



**Magata v Oyaro (Civil Suit 53 of 2013)
[2023] KEELC 15873 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 53 OF 2013
M SILA, J
FEBRUARY 28, 2023**

BETWEEN

CONCEFUTA KEMUNTO MAGATA PLAINTIFF

AND

DORCAS KWAMBOKA OYARO DEFENDANT

JUDGMENT

1. In this suit, the plaintiff seeks the following orders :-
 - a. An order of rectification of the register to remove the title West Kitutu/Bogeka/3950 and revert it back to the plaintiff.
 - b. Costs of the suit.
 - c. Any other relief this honourable court may deem fit to grant.
2. The plaintiff contends that this land parcel Central Kitutu//Bogeka/ 3950 was fraudulently created within her land. It is pleaded in the plaint that the plaintiff prepared mutation forms subdividing the land parcel West Kitutu/Bogeka/1476 into two portions, being parcels No 3224 and 3725, and consent to subdivide was given by Mosocho Land Control Board on 19 April 2007, to have the parcel number 1476 subdivided into two. She sold the parcel No 3725 to a third party. She claims that the defendant committed fraud by inserting her name in the mutation forms which has led the plaintiff to lose 0.07 Ha of her land.
3. The defendant filed defence refuting the claims of the plaintiff. She averred that she is the owner of the parcel No 3950 and has been on the disputed land since the year 1987. She pleaded that she purchased the land from the registered owner, Paulina Kwamboka Nyansiaboka.
4. The matter first proceeded ex parte before Kullow J, who delivered judgment on October 19, 2017 in favour of the plaintiff. He inter alia issued an order to the Land Registrar to have the register rectified



to cancel the title West Kitutu/Bogeka/3950. There followed an application to set aside the judgment which application was allowed and the matter started afresh.

5. In her evidence, the plaintiff gave the history of the land as follows : That the original title was West Kitutu/Bogeka/302 registered in name of Christopher Nyansiaboka who subdivided his land to his two wives, Pascalina Masese and Paulina Kwamboka. The plaintiff is daughter of Pascalina. She stated that Pascalina decided to sell a portion of her land to the defendant as she had no sons. The defendant's husband processed the subdivision of the parcel No 302 into the parcels No West Kitutu/Bogeka/1476 and 1477. The plaintiff got the parcel No 1476 and the parcel No 1477 was registered in name of Philip Oyaro, husband to the defendant. August 28, 2008, the plaintiff subdivided her parcel No 1476 into two portions, being West Kitutu/Bogeka/3724 and 3725. She contends that the defendant fraudulently caused another mutation form bearing the same date to be registered, now indicating that she has subdivided her parcel of land into three portions, including the parcel No 3950. Cross-examined, she stated that her father, Christopher, died on March 10, 1975. She was the one who did the subdivision of the parcel No 302. She did not know if succession was done. She was not aware that the land registrar cancelled the parcel No 302 in 1995 on account of forgery.
6. PW-2 was Pascalina Monchari a sister-in-law to the plaintiff (father of the plaintiff and her father in law being brothers. Her evidence was that the plaintiff is daughter of Pascalina Masese and that the defendant bought land from Paulina Kwamboka. She stated that the defendant is occupying land that she purchased from Pascalina. She had a witness statement which however states that the allegation that the defendant bought her land from the step-mother of the plaintiff (Paulina) is a lie and that if this parcel No 3950 was to be sold, the only person who could sell it was the plaintiff.
7. PW-3 was Steve Mokaya, the Land Registrar, Kisii. His evidence was that the parcel No 302 was registered in name of Christopher Nyansiaboka and Obure Orangi on August 5, 1976 each with a half share. He testified that on April 6, 1995, there was forgery indicating that the title has been transferred to Concefuta (the plaintiff); that the Land Registrar noted the forgery and cancelled this entry. On September 9, 1976, there was a purported subdivision of parcel No 302 into the parcels No 1476 and 1477 which entry was signed by the Land Registrar on May 2, 2004. He stated that these titles No 1476 and 1477 were fraudulently created and ought to be expunged. He continued that the parcel No 1476 was opened in name of Daniel Nyangeri and Kwamboka Nyansiaboka, whereas for parcel No 1477, the registration was in name of Philip Oyaro Getanda, Daniel Nyangeri and Kwaboka Nyansiaboka. This parcel No 1477 has two cards. He stated that the plaintiff subdivided the land parcel No 1476 into the parcels No 3724, 3725 and 3750. On December 14, 2009, parcel No 3724 was transferred to Denis Mombori Nyamwaro and Vincent Taabu Nyamwaro. On September 28, 2009, parcel No 3725 was transferred to Esther Kerubo Obaga. On December 9, 2009, parcel No 3950 (the suit land) was transferred to the defendant. He mentioned that there was a court order dated August 28, 2018 (probably in reference to the earlier judgment of Kullow J) which directed the Land Registrar to nullify the title of the defendant which was effected and the plaintiff subsequently transferred this title to the name of Barnabas Nyaosi Ondicho on June 24, 2019. He elaborated that upon closure of the parcel No 1476, the parcel numbers that were created were the parcels No 3724 and 3725 on 25 September 2009 and that parcel No 3950 was added later. He found this suspicious since the number 3950 does not follow the numbers 3724 and 3725. Cross-examined by counsel for the defendant, he contended that the subdivision of the parcel No 302 was irregular and that parcel No 1476 was irregularly created. It was the plaintiff who subdivided this parcel No 302. Her title to this parcel No 302 was cancelled. He extrapolated that the resultant parcels No 3724, 3725 and 3950 are not good titles and should be cancelled. He thought that everything arising from the parcel No 302 was irregular as the division was done by only one registered owner despite the property being jointly owned.



