



**Kinyanjui & another v Njuguna & another (Environment & Land Case 604 of 2017) [2023] KEELC 16632 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16632 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 604 OF 2017  
JG KEMEI, J  
MARCH 23, 2023**

**BETWEEN**

**MARY NYAMBURA KINYANJUI ..... 1<sup>ST</sup> PLAINTIFF**

**ANNA WANGARI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**TERESIA WANJIRU NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a Plaint dated the 16/6/2017 and filed on even date the Plaintiffs sought the following orders against the Defendants;
  - a. An inhibition or prohibitory order against the Defendant by themselves and or those claiming under them or any other body or officer restricting them, interfering, entering alienating, selling transferring registering charging and/or dealing with the suit premises RUIRU EAST/ JUJA EAST BLOCK2/1667 (suit land) pending the hearing and determination of the suit.
  - b. There be a declaration that the suit premises rightly and lawfully belong to the Plaintiffs.
  - c. There be an order revoking and or annulling the title issued to Patrick Ndungu Njuguna for the suit land and rectification of the register accordingly.
  - d. Costs of the suit plus interest.
2. The 1<sup>st</sup> Plaintiff describes herself as the wife of the late Herman Kinyanjui while the 2<sup>nd</sup> Plaintiff is the legal representative of the estate of Herman Kinyanjui Kimani alias Herman C Kinyanjui (Herman), deceased and the registered owner of the suit land.



3. The 1<sup>st</sup> Defendant is the legal representative of Patrick Ndungu Njuguna (Patrick) who died intestate, unmarried and left no immediate family of his own.
4. It is the Plaintiffs' case that the Herman was the registered proprietor of the suit land having been issued with a title on the 3/9/1990. That in September 2014 the 1<sup>st</sup> Plaintiff visited the suit land only to find third parties claiming ownership of the suit land after which she reported the matter to the police. Upon investigations, it was discovered that there were two titles registered in the names of two different persons to wit; Herman in 13/9/1990 and that of Patrick on 9/11/1993. They were advised by the Police to file suit to resolve the civil dispute. This is what triggered the current suit. The filing of the case was hastened by news that the Defendants had visited the land in 2017 with the intention of occupying the same.
5. Particulars of fraud have been pleaded against the Defendants in para 8 of the Plaint to wit; colluding to alter the records knowing well the suit land had been registered in the name of Herman; the 2<sup>nd</sup> Defendant fraudulently registered the name of Patrick as the second owner of the suit land in the green card and issuing title knowing it to be unlawful; the Defendants have altered the record with the intent to dispossess the original owner; the 2<sup>nd</sup> Defendant altering the records and fraudulently issuing another title to Patrick knowing well that the property was charged to the bank at the time.
6. That despite Herman having taken possession of the suit land and charged the same in 1990 to Kenya Commercial Bank Limited, the said charge was unceremoniously discharged in 1997 and another title fraudulently issued in the name of Patrick in total disregard of the law.
7. The 1<sup>st</sup> Defendant denied the Plaintiff's case vide their statement of defence dated the 26/8/2020 and filed on the 22/9/2020. She denied the particulars of fraud and contended that the suit land was registered in the name of Patrick 9/11/1993 and upon his death in 1998 she was appointed the legal administrator of his estate in 2007. Additionally, she refuted that the 2<sup>nd</sup> Defendant issues titles as it is the prerogative of the Land Registrars under the Ministry of Lands. She sought to put the Plaintiffs into strict proof.

### **The evidence**

8. PW1- Mary Nyambura testified and relied on her witness statement dated the 16/6/17 as her evidence in chief. In support of her case she produced the documents marked as PEX No 1-6.
9. She led evidence and stated that she is the wife of Herman and the mother of the 2<sup>nd</sup> Plaintiff who is the legal administrator of the estate of her said deceased husband. Herman was registered as owner of the suit land on 3/9/1990. She reiterated the contents of the Plaint and stated that Herman had taken possession of the suit land and even charged the same with the Kenya Commercial Bank to secure financial facilities. That although she did not have any documents in support she stated that she knows that Herman was a member of Juja Farms Limited and it is through his shareholding in the company that he acquired the suit land.
10. In addition, she stated that she has the authority of the 2<sup>nd</sup> Plaintiff to bring the suit. Interalia, that she is a beneficiary of the estate of the late Herman, her husband. She stated that she did not know Patrick nor that he had any relationship with her deceased husband. Shown the letter dated the 6/7/1990, she refuted that the same was authored by Herman seeing that it was unsigned, thus putting its authenticity to question. Shown the Defendants alleged members' register the witness challenged the same on the ground that it was not on the letter head of the company.
11. The witness testified that she was in possession of the suit land. On the issue of fraud, the witness stated that the title in the hands of the Defendant is tainted having been issued while a charge was subsisting



