



REPUBLIC OF KENYA



**Njuguna & 2 others v Mukungi (Environment and Land Case Civil Suit 743 of 2013) [2023] KEELC 16697 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16697 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 743 OF 2013  
EC CHERONO, J  
MARCH 21, 2023**

**BETWEEN**

**DANSON MAINA NJUGUNA ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN MUTUGI MAINA ..... 2<sup>ND</sup> PLAINTIFF**

**PETER KARIMI NDUGUTU ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**BEATRICE WAMBUI MUKUNGI ..... DEFENDANT**

**JUDGMENT**

1. By an amended plaint dated 19<sup>th</sup> June 2019, the plaintiffs seek the following orders;
  - a. The court does issue a permanent injunction restraining the defendant herself, her servants and or agents from entering, cultivating, utilizing or in any other manner whatsoever interfering with the plaintiff's suit land MUTIRA/KANGAI/634.
  - b. The defendant does remove any structures from the suit land forthwith failin which the defendant be forcibly evicted from the suit land.
  - c. Any other or further orders this honourable court deems fit and just.
  - d. Costs of the suit.
2. The plaintiffs aver that the 3<sup>rd</sup> plaintiff is the registered owner of whole that parcel of land known as MUTIRA/KANGAI/634 having purchased it wherein the defendant without any colour of right is in the process of entering upon the said land causing acts of wastage and trespass and their efforts to stop the defendant have turned naught.
3. The defendant filed her statement of defence and counterclaim pleading that she is the legal owner of land parcel mutira/kangai/ 702 by way of inheritance from her late husband Patrick m'ruriga Njeru



and parcel number MUTIRA/KANGAI/701 was given to her as a gift by Wagateri Maria Gatandi in the year 1981. She avers that the plaintiffs are being driven by greed to grab her land in which she has stayed on since the year 1973 and 1981 respectively.

4. The defendants counterclaim is based on fraudulent activities instigated by the plaintiffs with a view of dispossessing her of the property. Notably, she pleads that land parcel MUTIRA/KANGAI/634 was subdivided in the year 1973 to create parcel numbers MUTIRA/KANGAI/701 and MUTIRA/KANGAI/702. She avers that the plaintiffs then filed succession cause 10 of 2006 over the estate of Wagateri Maria Gatandi. She accuses the plaintiffs of using fraud to gain ownership of her land.
5. The suit was set down for hearing with Peter Karimi Ndungutu testifying as PW-1. His testimony was that he bought land parcel mutira/kangai/634 from Danson Maina Njuguna, John Muturi Maina, Reuben Kimani Muiruri, Gachoki Murage and Michael Kamucere Wagateri and signed the agreement on 1/5/2010 in the sum of kshs 3,000,000/=. That he thereafter acquired the necessary consents from the land control board for the transfer of the parcel into his name. He states that at the time of testifying, he was not in possession of the title deed to his parcel of land.
6. In cross examination, he denied knowing the defendant or the fact that land parcel 634 had been subdivided to create land parcels number MUTIRA/KANGAI/701 and MUTIRA/KANGAI/702 since land parcel number MUTIRA/KANGAI/634 was transferred to him after buying it from Reuben Kimani Muiruri (deceased) who was one of the vendors and also an advocate who was involved in the succession proceedings that led to the transfer of Land parcel MUTIRA/KANGAI/634. He acknowledges the fact that the said parcel was first sub divided in the year 1973 to create 2 parcels of land.
7. He acknowledged the fact that the initial owner of land parcel 634 died in the year 1996. He did not know the defendant when he visited the parcel but he found a permanent house thereon but did not ascertain whose it was or who was in occupation. He also distanced himself from the succession proceedings as well as the case that led to the cancellation of title numbers MUTIRA/KANGAI 701 and 702.
8. PW-2 Margaret Anita Omullo, the Land Registrar Kirinyaga County who testified that land parcel MUTIRA/KANGAI/634 was registered in the name of Peter Karimi Ndugutu in the year 2010. The initial numbers were registered in the year 1973 to wit MUTIRA/KANGAI/701 and 702 were cancelled by court vide orders issued in case number 101 of 2009.
9. In cross examination, she stated that the registry registers court orders that are presented to it after verification of its authenticity. She confirmed that parcel number 643 was registered in the name of Wagateri Maria and issued with a title deed. In 2007 Wanjiru Erasto and 5 others were registered as the owners after a succession case. That land parcel MUTIRA/KANGAI/702 was transferred to Patrick M'ruriga Njeru on 30/4/1973 while MUTIRA/KANGAI/701 was registered in the defendant's name on 27/8/1981. She was not aware of any orders reversing the cancellation of titles.
10. The defendant testified as DW-1 and stated that she is the widow of Patrick M'ruriga Njeru and that she had moved the court for restitution of her land. She is the one cultivating the land and her house had been demolished.
11. In cross examination, she stated that she was not aware of any succession case which had allegedly given away her land. That they had bought the land from Wagateri Maria and the number was MUTIRA/KANGAI/634. She stated that the land was later sub divided into 2 portions. She denied knowledge of the court order which cancelled the 2 titles.