8. With the above evidence, the plaintiff closed her case.
9. DW-1 was the defendant. She testified that the parcel No 3950 is in her name and measures 0.07 Ha. She elaborated that she and her husband purchased the land from Paulina Kwamboka in the year 1987. This land belonged to her husband who was deceased at the time they purchased it. Paulina herself later died in the year 1988. The plaintiff was not present when she purchased the land. She added that the land she bought appears in the Registry Index Map (RIM) which she produced. She acknowledged that the original land was parcel No 302 owned by Christopher Nyansiaboka and Ogure Orangi. The title was then transferred to the name of the plaintiff. She appreciated that this entry in the register is cancelled citing “forgery.” She thought the land should revert back to the parcel No 302 so that everything can be done properly. Cross-examined, she insisted that when she purchased the land from Paulina in the year 1987, it was parcel No 1476. She did not have a written agreement. Paulina had not taken out letters of administration. By that time the parcel No 302 had already been subdivided into the parcels No 1476 and 1477 and her husband was already registered as proprietor of the parcel No 1477. She alleged that they had an extension of the boundary. She did not attend the Land Control Board. She got the title in the year 2009 from the Lands office when she went there and explained to them her problem. They asked if anybody was complaining and she told them that there was no one so they gave her the title to the parcel No 3950. There was no transfer done. She did not have title to the parcel No 1476 and she did not surrender it. She acknowledged that there were two mutation forms for plot No 1476, one with only the parcels No 3724 and 3725, and the other mutation now having an additional parcel No 3950.
10. DW-2 was Philip Oyaró Getanda, the husband of the defendant. His evidence was that in the year 1987 he purchased 1/4 of an acre from Paulina from the parcel No 302. Paulina was wife to the registered owner who had died. As far as he was aware, no succession had been done. He asked his wife to process the title. He was aware of the plot No 1476 which emanated from the parcel No 302. He stated that it is this plot No 1476 which produced the parcel No 3950 though he did not know how. He did not know how many parcels of land emerged from the parcel No 1476. He thought that the plaintiff was to blame for not undertaking succession for the parcel No 302.
11. DW-3 was John Morara Masese. The plaintiff is his step-aunt. He is grandson to Christopher Nyansiaboka. He testified that Christopher had no sons and he is entitled to a share of his land. He stated that he was raised on this land but the plaintiff later drove him out of it as she wanted to remain alone on it. He claimed that his grandmother gave directions that he should be given the land and called the Chief who recorded this in writing. It was after her death that the plaintiff chased him away from the land. He stated that his grandmother sold land to the defendant and he was of opinion that the defendant is not unlawfully on the land. Cross-examined, he mentioned that he did not know from which title number the defendant’s portion that she bought was carved out of.
12. DW-4 was Joseph Kerandi Mogendi, who used to be the Assistant Chief of Bonyagatanyi Sub-Location where the land is located. He testified that the plaintiff comes from this area though she got married in another sub-location. He also knows the defendant. He knew Christopher, the father of the plaintiff and that he owned the parcel No 302. Christopher only had daughters all who got married. He died in the year 1975. He stated that the plaintiff was daughter of the 2nd house. He claimed that Christopher had separated from her mother and had divorced. The plaintiff was raised by Paulina (1st wife of Christopher). He testified that DW-3 was grandson of Paulina and lived with her. Before she died, she sent for him and he told him that she wished to leave the land to DW-3 which he recorded. Cross-examined, he stated that it was Paulina who sold land to DW-2.
13. With the above evidence, the defendants closed their case.



