



REPUBLIC OF KENYA



**Njuguna v Mwangi (Environment & Land Case 415 of 2014)
[2023] KEELC 16365 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 415 OF 2014**

**JO OLOLA, J
MARCH 23, 2023**

BETWEEN

NYAMBURA NJUGUNA PLAINTIFF

AND

BENSON IRUNGU MWANGI DEFENDANT

JUDGMENT

Background

1. This suit was initially instituted on August 2, 2001 at the High Court at Nyeri as Nyeri HCCC No 135 of 2001. By her Plaint dated July 19, 2001, Nyambura Njuguna, suing as the Legal Representative of the Estate of the late Njuguna Racho (the Plaintiff) prays for:
 - (i) A determination that the Defendant is no longer entitled to Land Parcel (No) Gikundu/Mirira/1555 there having been no consideration for the transfer into his name;
 - (ii) An order that the Land Registrar do rectify the register of the suit land by deleting the name of the Defendant and in its place inserting that of the Plaintiff;
 - (iii) Any further or other better relief the Court may find just and expedient.
2. Those prayers arise from the Plaintiff's contention that sometime in the year 1971, her husband the late Njuguna Racho and the Defendant entered into negotiations for the sale of the said parcel of Land No Gikundu/Mirira/1555. Subsequently, the deceased caused the suit property to be registered in the name of the Defendant to enable the Defendant to borrow money from a Bank so as to be able to pay the consideration which was agreed at Kshs 16,800/-.
3. It is the Plaintiff's case that even though the Defendant did borrow the money as agreed, he did not pay the purchase price which remains outstanding to-date. The Plaintiff thus urges that in the premises, the Register relating to the suit property ought to be rectified as per the prayers in the Plaint.



4. But in his Statement of Defence filed on May 27, 2005, Benson Irungu Mwangi (the Defendant) denies the Plaintiff's claim. It is his case that during land consolidation, several fragments or portions of land which he owned or had interest in, including a piece he had bought from the Plaintiff's deceased husband were consolidated to form one parcel which is the suit property herein.
5. It is the Defendant's case that he paid the full purchase price of Kshs 16,400/- for the portion of land he bought from the deceased and that indeed the final payment was made to the Plaintiff in person and she did acknowledge receipt thereof in writing.
6. It is further the Defendant's case that the Plaintiff's claim is misconceived and incompetent as his title is by first registration and the same cannot be annulled or defeated by virtue of Section 143(1) and 28 of the Registered Land Act (now repealed). The Defendant denies that the loan facility he took was for purposes of defraying the purchase price and asserts that the same was taken after the sale and for a different purpose.
7. The Defendant further avers that the Plaintiff's claim is in any event statutorily time barred by virtue of Section 4 and 19 of the *Limitation of Actions Act* (Cap 22) and that the leave granted to the Plaintiff to file this claim was inconsistent with the provisions of Sections 19, 22 and 27 of Cap. 22 aforesaid.

The Plaintiff's Case

8. At the trial herein, the Plaintiff called three (3) witnesses who testified in support of her case.
9. PW1 – Nyambura Njuguna is the Plaintiff herself and a resident of Location 20, Mirira in Muranga's County. Relying on her Statement dated March 19, 2022, PW1 told the Court her husband the late Njuguna Racho had informed her of his intention to sell land. That was after land consolidation although titles were yet to be issued. Following her husband's expression, one Muchoki Gichana who was present went and looked for the Defendant who was known to be intent on buying land.
10. PW1 testified that they then sat down with the Defendant and together with her husband they agreed to sell to the Defendant 21 acres of land at a consideration of Kshs 16,800/-. The Defendant then requested to have the land transferred to his name to enable him borrow the money from a bank to pay the purchase price.
11. PW1 further told the Court that the Defendant obtained the title but did not return. When he was later traced with the help of Muchoki Gichana, the Defendant at first said he did not want any land. He later changed his mind and wrote in a notebook that they would pay Kshs 5,000/-. PW1 told the Court the Defendant then paid Kshs 1,000/- in cash and issued them with a cheque for Kshs 4,000/- but the cheque bounced on presentation.
12. PW1 testified that after the death of her husband, the Defendant and his wife went to her home requesting her to remove a caution which had been lodged on the title by PW1's husband. PW1 declined as the Defendant had not complied with their agreement. PW1 then reported the matter to the Chief who in turn referred them to the Area District Officer (DO).
13. PW1 told the Court that upon hearing the case, the DO and the Elders directed that the land be shared with the Defendant getting 6 acres to match the Kshs 1,000/- he had paid. PW1 told the Court she has to-date remained in occupation of the land and that the Defendant has never set foot thereon.
14. On cross-examination – PW1 told the Court her husband was the owner of the land and that she was unaware the caution lodged on the title on July 5, 1971 indicated that her husband was claiming a 'Purchaser's interest' thereon. PW1 told the Court prior to filing the suit, she had sought the leave of



