



REPUBLIC OF KENYA



**Njeru (Suing as the attorney of Patrick Gitonga Nyaga) v Waweru (Environment & Land Case 9 of 2022) [2023] KEELC 17873 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17873 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT & LAND CASE 9 OF 2022  
AK BOR, J  
APRIL 26, 2023  
(FORMERLY NYERI ELC CASE NO. 642 OF 2014)**

**BETWEEN**

**JOHN KENNETH NJERU (SUING AS THE ATTORNEY OF PATRICK  
GITONGA NYAGA) ..... PLAINTIFF**

**AND**

**PETER MAINA WAWERU ..... DEFENDANT**

**JUDGMENT**

1. This dispute is over ownership of the land known as Nanyuki Municipality Block 11/33, which both the Plaintiff and Defendant lay claim to. The Plaintiff brought this suit as the Attorney of Patrick Gitonga Nyaga, who is the registered proprietor of Nanyuki Municipality/Block 11/33 measuring 0.6414 hectares (“the Suit Property”) claiming that the Defendant had on several occasions trespassed onto the land without any colour of right. He sought general damages for trespass, special damages of Kshs. 514,614/= and a permanent injunction to restrain the Defendant from interfering with his possession of the Suit Property.
2. In the Amended Defence filed in court on 5/7/2014, the Defendant denied the Plaintiff’s claim and averred that he was allotted the plot known as Uns. Residential Plot B in Nanyuki Municipality vide the letter of allotment dated 23/10/1992 and that he made the requisite payment following which the land was surveyed as land reference number (L.R. No.) 2787/1501. Further, he averred that the Plaintiff’s claim for special damages was exaggerated and that the order for injunction which the Plaintiff seeks could not be issued to restrain him from enjoying his rights over land he owns.
3. The hearing of the suit commenced on 4/10/2016 before Lady Justice Lucy Waithaka at the Nyeri Environment and Land Court (ELC) when the Plaintiff testified. He stated that Patrick Gitonga Nyaga, who is his younger brother, purchased the Suit Property on 24/8/2011 from David Ngarariga Gethi and Lawrence Ngigi at Kshs. 3,300,000/=. When he attempted to produce a copy of the sale



agreement in evidence, an objection was taken on the basis that it did not comply with the *Stamp Duty Act*. The court allowed the production of the sale agreement and directed that it would address that issue in the judgment. He also produced the stamp duty declaration, assessment and pay in slip dated 30/8/2011 together with the banking slip. Additionally, he produced the pay in slip for land rent dated 25/8/2011, the memorandum of deposit, the rent clearance certificate together with the Power of Attorney registered on 19/3/2012.

4. He stated that the Suit Property was transferred to his brother and a certificate of lease was issued to him on 30/8/2011, a copy of which he produced. That after getting the lease, he took possession of the land and planted trees as his brother was in USA. He finished fencing the land on 12/11/2011. Two months later he received a phone call from his neighbour informing him that the fence had been brought down. He reported the incident at the Nanyuki Police Station on 20/1/2012. He conducted a search on 3/2/2012 which revealed that Patrick Gitonga was registered as the proprietor of the Suit Proprietor. He reported the matter to the Director of Criminal Investigations (DCI).
5. The District Commissioner (DC) referred him to the Town Clerk, who on seeing his documents summoned the Defendant to appear alongside him on 15/3/2012 but the Defendant failed to show up. The Defendant attended the meeting on 30/3/2012 when he produced his documents. He filed suit and obtained a temporary injunction on 7/7/2010 and took possession of the Suit Property and started utilising it. He sought special damages on account of the expenses he incurred in fencing the Suit Property, accommodation and taxi costs all totaling Kshs. 514,614/=.
6. On cross examination, he reiterated that the Suit Property belonged to his brother even though he was not involved in its purchase. He conceded that his brother declared the value of the land as Kshs. 1,000,000/= and not Kshs. 3,300,000/= indicated in the sale agreement. He clarified that he had travelled to Nanyuki more than 23 times and maintained that the claim for special damages was genuine and that the receipts supported that position. He explained that he lost money for ploughing because that year he could not plant crops on the land.
7. Hassan M’thikua gave evidence on 25/9/2018. He stated that he had worked for the Plaintiff since 2012. At the time he was employed the Suit Property was fenced and had a house and toilet on it. It was his evidence that on 5/3/2012 a group of people invaded the suit land and destroyed the fence claiming that they had been sent by Major Waweru.
8. Peter Maina Waweru also gave evidence the same day. He stated that he was allocated the Suit Property in 1992 and that he made the requisite payments and took possession of the land. He wanted to establish the beacons for his plot in 2011 so that he could apply for a title deed. He found a fence had been erected on his land and reported the matter to the DC who referred the matter to the Town Clerk. He stated that he presented his documents to prove ownership of the land but that the Plaintiff did not have any documents.
9. He produced a copy of the letter of allotment dated 16/6/1992, the receipt addressed to the Commissioner of Lands and the letters dated 9/12/2011, 28/3/2012 and 10/4/2012. Despite complying with the special conditions and paying the premium, he was never issued a title over the land. He denied destroying the fence erected on his land and urged the court to dismiss the suit.
10. On cross examination, he stated that his plot was number B in Nanyuki Municipality. He was not certain whether it was the same plot known as Block 11/33. His plot measured 0.68 hectares. He paid the premium in 1994 but was allocated the land in 1992. He knew the physical location of the plot he was allocated and stated that he had put four posts in the corners of his plot. He indicated in his witness statement that he removed the fence around the plot and the structures on it.



