



**Kithongo v Mulandi & 3 others (Environment & Land Case
80 of 2018) [2023] KEELC 184 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 80 OF 2018
CG MBOGO, J
JANUARY 26, 2023**

BETWEEN

PETER NZIOKA KITHONGO PLAINTIFF

AND

MARIA MWENDE MULANDI 1ST DEFENDANT

MUINDE MASILA KITATI 2ND DEFENDANT

FRANCIS MUTISO MUTUNYU 3RD DEFENDANT

DANIEL MASILA 4TH DEFENDANT

JUDGMENT

1. Vide the amended plaint dated March 5, 2018, the plaintiff sought the following reliefs against the defendants: -
 - a) An order directing the Minister of Health to issue an exhumation permit for the exhumation of the body of Philip Mulandi buried on the land parcel LR No Makueni/Nguu Ranch/1066.
 - b) A declaration that the defendants are trespassers in the properties LR No Makueni/Nguu Ranch/1066 and LR No Makueni/Nguu Ranch/1067.
 - c) A permanent injunction restraining the defendants by themselves, their servants and/or agents from interfering in any manner with and or alienating land parcels LR No Makueni/Nguu Ranch/1066 and LR No Makueni/Nguu Ranch/1067 situated at Nguu Ranch the property of the Plaintiff and their eviction.
 - d) Costs of this suit and interest.
 - e) Any other relief which this Honourable Court may deem just.



2. The plaintiff's suit was opposed by the 2nd and 4th Defendants vide the amended Statement of Defence and Counterclaim dated March 11, 2019. The following reliefs were sought: -
 - a. The Title deeds and registration of LR No Makueni/Nguu Ranch/1067 in the name of the Plaintiff be cancelled and the said parcels be registered in the names of the 2nd and 4th Defendants respectively.
 - b) Costs of the suit and the Counterclaim.
 - c) Any other or further relief that this Honourable Court may deem just to grant.
3. The plaintiff filed a reply to the amended Statement of Defence and defence to counterclaim on May 22, 2019.
4. On December 4, 2019, the claim against the 1st defendant was marked as having abated while the suit against the 3rd defendant was withdrawn with no order as to costs.
5. The plaintiff called three witnesses in support of his case. Peter Nzioka Kithongo (the plaintiff), adopted his statement dated February 28, 2017 as his sworn evidence in chief. He produced the bundle of documents dated November 18, 2003 as exhibits in support of his case which were marked as P EX Nos 1 – 7 respectively. Again, the plaintiff produced the bundle of documents dated January 18, 2017 which was marked as PEX Nos 8 – 18. The plaintiff then produced the bundle dated 12th November, 2019 which was marked as PEX Nos 19 – 20. Lastly, he produced the bundle dated February 15, 2019 which was marked as PEX No 21.
6. It was plaintiff's testimony that land parcel No. Makueni/Nguu Ranch/1066 belongs to him. He stated that the land initially belonged to Adelinah Mbevi by virtue of an allotment letter. That after approaching land officers, the land was pointed out to him. That Adelinah sold the land to him and he paid her in full. That he obtained a discharge of charge and he was issued with a title deed. He added that the 4th defendant is in occupation of his land. That even after suing the 4th defendant in 2001 and after obtaining an order of injunction against him, he has refused to vacate the land and has instead become violent. The plaintiff added that when purchasing the land, there was no report of any dispute.
7. The plaintiff further averred that he purchased land parcel No Makueni/Nguu Ranch/1067 from Kennedy Kyalo Itume. That Itume too had an allotment letter and the land is adjacent to LR No Makueni/Nguu Ranch/1066. It was his evidence that they entered into a sale agreement and he paid the full purchase price to Itume. That the land was transferred to him and he was issued with a title deed in the year 2010. That the 2nd defendant is in occupation of Parcel No 1067 and he has refused to vacate.
8. In cross-examination, the plaintiff stated that the signature of Adelinah Mbevi as an allottee and as a vendor is different. He added that he obtained the title deed for Parcel No 1066 in the year 2004. That he filed this suit before he had obtained the title deed. The plaintiff refuted that the 2nd and 4th defendants were on the ground when he purchased the two properties. He added that the two defendants had built on the land and that they live there with their families. He refuted claims that he obtained his title documents fraudulently.
9. In re-examination, the plaintiff confirmed that the vendors of the two parcels of land had allotment letters. That the consent of the Land Control Board to transfer the land was obtained. That when he filed this suit, the process of acquiring title deeds had not been barred.



