



REPUBLIC OF KENYA



KENYA LAW

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Mutisya & 6 others v Muikai (On her behalf and as Trustee of Alfina Matimbai Moikai) & 6 others (Environment and Land Case Civil Suit 471 of 2017) [2023] KEELC 137 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 137 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND CASE CIVIL SUIT 471 OF 2017

MN GICHERU, J

JANUARY 19, 2023

FORMERLY MACHAKOS O.S MISC. CIVIL SUIT NO. 87 OF 2015

BETWEEN

JOHN MUTUA MUTISYA 1ST PLAINTIFF
KENNEDY KIMUYU 2ND PLAINTIFF
ESTHER KITUKU 3RD PLAINTIFF
BERNARD MUSYOKA 4TH PLAINTIFF
JOEL MASAI 5TH PLAINTIFF
MULENGE KILUNGU 6TH PLAINTIFF
DISHON MWONGELA KILONZO 7TH PLAINTIFF

AND

KURANI ENE MUIKAI (ON HER BEHALF AND AS TRUSTEE OF ALFINA MATIMBAI MOIKAI) 1ST DEFENDANT
KIRISUA MOIKAI 2ND DEFENDANT
SHADRACK MOPIA MOIKAI 3RD DEFENDANT
MOSES KITIRMAN MOIKAI 4TH DEFENDANT
NDERITU MOIKAI 5TH DEFENDANT
GIDEON LENANA NAKUO 6TH DEFENDANT
STEPHEN KISAMPEI MOIKAI 7TH DEFENDANT



JUDGMENT

1. This judgment relates to this suit as well as case Number 471 of 2017. The two cases were consolidated through a court order dated 12/2/2018. I have taken the older file as the lead one. I have taken Kurani Ene Moikai, her sons Shadrack Moipai Moikai, Moses Kitirman Moikai, Nderitu Moikai and Stephen Kisampe Moikai as well as Gideon Lenana Nakuo as the Plaintiffs for the purpose of this judgment as they have a common case against the Defendants.

I have taken Mulinge Kilungu, Muthenya Kakesi, Onesmus Theua, Rebecca Musyoki, Joel Maiteh Masai, Kitavi Musinga, Muli Mutisya, John Mutua, Kennedy Kimunyu, Musyoka Musau, Monica Mutiso, Dishon Kilonzo, Mukeku Kimeu, Mutungi Kilelo, Boniface Kimeu, Simon Mwasi, Mutua Kilungu, John Mutisya, Mutuiva Mbogo and Rose Kitiku as the first to twentieth Defendants respectively.

2. The Plaintiffs' claim against the Defendants is as follows.
 - a. An order that with the help of OCS Kajiado Police Station, the Defendants be and are hereby evicted from LR Kajiado/Kaputiei/Central/466.
 - b. An order for mesne profits.
 - c. Interest on (b) above.
 - d. Costs of the suit.
 - e. Any other relief this honourable court may deem fit to grant.

This is as per the plaint dated November 20, 2000.

3. In brief, the Plaintiffs' case is as follows. At the time of filing this suit in the year 2000, Kurani Ene Moikai was the registered proprietor of LR Kajiado/Kaputiei/446 measuring approximately 99.5 hectares or 245 acres.

She got so registered in the year 1995 as a beneficiary or member of Ilmamen Group Ranch (LRkajiado/kaputiei –central/1) after the dissolution of the Group Ranch.

She got registered after the death of her husband Moikai Makunte Dukuny. She is not a trustee of Alfina Matimbai Moikai named in the originating summons. This Alfina is unknown to Kurani.

The first Plaintiff filed this suit so that she could subdivide the suit land and transfer it to her children who are all beneficiaries of the estate of her late husband. The Defendants have done everything possible to delay their eviction from the suit land. Such delaying tactics include filing a multiplicity of suits before the lower court and the District Land Disputes Tribunal.

On 13/1/2014, the District Land Disputes Tribunal authorized the first Plaintiff to subdivide part of the suit land measuring 96.72 hectares and then transfer the subdivisions to the beneficiaries of her husband's estate. In February the same year, she caused the said land to be subdivided into eleven (11) parcels nine (9) of which she transferred to her co-plaintiffs. She retained parcels numbers 4060 and 4061.

