



**Seventh Day Adventist Church E.A. Union Limited v Nyamira County
Government & 2 others (Environment & Land Case E003 of 2023)
[2024] KEELC 14112 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 14112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E003 OF 2023**

**JM KAMAU, J
DECEMBER 18, 2024**

BETWEEN

SEVENTH DAY ADVENTIST CHURCH E.A. UNION LIMITED PLAINTIFF

AND

NYAMIRA COUNTY GOVERNMENT 1ST DEFENDANT

THE LAND REGISTRAR, NYAMIRA COUNTY 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. This suit was commenced by a Plaint dated 25/10/2023 where the Plaintiff sued the Defendants and prayed for Judgement for:-
 - i. A Declaration that LR No. West Mugirango/Siamani/1210 was lawfully allocated and in favour of the Plaintiff and hence same is the Bona-fide and legitimate proprietor of the suit property.
 - ii. A Declaration that the transactions and/or entries entered and/or endorsed in the Register of LR No. West Mugirango/Siamani/1210 on the 8th September 2023, were fraudulent, unlawful, illegal and void.
 - iii. An Order cancelling and nullifying the Title in respect of LR No. West Mugirango/Siamani/1210 fraudulently issued in the name of the 1st Defendant and restoration of the name of the Plaintiff on the Register as the lawful owner.
 - iv. An Order of Eviction against the 1st Defendant, her agents and/or servants from LR No. West Mugirango/Siamani/1210.



- v. An order of Permanent Injunction restraining the Defendants and more particularly, the 1st Defendant either by herself, agents, servants and/or anyone claiming under the said defendant(s) from transferring, selling, charging, leasing, sub-dividing, constructing, fencing, interfering with and/or in any other manner dealing with the suit property, that is LR No. West Mugirango/Siamani/1210 and/or any portion thereof.
 - vi. General Damages for Trespass.
 - vii. Costs of this suit be borne by the Defendants.
 - viii. Such further and/or other relief as the honorable court may deem fit and expedient so to grant.
2. The Plaintiff averred that the suit property i.e. L.R. NO.WEST MUGIRANGO/SIAMANI/1210 measuring 0.4 Hectares was on 9/5/1973 registered in the name of the defunct Gusii County Council and reserved for Nyaigwa Nursery School. Subsequently, the Plaintiff applied for the same in order to put up a Church and a Nursery School. The same was approved in meetings held on 26/3/1992 and 7/5/1992 respectively and which was then allocated to the Plaintiff. These changes were effected after the County Council of Nyamira voted in favour of the same. But the 2nd Defendant has now refused to issue the Plaintiff with a Title Deed as agreed earlier on. A suit for Judicial Review to compel the Defendants to issue the Plaintiff with a Title Deed in Kisii ELC JR NO. 21 of 2014 was dismissed on 17/3/2017. But on 23/6/2017 the 2nd Defendant registered the Plaintiff the owner of the suit property. Nevertheless in 2020 the Plaintiff was asked to pay Khs.45,000/= to the 2nd Defendant for boundary determination which was duly complied with. The 1st Defendant has now been registered the owner of the suit land in a dubious manner and through fraud on the part of the Defendants.
 3. On 24/7/2024 the Defendant filed a Statement of Defence denying the entire claim by the Plaintiff in toto save admitting the jurisdiction of this Court to hear and determine this matter.
 4. The Hearing of the case kickstarted on 24/7/2024 when Pastor Evans Masengo adopted his written statement dated 25/10/2023 and produced the following documents to support the Plaintiff's case:-
 1. Copy of Extract of Resolution dated 11th October 2023.
 2. Copy of letter from Gusii County Council under reference GCC/LAND/14/23 in respect of LR NO.WEST MUGIRANGO/SIAMANI/1210 dated 31st August 1989.
 3. Copy of Extract of Minutes of Meetings held on 26th March 1992 and 7th May 1992 of Gusii County Council.
 4. Copy of Minutes of Nyamira County Council dated 8th July 1993.
 5. Copy of letter confirming approval from the Nyamira County Council under reference NCC/ADM/14/1(55) dated 26th May 1994.
 6. Copy of Ruling vide KISII HCC NO.579 of 1993 dated 24th January 1994.
 7. Copy of Decree vide KISII HCC NO.579 of 1993 dated 26th April 1995.
 8. Copy of Certified Proceedings vide KISII HCCC NO.579 of 1993 dated 19th April 1995.
 9. Copy of Title Deed in respect of LR NO. WEST MUGIRANGO SIAMANI/1210 dated 7th March 2007.
 10. Copy of Judgment vide KISII HCJR NO.21 of 2014 dated 17th March 2017.



