Plaintiff's case that he had vide an Agreements for Sale dated 21/6/1994 and 19/8/1994 bought from the 1st Defendant portions of land totaling to 1.20 hectares within Nandi/Kombe/728.
13. The agreed purchase price was kshs 40,000/= per acre, a Land Control Board consent for subdividing was obtained and Nandi/Kombe/728 was subdivided into Nandi/Kombe/743, 744 and 745. The mutation was registered and that he obtained consent to transfer on 9/12/1994 and he became the registered owner of Nandi/Kombe/745 hereinafter referred to as 'the suit property' and he took possession of the property.
14. It was his further testimony that in 2023, Elizabeth Jelel the 1st Defendant and her family members trespassed on the suit property and harvested his mature blue gums trees and tea bushes and sold the trees to the 5th Defendant Solomon Kiprop.
15. The witness further testified that Nandi/Kombe/743 belonging to the 1st Defendant was subdivided into Nandi/Kombe/814/815 and 816 on 3/3/2000 and in this subsequent subdivision and mutation of Nandi/Kombe/743, Nandi/Kombe/744 was moved to where Nandi/Kombe/745 was originally located and the 2nd mutation thus had no indication of Nandi/Kombe/745 making it disappear on the RIM.
16. It was PW1 further evidence that his property Nandi/Kombe/745 disappeared from the subsequent mutations although it exists on the ground as it appeared on the 1st mutation registered on 15/12/1994. That his workers were evicted in 2023, and he stopped harvesting tea, which he would ordinarily supply to Kipchabo Tea Factory as well as Kamarich Tea Factory. At Kipchabo Tea Factory he was registered as farmer No. 110299 on the Aron Kili – Kabaa route. His average monthly delivery was kshs 616 kgs.
17. The witness testified that the uprooted tea bushes have 310 and were uprooted by the 5th Defendant. In support of his case the Plaintiff produced a total of 16 exhibits including copy of the title for Nandi/Kombe/745 and he sought for the prayers in his amended plaint.
18. In further support of his case, the Plaintiff called the Land Registrar Nandi County, who testified as PW2.
19. It was PW2's testimony that Nandi/Kombe/745 was registered in the name of Aaron Kiptanui Kili and register opened on 15/12/1994 as a subdivision from Nandi/Kombe/728 and was transferred to Aaron Kiptanui Kili by Elizabeth Chelel Maiyo.



20. Upon subdivision of Nandi/Kombe/728, three parcels emanated therefrom as Nandi/Kombe/743, 744 and 745. The witness testified that Nandi/Kombe/744 was registered on 15/12/1994 in the name of Elizabeth Chelel Maiyo. Nandi/Kombe/743 was closed on subdivision to Nandi/Kombe/814, 815 and 816.
21. The witness confirmed that the mutation of Nandi/Kombe/728 agrees with the registers and the title of the mutation of Nandi/Kombe/745 which tallies with copies of the registers. It was her testimony that the transfer from Elizabeth Chelel to Aaron Kili was done regularly and procedurally as copy of receipt, and the transfer and stamp duty were paid for. There was consent for transfer too, hence title in respect of Nandi/Kombe/745 was issued regularly.
22. She produced the certified copies of the records of the register of Nandi/Kombe/728, 745 and 743 as well as 814; mutations of Nandi/Kombe/728, 743 together with letters of consent and receipts which the Plaintiff had earlier been produced by the Plaintiff and were thus not given exhibits number.
23. PW3 Mr. James Vosena, a cartographer at the Nandi Survey Office testified on behalf of the County Surveyor and produced P Exhibit 17, 18, 19 (a) and (b) and it was his testimony that after the original mutation of Nandi/Kombe/728 there was a mistake in the subsequent mutations of Nandi/Kombe/743 that led to the disappearance of Nandi/Kombe/745 on the RIM and therefore the mutation of Nandi/Kombe/728 should be reamended so as to reflect the title the RIM and the ground.
24. After the testimony of the 3 witnesses, the Plaintiff's case was closed.
25. As the Defendants did not enter appearance and did not take part in the proceedings the Defendants case was closed by the Court, and the Plaintiff filed submissions on his case.

Plaintiff's Submission: -

26. The Plaintiff has framed and submitted on two issues, to wit;
 - a. Who is the legal owner of the suit property?
 - b. Who should bear costs of the suit?
27. On issue number 1, the Plaintiff when placing reliance on Sections 24, 25 and 26 of the [Land Registration Act](#), submits that having produced the certificate of title, he is the registered owner of the suit property a fact that has not been challenged in evidence.
28. The Plaintiff further submits that in accordance with Sections 107 to 109 of the [Evidence Act](#), he had discharged his burden of proof by proving ownership of Nandi/Kombe/745 and accordingly judgment should be entered in his favour.
29. In terms of the compensation claimed the Plaintiff submits and urges the Court to rely on the valuation reports produced in Court so as to determine the compensation and places reliance on the decision in the case of Dhaby vs Republic (1995 -1998) E. A. 29.
30. On the second issue on costs, the Plaintiff cites Section 27 of the [Civil Procedure Act](#) and submits the Court to grant the costs of the suit to him as the successful litigant.
31. Finally, the Plaintiff submits for judgment to be entered in his favour as prayed for in the plaint.

