



**Maina v Waigwa (Environment & Land Case 86 of 2016)  
[2023] KEELC 86 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 86 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 86 OF 2016  
FM NJOROGE, J  
JANUARY 19, 2023**

**BETWEEN**

**JOSEPH NJOROGE MAINA ..... PLAINTIFF**

**AND**

**RUTH WAMBUI WAIGWA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff's claim has been brought by way of the plaint dated March 14, 2016 in which he seeks the following prayers:
  - a. Stay of the proceedings in the Chief Magistrates Court Civil Suit No 266 of 2015 at Molo
  - b. Cancellation of the Title Number Mau Summit/Molo Block 7/135 (Tayari) to the parcel belonging to the plaintiff
  - c. A declaration that the plaintiff is the legal owner of that parcel of land known as Mau Summit/Molo Block 7/135 (Tayari)
  - d. An order of injunction restraining the defendant by herself, her agents, servants and or employees from in any way interfering with the plaintiff's Land known as Mau Summit/Molo Block 7/135 (Tayari)
  - e. Costs of the suit and interest.
2. The plaintiff claims land parcel No Mau Summit/Molo Block 7/135 (Tayari) belongs to him; that in the 1980's he was a registered member and a shareholder of Tayari Farmers Company Limited which is a land buying Company in Molo area; that in 1982, the plaintiff stated that through a successful ballot vide the shares held with the Company he acquired the parcel of Land known as Plot No 22 Tayari Farm the suit property; that he has lived on that property for a period of over 25 years; that he was surprised when he was served with documents in Molo Chief Magistrate's Court No 266 of



2015 where the defendant claimed that the parcel of land belonged to her and produced a title deed for land parcel No Mau Summit/Molo Block 7/135 Tayari; that the registration was done fraudulently to enable the defendant to file an eviction claim; that the plaintiff's case is for a declaration that he is a bona fide owner of land parcel No Mau Summit/Molo 7/135 (Tayari) and for cancellation of the defendant's title.

3. By a consent order issued on October 11, 2019, this matter was consolidated with Molo CM ELC Case No 266 of 2015 and this matter was chosen as the lead file. The parties in Molo CM ELC Case No 266 of 2015 are Ruth Wambui (plaintiff Waigwa) and Joseph Njoroge Maina (defendant.)
4. The plaintiff in Molo CM ELC Case No 266 of 2015 sought the following prayers which are similar to the orders she seeks in her counterclaim herein as follows:
  - a. That the defendant vacates the plaintiffs parcel of land known as Mau Summit/Molo Block 7/135 (Tayari)
  - b. That in default an eviction order do issue against the defendant in respect of the suit land.
  - c. Damages for trespass.
  - d. Costs of this suit and interest thereon at court rates.
5. The plaint in Molo CM ELC Case No 266 of 2015 has the same averments as set out in the defence in the present matter.

#### **Defence**

6. In her statement of defence and counterclaim dated 1/10/2019, the defendant claims that the parcel of land known as Mau Summit/Molo Block 7/135(Tayari) was the property of the Late James Waigwa Gathathu; that upon his death, the defendant applied for and was issued with a grant of letters of administration and the property eventually devolved to her as the heir to the estate; that the suit property is land parcel No Mau Summit/Molo Block 7/135(Tayari) and has no relation with plot number 22 that is pleaded in paragraph 5 of the plaint; that she filed Molo CMC Civil Suit Number 266 of 2015 against the plaintiff; that in that case she intended to recover land from the plaintiff as a trespasser and sought the following orders in her counter claim;
  - a. An order that the plaintiff (defendant in the counterclaim) delivers vacant possession of the parcel of land known as Mau Summit/Molo Block 7/135 (Tayari) and in default an eviction order be issued.
  - b. Damages for trespass.
  - c. Costs of the suit.