the Court as she was aware that the time to file had lapsed. She told the Court she was unable to file earlier as the Defendant had brought an appeal against the decision of the Tribunal.

15. PW1 testified that there was no written agreement between her husband and the Defendant because the Defendant had been introduced to them by a friend. She told the Court she was married before 1972 and that she was present when the Parties were negotiating.
16. PW2 – Simon Wainaina Njuguna is a son to the Plaintiff and a farmer in Mirira Sub-location, Murang’a. Relying on his Statement dated December 3, 2019, PW2 told the Court the land was originally owned by his father Njuguna Racho. He told the Court that even though he had not built on the land, it is their family which uses the same for cultivation and grazing of livestock.
17. On cross examination, PW2 told the Court he is 56 years old. He further told the Court his mother had another parcel of land No 1498 in Mirira which she had sub-divided to her children. He told the Court his father had many parcels of land. He denied that his mother only started tilling the land in the year 2020 and told the Court his mother has been using the land ever since he was born.
18. PW3 – Benson Kamurwa Kiumba is a farmer in Mikindu Location, Murang’a. Relying on his Statement dated March 9, 2022, PW3 told the Court he knows the land in dispute and that it was owned by the late Njuguna Racho even before land consolidation in 1965. PW3 further told the Court it is the Plaintiff who has been utilizing the land cultivating maize, beans and other crops. She also grazes her livestock on the land measuring about 20.5 acres.
19. On cross examination, PW3 told the Court he did KPE in 1965 and that he was one of those who were helping with measurements of the land during the consolidation in 1966 to 1968. He told the Court it was the Plaintiff who was using the land and denied that one David Kahero Kiragu was the Defendant’s caretaker thereon.

The Defence Case

20. The Defendant on the other hand called two (2) witnesses who testified in support of his case at the trial herein.
21. DW1 Benson Irungu Mwangi is the Defendant himself and a resident of Murang’a. Relying on his Statement dated May 28, 2015 but filed herein on April 23, 2018, DW1 told the Court that he is the registered proprietor of LR No Loc 20/Gikindu/Mirira/1555 situated in Mirira Sub-location, Gikindu Location of Murang’a County.
22. DW1 told the Court that the suit property resulted from a consolidation of several parcels of land during land consolidation amounting to 8.4 Ha. He was issued with a Land Adjudication Certificate on April 7, 1970 after being shown the boundaries. A register was then opened on June 17, 1971 and he was registered as the owner of the land and issued with a Title Deed on September 28, 1971.
23. DW1 further told the Court that the Plaintiff placed a caution to be registered on his said title. The Plaintiff is not DW1’s relative and DW1 was unable to understand what her claim was on the land. DW1 denied that the Plaintiff has ever lived on, occupied or cultivated the land as she has her own parcel of land being Loc 20/Gikindu/Mirira/1498 which was originally registered in the names of her husband Njuguna Racho.
24. On cross-examination, DW1 denied that he had bought any land from Njuguna Racho. He told the Court that if his Statement of Defence indicated that he bought a portion of land from the said Njuguna Racho, then that was incorrect. He further told the Court it was not true that he consolidated