Issues for Determination: -

32. Having analyzed the pleadings, evidence on record and submissions filed the Court frames the following as issues for determination.



- i. Whether or not the dispute is a boundary dispute so as to oust the Court jurisdiction under Section 18 of the [Land Registration Act](#).
- ii. Whether or not the Plaintiff has proven his case
- iii. What reliefs are to issue in the suit?
- iv. Who bears the costs of the suit?

Analysis and Determination: -

33. The issue of jurisdiction has been raised by Court suo moto in light of Section 18 of the [Land Registration Act](#) that ousts the Courts jurisdiction in boundary disputes.
34. A casual perusal of the plaint paragraphs 7, 8, 9, 11 and 15 seems to disclose a boundary dispute between the Plaintiff and the 1st and 2nd Defendants, however upon a keen analysis of the whole plaint, it discloses more than a boundary dispute, it discloses “ the wiping out and/or disappearance” of Nandi/Kombe/745 from the Registry Index Map (RIM) of Kombe Registration Section due to subsequent erroneous and/or fraudulent subdivisions and mutations, which then transcends the dispute from a boundary dispute to an ownership dispute of Nandi/Kombe/745 and the occupation thereof and whether indeed Nandi/Kombe/745 exists as it should on the ground having been ‘wiped out’ of the Registry Index Map of Kombe Registration Section. This thus becomes an issue of ownership and occupation and the matter is rightly before the Court under provisions of Article 162 (2) b of [the Constitution](#) of Kenya read together with Section 13 (1) (a) of the [Environment and Land Court Act](#).
35. The answer to issue number 1, is the Court has the requisite jurisdiction to hear and determine the matter.
36. Having answered the first issue in the affirmative, the Court shall now proceed to issue number 2 on whether or not the Plaintiff has proven his case.
37. The Court is aware of the duty of imposed on a Plaintiff to prove his case even so when the matter is undefended as the case herein, as was held by the Court of Appeal, in the case of Kabiya & 3 others vs Kabugi & 3 others 1983 (eKLR) where the Court held interalia;

“The burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended. The burden of prove is not way lessened because this is heard by way of formal proof.”
38. In the case before Court, the Plaintiff pleads to be the owner of Nandi/Kombe/745 which was a subdivision of Nandi/Kombe/728 which originally belonged to the 1st Defendant who sold and transferred to him after the subdivision of Nandi/Kombe/728 into 3 parcels. The sale was made in 1994. In support of this fact the Plaintiff produced as P Exhibits. Copy of title of Nandi/Kombe/745 (P Exhibit 2) certificate of search of Nandi/Kombe/745 as P Exhibit dated 13/3/2024 as P Exhibit 3 (a). certificate of search of Nandi/Kombe/745 dated 13/3/2023 P Exhibit 3 (b), Agreements for Sale between the Plaintiff and the 1st Defendant as P Exhibit 4 and 5, mutation of Nandi/Kombe/728 dated 15/12/1994 as P Exhibit 6, application for Land Control Board consent to transfer as P Exhibit letter of consent transfer as P Exhibit. Receipt for consent as P Exhibit 9.
39. The above documentary evidence produced by the Plaintiff were also confirmed and by the Land Registrar PW2, who produced certified copies thereof, but the same were not numbered as they were a replica of the documents produced by the Plaintiff.