Later she sold LR No 4060 to Gideon Lenana Nakuo to enable her pay the estate debts and school fees. The land sold to Gideon measures 32 acres or 12.96 hectares.



According to the first Plaintiff, none of the Defendants occupies LR 4060 and 4061. She does not therefore understand why Gideon has been joined in this suit. She concluded by saying that the Defendants occupied the suit land without her consent. If the Defendants are successful in their counterclaim, she is ready and willing to refund the purchase price proved to have been received by her husband.

The case by the other Plaintiffs is similar to that of the first Plaintiff.

4. In support of their case, the Plaintiffs filed the following evidence.
 - i. Affidavits by Kurani Ene Moikai, Joseph Kirisua Moikai and Gideon Nakuo.
 - ii. Copy of title deed for the suit land dated 4/10/1995.
 - iii. Copies of certificates of official search for LR Nos 2149, 2150, 4056, 4057, 4058, 4059, 4060, 4062, 4063, 4064, 4065 and 4066 in the names of the Plaintiffs some jointly and others separately.
 - iv. Copy of letter dated 13/1/2014 by the Ag. Deputy County Commissioner on LR 2149.
 - v. Copy of mutation form for LR No 2149.
 - vi. Copy of agreement for sale of 32 acres from the suit land between Kurani Ene Moikai and Gideon Lenana Nakuo dated 6/11/2013.
 - vii. Copy of title deed for LR 4060 dated 9/7/2014.
 - viii. Six copies of black and white black and white blurred photographs.
5. Only fourteen out of the twenty Defendants entered appearance in this suit. They are Mulinge Kilingu, Muthenya Kakesi, Onesmus Theua, Kolavi Musinga, Muli Mutisya, Kennedy Kimuyu, Dishon Kilonzo, Mukeku Kimeu, Mutungi Kilelo, Boniface Kimeu, Simon Murasi, Mutua Kilungu and John Mutisya.

They are the first, second, third, sixth, seventh, ninth, tenth, twelfth, thirteenth, fourteenth and eighteenth Defendants.

Rebecca Musyoki, Joel Maithe Masai, John Mutua, Monica Mutiso, Mutuiva Mbogo and Rose Kitiku did not enter appearance or file any defence. They are the fourth, fifth, eighth, eleventh, nineteenth and twentieth Defendants.
6. In case No 471 of 2017, only seven out of the twenty Defendants are parties. They include Mulinge Kitungu, Joel Masai, John Mutua Mutisya, Kennedy Kimuyu, Dishon Mwongela and Esther Kituku. They are either the Defendants or represent the first, fifth, eighth, ninth, twelve and twentieth Defendants.

Bernard Musyoka Mutula represents the estate of Mutula Kilungu. His witness statement does not come out clearly in this regard. Neither did he file the agreement between his father and the deceased. He however produced it at the trial.
7. The case by the Defendants is as follows. For the first Defendant Mulinye Kilungu, he entered into an agreement with the deceased Moikai Ndakuni in the year 1985 for the sale of 30 acres of unadjudicated land. He occupied the land and built a permanent house thereon. To get money to pay the deceased, the first Defendant sold his land at Katuaa in Machakos. He has no other land. He paid the purchase price as follows.