- other parcels of land he bought with the portion he had bought from the Plaintiff and declared that if his Statement of Defence stated so, then it was not true.
25. DW1 told the Court he was only required to give a ram and a beer to the said Njuguna Racho as the Chair of the Land Consolidation Committee. The beer was to be given to the elders and he had given what was required to Njuguna through his wife who is the Plaintiff herein.
 26. DW1 conceded that he had never mentioned the issue of the ram and beer in any proceedings between them though the dispute has been going on since 1986. He told the Court he had never entered into any contract with the Plaintiff and/or her husband and denied paying them the sum of Kshs 16,500/- as stated in his Statement of Defence.
 27. While conceding that there were arbitration proceedings between the parties, DW1 testified that he did not accept the arbitration records. He disowned the elders said to have represented him in the proceedings and told the Court he did not participate in the same.
 28. DW2 – David Kahi Kiragu is a resident of Mirira in Murang'a. Relying on his Statement dated May 20, 2015 but filed on April 23, 2018, he told the Court the Defendant is his immediate neighbor and the owner of the suit property. He also knew the Plaintiff as the owner of a nearby parcel of land No Gikindu/Mirira/1498. She has since sub-divided the land and gave some to her sons while selling other portions to other people. He told the Court the Plaintiff has never occupied or cultivated the suit property.
 29. On cross-examination, DW2 testified that the Defendant verbally engaged him as a caretaker of the land in the year 2007. The Defendant does not however utilize the land. He told the Court he did not know the history of the land before the year 2007 and further told the Court he could not tell if it was the Plaintiff who is now cultivating the land.

Analysis and Determination

30. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
31. The Plaintiff herein – Nyambura Njuguna – is the widow and legal representative of the estate of the late Njuguna Racho. She brings this action asking the Court to make a determination that Benson Irungu Mwangi (the Defendant) is no longer entitled to LR No Gikindu/Mirira/1555 there having been no consideration for the transfer of the suit property into his name. Accordingly, the Plaintiff urges the Court to order the Land Registrar, Murang'a, to rectify the Register for the suit land by deleting the Defendant's name therefrom and in its place inserting the name of the Plaintiff.
32. It is the Plaintiff's case that her deceased husband entered into negotiations with the Defendant for the sale of the suit property way back in 1971 and that pursuant to those negotiations, the deceased caused the land to be registered in the name of the Defendant on the Defendant's undertaking that he would use the title in his name to borrow the sum of Kshs 16,800/- from the Bank and pay the same to the deceased as the agreed consideration.
33. The Plaintiff told the Court that despite her husband keeping his part of the bargain, the Defendant went ahead and used the suit property to borrow money but refused to pay the agreed consideration which remains outstanding to-date.
34. In his Statement of Defence filed herein on May 27, 2005, the Defendant avers that the suit property as it is now did not wholly belong to the Plaintiff's husband. He asserts that the suit property comprises



several fragments or portions of land which he owned or had an interest in, including a portion sold to him by the Plaintiff's husband, which he caused to be consolidated to form one parcel of land during the period of land consolidation in the area.

35. At paragraph 4 of the said Statement of Defence, the Defendant pleads as follows:

' 4. The Defendant avers that he paid in full the purchase price of Kshs 16,400/- for the fragment of land he bought from Njuguna Racho (deceased), of which the final payment was made to the Plaintiff and which sum she has acknowledged in writing.'

36. In support of her case, the Plaintiff testified that her now deceased husband expressed an intention to sell the 21 acre suit land after land consolidation but before titles were issued in the area. One Muchoki Gichana who became aware of her husband's intention then introduced them to the Defendant who was apparently looking for land to buy.

37. It was then, the Plaintiff told the Court, that the Parties entered into negotiations in her presence which culminated into the suit property being transferred to the name of the Defendant on his undertaking that he would pay the purchase price of Kshs 16,800/- once the title came out in his name as he would use the same to obtain a loan from a Bank. The Plaintiff told the Court that upon issuance of the title in the Defendant's name, he indeed used the same to obtain a loan but thereafter disappeared without paying the purchase price.

38. The Plaintiff told the Court they subsequently managed to trace the Defendant through the said Muchoki Gichana who had introduced the Defendant to her husband. It was her case that during the second meeting, the Defendant told them he was no longer interested in purchasing the land and that the Defendant even wrote a note returning the land to her husband even though he did not execute a transfer back to the Plaintiff's husband's name.

39. The Plaintiff further told the Court that the Defendant subsequently changed his mind and agreed to pay for the land. In that respect, the Defendant agreed to pay an initial amount of Kshs 5,000/- which he (the Defendant) wrote in a note book that was kept by the Plaintiff's husband. The Plaintiff further told the Court that in expression of this new intent to pay for the land, the Defendant paid her Kshs 1,000/- in cash and issued her with a cheque for Kshs 4,000/-. To her surprise however when she presented the cheque to the Bank, she was told the account had no money and it was her case that the Defendant has since not paid for the agreed purchase price.