12. At the close of hearing, the parties filed their written submissions. The plaintiff submits that since the defendants' counterclaim is based on fraud, no satisfactory evidence was led in support of the allegation. Counsel relies on the provisions of Section 107-110 of the Evidence Act as well as the authorities in Selina Mecca Wekesa v Kennedy Ellam Wekesa & 7 others (2014)eKLR, Koinange & 13 others v Koinange (1968) KLR 23 and R.G Patel v Lalji Makanji (1957) E.A 314.
13. It is submitted that since it is alleged that the plaintiffs unprocedurally obtained letters of administration in Murang'a PMC Succession Cause No. 10 of 2006, the proper procedure for the defendant was to move the court for revocation and or annulment of grant under Section 76 of the Law of Succession Act. That pursuant to this cause, the plaintiffs were registered as proprietors and later sold the parcel to the 3<sup>rd</sup> plaintiff. That since he obtained title regularly, he should be allowed to enjoy all rights accorded by Section 24 and 25 of the land Registration Act.
14. It is contended that the decree issued in Kerugoya PMCC no. 101 of 2009 has never been set aside and or vacated but the proceedings in Kerugoya PMCC 112 of 2010 through Civil Appeal No. 41 of 2011. Counsel submits that the defendant failed to satisfy the conditions under section 26 (1)(a) and (b) of the land registration Act citing the decisions in Danson Munene Kibetu v Edwrd Njeru ELC 26 of 2016-Kerugoya and Moses warui gatimu v Douglas Mwai Machuru & another ELC 786 of 2013-kerugoya.
15. For the defendant, it is contended that she has been living peacefully on land parcel number Mutira/kangai 634 since the year 1973 until 2006 when Reuben Kimani (deceased) through fraud obtained registration through a flawed succession process over the estate of Wagateri maria Gatandi. She submits that the parcel number 634 ceased to exist in the year 1973 when it was closed for sub division to create two parcels MUTIRA/KANGAI/701 and 702.
16. She submits that the deceased and the plaintiffs used the grant so obtained to have the parcels MUTIRA/KANGAI/701 and 702 cancelled in the year 2009 in civil suit no. 101 of 2009. She faults the subordinate court for issuing a certificate of confirmation of grant over a parcel of land which did not exist and condemning her unheard for she was not summoned to appear before the court before her title could be cancelled. That therefore, the said cancellation of her titles was illegal for excluding her in the process contrary to the provisions of Sections 142 and 143 of the Registered land Act(repealed) Cap 300.
17. She further challenges the jurisdiction of the subordinate court both in dealing with the succession cause and in cancellation of her titles. She asserts the property in land title 634 was 10 acres and the pecuniary value of the Magistrate Court exceeded the courts jurisdiction while handling the succession cause. Further, Section 159 of Cap 300 donated jurisdiction to the High Court to deal with issues to do with Title to land.
18. In support of her submissions, the following authorities are cited; Kibiro Wagoro Makumi v Francis Nduati Macharia another (2018)eKLR, Reginah Nyambura Waitathu v Tarcisio Kagunda Waitathu (2016)eKLR and Joseph Karis Mutsonga v Johnson Nyati (1984)eKLR, Kenya National Highways Authority v Shalien Masood Mughal & 5 others (2017)eKLR and Alberta Mae Gacci v Attorney General & 4 others (2006)eKLR.