- i. Kshs 47,877.20 on 3/12/1985 for 20 acres.
 - ii. Kshs 14,000/- on 3/12/1985 for an extra 10 acres.
 - iii. Kshs 7,800/- on December 27, 1985.
 - iv. Other amounts on dated that are not clear from the documents produced as exhibits.
8. In the case of the case of the fifth Defendant Joel Masai, his case is that in the year 1989, he bought ten acres to be excised off the suit land from Ndukuni Moikai. The seller's family members witnessed the agreement. He settled on the land and put up permanent buildings. He also undertook farming activities. He has been living on the land with his wife, children and grandchildren. They have no other place to call home.
- In support of his case, Joel filed three copies of agreements and acknowledgement of receipt of money by the deceased.
9. John Mutua Mutisya's case is that on 12/7/1992, he and Ndukuni Moikai entered into an agreement for sale of seven (7) acres to be excised from the suit land. He immediately occupied the seven (7) acres. He built a permanent house on the land and he has no other home.
- In support of his case, John produced a copy of agreement dated 12/7/1993 showing that he bought three (3) acres at Kshs 9000/- with each acre costing Kshs 3,000/-. He also produced copies of photographs showing houses he says he built on the land.
10. Kennedy Kimuyu Mativo's case is that in 1985, he bought 20 acres from the deceased Ndukuni Muikai. He occupied the land and built a permanent home. Since then, he has lived on the land with his family.
11. In the case of Dishon Mwongela, his case is that in 1973, he settled on two acres of suit land with the permission of the deceased. He lives on the land with his family. He has developed it by building a permanent house at a great cost.
- In support of his case, he filed an agreement dated 2/8/1992 which shows that he bought two acres at Kshs 3,000/= per acre.
12. Esther Kanini Kituku in her capacity as the beneficiary of the estate of her mother Loise Mbinya in her evidence says that her late mother bought 10 acres of land from the deceased in 1991. The family occupied the land which they have since known as their home. To buy this land, they had to sell their only land in Kangundo. They have built a permanent house thereon.
13. At the trial evidence was given by or on behalf of the following Kurani Ene Moikai, Gideon Lenana Nakuo and Joseph Kerisua Moikai. Joseph Kerisua Moikai also testified on behalf of his brothers Shadrack Moipai, Moses Kitirman Moikai, Nderitu Moikai and Stephen Kisampe. Their evidence is simply that the Defendants are trespassers and ought to be evicted. They all occupied the suit land during the lifetime of the deceased. If he ever sold them land, he did so when he was drunk.
14. Mulinge Kilungu testified at the trial that he bought 30 acres from the deceased in 1967 and he paid in kind through livestock. He produced an old exercise book with records dating from 1/12/1985 to 15/5/1989 showing the amounts received by Moikai Ole Dokony and the witnesses thereto. He also produced photographs showing houses in a homestead and cultivated land. He made one significant admission that he did not complete paying for the land because the deceased's wife refused to take the balance.
- From the agreement and records, there is no mention of 30 acres. Only ten acres are mentioned. The witness statement is not elaborate on how much he paid and what the balance is.



15. For Onesmus Muoka Nthiwa, his son Francis Kioko testified that he bought five acres at first and two more acres at Kshs 2,000/- per acre. The record produced does not bear the signature of the deceased. The record is dated December 16, 1985.
16. Joel Maithya Masai said that he initially bought ten acres but the deceased asked him to buy an extra 3.5 acres to make 13.5 acres. That is the land that he now occupies. He produced an old exercise book with signatures and names said to be those of the deceased and his family members. The dates especially the last figure 8 on each of the entries appears to have been overwritten.
17. For the estate of Kitavi Musinga, his wife Monica Mutile testified and said that he bought five acres at Kshs 20,000/-. Her evidence is that the wife has no problem with her occupying the suit land. It is the deceased's children who have brought up this case. She produced records signed by the deceased acknowledging receipt of money from the witness's husband.
18. Esther Mumbua testified on behalf of the estate of Muli Mutisya. Her husband had an agreement for five (5) acres but he only paid for three (3) acres.
19. Kennedy Kimuyu Mativu's evidence at the trial was to the effect that he bought twenty acres at Kshs 30,000/- with each acre going for Kshs 1,500/-. He produced a laminated agreement dated 20/12/1985 which is not signed by any of the parties or the witnesses.
20. Johnes Muysoka Musau in his testimony said that he bought two acres from the deceased's wife on 6/12/1992 at Kshs 3,000/-for acre. He paid a total of Kshs 6,000/-. He produced an agreement which is signed by the seller and witnessed by three people.
21. Dishon Mwangela's evidence is simply that he bought two acres from the deceased on 2/8/1992. Each acre was sold at Kshs 3,000/-. He has occupied the land and developed it.
22. Peter Mukeku testified on behalf of the estate of his father Mukeku Kimeu Lole. His evidence is that his father bought 6 acres at Kshs 2,000/- per acre. This was on 7/4/1989. He produced an old exercise book with many entries to support his oral evidence.
23. Boniface Kimeu Mweu testified to the effect that he purchased 5 acres from the deceased at Kshs 3,000/- per acre. In total he paid Kshs 15,000/-. Kshs 8, 500/- was paid to the deceased on 24/8/1992 and the balance of Kshs 6, 500/- on 2/1/2008 to the wife and her son. For an exhibit, the witness produced an old exercise book and a copy of acknowledgment dated 2/1/2008.
24. Testifying on behalf of the estate of Mutula Kilungu was Bernard Musyoka Mutula. His evidence is that his father bought 9 acres at Kshs 2,000/- per acre on 19/5/1998. He produced a hard covered book with various entries relating to this particular transaction as well as others.
25. Esther Kanini Kituku testified on behalf of her mother Loice Mbinya Kituku. Her evidence is that her mother bought 10 acres at a total of Kshs 30,000/- on 30/12/1991. She supported her testimony with an old exercise book whose entries cover the period 30/12/1991 to 23/2/1993. The record shows that by then the balance was Kshs 15,000/-. This would mean that she paid for only half of the land. She however says that in 1998, they paid the balance to the deceased's son by the name of Kisembei.
26. Counsel for the parties filed written submissions on January 19, 2022, January 31, 2022 and February 2, 2022 respectively. They identified the following issues for determination.
 - a. Whether the Plaintiffs entered into valid agreements of sale for the suit property?
 - b. Whether the Plaintiffs have acquired rights over the suit property through adverse possession?