- on the title of Herman. She wondered how a title can be issued on top of another even in the presence of an encumbrance in form of a charge. That Herman's title takes precedence over that of the Defendants.
12. DW1- Teresia Wanjiru Njuguna, led evidence and adopted the contents of her witness statement dated the 4/11/2020 as evidence in chief. She produced the documents on page 4 of her trial bundle and marked DEX NO 1-6.
  13. The 1<sup>st</sup> Defendant stated that she is the 2<sup>nd</sup> born sister to the late Patrick who worked as a High School teacher at Easleigh High School but remained unmarried to his death in 1998. In 2017 she was appointed the legal administrator of his estate. That Patrick was allocated the suit land 9/11/1993 pursuant to his membership as a shareholder of Juja Farms (1976) Limited under Share Certificate Number 355. That Patrick and Herman were trusted and good friends, hailed from the same village. Patrick being indisposed, sent Herman to run errands for him, one of which was on the 6/7/1990 where vide a note he sent him to collect for him his title from the Land Registrar Kiambu. The land register was thereupon opened on the 3/9/1990 and a title was issued in the name of Herman two months after the letter authorizing Patrick to collect the title. Interalia, the name of Herman does not exist in the shareholders list of Juja Farms (1976) and in her opinion the said Herman has failed to give the history of how he acquired the suit land. Shown the verifying affidavit by the 1<sup>st</sup> Plaintiff the witness maintained that the 1<sup>st</sup> Plaintiff has no authority to file the suit on behalf of the estate of Herman because she is not the administrator of the estate. That the 2<sup>nd</sup> Plaintiff who is the legal administrator of the estate has not testified at all. She stated that she is in possession of the suit land. She admitted that the title in the name of Patrick was done whilst the charge over the suit land was subsisting, the charge having been discharged on the 5/8/97.
  14. DW2 – Robert Mugendi Mbuba testified and introduced himself as the Land Registrar No 327 currently stationed at the Ruiru Land Registry since 2019. That the title in the name of Herman was issued on the 3/9/1990. The suit land is parcel 1667 measuring 1.30 ha on Registry Map Index 3 and 4. He informed the Court that there are two titles issued in the names of Herman and Patrick for one parcel of land 1667. He admitted that the two titles emanated from the land office and attributed it to duplication of titles seeing that there are two registers for the land. That according to the members register for Juja Farm Limited in his records, plot No 1667 was allocated to Herman vide Share Certificate No 5411. He opined that the first register in time takes precedence over the second one. The title for Herman was registered in 1990 while that of Patrick was registered in 1993.
  15. In addition, he stated that the name of Patrick appears on the Juja members registered as No 289-Share Certificate No 355. That Patrick was also a member of Juja Farm Limited.
  16. The 2<sup>nd</sup> Defendant did not file any defence to the Plaintiffs claim.
  17. The law firm of Muchangi Nduati & Co advocates filed written submissions on behalf of the Plaintiffs while that of the 1<sup>st</sup> Defendant were filed by the law firm of Ayieko Kangethe & Co advocates.

#### **The written submissions.**

18. The Plaintiffs submitted that it is unlawful for one parcel of land to have two titles. See Section 10 (1) of RLA now repealed. They submitted that in the circumstances of this case the title in the name of Herman is the lawful title and that of Patrick must be cancelled on the following grounds; Herman's title was the first in time to be registered; the 1<sup>st</sup> Defendant's title was registered 3 years later; it not regular for a title to be registered over another one which is encumbered with a charge;
19. It was submitted that Herman's title having been registered first takes priority.



20. The 1<sup>st</sup> Defendant relied on the decision of the Court in IEBC & Anor Vs Stephen Mutinda Mule & 3 Others (2014) EKLRL that held that;

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is a variance with the averments of the pleadings goes to no issue and must be disregarded.”

21. Flowing from the decision of the above case, the Plaintiffs were faulted for not disclosing that Herman was a member of Juja Farms Limited. That the Plaintiffs have objected to the production of the members register are estopped from relying on the said members register in support of their case. That the 1<sup>st</sup> Plaintiff failed to explain how Herman acquired the suit land. That the 1<sup>st</sup> Defendant has been in occupation of the land since the death of Patrick.