### **Analysis and determination**

19. Having carefully perused the pleadings and the materials in this matter, the following facts are uncontroverted and/or proved; (i)land parcel mutira/kangai/634 was initially registered in the name of wagateri maria-deceased;



- (ii) the land was subsequently subdivided into two portions namely mutira/wagateri/701 and 702;
  - (iii) land parcel NO. MUTIRA/WAGATERI/701 was transferred to the defendant ;
  - (iv) land parcel NO. MUTIRA WAGATER/702 was transferred to one Patrick M’ruriga Njeru;
  - (v) It was also established that the plaintiffs undertook a succession process that culminated in the cancellation of the two parcels and the title reverted back to the initial number.
20. There is ample evidence that the 3<sup>rd</sup> plaintiff, an advocate of this court became the registered owner though he had no relationship with the deceased. Upon further consideration of the evidence, I find that indeed the succession cause excluded the defendant who would have legitimately contested the confirmation of the grant in favour of the 3<sup>rd</sup> defendant.
21. It is now agreed and settled that where fraud is alleged, the same should be pleaded and proved as was held in *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA stated that:
- 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.
22. It is trite law that a certificate of title is indefeasible unless it is established that the same was obtained fraudulently pursuant to the provisions of Section 24, 25 and 26 of the *Land Registration Act*. Section 26(1) provides;
- (1) 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.
23. The interpretation of these provisions were discussed in the case of *Elijah Makeri Nyangw’ara -v- Stephen Mungai Njuguna & another* (2013) eKLR where the court held:-
- ...is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.



24. The standard of proof where fraud is pleaded is always higher as compared to civil case as was observed in *Kinyanjui Kamau v George Kamau* [2015] eKLR where it was held;-
- ..... Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.
25. PW-2, the land registrar in her own words confirmed that she was not aware of any court order reversing the cancellation. The green card she produced has marginal notes at the top scribbled in a red pen showing that the entry closing the title for subdivision was cancelled on 20/8/2009. However, this is noted as an entry in the usual way.
26. The title deeds also exhibited for land parcels 701 and 702 does not show that the titles were cancelled. The last entry thereon is 7/1/82 and 30/4/73 respectively without a corresponding entry of cancellation of the titles. This is not in tandem with the witness testimony that the registration was revoked on orders of the court.
27. The defendant however produced the title deeds for land parcel 701 and 702. This is in contrast to the plaintiffs assertion that they were not aware of any titles issued. If the plaintiffs are to be believed, one wonders what titles they were asking court to cancel.
28. A further look at the decree cancelling the title deeds in land parcel numbers 701 and 702 shows that the defendant was not a party to that suit. My take is that before any title deed is cancelled, the person registered as owner ought to be made a party. In this case, the registered proprietor was not involved which leaves this court with the conclusion that the process was illegal.
29. Having found that the process of acquisition of title was suspect, I find guidance in the case of *Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others* [2015] eKLR where Munyao J held that;
- The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.
30. For the foregoing reasons, I find that the counterclaim succeeds to the extent that the titles issued over land parcel MUTIRA/KANGAI/634 was obtained through a fraudulent scheme and is liable for cancellation
31. For all the reasons stated hereinabove, I find the plaintiffs' claim has not been proved on the required standard. On the other hand, I find the Defendant's counter-claim has been proved to the required standard.
32. In the final analysis, I enter Judgment in the following terms;
1. The plaintiffs' suit is hereby dismissed
  2. Judgment be and is hereby entered for the defendant against the plaintiffs as prayed in the counterclaim, to the extent that the title issued over L.R NO. MUTIRA/ KIANGAI/634 was obtained through fraud and illegality and the same is hereby cancelled.



3. The land Registrar Kirinyaga County is hereby directed to rectify the register and restore the Title in respect of land parcel NO. MUTIRA/KANGAI/701 in the name of the defendant, Beatrice Wambui Mukungi and land parcel NO. MUTIRA/KIANGAI/702 to the name of Patrick M'Ruriga Njeru
4. The plaintiffs shall bear the costs of the dismissal of this and the of counterclaim plus interest at court rates.

**READ, SIGNED and DELIVERED virtually at Bungoma this 21<sup>st</sup> day of March, 2023**

**HON. E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

Mr. Ngigi for the Plaintiff

Mr. Ondieki for the Defendant

C/A Joy