#### **Evidence of the parties**

7. The plaintiff testified as PW1. His evidence is that land parcel No Mau Summit/Molo Block 7/135 (Tayari) belongs to him as he obtained it from Tayari Farmers as he was a member with one share; that he was allocated the land in 1980 after balloting and being issued with ballot No 22; that the ballot paper acknowledges Kshs 2,000/= in cash bearing plaintiff's name; the ballot paper was produced as P Exh 1; that after balloting for Plot No 22 he was allocated the same in addition to Plot No 404; that Plot 404 is different from plot No 22; that he got both a shamba and a plot; he produced the ballot for plot No 404 as P Exh 2; that he paid Kshs 2,000 and then Kshs 11,000/=; he produced the receipt for Kshs 11,000/= as P Exh 3; he averred that the land was 1.5 acres and that he was shown the land



by a director in 1980; that he started living and farming on it; that in the year 1989 he was served with summons to vacate the land by James Gathagu Waigwa who had sued him in Nakuru PMCC 1130/89 claiming that he was in occupation of his land; that James wanted the plaintiff to vacate land parcel No 448 and 333 which was not the land that he was allocated and so the case was dismissed; that there was another case by the directors of Tayari Farmers which was Nakuru PMCC 23/90 whose outcome he was not aware of; that he has never been evicted from the land; that no other case was filed until 2015 when Ruth Gathagu, wife to Gathagu filed Molo ELC 266/15 seeking for his eviction from the suit property; that he did not see any other ownership documents relied on by the defendant except for the title deed; he concluded his testimony by stating that he seeks for orders of cancellation of the title in the name of the defendant and for issuance of the same to him in his name.

8. On cross-examination he averred that he was a shareholder of Tayari Farmers Co. Ltd and that such companies do not issue share certificates and so he did not have one. He also confirmed that the company had a list of members which he admitted to not having in court. He further confirmed that he was entitled to a share of the land as it belonged to the shareholders and not the directors. He admitted to not knowing the original title number. He further admitted that the plaint stated that plot No 135 belongs to him but the ballot reads plot No 22.
9. He stated that the ballot paper does not have LR No Mau Summit/Molo Block 7/35 (Tayari) on it. When he was referred to the ballot for plot No 404 produced as P. Exh 2, he stated that it is for a commercial plot which helped pay for Plot 135 even though it bears neither that number nor his name. He was further referred to the receipt of Kshs 11,000/= produced as P Exh 3 which he agreed that though it has his name it does not show what he was paying for. He stated that Plot No 22 was as a result of shares but those who prepared the title referred to Plot No 135. He confirmed that the directors were involved in the production of the title and agreed to having nothing that connects Plot 22 to and 135. He averred that he had the plaint for Case No 1130/89 but did not have the judgement in the matter.
10. On re-examination he stated that plot No 22 and plot No 135 refer to the same land and that he got parcel No 135 after titling was done as the numbers were messed up. He further stated that Kshs 11,000/= was for purchasing the entire land which they paid to the Tayari Farm account. He also stated that the documents produced as P.Exh- 1 to 3 were issued to him by the directors of Tayari Farmers Co. Ltd.
11. The plaintiff's case was then closed.
12. The defendant testified as DW1 and adopted her witness statement dated September 21, 2015 in ELC 266/15 as part of her evidence. She testified that land parcel No Mau Summit/Molo Block 7/135 (Tayari) belonged to her late husband James Gathagu; that after she got the grant to his estate the land was transferred to her name. She was then referred to the List of Documents filed on September 21, 2015 and produced a copy of the title to LR NO Mau Summit/Molo Block 7/135 (Tayari) as D. Exh 1, and a copy of the confirmation of grant that was produced as D. Exh 2(a) and the grant as D.Exh 2(b).
13. It was her evidence that her late husband had sued the plaintiff in civil case No 1134/90 which was ruled in her late husband's favor; that despite the judgement the plaintiff continued to interfere with the suit property; that she went to the chief who summoned them through a letter which she produced as D.Exh 4; that at the meeting with the chief the plaintiff was present and that he insulted them; that her late husband then went to the D.O Molo over the issue and a letter dated 29/5/91 (D.Exh 5) was written; that her advocate wrote a demand letter dated 21/05/15 (D.Exh 6); that the suit property belongs to her and she therefore prayed that the plaintiff be evicted from the suit property.
14. On cross-examination she confirmed that the suit property belonged to her late husband. She further confirmed that her late husband was the first owner and when she was shown a letter from the District



Officer concerning case No 1130 of 1989 and admitted that she did not know that the suit was dismissed. She also confirmed that the decree concerned Case No 1134/90 and not 1130/89. She averred that her husband was allocated land parcel No 135 and that he had had tried to evict the plaintiff but he was not able to do so before his demise in the year 2009. She further admitted that she could not remember when her husband was allocated the land and who allocated the land to him. She confirmed that her husband never lived on the land and that he had only ploughed the land once with a tractor.