10. PW1, Lucas Mutisya Maweu, adopted his statement dated February 28, 2017 as his sworn evidence in chief. He stated that he settled at Nguu Ranch in 2009. That Parcel Nos 1066 and 1067 are the properties of PW1.
11. In cross-examination, PW1 stated that he did not know how the plaintiff acquired the two parcels of land. He added that he had known the two defendants since settling in Nguu Ranch. That the defendants and himself were squatters.
12. PW2, Peter Mwangangi Mutiso, adopted his statement dated February 28, 2020 as his sworn evidence in chief. He stated that his land and that of the plaintiff are not far from each other. That in the years 1994 and 1995, there were squatters who invaded people's farms. He added that when he acquired his land in 1996, he found the plaintiff having already settled on the land. He further added that Daniel Masila used to reside along the railway line at that particular time.
13. In cross-examination, PW2 stated that he bought his land in 1996. That the plaintiff was already settled there. That the plaintiff had already built on the land. He stated that he did not know how the plaintiff acquired his parcels of land. He added that the 2nd and 4th defendants were not residing on the land at that particular time.
14. The defendants called four witnesses. DW1, Muinde Masila (the 2nd defendant), adopted his statement dated March 15, 2019. He stated that he resides in Parcel No 1067. That the said land was his residence since the year 1951 when he was born and that the land used to be part of trust land. He stated that the 4th defendant is his younger brother. It was his evidence that he did not know how the plaintiff acquired the title deeds for the two parcels of land. He added that he did not know who Kennedy was, the person who sold the land to the plaintiff. He added that in 1990, he buried his child, one Alex, on the parcel of land.
15. The 2nd defendant produced the bundles of documents dated March 11, 2019 and August 3, 2020 in support of his case. He averred that he resides in the area of land which is trust land. That it was part of Nguu Settlement Scheme and that the Government informed him to continue residing thereon until when he would be issued with an allotment letter. He urged the Court to cancel the plaintiff's title deed.
16. In cross-examination, the 2nd defendant stated that his parents resided on Parcel No 1067. That the land had no number as it was part of trust land. That his parents are buried in the suit property. That he did not have a burial permit showing that his parents are buried in the suit property. He also conceded that he had never applied for allocation of the suit property given that he resided in therein. He also could not confirm if his name or that of the 4th defendant appear in the verification report. He conceded that he had never received any document from the land adjudication office showing that parcel numbers 1067 and 1066 were allocated to him and the 4th defendant respectively.
17. The 2nd defendant added that his allotment letter is for Plot No 2600 and is dated September 29, 1995. He stated that the said allotment letter was recalled by the District Commissioner but that he did not make a follow up of the land allocated to him. He averred that he constructed the houses appearing in his bundle of photos about five years back. He also averred that he did not have a letter showing that the plaintiff had been summoned by the area chief over the land. The 2nd defendant stated that he would like to be registered as the owner of the suit property by virtue of long occupation. He stated that he did not know how the land was declared trust land.
18. The 4th defendant, Daniel Masila, adopted his statement that was filed in Court on March 15, 2019 as his sworn evidence in chief. He stated that the 2nd Defendant is his brother and that he resides in Parcel No 1066. He added that he has resided in the suit property for more than thirty years. That the



land was part of trust land. He added that he had never been issued with any allotment letter for the suit property and neither had he been shown any parcel of land. He refuted the claim that they had previously been residing near the railway line. He also refuted the claim that he invaded the land in 1999 insisting that he was all along residing therein. He stated that the area chief at the material time was one Onesmus Kyumwa Kimoli. He urged the Court to cancel the plaintiff's title deed.