11. Copy of letter from the Plaintiff to the 2nd Defendant dated 5th November 2020.
 12. Copy of Revenue Receipt number 5561581 of kshs. 15,000/= dated 10th November 2020.
 13. Copy of Revenue Receipt number 5561584 of kshs 30,000/= dated 10th November 2020.
 14. Copy of Boundary Disputes Summons dated 1st December 2020.
 15. Copy of Green Card in respect to LR No. West Mugirango/Siamani/1210 dated 2nd June 2023.
 16. Copy of certificate of Official Search in respect of LR No. West Mugirango/Siamani/1210 dated 2nd June 2023.
 17. Copy of the Application vide NYAMIRA CMCC MISC APPLICATION NO.E008 of 2023 dated 9th June 2023.
 18. Copy of letter to the 2nd Defendant requesting the Green Card and certificate of official search in respect of LR NO.WEST MUGIRANGO/SIAMANI/1210 dated 25th September 2023.
 19. Copy of Certified Green Card in respect of LR NO.WEST MUGIRANGO SIAMANI/1210 dated 25th September 2023.
 20. Copy of Certificate of official search in respect of LR NO.WEST MUGIRANGO/SIAMANI/1210 dated 25th September 2023.
 21. Copy of Revenue receipt issued by the 2nd Defendant in respect of LR NO.WEST MUGIRANGO/SIAMANI/1210 dated 25th September 2023.
 22. The Pleadings, Affidavits and all other documents filed in respect of the instant suit.
 23. Such other and/or further documents that may come into the possession and/or power of the Plaintiff.
5. The witness said that apart from the minutes giving them the suit land, he has not been shown any other minutes to the contrary. The ones of 26/3/1992 and 7/5/1992 respectively are the only ones. These minutes are also indicated in the Title Deed issued on 26/5/1994. This Title has never been revoked by any Court Order/Judgment. It is the Land Registrar, Nyamira who did the revocation without any Notice to the church. This was due on 8/9/2023. When cross-examined by Ms. Moeche for the 1st Defendant the witness said that the suit property had been reserved for Nyaigwa Nursery School. On cross-examination by Mr. Ndiritu for the 2nd and 3rd Defendants, the witness said that the church was registered the owner of the suit land on 23/6/2017 after the Court had already dismissed their case for compelling the Land Registrar to issue the church with a Title Deed. On re-examination by Ms. Ochwal, Pastor Masengo said that he was not familiar with the meetings and procedures of the CouncilAll he has is a document from the Town Clerk. The Application for the suit property is referred to the letter of allotment.
6. On her part, the 1st Defendant through her Director Land Administrator, Francis Mchin Mbeche produced the documents as per the list dated 23/7/2024 as follows: -
1. Copy of official search in respect to WEST MUGIRANGO/SIAMANI/1210.
 2. Copies of minutes dated 26th March, 1992.
 3. Copy of Judgment dated 17th March, 2017.
 4. Others to be supplied with leave of the Court.



7. He testified that the search shows the land to be a public land reserved for Nyaigwa Nursery school; belonging to the County Government which cannot later be transferred to a private individual. The same measures 0.4 Hectares. The witness who was by then the Town Clerk disowned all the correspondences as well as the minutes from the Council that gave the Plaintiff ownership of the suit land. While cross-examined by Mr. Ndiritu for 2nd and 3rd Defendants, the witness said that they never convened meetings to allocate public land and that the 2 meetings of 26/3/1992 and 7/5/1992 were not genuine. And that the proper process of allotment was not followed in this case.
8. He finally said that the Title Deed held by church was not legitimate. And that the Plaintiff has never paid any Rates to the Defendants.
9. On cross-examination by Ms. Ochwal for the Plaintiff, the witness said that the Defendants have never sued the Land Registrar for the issuance of the Title Deed and that he did not have the regulations on how the meetings for the Council ought to be conducted. Mr. Martin Osano, Land Registrar, testified on behalf of the 2nd and 3rd Defendants that the Title was in the name of Gusii County Council having been issued in 1971 and reserved for Nyaigwa Nursery School. It is a leasehold. He admitted that the cancellation of the Title Deed from the Plaintiff to the 1st Defendant was never brought to the attention of the Plaintiff and that is why the Title held by the Plaintiff has never been surrendered nor demanded. He said that the then Land Registrar must have colluded with the Plaintiff.
10. On cross-examination by Ms. Moeche for the 1st Defendant Mr. Osano said that the Title Deed was cancelled on 8/9/2023. On cross-examination by Ms. Ochwal the witness admitted that there was no Court Order to cancel the Title Deed in favour of the Plaintiff and that there was no collusion with the 1st Defendant. On re-examination by Mr. Ndiritu for 2nd and 3rd Defendants, the witness said that the then Land Commissioner is the one who issued allotment letters before the lease and that Case No. 579 of 1993 was withdrawn and not dismissed. After the close of the case, all the parties filed their written submissions.
11. It is the duty of this Court to interrogate whether the Plaintiff had been allocated the suit property lawfully. From the evidence on record this is to be answered in the affirmative.
12. I will then deal with the issue of cancellation of Title Deed by the Land Registrar.
13. A certificate of Title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Section 24 of the *Land Registration Act* 2012, gives the registered proprietor absolute rights over land, it provides:

Subject to this Act—

 - (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease
14. Further, this Title is protected under Section 26 of the same Act which provides:
 - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie



evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
15. Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of Title as long as he can show that the Title was acquired procedurally. The circumstances when Title can be cancelled or revoked have been enumerated under Section 26(1) (a) & (b) of the [Land Registration Act](#).
16. Section 79(2) of the [Land Registration Act](#), provides for the Rectification of the Register by the Registrar.
 - (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
 - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
 - (b) in any case and at any time with the consent of all affected parties; or
 - (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
 - (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.
 - (3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.
 - (4) The Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection (2) and without prejudice to the generality of the foregoing, the regulations may provide for—
 - (a) the process of investigation including notification of affected parties;
 - (b) hearing of the matters raised; and
 - (c) the criteria to be followed in coming up with the decision.
17. Sub-section (1) above envisions rectification that does not affect the rights/interest of the registered proprietor. Loosely translated, basic and apparent errors or mistakes. And even then, the rectification can only occur with the proprietor's consent.
18. However, sub-section (2) provides for a situation where the Title was obtained through malpractices or by mistake,
 - (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.



19. In the first state of affairs, the registered proprietor is issued with a 90 Days' Notice of the intention to alter the register. The Registrar must give audience to the Title Holder before making any cancellation or changes. The law also gives an aggrieved party a right to seek recourse in Court.
20. As to the cancellation on the ground of fraud, in the case of *Kisumu Misc No. 80 of 2008 Republic V Kisumu District Lands Officer & another* [2010] eKLR the Court held that:

.....it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.
21. Similarly, the Court of Appeal in *Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* [2018] eKLR agreed with the trial Court that

The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.
22. The Land Registrar claimed that Title to the Suit land was cancelled because of fraud. Mr. Martin Osano, Land Registrar, said that the Title was in the name of Gusii County Council having been issued in 1971 and reserved for Nyaigwa Nursery School. He then admitted that the cancellation of the title deed from the Plaintiff to the 1st Defendant was never brought to the attention of the Plaintiff and that is why the Title Deed was still held by the Plaintiff and has never been surrendered nor demanded. He said that the then Land Registrar must have colluded with the Plaintiff. He had the onus of proving the said fraud by dint of Sections 107 to 109 (inclusive) of the *Evidence Act*. The cancellation was based on issues of fraud. It was not shown that such allegation of fraud was properly placed before the Plaintiff or at all nor was the Court guided as to how the Land Registrar concluded so. Allegations of fraud are grave and it is only fair that evidence be tendered. There is no procedure in adducing evidence before the Land Registrar, but the Court has been vested with the said procedure and it can fairly examine issues of fraud.
23. Accordingly, the Land Registrar did not have the power to cancel the Plaintiff's Title as it affected the rights of the registered proprietor.
24. But even if for instance this Court were to find otherwise, which is doubtful, this was a quasi-judicial action and it was only proper that parties be accorded fair hearing. Rules of procedure are the handmaidens of justice. They are to facilitate the administration of justice in a fair, orderly and predictable manner. Article 159(2)(d) of *the Constitution* of Kenya, 2010 and the oxygen principles as drafted were meant to cure technicalities in the process of administering justice. But these provisions should not be used as a means of avoiding observance to procedure.
24. Did the 2nd Defendant follow the process prescribed in the Act to have the property's registered proprietor cancelled? The 2nd Defendant has chosen to give his justification of doing so. The 2nd Defendant did not produce any documents or even say that he gave the Plaintiff any audience. This Court will only be guided by availability of evidence and with lack of the said evidence, there is nothing to inform this Court that the hearing was conducted. If cancellation of Titles were to take place without any formal documentation, or without following the law then it would be easy for fraudsters to have their way in the cancellation of Titles. We shall have thrown the sanctity of Title Deeds to the dogs.
25. The Land Registrar has to give Notice to the affected parties and more particularly the registered proprietor of the land in question before effecting the cancellation and/or any change of ownership.



He cannot do it whimsically, capriciously or arbitrarily. However good his intentions are. I do agree with the Plaintiff that the Land Registrar in cancelling the Plaintiff's Title as he did, acted outside the scope of his mandate and he had no jurisdiction to do so and in total disregard of Section 79 of the [Land Registration Act](#). And the cancellation of the Title Deed from the name of the Plaintiff cannot be sustained and it is hereby ordered that:

LR No. West Mugirango/Siamani/1210 issued in the name of the 1st defendant be restored to the name of the Plaintiff in the register as the lawful owner.

One will then ask, what happens to the school. This is a case of double allocation by different officers of the 1st Defendant for whatever reasons. My advice is that the 1st Defendant sorts out the mess it created by inviting both parties and resettling one elsewhere. Or else compensates one in monetary terms. But this is beyond the scope of this case. It only remains an advice.

Each party to meet its own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY OF DECEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff's Counsel: Mr. Mulisa

Defendants' Counsel: Ms. Moeche for the 1st Defendant

Ms. Osebe for the 2nd and 3rd Defendant

