



**Mugaki (Suing as the Administrator of the Estate of Pity Wangari  
Mugaki) v Nyambane & another (Environment & Land Case  
759 of 2013) [2023] KEELC 16273 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16273 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 759 OF 2013**

**OA ANGOTE, J  
MARCH 16, 2023**

**BETWEEN**

**BARBARA MUGAKI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF  
PITY WANGARI MUGAKI) ..... PLAINTIFF**

**AND**

**JUDSON MARANGA NYAMBANE ..... 1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In the amended plaint dated May 29, 2017, the plaintiff averred that the late Pity Wangari Mugaki (the deceased) purchased parcel of land known as Nairobi/Block 62/694 also known as House No. X-12, Ayany Estate in Nairobi (the suit property) from the National Housing Corporation (NHC).
2. It was averred by the plaintiff that although the NHC indicated to the Commissioner of Lands to register the property in the deceased's name following completion of payment, the suit property was mistakenly or fraudulently registered in the 1<sup>st</sup> defendant's name and that this anomaly was discovered pursuant to an official search at the Nairobi lands registry on January 29, 2009
3. Particularly, the Plaintiff averred, the 1<sup>st</sup> Defendant's fraud included applying and misleading the Commissioner of Lands as to the physical property in reference; failing to disclose to the Commissioner of Lands that the suit property belonged to and was occupied by the deceased and neglecting to advise the Commissioner of Lands that he was the proprietor of the adjacent property and not the suit property.
4. The Plaintiff further averred that the particulars of the mistake of the Commissioner of Lands include issuing a certificate of lease for the suit property to the 1<sup>st</sup> Defendant for property otherwise owned



by the deceased; and issuing a title to the 1<sup>st</sup> Defendant for land measuring 0.0343 Ha, formerly the leasehold interest of the NHC and sold to the deceased.

5. In the Amended Plaintiff, the Plaintiff has sought for the following orders:
  - a. A declaration that L.R. Number Nairobi/Block/ 62/694 is the Leasehold interest of the Plaintiff.
  - b. An Order that the Commissioner of Lands and Chief Land Registrar does rectify the Land Register by cancellation of the entry of Judson Maranga Nyambane and substituting it with and reflecting that of Pity Wangari Mugaki as the holder of the Leasehold interest over L.R. Number Nairobi/Block/62/694.
  - c. An order to the Commissioner of Lands to issue a Certificate of Lease over L.R. Number Nairobi/Block/62/694.
  - d. Costs of this suit.
6. In his statement of Defence and Counterclaim dated 15<sup>th</sup> July 2020, the 1<sup>st</sup> Defendant denied the Plaintiff's assertions. The 1<sup>st</sup> Defendant averred that on 14<sup>th</sup> November 1995, he purchased Block 62/694 Nairobi Kibera (the suit property) from Herman Guleho Obaga, who was the legal allottee of the suit property; that he paid the full purchase price and took possession of the suit property and that the said Herman Guleho Obaga transferred his interest to him.
7. The 1<sup>st</sup> Defendant averred that a Lease in his name was prepared and registered on 29<sup>th</sup> April 1996 and the Lease issued to him; that he thereafter constructed a house on the suit property which he has rented out and that during the deceased's lifetime, she claimed that the suit property belonged to her whereas each party has distinct portions of land with each occupying their own portion which they have each developed.
8. In his Counterclaim, the 1<sup>st</sup> Defendant sought for the following orders:
  - a. The Plaintiff's suit be dismissed with costs.
  - b. An order of injunction to issue to restrain her either by herself or her agents or servants from trespassing, harassing his tenant or in any other manner whatsoever interfering with the 1<sup>st</sup> Defendant's quiet use and enjoyment of the land reference known as Nairobi Block 62/694, or in the alternative a declaration that the 1<sup>st</sup> Defendant is the rightful owner of Nairobi Block 62/694 measuring 0.026 hectares and had acquired good title by way of adverse possession under declaration to issue that the 1<sup>st</sup> Defendant is he right owner Nairobi Block 62/694.
  - c. Costs of the Counterclaim.
  - d. Any other relief that this court may deem fit to grant.
9. In his reply to the amended defence and defence to counterclaim, the plaintiff reiterated that the certificate of lease was issued to the 1<sup>st</sup> defendant mistakenly or fraudulently and amounted to an outright illegality.