19. In cross-examination, the 4th defendant maintained that he had been living in Parcel No. 1066 since he was born in 1966. He stated that he did not have any documents showing that his parents owned the suit property. He stated that he had built his houses ten years back. He added that he did not know the size of the suit property and neither had he ever seen beacons on the land. He averred that the suit property was surveyed while he was residing thereon. He further averred that he used to be a councilor and that he did not know if by the year 2002, parcel No 1066 had a title deed.
20. On further cross-examination, the 4th defendant averred that he had never complained in writing that someone had invaded his land yet he was at a position of power being a councilor. He averred that he had never applied for any parcel of land. After being shown the letter dated September 29, 1995 by the counsel, the 4th defendant denied ever seeing such a letter which showed that he was allocated land parcel number 3004. The letter was authored by one, AK Tomno, the Director of Land Adjudication and Settlement. He stated that he had never sued Peter Kithongo in order to be registered as the owner.
21. In re-examination, the 4th defendant stated that in 1993, the Government counted them as occupants of the suit property.
22. DW1, Onesmus Kyumwa Kimuli, adopted his statement filed in court on August 3, 2020 as his sworn evidence in chief. He stated that he knew the defendants herein. He added that he was familiar with the suit properties and that the defendants were in occupation of the same while he was still the area chief. That the suit properties formed part of trust land which borders Nguu Farmers Society. That Nguu Farmers Society and the trust land were amalgamated into one.
23. In cross-examination, DW1 stated that the suit properties are in Wolwa location which was created in 1994. That he did not know who the first chief of Wolwa location was. That he was the one who allocated people land under the instructions of the government. That by the time the area chief for Wolwa location was being appointed DW1 had already allocated land to the defendants. He stated that he allocated land to the defendants in 1992.
24. DW1 further stated that surveying of the area was done after he allocated land to the defendants. That people balloted for their own parcels of land and any person who balloted was allocated a parcel of land. DW1 however could not confirm whether the defendants balloted. He also could not produce any document confirming that he was the area chief when pressed by the counsel.
25. DW2, Patrick Mbatia, was duly sworn and stated as follows in his evidence in chief. That he is an officer from the Department of Land Adjudication and Settlement and is stationed at the Kibwezi office. He produced the Nguu Ranch Task Force Report prepared in October, 2007 as DEX No 8. He stated that he was not involved in preparation of the report and that none of the members who prepared the report was available.
26. He stated that among the recommendations that were made in the report were that squatters be legalized and that members of Nguu Ranching Society who were never allocated and some whose land was occupied by squatters be dealt with. That some parcels numbering about 880 were to be repossessed in order to resettle squatters.
27. In cross-examination, DW2 stated that the suit properties fall under Simba area where issuance of title deeds is still unresolved. That the 2007 Task Force Report has never been fully implemented due to



- the squatter problem who have been hostile to surveyors. Nonetheless, DW2 stated that an allottee of a particular parcel of land could not be regarded as a squatter. He denied knowledge of the two defendants herein.
28. After the parties had duly closed their respective cases, the plaintiff filed his submissions on February 2, 2021. The counsel for the plaintiff argued that the plaintiff purchased the suit properties for valuable consideration and the same was without notice of any illegalities and without collusion with the vendors. That at the time of purchase, the suit properties were vacant and no one was in possession or had a separate claim.
29. The counsel for the plaintiff submitted that the plaintiff's title to the suit properties can only be challenged on proof of fraud or the circumstances prescribed under Section 26 (a) and (b) of *The Land Registration Act*. That the plaintiff was an innocent purchaser for valuable consideration without knowledge of any illegality in the vendors' titles. That no evidence of fraud was presented by the defendants that could impeach his title.
30. The plaintiff relied on the following authorities to buttress his submissions: -
- i) *Jose Estates Limited v Mutumbu Farm Limited & 2 others* [2019] eKLR;
 - ii) *Central Kenya Ltd v Trust Bank Limited & 4 others* [1996] eKLR;
 - iii) *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR; and
 - iv) *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2015] eKLR
31. The defendants filed their submissions on March 5, 2021. The counsel for the defendants submitted that the plaintiff's title deed for Parcel No 1066 was irregularly obtained because the signature of the Adelinah Mbevi in the sale agreement dated September 28, 1999 and her signature in the letter of acceptance of offer by allottee dated October 19, 2000 were different and not made by the same person. That the sale agreement dated September 28, 1999 does not bear the national identity card of the seller or her postal address. That the postal address in the receipt for stamp duty dated April 5, 2000 from the department of lands bears a different postal address for Adelinah Mbevi in comparison with that in the letter of acceptance of offer. It was also argued that other than the letter of consent dated March 30, 2000, the plaintiff did not produce any other transfer documents to prove how Parcel No. 1066 was registered in his name.
32. It was also argued that Adelinah Mbevi became the owner of Land Parcel No 1066 on October 19, 2000 when she signed the letter of acceptance of offer. In that respect, the counsel argued that the said Adelinah Mbevi could not enter into a sale agreement with the plaintiff on September 28, 1999 and neither could she obtain the letter of consent to transfer the suit property as at March 30, 2000 because she never legally owned the suit property. It was also argued that as per the verification report produced as DEX No 8, the land Parcel Nos 1066 and 1067 were among the plots recommended for repossession and reallocation to the squatters who had developed the said plots.
33. As for land Parcel No 1067, the counsel argued that the plaintiff irregularly obtained the title deed because the copies of the transfer forms had no ID numbers and PIN numbers of the alleged transferor and the transferee. The said transfer forms were also not dated when the parties appeared before their advocates for certification. That on the basis of the said glaring omissions, the plaintiff could not be lawfully registered as the owner of the suit property. It was also argued that the title deed was issued on May 21, 2010 about nine years from the filing of the suit herein which confirms an irregular ownership claim by the plaintiff.