15. On re-examination she was referred to the Certificate of Confirmation of Grant which she confirmed had her name and further that her husband stopped ploughing the land because when he went there he found the plaintiff in the land.
16. The defendant then closed her case.

### **Submissions**

17. The plaintiff filed his submissions dated 1/04/2022 on April 20, 2022 while the defendant filed her submissions dated May 12, 2022 on May 18, 2022.
18. The plaintiff in his submissions gave a summary of the facts of the case, the evidence at the hearing and identified the following issues for determination; whether he had demonstrated ownership over suit parcel known as plot No 22 now registered as Mau Summit/Molo Block 7/135 and whether he is entitled to Mau Summit/Molo Block 7/135 by way of adverse possession.
19. On the first issue, the plaintiff submitted that he was allocated the suit property known as Plot No 22 by Tayari Farmers Company Limited after paying the requisite the fees and produced documents in support of his arguments. The plaintiff further submitted that on the other hand the defendant did not produce any documents to prove that her husband was a member of Tayari Farmers and whether her husband balloted for the suit parcel.
20. On the second issue, the plaintiff submitted that he is now entitled to the suit property by way of adverse possession and relied on the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR. He concluded his submissions by stating that the defendant had confirmed that her family has never lived on the suit property and sought that the orders sought in his plaint be allowed as prayed.
21. The defendant in her submissions gave a summary of the facts of the suit and submitted on who is the legitimate owner of land parcel No Mau Summit/Molo/ Block 7/135 (Tayari) and whether the case is for adverse possession.
22. On the first issue, the defendant submitted that the burden of proof was on the plaintiff to demonstrate that he is the owner of the suit property but he did not produce any title deed in support of his allegations and neither did he establish a nexus between Plot No 22 which he claimed to have balloted for and Plot No 404 that he was allegedly allocated and the suit property land parcel No Mau Summit/Molo/Block 7/135 (Tayari).
23. On the second issue, the defendant submitted that parties are bound by their pleadings and relied on the cases of *Levi Simiyu Makali v Koyi John Waluke & 2 Others* [2018] eKLR and Kitale High Court Election Petition No 1 of 2017 *Robinson Simiyu Mwangi & Another vs IEBC & 2 Others* (unreported). She further submitted that the court should not consider the unpleaded issue of adverse possession, which position this court agrees with entirely. The defendant concluded her submissions by seeking that the court dismisses the plaintiff's case and allows her counterclaim.



## Analysis and Determination

24. After considering the pleadings, evidence and the submissions, the issues that arise for determination are as follows:
- a. Whether the registration of the defendant as the owner of Land Parcel No Mau Summit/Molo 7/135 (Tayari) was fraudulent and ought to be cancelled.
  - b. Whether the plaintiff is entitled to the reliefs sought in the plaint.
  - c. Whether the defendant is entitled to the reliefs sought in her Counterclaim.
25. The plaintiff in this matter alleges that he was a member of Tayari Farmers Company Limited which was a land buying company. He further alleges that after balloting in the said land buying company, he acquired plot No 22 Tayari Farm. He stated that the directors showed to him the said plot which he took possession and has been on it for over twenty-five years.
26. He alleged that he was surprised to be served with documents for Molo CMCC No 266 where the defendant claimed that land parcel No Mau Summit/Molo Block 7/135 used to belong to her late husband and that after succession, the property was registered in her name. In support of his case he produced a ballots for plot No 22, plot No 404 and a receipt of Kshs 11,000/=.
27. The defendant, as pointed out by the plaintiff, alleges that land Parcel No Mau Summit/Molo Block 7/135 belonged to her late husband and upon his death devolved to her. The defendant acknowledged that the plaintiff has always been in occupation of the suit property and attempts to solve the matter out of court were not successful. She sought that the plaintiff vacates the suit property and in default an eviction order do issue. In support of her case she produced a copy of the title deed which showed that the property is registered in her name, a copy of the Certificate of Confirmation of Grant and various letters from the chief and the district officer.
28. Sections 107 and 112 of the *Evidence Act* Chapter 80 of Laws of Kenya provides as follows:
- 107 (1) Whoever desires any court to give judgment as to why any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
29. As pointed out before, the plaintiff claims that he is the owner of Plot No 22 Tayari Farm now registered as Mau Summit/Molo Block 7/135 (Tayari). During cross examination by counsel for the defendant, he admitted that he did not have anything that relates plot No 22 to land parcel No Mau Summit/Molo Block 7/135 (Tayari) that he is claiming in the plaint. It is this court's view that the plaintiff has not created a nexus between the plot number he alleges was allocated to him by Tayari Farmers Company Limited and land parcel No Mau Summit/Molo Block 7/135 (Tayari).
30. The particulars of fraud as pleaded by the plaintiff in his plaint are that the defendant falsely pretended to be the bona fide owner of the suit property thereby obtaining the title deed under false pretense, obtaining title without documentation proving ownership and purporting to inherit the parcel of land while knowing that it did not fall under her late estate.