22. Relying on the cases of Moses Parantai & Peris Wanjiku Mukuru Vs Stephen Njoroge Macharia (2020); Urmilla W/o Mahendra Shah Vs Barclays Bank International Limited & Anor (1979)eKLR; Vijay Morjaria Vs Nansingh Madhusingh Darbar & Anor (2000) , the 1<sup>st</sup> Defendant submitted that the Plaintiffs have failed to proof fraud albeit impleading the same.

23. Further the 1<sup>st</sup> Defendant took issue with the 2<sup>nd</sup> Plaintiff who failed to testify despite being the legal representative of the estate of Herman. Further the 1<sup>st</sup> Plaintiff failed to place any authorization from the 2<sup>nd</sup> Plaintiff authorizing her testify on her behalf. In conclusion the 1<sup>st</sup> Defendant concluded that the 1<sup>st</sup> Plaintiff lacked capacity to rendering the Plaintiffs suit incompetent.

24. Having read and considered the pleadings the evidence adduced during the hearing, the written submissions and all the materials placed before the Court the issues that commend themselves for determination are;

- a. Whether the suit is incompetent for lack of capacity by the 1<sup>st</sup> Plaintiff to file suit on behalf of the estate of Herman.
- b. Whether the Plaintiffs have proved fraud on the part of the Defendants.
- c. What orders should the Court issue.
- d. Who meets the costs of the suit.
- e. Whether the suit is incompetent for lack of capacity by the 1<sup>st</sup> Plaintiff to file suit on behalf of the estate of Herman.

25. Order 4, rule 1 of Civil Procedure Rules provides the nature and content of the verifying affidavit that must accompany the Plaint. It states as follows;

“(1) The Plaint shall contain the following particulars-

- a. The name of the Court in which the suit is brought;
- b. The name, description and place of residence of the Plaintiff, and an address for service;
- c. The name, description and place of residence of the Defendant, so far as they can be ascertained;
- d. The place where the cause of action arose;



- e. Where the Plaintiff or Defendant is a minor or person of unsound mind, a statement to that effect; and
  - f. An averment that there is no other suit pending, and that there have been no previous proceedings, in any Court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaintiff.
- (2) The Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above.
  - (3) Where there are several Plaintiffs, one of them, with written authority filed with the Verifying Affidavit, may swear the Verifying Affidavit on behalf of the others.
  - (4) Where the Plaintiff is a Corporation, the Verifying Affidavit shall be sworn by an Officer of the Company duly authorized under the seal of the Company to do so.
  - (5) The provisions of sub-rule (3) and (4) shall apply mutatis mutandis to counterclaims.
  - (6) The Court may of its own motion or on the application by the Plaintiff or the Defendant order to be struck out any Plaintiff of counterclaim which does not comply with sub-rule (2), (3), (4) and (5) of this rule.”

26. Order 1 rule 13 rule (1) and (2) of the Civil Procedure Rules provides as follows;

“ Appearance of one of several Plaintiffs or Defendants for other.

- a. Where there are more Plaintiffs than one, nay one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
- b. The authority shall be in writing signed by the party giving it and shall be filed in the case.”

27. It is not in dispute that the 1<sup>st</sup> Plaintiff is the wife and mother of Herman and the 2<sup>nd</sup> Plaintiff respectively. The 2<sup>nd</sup> Plaintiff is the legal representative of the estate of the late Herman. The 1<sup>st</sup> Defendant has argued that the 1<sup>st</sup> Plaintiff has no locus standi to bring the case seeing that she has sworn a Verifying Affidavit dated the 16/6/2017 to the effect that she has the authority of the 2<sup>nd</sup> Plaintiff to bring the suit. I note that that the 2<sup>nd</sup> Plaintiff being the legal representative of the estate of Herman has not filed any authority authorizing the 1<sup>st</sup> Plaintiff to file suit. The 1<sup>st</sup> Defendant has argued that the suit is incompetent on that account.

28. A legal representative under Section 2 of the *Civil Procedure Act* is a person clothe with the power to sue or represent the estate of a deceased person.

29. Section 79 and 80 of the Law of Succession provide that the administrator of the estate of the deceased who can sue or be sued with regard to the estate of a deceased.