34. In urging the court to find that the defendants have demonstrated a case for the impeachment of the title of the plaintiff to the suit properties under Section 26 (1) (a) and (b) of the [Land Registration Act](#), the defendants placed further reliance on the following authorities: -
- i) [Alice Chemutai Too v Nickson Kipkurui Korir & 2 others](#) [2015] eKLR; and
 - ii) [Jane Achieng Onyango v Giro Commercial Bank](#) Kisumu High Court Civil Case No. 339 of 1999
35. I have perused the pleadings, the evidence and the submissions filed by the counsel on record for the parties. In my disposition, the undisputed facts are as follows: -
- i) The plaintiff is the registered owner of Land Parcel No Makueni/Nguu Ranch/1066 vide the title deed issued on January 13, 2004;
 - ii) The plaintiff is the registered owner of Land Parcel No. Makueni/Nguu Ranch/1067 vide the title deed issued on May 21, 2010;
 - iii) Vide the Nguu Ranch Settlement Scheme Local Verification Committee Report of October, 2007 the above suit properties were recommended for repossession and reallocation;
 - iv) The above 2007 Local Verification Committee Report was not fully implemented and as at January 12, 2017, the National Land Commission was undertaking another verification exercise to determine ownership of land at Nguu Ranch.
34. I have isolated the issues for determination as follows: -
- i) Whether the defendants have demonstrated fraud in the issuance of the plaintiff's title deeds to the suit properties as per their counterclaim;
 - ii) Whether the plaintiff is entitled to the orders sought in the amended plaint.
35. Section 107 (1) of the [Evidence Act](#) attaches the burden of proof to the defendants if they wish to impeach the plaintiff's titles to the suit properties on the basis of fraud. The law outlines as follows: -
- (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.
36. The legal burden to prove that the suit property is trust land also lies with the defendants. It is the defendants' case under paragraphs 12, 13 and 14 of their counterclaim, that they are entitled to the suit property because it is trust land. Even though the nature of trust they have sought to justify has not been mentioned, it is apparent from their oral evidence that it is a customary trust. This is so owing to their testimony that their parents lived in the suit property, that is where they were born and raised and that is where they have buried their kin and hence it is ancestral land.
37. A customary trust is a valid claim to land as noted under Section 28 of the [Land Registration Act, 2012](#) and being an overriding interest, it affects the rights of a proprietor of land under Section 25 (1) (b) thereof. Section 25 (1) (b) provides as follows: -
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a)



(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

38. The question that begs is whether the defendants have demonstrated that the suit properties are trust land. In *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR, the Supreme Court soundly held as follows: -

“

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

39. In their testimony, both the 2nd defendant and the 4th defendant averred that they had built their homesteads not more than five years and ten years back respectively. They did not tender proof that other than the body of Philip Mulandi whom the plaintiff has sought the exhumation, any other of their kin is buried in the suit property.