14. Counsel were invited to file submissions and I have taken into account the submissions filed by counsel for the plaintiff and defendant before arriving at my decision.
15. The case of the plaintiff, as I understand it, is that she was proprietor of the land parcel 1476 which she subdivided into two portions, parcels No 3724 and 3725. She thus contends that the insertion of the parcel No 3950 into the mutation form of the parcel No 1476 was fraudulently done by the defendant as she never subdivided the land into three portions. The defence of the defendant is that she and her husband purchased this land in the year 1987 from Paulina, the deceased husband of Christopher, who was the owner of the land in its original title No 302. There are also claims by the defendant that the plaintiff could not have properly obtained title to the parcel No 1476 as she never did succession for the estate of the late Christopher. There are even more intrigues in the case. There is DW-3 who asserts that this land was left for him by his grandmother (Paulina) because she had no sons. There is also the rather curious evidence of the Land Registrar, that all the titles herein are forgeries as there has never been proper transfer of title from the original parcel No 302 which was jointly owned by Christopher and one Orangi. To confound the matter further, the Land Registrar's evidence is that after the plaintiff got judgment in the first instance, she transferred the parcel No 3950 to another person, one Barnabas Nyaosi Ondicho. Since this transfer was pursuant to a judgment that was nullified, the transfer, if any, cannot be given effect.
16. I am not very sure of the Lands records because they seem to have contradictory information, multiple green cards, and unbridled insertions. Starting with the parcel No 302, the Green Card produced shows that it was opened on August 5, 1976 in the name of Christopher Nyansiaboka and Obure Orangi, with the land measuring 2.0 Ha. The names of the proprietors are typed. However, there is insertion by hand, of the words 'deceased', with an arrow pointing to the name of Christopher Nyansiaboka. There is no name or signature to show who made this writing and when. There is also handwriting to indicate that they hold ½ share each and it is not clear why this was not typed alongside their names. It is also curious that the signature therein purports to be dated May 19, 1979. You would expect this to be signed and dated 5 August 1976 when the register was opened. This was not explained by the Land Registrar. There is an entry No 2 said to be dated April 6, 1995 in name of Consefuta Kemunto Magata, the plaintiff herein, and Obure Orangi. The entry is shown cancelled with words 'Forgery'. These are handwritten. That cancellation is not signed and nobody knows who entered those words and when. Interestingly, there is another entry No 2 dated September 9, 1976, indicating that the title is closed on subdivision into the parcels No 1476 and 1477. To convolute the entry, the entry is said to be signed on May 20, 2004.
17. I have looked at the green cards to the parcels No 1476 and 1477, which are said to be subdivisions of the parcel No 302. The Green Card to the parcel No 1476 shows that it was opened on September 9, 1976 in the name of Kwamboka Nyansiaboka. On September 1, 2009, the title is transferred to Consefuta Kemunto Magata (plaintiff). On September 25, 2009, the title is closed on subdivision into the numbers 3724 – 3725, but below these two numbers is inserted '& 3950'. I will come back to this later as I first need to exhaust address on the other subdivision of parcel No 302, which is parcel No 1477. There are actually two Green Cards. One shows that the register was opened on September 9, 1976 in name of Daniel Nyangeri and Kwamboka Nyansiaboka as first proprietors upon division of the parcel No 302. The second Green Card shows that it was opened on September 9, 1976, in the name of Philip Oyaro Getanda, and that he was issued with title deed on May 20, 2004. I am unable to reconcile how two parcels of land have two registers showing different entries and proprietorship. The lands records are certainly confounding, and it is difficult, if not impossible, within the confines of the pleadings of this case, to know exactly which is the correct position regarding division of the parcel No 302.