- c. Whether the sixth Defendant is a bonafide purchase for value for title No Kajiado/Kaputiei-Central/4060?
- d. Who bears the costs?
- e. Whether the Plaintiffs in Case No 471/2017 should have the suit property transferred to them?

I find that the issues as identified by the counsel above will determine the dispute. Before I decide on the issues, I have the following findings of fact to make.

Firstly, I find it proved that the Plaintiffs in case No 471 of 2017 are in actual possession of part of the suit land, that is to say, LR Kajiado/Kaputiei –Central/466.

There are three reasons for making this finding. Firstly, when the first Defendant Kurani Ene Muikai testified in court on 27/5/2019, she said the following while under cross-examination by Mr. Olonde

“I know all the Defendants reside on my land. My husband let them reside on our land. They have resided on my land for a long time. I do not know the exact period. They got into my land when Moi was president. My husband sold land to the Defendants when he was drunk. The Defendants settled at different times on the land. The Defendants ...put up homes thereon”. ... At the time the Defendants settled on the land, the title deed had not been issued”.

The second reason is that in Suit No 13 of 2017, the Plaintiff Kurani Moikai seeks to evict the twenty Defendants. This is evidence that they are in actual occupation of part of the land. She would not seek to evict them if they were not in occupation.

Finally, I believe the testimony of the Defendants that they are in actual possession because they were able to provide documentary evidence of their occupation in form of pictures which are not controverted by the Plaintiff.

27. The second finding of fact that I wish to make is that the twenty Defendants were not able to prove that they have occupied the entire land parcels of land they claim. Mulinge Kilungu claims 30 acres saying that he paid livestock from 1967. In the agreement dated 3/12/1985, there is no mention of any livestock. He also said that he did not finish paying for the land. In the face of these apparent contradiction, I find that he occupies no more than three (3) acres.

As regards Onesmus Muoka who claims seven acres, I find that he does not occupy that much land. In the absence of congent proof, I find that he occupies one hectare.

In the case of Joel Maithya Masai who claims 13.5 acres, I find that he occupies no more than three (3) acres.

As regards Onesmus Muoka who claims seven acres, I find that he does not occupy that much land. In the absence of congent proof, I find that he occupies one hectare.

In the case of Joel Maithya Masai who claims 13.5 acres, I find that he too occupies much less land which I also estimate at one (1) hectare.

For the estate of Kitavi Musinga, I find that one (1) hectare is proved in the absence of congent evidence to prove occupation of five (5) acres.

I found Esther Mumbua testifying on behalf of the estate of Muli Mutisya the most convincing of all the witnesses when she said that though the agreement was for the five acres, they paid for only three acres. I am convinced by her candid testimony. I find that she occupies three (3) acres.