40. Testifying before this Court however the Defendant told the Court that he was the registered proprietor of the suit property and that the Plaintiff herein was not his relative and he was therefore completely unable to understand what her claim was on the suit property. The Defendant told the Court that the suit property resulted from a consolidation of several parcels of land during land consolidation which amounted to 8.4 Ha and that he was issued with a Land Adjudication Certificate therefore on April 7, 1970.

41. In his testimony before the Court the Defendant vehemently denied that he had purchased any land from the Plaintiff's husband. On the contrary, he told the Court that the Plaintiff's deceased husband was the Chair of the Land Consolidation Committee. On account that the Defendant had not paid for a ram and beer required by the Committee for its services, the deceased had placed a caution on the Defendant's title.

42. It was the Defendant's case that in order to offset the 'debt' owed to the Land Consolidation Committee he gave Kshs 5,000/- to the deceased through the Plaintiff herein and there was no longer



a debt owing from himself. The Defendant denied issuing the Plaintiff with any cheque and told the Court that the Cheque produced by the Plaintiff was a forgery as the same was never issued by himself.

43. It was however difficult for this Court to believe in the Defendant's story. For starters, his testimony as to how he had acquired the suit property was a complete departure and in contrast with his pleadings filed herein. As seen at Paragraphs 34 and 35 hereof, the Defendant had pleaded that he had bought a portion of the suit property from the Plaintiff's husband and that he had consolidated the same with other parcels in which he had an interest in the area.
44. At Paragraph 4 of his Statement of Defence, the Defendant had categorically stated that he had paid in full the purchase price of Kshs 16,400/- for the 'fragment of land' he had bought from the Plaintiff's husband. On cross-examination, the Defendant completely disowned his Statement of Defence and vehemently denied that he had purchased the suit land or any portion thereof from the Plaintiff's husband and or that he had paid any monies therefore to the deceased.
45. The Defendant however admitted that even though there had been other proceedings between himself and the Plaintiff extending back to the year 1986, this was the first time he was attributing the payment he had made to the Plaintiff herein to be for the purpose of purchasing a ram and a beer for the elders who were carrying out the land consolidation exercise.
46. From the material placed before me, it was evident that prior to the filing of this suit, the Plaintiff had instituted Arbitration case No 65 of 1986 before the Land Disputes Tribunal at Murang'a. The proceedings before the Tribunal produced as the Pexh. 10 capture in full the Defendant's testimony before the Elders as follows at Page 3 and 4 thereof:

1. The land under dispute is mine. I have possessed this land under dispute for the last 13 years.
2. I bought the land under dispute before land consolidation. It consisted of several pieces of land which were consolidated and became the land under dispute.
3. During land consolidation, I asked the husband of the Plaintiff to get me my land which I had bought. The husband of the Plaintiff said that we had to enter into a new agreement.
4. Later a Mr Julius Irungu and myself went to the husband of the Plaintiff. At the time we met together with the husband of the Plaintiff, and the husband of the Plaintiff said that he did not accept the costs of the land under dispute, the costs to which we had agreed earlier.
5. At that time the husband of the Plaintiff said that he wanted to be paid Kshs 600/- per acre. He said if I did not accept that, then he would refund to me the money I had paid him according to the initial cost of the land under dispute.
6. I decided to buy the land under dispute even though the husband of the Plaintiff changed his mind and raised its costs.
7. When I gave the husband of the Plaintiff additional Kshs 1,500/- all the money that I had paid him was Kshs 7,700/-. On the same day we agreed with the husband of the Plaintiff how I would pay the balance of the cost of the land under dispute.