## Hearing & Evidence

10. The Plaintiff, PW1, relied on her statement dated 4<sup>th</sup> May 2017, in which she testified that the deceased was the owner of the suit property, having bought it from the NHC; that while the property was delineated and occupied by the deceased and her nominees, the suit property was mistakenly or fraudulently registered in the 1<sup>st</sup> Defendant's name, who is the proprietor of an adjacent property distinct from the deceased's and that the anomaly was discovered on January 29, 2009.
11. In cross-examination, PW1 testified that there is a three-roomed house which still exists on the suit property. While confirming that herself and the 1<sup>st</sup> Defendant were claiming the same land, PW1 testified that the 1<sup>st</sup> Defendant put up his house on a portion of the land that her mother bought, and that there is a parking slot between their house and that built by the 1<sup>st</sup> Defendant. She did not however know when the 1<sup>st</sup> Defendant put up his house.
12. PW2, Joshua Odege Sanduk, a surveyor with the NHC relied on his statement dated September 30, 2019 where he testified that he was aware of an allotment letter dated February 7, 1978 through which the NHC sold to the deceased the suit property for a consideration of Kshs. 60,000/-; that an amended allotment letter dated February 26, 1980 was offered and accepted by the deceased, and that vide the letter dated April 16, 1980, the deceased agreed to remit Kshs. 633 every month to NHC as installments for the suit property.
13. PW2 testified that the Plaintiff duly completed paying the purchase price as evidenced in the letter dated April 10, 1995, where the NHC acknowledged receipt of the payment of the Plaintiff's final balance of Kshs. 26,688 and that vide the letter dated March 25, 2008, the NHC wrote to Commissioner of Lands requesting them to process title documents in favour of the deceased.
14. According to PW2, vide the letter dated March 31, 2008, NHC disputed the issuance of the Certificate of Lease to the 1<sup>st</sup> Defendant and asked the Commissioner of Lands to recall the said certificate for cancellation, rectify the records and issue a Certificate of Lease for the property in the deceased's name, and that the Plaintiff is the rightful owner of the suit property.
15. In cross-examination, PW2 stated that there is space at the front and back of each house; that there are mabati structures on the suit land; that there is an open space where residents of the court park and that there is an incomplete foundation on the suit land
16. DW1, the 1<sup>st</sup> Defendant, relied on his statement dated 22<sup>nd</sup> July 2020 as his evidence in chief. He testified that he bought the suit land from Herman Guleho Obaga who was the legal allottee of Nairobi Block 62/694 Nairobi Kibera vide a letter of allotment dated 26<sup>th</sup> July 1994; and that upon transfer of Mr. Obaga's interest to him, the Ministry of Lands and Settlement issued to him a new lease in his name dated 26<sup>th</sup> April 1996. DW1 produced copies of the application form, letter of allotment, deed plan, letter of consent to transfer, form of Transfer, instructions to prepare a new lease and a copy of the Certificate of Lease.
17. DW1 averred that he thereafter constructed a house on the suit property and has a tenant living on the property; that while the deceased claimed that his land belonged to her, they each reside on their own portions of land, which have been developed by their respective owners; that Ayany House No. X12 is different from his property and that he has resided on the suit property since 1995 peacefully, and without interruption.
18. In cross-examination, DW1 testified that he bought the land from Herman Oguttu who was an allottee of the suit land; that he has never met him since the transaction; that the land was described as vacant



government land; that the house no. X12 by NHC is separate and is not on his land and that he built a house on this land which is still intact and which he lives in to date.

### Submissions

19. In his written submissions dated 12<sup>th</sup> April 2022, the Plaintiff's Counsel submitted that the Plaintiff is the lawful owner of the suit property, as elucidated through the testimony of PW2, a surveyor from the NHC. Counsel challenged the validity of the allocation letter to Herman Guleho Obaga and submitted that as the deceased's allocation dated February 26, 1980, the same was superior to that of Herman Guleho Obaga dated July 26, 1994 as it was first in time.
20. The Plaintiff's counsel sought to rely on the case of *Wreck Motors Enterprises vs Commissioner of Lands* [1997] eKLR, as quoted by the Court of Appeal in *Embakasi Properties Limited & Another vs Commissioner of Lands & Another* [2019] eKLR.
21. While relying on the case of *Kenya Anti-Corruption Commission vs Wilson Gachanja & 3 Others* [2008] eKLR, the Plaintiff's counsel submitted that as the deceased was in legal ownership and occupation of the land, the land was not available for allocation, and therefore, the allocation to Herman Guleho Obaga was irregular and illegal. Counsel also sought to rely on the case of *Nakuru Industries Limited vs Vinod Shah & 2 others* [2016] eKLR, *Republic vs City Council of Nairobi & 3 others* [2014] eKLR.
22. The Plaintiff's counsel submitted that the Defendant failed to prove to the required standards the root of his claimed title to the suit property. Counsel relied on numerous authorities and provisions of the law which I have considered.
23. Counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff failed to produce documentation to support her root of title while the 1<sup>st</sup> Defendant has availed a copy of the letter of allotment dated July 26, 1994.
24. It was the 1<sup>st</sup> Defendant's counsel's submission that the 1<sup>st</sup> Defendant is an innocent purchaser for value entitled to protection of his right to property under article 40 of *the Constitution*; that the 1<sup>st</sup> Defendant purchased the suit property and was in occupation of the land for 18 years; that no one claimed that the land belonged to them until 2013 when the Plaintiff instituted this suit; and that in any case, the Plaintiff has been indolent.
25. Counsel for the 1<sup>st</sup> Defendant submitted that the Plaintiff's allegations of fraud are false and have not been proved to the standard set out in section 107 of the *Evidence Act*. Counsel relied on numerous authorities which I have considered.