Kennedy Kimuyu Mativu was not convincing with his laminated agreement that did not look like it was made in 1985. It is also not signed by the deceased. I find that he only occupies one (1) hectare.

I am convinced that Johnes Musyoka bought two acres from Kurani Moikai in 1992 and occupies the two acres. The testimony of Dishon Mwangela is equally convincing and I find that he occupies two acres.

Regarding Peter Mukeku, I find that he occupies one hectare in the absence of strong evidence to prove that he occupies six acres.

For Boniface Kimeu Mweu, I find he occupies only one hectare because he has failed to prove that he kept his part of the bargain. Paying half the purchase price in 2008 when the agreement was in 1992 is not fair. I find that though he may have had an agreement for five acres, he should only occupy one (1) hectare which he paid for at the time of the agreement.

In the case of Mutula Kilungu, I find he too occupies one hectare.

Finally in the case of Loice Mbinya, there is no evidence that she paid the entire purchase price. I find that her family occupies only one hectare.

Having made those findings of fact, I now come to the issues raised by counsel.

28. On the issue of whether or not the sale agreements are valid, I find that some are valid while others are not. However in view of Section 3 (4) of the [Law of Contract Act](#), I find that since all the Defendants in Case No 13 of 2017 occupied the land at the time of purchase, a constructive trust was created. This makes the requirement of a written agreement immaterial.
29. On whether the Plaintiffs in Case No 471 of 2017 acquired rights over the suit land through adverse possession, I find that they may have. However, I am certain that they have an overriding interest under Section 30 (g) of the [Registered Land Act](#) (Now Repealed). It provides as follows.

“Unless the contrary is expressed in the register, all registered land shall be subject to such overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

- (g) The rights of a person in possession or actual occupation, save where inquiry is made of such person and the rights are not disclosed”.

I find that where the deceased Moikai put the Defendants in Case No 13 of 2017 in possession of their respective parcels, a trust was created. Such trust is recognized by Section 28 (b) of the [Land Registration Act](#) (Act No 3 of 2012) as overriding the register.

To override means to be superior to. To use one’s authority to reject or cancel a decision, view or reverse. What this means is that the rights of a person in possession or actual occupation overrule what may be in the register. In short, the rights of the twenty Defendants in possession override the title deeds that the Plaintiff Kurani Moikai, her children and Gideon Lenana Nakuo have.

In the case of Isaack M’Inanga Kiebia v Isaya Ntongai M’Lintari and another Petition No 10 of 2015, the Supreme Court of Kenya, held as follows at paragraph 58...

“it is now clear that customary trusts, as well as other trusts, are overriding interests. These interests, being overriding interest are not required to be noted in the register”.

30. I find that the sixth Defendant in Case No 471/2017 is not a bona fide purchaser for LR No 4060. This is because even the person who sold the land to him had an inferior right to the Plaintiffs who



were already in occupation. As we have already found in paragraph 29 above, nothing can override the rights of a person in actual occupation.

31. On the issue of whether the Plaintiffs in Case No 471/2017 should have the suit property that they occupy transferred to them, I find that they should. As already found, they have a far superior right than any other person to the land that they occupy.
32. On costs, the law is that they should follow the event. In this case, both parties have been partially successful. The Plaintiffs have been found to own part of the suit land though it is less than the one they claim to occupy. On the other hand, they Defendants will retain some of the land the Plaintiffs were claiming. This is therefore an appropriate call where each party should bear its own costs.
33. In summary, I enter judgment for the Plaintiffs in Case No 471 of 2017 as per the land sizes spelt out in paragraph 27 of this judgment. This land to be carved out of the suit land known as Kajiado/Kaputiei-Central /466 and to incorporate the homesteads of the Defendants and any area where they have buried their loved ones.

Owing to the superiority of the Defendants' claims the title deeds issued to Kurani Ene Moikai, her sons, Gideon Lenana Nakuo and/or any other person to be cancelled if they are inconsistent with the Defendants occupation.

It is considered that the two suits namely, No 13 of 2017 and 471 of 2017 have been determined by this judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH DAY OF JANUARY, 2023

M.N. GICHERU

JUDGE