8. We made a record in a book, of payments to the husband of the Plaintiff. This book was kept by the husband of the Plaintiff.
 9. The new cost of the land, according to the records we made was Kshs 12,600/-.
 10. Later the Plaintiff changed his mind and demanded Kshs 16,400/- for the land under dispute. When the Plaintiff changed his mind I gave to the Plaintiff Kshs 2,000/- and she signed for it on a piece of paper. This meant that each acre was now Kshs 800/-. When I gave to the Plaintiff Kshs 2,000/- she had already received from me Kshs 9,400/-.
 11. I agreed to pay Kshs 16,800 being the cost of land under dispute and we agreed that after paying the balance of Kshs 5,000/- I would have the land under dispute.
 12. When I paid the last instalment of Kshs 5,000/- I was with a Mr Julius Irungu and Mr Muchoki Gichana.
 13. After buying the land under dispute, I gave the Plaintiff a blank cheque to write it out and draw money to pay her lawyer, Punja, so that the Plaintiff should remove the caution she had launched in respect of this land under dispute and for this additional amount of money the Plaintiff give me more land. Since I gave this cheque, the Plaintiff did not remove this caution nor did I see the cheque until I came to this office for the hearing of this case. Despite the Plaintiff's refusal to remove the caution and to return to me the cheque I continued to give more aid.'
47. Arising from the foregoing, it was clear to me that the reference to payment of a ram and beer being made to the Plaintiff's husband as the Chair of the Land Consolidation Committee by the Defendant was a cock and bull story created solely for the purpose of misleading this Court.
 48. Testifying some 36 years earlier before the Tribunal and when presumably the issue was more fresh in his mind in 1986, the Defendant could clearly remember that he was buying land from the Plaintiff's husband at a consideration of Kshs 16,800/- as stated by the Plaintiff in her pleadings herein.
 49. While the Tribunal's award was set aside in Nyeri HCCA No 123 of 1998 on account that the elders had exceeded their jurisdiction in apportioning the land to the disputants herein, their finding that the Defendant had failed to produce documents showing that the full purchase price had been paid cannot be faulted. That absence of any proof of payment of the purchase price must be the reason the Plaintiff is running away from his pleadings herein.
 50. As the Defendant stated in his testimony, the Plaintiff's husband was keeping a little note book of the payments made by the Defendant. That note book was produced by the Plaintiff as Pexh. 4. The Defendant was unable to point out the payments he had made.
 51. While he denied in his testimony before Court that he had issued a cheque for Kshs 4,000/- to the Plaintiff in part-payment of the purchase price, it was apparent from this testimony before the Tribunal that he had indeed issued the cheque. In support of her case, the Plaintiff produced a copy of the cheque No xxxx dated February 28, 1972 issued in her name (Pexh 3a). She further produced evidence (Pexh 3c) that the cheque was lodged in her Barclays Bank Account on April 26, 1972 but was returned unpaid with remarks 'Refer to Drawer'.



52. Arising from the Plaintiff's testimony herein as well as the Defendant's own testimony as captured by the proceedings before the Tribunal it was clear that the suit land belonged to the Plaintiff's husband at the time of land consolidation and that the same was transferred to the Defendant's name before titles were issued under an arrangement that required the Defendant to pay for the same after the transfer of the title to his name.
53. While the Defendant denied that he was required to obtain a loan under the arrangement to pay for the purchase price, it was apparent from a perusal of the Green Card produced in evidence that he was issued with the title on September 28, 1971 and that less than three months later on December 10, 1971 the title was charged to Kenya Commercial Bank Limited, Murang'a to secure a loan of Kshs 15,000/-. This fact indeed corroborates the Plaintiff's testimony that the Defendant was to use the title to obtain a loan to enable him pay for the land.
54. In my considered view, the failure by the Defendant to pay the required consideration after the suit property was transferred to his name can only mean that he held the land henceforth in trust for the Plaintiff's deceased husband and by extension, in view of the grant, to the Plaintiff. That trust arises by necessary implication even if not pleaded.
55. As was stated by Lord Denning *MR in Hussey -vs- Palmer (1972) 3 All ER 744*, a constructive trust is imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution. In the circumstances herein I am persuaded that justice and good conscience require that such a trust be imposed herein.
56. It was indeed evident that despite the transfer of the title to his name, the Defendant had never taken occupation and/or possession of the land. While the Defendant told the Court he had put a caretaker by the name Kiragu Kahiru to take care of the land in 1975, it was clear that that was not the case. The said Kiragu testified as the Defendant's witness (DW2) and according to him he had been asked to take care of the land in the year 2007. Both the Defendant and his witness admitted that the Plaintiff was using a portion of the land.
57. It follows that I am persuaded that there was merit in the Plaintiff's case and that she has proved her case on a balance of probabilities. Accordingly I hereby make the following orders:
- (i) A determination is hereby made that the Defendant is no longer entitled to Land Parcel No Gikindu/Mirira/1555 there having been no consideration for the transfer of the same to his name;
 - (ii) The Land Registrar, Murang'a is hereby directed to rectify the Register of the said Land Parcel No Gikindu/Mirira/1555 by deleting the name of the Defendant therefrom and in its place inserting the name of the Plaintiff;
 - (iii) The Defendant shall pay the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 23RD DAY OF MARCH, 2023.

J. O. OLOLA

JUDGE

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant



Court assistant - Kendi