40. That aside, I have agonized as to the circumstances under which the suit properties were not allocated to the defendants if they were in possession and occupation of the suit properties as at the year 1994



when balloting and allotment of plots was being carried out. If the suit properties were rightfully theirs, I would have anticipated a plethora of evidence in their record decrying the manner in which the suit properties were allocated to Adelinah Mbevi and Kennedy Nzioka. It is baffling that the defendants did not file any complaints over the suit properties with government agencies between the years 1994 and 2000 which from the evidence, is the material time when the suit properties were being registered and being transferred.

41. Besides the 2007 Nguu Ranch Local Verification Committee Report, no shred of evidence by the defendants puts the title deeds of the Plaintiff in doubt. The Court of Appeal in *George Mbiti Kiebia & another v Isaya Theuri M'lintari & another* [2014] eKLR endorsed the decision of Kwach JA as it aptly held as follows: -

“In *George Roine Titus & Another v John P Ngurai*, Civil Appeal No 107 of 1999, Kwach, JA, stated that in adjudication matters, in order to succeed on a claim to land based on trust, it must be shown that at the conclusion of the adjudication process but before the suit land was registered in the name of a proprietor, the adjudication committee had ascertained the interest of the claimant and confirmed that the suit land belonged to them. And further, that the reason why the claimant was not registered was because of some legal impediment which precluded the claimant from taking title immediately thereby making it necessary for the suit land to be registered in the proprietor in trust.”

42. As far as the evidence shows, the plaintiff was regularly issued with registration documents for the suit property from whence he derives his claim. PEX No.4 shows the offer letter dated October 18, 1999 for Parcel No 1066 issued to Adelinah Mbevi. PEX No 6 dated April 5, 2000 shows that Adelinah Mbevi paid the requisite settlement fees and charges. PEX No 3 is the sale agreement dated September 28, 1999 duly executed and PEX No 7 is the letter of consent by the Land Control Board dated March 30, 2000. PEX No 8 is the title deed for Parcel No 1066. Nothing suggests and no basis has been shown by the defendants that there was fraud in the above procedure culminating in the plaintiff's registration as proprietor.

43. The evidence also shows the offer letter dated September 29, 1995 for Parcel No 1067 issued to Kennedy Nzioka. PEX No 2 dated September 14, 2000, Kennedy Nzioka paid the requisite settlement fees and charges. PEX No 1 shows the duly executed sale agreement dated October 4, 2000. DEX No 10 is the transfer form for Parcel No 1067 duly executed and franked. Finally, PEX No 8 shows the title deed for Parcel No 1067 issued in favour of the Plaintiff.

44. Moreover, it is plausible from the Letters of Offer produced as PEX Nos 19 and 20, that the defendants were allocated land elsewhere and yet they unlawfully cling to the suit property which they cannot substantiate their claim towards. In *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, 317, the Court of Appeal observed as follows: -

“There is one preliminary observation which we must take on the learned judge's treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.”

45. I am not satisfied on the preponderance of the evidence that the defendants have demonstrated fraud on the plaintiff's part up to the required standard. For the said reason, the plaintiff's title deeds are



prima facie evidence of absolute and indefeasible title. Section 24(a) of the [Land Registration Act](#), 2012 provides as follows: -

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...

46. Accordingly, I am satisfied that the plaintiff has demonstrated his case against the defendants on a balance of probabilities. In the circumstances, the defendants' amended statement of defence and counter claim is dismissed with costs to the plaintiff. I hereby enter judgment in favour of the Plaintiff as prayed in the amended plaint as follows:-

- a. An order directing the Minister of Health to issue an exhumation permit for exhumation of the body of Philip Mulandi buried on the land parcel No Makueni/Nguu Ranch/1066.
- aa. A declaration that the defendant are trespassers in the properties LR No Makueni/Nguu Ranch/1066 and LR.No. Makueni/Nguu Ranch/1067.
- b. A permanent injunction restraining the defendants by themselves, their servants and/or agents from interfering in any manner with and/or alienating land parcels LR No Makueni/Nguu Ranch/1066 and LR No Makueni/Nguu Ranch/1067 situated at Nguu Ranch the property of the plaintiff and the eviction.
- c. Costs of the suit and interest.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAROK VIRTUALLY THIS 26TH DAY OF JANUARY,2023.

MBOGO C.G.

JUDGE

In the presence of:

CA:T.Chuma