### Analysis and Determination

26. Having considered the Plaint filed in this matter and the pleadings filed in response, the evidence presented by the parties and the submissions filed, the following issues arise for determination by this court:
  - a. Who between the Plaintiff and the 1<sup>st</sup> Defendant are the legal owners of the suit land.
27. The central question in this suit is the ownership of the suit land Title No. Nairobi/ Block/62/694 also known as House No. X-12, Ayany Estate in Nairobi. It is the Plaintiff's contention that the deceased purchased the suit land from the National Housing Corporation (NHC), a public body and was issued a Letter of Allocation dated February 26, 1980.



28. According to the plaintiff, on January 29, 2009, it was discovered that the suit land had been mistakenly or fraudulently registered in the 1<sup>st</sup> defendant's name. The plaintiff has sought a rectification of the land register and issuance of a lease in favour of the deceased.
29. On his part, the 1<sup>st</sup> defendant's case is that he lawfully acquired the suit land from Herman Guleho Obaga, and that the suit property is a distinct portion of land from the plaintiff's land, each occupying their own portion which they have developed.
30. In his Counterclaim, the 1<sup>st</sup> defendant has sought an injunction against the Plaintiff and any of her assigns, preventing them from interfering with quiet enjoyment of his property, and a declaration that he is the lawful owner of the suit land and has acquired good title by way of adverse possession.
31. Section 26 of the *Land Registration Act* No. 3 of 2012 provides that a Certificate of Title shall be taken by the court to be prima facie evidence that the person issued with the title is the absolute and indefensible owner of such land. However, such title can be challenged on the grounds of fraud or misrepresentation to which the registered person is party to or where the certificate of title was obtained illegally, unprocedurally or through a corrupt scheme.
32. It is trite that where the root of title of a registered proprietor is challenged, it is upon such registered person to go beyond the instrument of title to prove how he acquired the title and to show that the acquisition was legal, formal and without any encumbrances. This position was prescribed by the Court of Appeal in *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR.
33. The Plaintiff's case is that the deceased acquired title from the NHC vide a letter of allotment but was not issued with a Certificate of Lease. It is well settled in law that where a party, such as the Plaintiff in this matter, seeks to claim an unregistered title to land, he ought to establish an unbroken chain that leads to a good root of title. This court is persuaded by the case of *Caroline Awinja Ochieng & Another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR, where it was held as follows:
 

“The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.”
34. In this case, the Plaintiff has presented several correspondences between himself and the NHC in respect to the suit property. The factual thread that arises from these correspondences is that the NHC, through the letter dated 7<sup>th</sup> February 1978, offered to sell a three-bedroomed house, being House No. X12, for a consideration of Kshs. 60,000/-. These terms of offer were later revised through the letter dated 26<sup>th</sup> February 1980.
35. While the Plaintiff failed to present evidence of acceptance of this offer from the deceased or the signed Tenant Purchase Agreement, they did annex in their bundle the letter from the NHC dated 3<sup>rd</sup> April 1980 confirming receipt of the letter of acceptance and the letter dated 16<sup>th</sup> April 1980 where the NHC confirmed receipt of the deceased's monthly deductions of Kshs. 633 per month from her salary towards the purchase of the House No. X-12.
36. The fact that the deceased indeed purchased the suit land from the NHC on which House No. X-12 stands has not been challenged. In fact, the Plaintiff's second witness, PW2, a surveyor of the NHC, attested to the fulfillment of the terms set out in the letter of allocation. The Plaintiff also produced in evidence the letter dated 10<sup>th</sup> April 1995, where the NHC acknowledged receipt of Kshs.



26,688/- being the final balance for the house. On that basis, this court is satisfied that the Plaintiff has established an unbroken chain which leads to a good root of title.

37. This court is also satisfied that upon full payment for the house, a constructive trust was created between the Plaintiff and the NHC which estops the NHC from reneging from such contract. The definition of a constructive trust was set out by Lord Denning in *Hussey vs Palmer* (1972) 3 All ER 744, which was quoted with approval by the Court of Appeal in *Gideon Mwangi Chege vs Joseph Gachanja Gituto* [2015] eKLR as follows:

“... a constructive trust is a trust 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”.