18. However, I do not have a dispute before me regarding the history of the land. There was attempt by DW-3 to claim the land but this is not within the purview of this litigation. Even the issue of succession of the estate of Christopher, or Paulina, is not within the ambit of this dispute. The dispute that is before me is whether the parcel No 1476 was subdivided into two portions, that is parcels No 3724 and 3725, or whether it was subdivided into three parcels to include the parcel No 3950. I will remain focused on that issue and not meander to other matters which cannot be within the dispute herein.
19. My conclusion from the documentary evidence tendered is that the land was only subdivided into two portions, that is, parcel No 3724 and 3725. There are of course two mutation forms, one with two parcels, and the other with three parcels now including the parcel No 3950. It is my opinion that the one with three parcels is an obvious forgery and this parcel No 3950 must have been added later. When mutation was done, it only showed plots A and B. There was no 'C' to depict a third parcel. Moreover, the sequence of the numbers tells you that parcel No 3950 was added later. If it was part of the subdivision when the mutation was done in the year 2009, you would expect that it would have been given the number 3726 which is not the case. In addition, the only consent of the Land Control Board displayed, for subdivision of parcel No 1476, is that indicating subdivision into two parcels. The defendant has of course presented an LCB consent showing that the parcel No 302 was subdivided into three in the year 2006, but this cannot be the case to result into the parcel No 3950, for the parcel No 302 had already birthed the parcels No 1476 and 1477 a while back. In any event, the defendant did not display a mutation form to indicate that the parcel No 3950 arose out of subdivision of parcel No 302.
20. My finding is that the parcel No West Kitutu/Bogeka/ 3950 was improperly inserted in the mutation form to indicate that it was part of the subdivision of the parcel No West Kitutu/Bogkeka/1476 when it was not. I proceed to nullify this title. It should be clear that what I have done is to completely nullify and obliterate this title. It should not exist at all. It is not a title capable of being transferred to anyone as it ought not to exist. Whatever land it purports to fall in must be land that falls within the parcels No West Kitutu/Bogeka/3724 or 3725. I therefore issue an order cancelling the title to the parcel No West Kitutu/Bogeka/3950 and nullifying its register, and further order for the amendment of the Registry Index Map so that this title is removed from both registry and the maps. For the avoidance of doubt, I have not made the order that this land parcel No West Kitutu/Bogeka/ 3950 should revert to the plaintiff for there is nothing to revert. I have completely nullified the said title. The only recognized subdivisions of the parcel No 1476 are the parcels No 3724 and 3725, pursuant to the mutation form bearing parcel A and B. There is no recognized title West Kitutu/Bogeka/3950.
21. The last issue is costs. Costs will follow the event. The defendant cannot get away by purporting that the plaintiff subdivided the land into three whereas she only subdivided the land into two. The defendant will therefore pay the costs of this suit.
22. Judgment accordingly.

DATED AND DELIVERED THIS 28 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