30. In this case it is not in dispute that according to the certificate of confirmation of grant issued on the 28/2/2012 and amended on the 19/2/2013, the suit land among others is awarded by way distribution to the 1<sup>st</sup> Plaintiff to hold in trust on behalf of herself and of behalf of the other beneficiaries namely; Anthony Kimani Kinyanjui, Anna Wangari, Jacqueline Wangari, Joan Wanjiku Kinyanjui and Emily Ngendo Kinyanjui. The 2<sup>nd</sup> Plaintiff being the legal administrator of the estate is also a beneficiary of the suit land. It is the view of the Court that the 1<sup>st</sup> Plaintiff has established adequate legal capacity as a beneficiary to bring this suit.
31. The 1<sup>st</sup> issue is answered in the negative.

**Who between the Plaintiffs and the 1<sup>st</sup> Defendant is the lawful owner of the suit land.**

32. It is the Plaintiffs claim that the suit land was allocated to Herman their kin through his membership with the Juja Farms Limited and became registered as owner in 1990. That in 2014 the 1<sup>st</sup> Defendant visited the suit land and discovered that third parties were claiming the land. This prompted her to report the matter to the police who upon investigations deemed it a civil suit and advised her to pursue civil remedies hence the filing of the suit. They learnt that a title in the name of Patrick had been issued in 1993 while a charge in favour of Kenya Commercial Bank subsisted on the title. The Plaintiffs have accused the 1<sup>st</sup> Defendant of fraud as particularized under para 8 of the Plaint.
33. The 1<sup>st</sup> Defendant on the other land claims the suit land belonged to Patrick pursuant to his shareholding in Juja Farms Limited who was issued with a title in 1993. She denied the allegations of fraud.
34. Fraud is defined as-
- “Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’.
35. Section 26 of the *Land Registration Act* provides 2 instances in which a title may be impugned in law. It sets out the legal provisions as follows:-

“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.”

36. Where a title is challenged on account of fraud, the law is clear that fraud must be pleaded and proved. This has been buttressed in the Court of Appeal case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

37. In the Court of Appeal case of Arthi Highway Developers Limited V West End Butchery Limited & 6 Others [2015] eKLR it was settled that a person who holds a bad title cannot pass a good title to a purchaser.

38. It is not in dispute that this is a case of double titling of a single parcel of land. Where there are competing interest like in this case the Court is being urged to determine which one of the two titles was acquired lawfully.

39. It is not in dispute that both original titles holders were members of the Juja Farm Limited going by the evidence adduced at the trial. Patrick was member No 289 holding certificate Number 355. Herman was member No 4576 holding Share Certificate No 5411.

40. According to the evidence produced by DW2 two documents stand out: one is the area list containing the names of the allottees plot Numbers, certificate number and their addresses and the second list is the shareholders list. The latter agrees with the members list produced by the Plaintiffs which disclose both Herman and Patrick as shareholders of Juja Farms Limited.

41. The point of divergence is that the name of Herman is included in the area list which shows his name, plot No as parcel 1667 and Share Certificate Number 5411. The disclosed parcel number is the nexus between his membership and the suit land.

42. The case of Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No. 239 of 2009 states as follows:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

43. The 1<sup>st</sup> Defendant has not explained the root of her title other than that it was allocated to Patrick and a title issued in 1993.

44. It is trite that in Kenya land can only have one registered title and the reason is the indefeasibility of title. A title must be defined so as to enjoy the protection of law. In this case the title of Herman was registered in 1990 while that of Patrick was in 1993. Holding all things constant, then the first in time is that of Herman. By 1993 there was no title available for allocation to Patrick as the land had already been alienated. The Court finds that the Plaintiffs have a better title than the Defendants in the circumstances of this case.



45. The 1<sup>st</sup> Defendant having acquired title under a cloud of suspicion, the Court is not helpless in the circumstances. I find that the Defendant has not explained the root of how Patrick acquired the title and the same be and is hereby cancelled pursuant to the provisions of Section 26 1(b) of the [Land Registration Act](#).
46. Final orders for disposal
- a. An inhibition or prohibitory order be and is hereby issued against the Defendant by themselves and or those claiming under them or any other body or officer restricting them, interfering, entering alienating, selling transferring registering charging and/or dealing with the suit premises RUIRU EAST/JUJA EAST BLOCK 2/1667 (suit land) pending the hearing and determination of the suit.
  - b. It is hereby declared that the suit premises rightly and lawfully belong to the Plaintiffs.
  - c. An order is hereby issued revoking and or annulling the title issued to Patrick Ndungu Njuguna for the suit land and rectification of the register accordingly.
  - d. Costs in favour of the Plaintiffs.
47. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23<sup>RD</sup> DAY OF MARCH, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Nduati for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

Ayieko for 1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant – Absent

Court Assistants – Kevin/Lilian