38. The upshot is that the Plaintiff has established that the deceased acquired lawful ownership of the suit land.
39. The 1<sup>st</sup> Defendant in this matter has presented a Certificate of Lease for Nairobi Block 62/694. To buttress the title, he produced in evidence a copy of a Sale Agreement dated 14<sup>th</sup> November 2015 between himself and one Herman Guleho Obaga, which agreement was witnessed by Alex Timothy Rogena. It is the 1<sup>st</sup> Defendant’s averment that he purchased the suit land at a consideration of Kshs. 400,000.
40. Another document presented as evidence of the Defendant’s root of title is a Letter of Allotment dated 26<sup>th</sup> July 1994 allotted to Herman Guleho Obaga which also indicates the area of the suit land as 0.026ha; a deed plan; a request for consent from the Commissioner of Lands; a form of transfer indicating that the sale of the suit land was for the consideration of Kshs. 100,000 and instructions to prepare a new lease in favour of the 1<sup>st</sup> Defendant.
41. One cannot ignore the inconsistencies between the consideration indicated in the sale agreement as Kshs. 400,000 and that indicated in the form of transfer as Kshs. 100,000. In his testimony before this court, the 1<sup>st</sup> Defendant claimed a different figure all together as the consideration that was paid, that is Kshs. 500,000.
42. While the Plaintiff has asserted that the suit land measures 0.0343 Ha and has a three-roomed house constructed upon it, the 1<sup>st</sup> Defendant claims that the suit land is in fact vacant government land measuring 0.026Ha. In his testimony, the 1<sup>st</sup> Defendant admitted that the house No. X12 was indeed built by the NHC and that it is next to land known as Nairobi Block 62/694 (the suit property).
43. On the basis of the outlined facts and upon finding that the Plaintiff indeed acquired House No. X12 on the suit land, being Nairobi Block No. 62/694, this court must draw the conclusion that the letter of allotment, which is the root of the 1<sup>st</sup> Defendant’s title, was obtained fraudulently. Indeed, what seems to have happened is that the space that the 1<sup>st</sup> Defendant is claiming to be vacant land was part of the suit property, to be used either for parking or open space.
44. The evidence before this court shows that since the year 1980, the suit land was under the ownership of the NHC, which had constructed a house on it property. Further, as at 26<sup>th</sup> February 1980, the suit land had already been allotted to the deceased and was therefore not available for allocation to any other person such as the 1<sup>st</sup> Defendant. This court therefore concludes that the 1<sup>st</sup> Defendant was a victim of a fraudulent conveyance.
45. While in its Counterclaim the 1<sup>st</sup> Defendant has asked this court to find that it has acquired title to the suit property by adverse possession, it is clear that the 1<sup>st</sup> Defendant did not have clear and exclusive



possession of the suit land, seeing as both himself and the deceased have been occupying the land simultaneously.

46. In the case of Samuel Katana Nzunga & 102 others vs Salim Abdalla Bakshwein & Another [2013] eKLR, this court held that where parties were both in occupation of the suit land, it is not possible to state categorically that the defendants were ever dispossessed or abandoned the land and that the claimants did take exclusive peaceful, possession accompanied by the necessary mens rea of the suit land.
47. In any event, the Plaintiff has averred that he only discovered that the 1<sup>st</sup> Defendant was in possession of a Certificate of Lease in respect to the suit property in the year 2009. Section 26 of the Limitation of Actions Act stipulates that time in respect of a fraudulent transaction starts running from the time the fraud is discovered, and not before.
48. Therefore, there being no evidence to show that the Plaintiff or the deceased was aware of the existence of the Certificate of Lease before the year 2009, the 1<sup>st</sup> Defendant's claim that he has acquired the suit property by way of adverse possession fails.
49. Having found that the Plaintiff has established that the deceased is the lawful owner of the suit land and that the 1<sup>st</sup> Defendant's Certificate of Lease is unlawfully procured and is a product of fraud, this court enters a finding for the Plaintiff as follows:
  - a. A declaration be and is hereby issued that parcel of land known as Nairobi/Block/62/694 is the lawful property of the Estate of the Deceased Pity Wangari Mugaki.
  - b. An order be and is hereby issued that the Chief Land Registrar does rectify the Land Register by cancelling the entry of Judson Maranga Nyambane and substituting it with and reflecting that of the Estate of Pity Wangari Mugaki as the holder of the Leasehold interest over parcel of land known as Nairobi/Block/62/694.
  - c. An order be and is hereby issued to the Chief Land Registrar to issue a Certificate of Lease in respect of Nairobi/Block/62/694 to the Estate of the late Pity Wangari Mugaki.
  - d. The 1<sup>st</sup> Defendant to pay the costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**O. A. ANGOTE**

**JUDGE**