40. It is the Plaintiff's further claim that subsequent mutation on title 743 made in 1998 made his parcel number 745 disappear from the RIM. In support of this claim PW3 produced a tracing map of the original Nandi/Kombe/728, showing the subdivisions into Nandi/Kombe 743, 744 and 745. In the survey report produced in Court as P Exhibit 17. The Surveyor observed that there was an interchange of numbers between the parcel numbers 744 and 745, 745 was indicated as 744, and 745 indicated as 744. On the RIM, hence the map amendment did not conform to the mutation form.
41. Due to this error on the RIM, and since the 1st Defendant was the registered owner of parcel number 744. She proceeded to subdivide the same pursuant to a mutation produced as P Exhibit 11, hence making 745 disappears completely on the RIM although there are no records of its subdivision as was confirmed by the PW2.
42. The Plaintiff further claim is that as a result of the illegal subdivision and/or mutation, his property Nandi/Kombe/745 disappeared and the 1st Defendant sold his grown trees and tea bushes to the 3rd Defendant, thereby causing loss and damage and sought compensation as a result of the said loss.
43. In support of this claim, the Plaintiff produced delivery statements of tea leaves to Kipchabo Tea Factory, as well as photographs of the nature trees that had been felled as well as crop damage assessment report, and Forester's report on the damaged trees as P Exhibit 13 (a) (b) 14 and 16.
44. It is the Plaintiff's claim that the 1st Defendant sold his trees to the 3rd Defendant who harvested the same with no color of right and in support he produced P Exhibit 15 a letter authored by Cheruiyot Melly Advocates on behalf of the 1st Defendant selling the mature trees.
45. As a result of the new mutation that interchanged Nandi/Kombe/745 with Nandi/Kombe/744, the 1st Defendant subdivided the erroneously exchanged parcel with the result of new parcels that included Nandi/Kombe/814, 815 and 816. And as a result of the erroneously exchange. The sale of the trees was said to be on Nandi/Kombe/774.
46. The Plaintiff has demonstrated that he lawfully and procedurally acquired Nandi/Kombe/745 from the 1st Defendant in 1994 and that he took possession thereof. As a result of the subdivision of Nandi/Kombe/728 which belonged to the 1st Defendant into 3 parcels Nandi/Kombe/743, 744 and 745.
47. That through a mistake and/or error in the mutations of 743, the numbers 744 and 745 were interchanged on the RIM, but the same did not alter the ground as the Plaintiff was in occupation of Nandi/Kombe/745.
48. As a result of the interchanging of the parcel numbers 744 and 745; and during the subsequent subdivision of Nandi/Kombe/743, into Nandi/Kombe/814, 815 and 816 parcels 743 overlapped 744 and displaced parcel 745 hence wiping off the suit land from the RIM sheet no. 5, although parcel no. 745 has not been subdivided and existed in the mutation of Nandi/Kombe/728 in 1994.
49. The Court finds that the Plaintiff has discharged his burden of proof by proving his case as required under Section 107 – 109 of the *Evidence Act*.
50. On the issues of reliefs, the whole wiping of Nandi/Kombe/745 can be traced from the interchanging of the parcels on the RIM; which did not conform to the mutation form of Nandi/Kombe/728; as captured in the survey report dated 10th July 2024 produced as P Exhibit no. 17.
51. Section 80 of the *Land Registration Act* empowers the Court to order the Register to be rectified when registration was obtained by fraud and/or mistake.



52. The Plaintiff has pleaded fraud, on the registration of the subsequent mutations however he did not prove the same and the Courts views the registration of the interchanged parcels numbers on RIM to have been made erroneously and/or by mistake and the Plaintiff is entitled to an Order of rectification, as well as compensation for loss and damage.
53. Having proven his case on a balance of probabilities, noting that the Plaintiff case was uncontroverted the Court enters judgment for the Plaintiff in terms as follows;

Disposition: -

54.

- a. Judgment be and is hereby entered for the Plaintiff against the Defendants as here follows;
 - i. Kshs. 181,281 being value of the uprooted tea bushes under the prayer of damaged crops
 - ii. Kshs 757, 269 being value of the mature tree valuation; both sums to be borne by the 1st and 5th Defendant jointly and severally.
- b. The Land Registrar and the County Surveyor Nandi County (National Government) shall cause rectification and Amendment of the Registry Index Map of Kombe Registration Section map sheet 4 and 5 so as to reflect the mutations forms of Nandi/Kombe/728 Dated 9/12/1994, such rectification shall include cancellation if need be, of any mutations that were mistakenly and/or erroneously prepared it shall also include rectifications of all the registers of the resultant parcels that have emerged from Nandi/Kombe/728, so as to reflect Nandi/Kombe/745 as it appears on the ground in line with the survey report dated 10/7/2024, and the mutation of Nandi/Kombe/728 dated 9/12/1994.
- c. Upon rectification and re-establishment of Nandi/Kombe/745 through the amendments of RIM as ordered in B above, the 1st and 2nd Defendants shall grant vacant possession to the Plaintiff within 30 days thereof and they 91st and 2nd Defendants) together with their Agents Servants employees and/or nominees are restrained permanently by an order of injunction from interfering with the Plaintiffs ownership and enjoyment of Nandi/Kombe/745.
- d. The costs of this suit shall be borne by the 1st Defendant.
- e. Judgment accordingly.

JUDGMENT, DELIVERED, DATED AT KAPSABET THIS 14TH DAY OF NOVEMBER, 2024.

Hon. M. N. Mwanyale,

JUDGE

In the presence of; -

1. Mr. Sagasi holding brief for Mr. Choge for the Plaintiff.