31. The Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR stated as follows:

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:

Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged.”

32. I have examined the particulars of fraud pleaded by the plaintiff and I am inclined to think favourably regarding only one of them, that is “obtaining title without documentation proving ownership.” In the case of land claimed to have been obtained from a land buying company as in the present case, the proper documents that would establish ownership are usually the share certificate the receipts and the members register or any of them, depending on which of them were issued by the company. The plaintiff in the present suit has copies of receipts vide which he claims to have paid for the suit land. However, he has not effectively demonstrated the nexus between such receipts and ballot paper with the title number Mau Summit/Molo Block 7/135 (Tayari).
33. On the other hand, the defendant has no such documents save a copy of the title to the land. It is also important to point out that the defendant admitted on cross-examination that she does not know how her husband acquired the said property and she only had the title deed but could not explain how he became to be the owner of the property.
34. It has been established in recent decisions including *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR that where a title has been challenged the holder thereof must adduce evidence to show that it is valid. The Court of Appeal stated as follows in the *Munyu Maina case* (supra):
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
35. Since the Defendant has not demonstrated the root of her title then the orders that she seeks in her counterclaim cannot also be granted.
36. When weighed for probative value, the plaintiffs documentary evidence rates higher than the defendants’ as he is in possession of both the suit land and documents and that he has also ably demonstrated that he has been in occupation of the suit land over a lengthy period while the defendant has never occupied it.
37. The plaintiff and the defendant were not responsible for the company records or the survey process. The plaintiff has been in occupation with knowledge of the Farm officials. If any mishap occurred regarding the numbering of his plot on the map, which resulted in the claim by the defendant, I would not be inclined to hold him liable for the same. In my view both the plaintiff and the defendant are helpless victims of some maladministration on the part of the Farm officials or Lands Registry and



Survey Office officials who may have misdealt the survey and allocation of numbers to the Farm's subdivisions.

38. The inescapable fact here is that of the two claimants before me, the plaintiff who has possessory right has a more meritorious claim than the defendant, this by virtue of having been settled there by the company officials ages ago. Consequently, any order that negates his right and interest in the suit land would be unjust and it may result in his deprivation of property for no fault of his own making, including loss of his developments of many years on the land while the defendant stands to lose very little or nothing at all. In this court's view the plaintiff therefore ought to have both title to and continued possession of the land.
39. I therefore dismiss the defendant's counterclaim and I allow the plaintiff's claim in the plaint dated March 14, 2016 and I order as follows:
- a. A declaration is hereby issued declaring that the plaintiff is the lawful proprietor of all that land known as Title No Mau Summit/Molo Block 7/135 (Tayari).
  - b. The Land Registrar Nakuru shall cancel the title deed issued in the name of Ruth Wambui Waigwa in respect of Title No Mau Summit/Molo Block 7/135 and reissue the same in the name of the plaintiff, Joseph Njoroge Maina.
  - c. An order of permanent injunction is hereby issued restraining the defendant herein or anybody claiming under her from in any manner whatsoever interfering with the plaintiff's title and quiet possession of title No Mau Summit/Molo Block 7/135(Tayari).
  - d. Each party shall bear their own costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

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