11. The Defendant's advocate applied for leave to call an officer from the National Land Commission (NLC) to confirm whether the two plots were one and the same. The court granted leave for the Defendant to call an officer from NLC to produce documents relating to the suit land.
12. Josphat Wasua, the County Coordinator of Laikipia NLC was called to give evidence on 4/10/2018. According to their records, a meeting was held on 16/6/1992 chaired by the DC in which the Laikipia District Land Committee recommended that plot B be allocated to Brigadier Peter Maina Waweru. The Commissioner of Lands prepared a letter of allotment for the Defendant dated 23/10/1992. He produced copies of the letters dated 16/6/1992 and 23/10/1992. He was aware that the allottee paid the money required by the Commissioner of Lands even though he did not have evidence of the payment in his records. He produced the Registry Index Map (RIM) and survey plan for Nanyuki Municipality/ Block 11/33 (L.R. No. 2787/1801) showing the location of plot number B II/33 which after survey became L.R. No. 2787/1501.
13. The cross examination of Josphat Wasua was put off to 23/10/2018. The matter came up in court on 6/11/2018 and on 28/2/2019 when the court was informed that the witness could not attend court on that day. Thereafter, it came up on several occasions. The Plaintiff filed the application dated 24/7/2020 seeking to have the hearing start de novo. A ruling was delivered on 10/3/2021 in which the court directed that proceedings were to be typed and the suit would be heard by any available Judge of the ELC.
14. By consent of the parties, the suit was transferred to Nanyuki ELC in April 2022. Josphat Wasua was cross examined before this court on 26/9/2022. He confirmed that Nanyuki Municipality/Block XI/33 was the same as unsurveyed plot B Nanyuki Municipality, which was also known as Nanyuki Municipality/ Block 11/33. Further, that what the Defendant was claiming is the same plot occupied by the Plaintiff, which is the subject matter of this suit. He conceded that the offer under the letter of allotment lapsed where there was no acceptance and payment was not made within 30 days. Further, that the Defendant paid the premium in 1994 outside of the 30 days indicated in the offer.
15. The witness produced survey plan number F/R 247/36 which had L.R. No. 2787/1501 and stated that it was converted to Nanyuki Municipality/Block 11/33. He told the court that the first lease was registered in favour of David Gethi and Lawrence Ngigi who were issued a certificate of lease on 14/1/2003. As a planner, the last process after a letter of allotment was issued was the registration and issuance of a lease. He stated that the purchaser was in possession and had a lease.
16. On re-examination he stated that he never got the lease used to register the certificate of lease. He got the green and white cards for the land from the Nanyuki Land Registry. He explained that before a lease was forwarded from Nairobi to the respective land registry, there had to be a file number given for the plot which would be in the correspondence file. He confirmed that in 2018 there was no correspondence file in the SPRO's office in Ardhi House, Nairobi for either the Plaintiff or the Defendant.
17. Robert Simiyu was also called by the Defendant to give evidence. He told the court he was the Assistant Director in Land Administration at the Ministry of Lands headquarters. His director received court summons in relation to file number 311374. He had the original file in court and the certified copies, which he produced. The file contained a copy of the letter of allotment issued to the Defendant on 23/10/1992 and a copy of the cheque paid to the Commissioner of Lands on 26/8/1994. It also had a letter of acceptance dated 8/2/2019 vide which the Defendant accepted the offer of allotment made on 23/10/1992. The letter is addressed to NLC and attached cheque no. 295776 for Kshs. 30,110/= . It has a handwritten endorsement to the effect that cheque number 295776 dated 1/2/2019 was stale and was collected for replacement. In his letter to the PS, Ministry of Lands which was received on



- 29/7/2021, the Defendant complained that he paid Kshs. 30,110/= vide a cheque dated 28/8/1994 but never received a payment receipt.
18. A receipt dated 10/8/2021 for payment of Kshs. 30,110/= in respect of Uns. Residential Plot B Nanyuki Municipality was in the file with cheque number 364881 written by hand on the receipt. The letter dated 22/10/2021 from the Director of Land Administration to the Director of Surveys mentioned that when the Defendant approached that office for the processing of a lease it was noted that the plot was already surveyed as Nanyuki Municipality Block 11 (XI) 33 through FR No. 247/36 and the RIM was already amended. A sealed RIM was forwarded by the Director of Surveys on 3/11/2021. The Cabinet Secretary in the Ministry of Lands and Physical Planning forwarded the lease in triplicate to the Nanyuki Land Registrar for registration on 16/11/2021.
  19. On cross examination, the officer stated that he was not aware if there was conversion of the land. The file he produced was opened in 2018. He confirmed that the Defendant made payment for unsurveyed residential plot number B Nanyuki Municipality on 10/5/2021. He explained that leases were issued by the Director, Land Administration then the Land Registrar at the county registers the lease and issues a certificate of lease to the proprietor. He acknowledged that when they opened file number 311374 they did not liaise with their counterpart in Nanyuki. He had not seen the lease issued to the Plaintiff, and stated that the certificate of lease which the Plaintiff produced was incomplete.
  20. Upon the conclusion of the hearing, the court directed parties to file written submissions. The Plaintiff cited Sections 24, 25 and 26 of the [Land Registration Act](#) in support of his claim and relied on *Samwel Ambasa & 3 Others v Stella Ingasia* [2022] eKLR where the court stated that a title was conclusive evidence of proprietorship and that the law was protective of titles except where it was obtained by fraud or misrepresentation which the proprietor was party to; or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. He submitted that the Defendant did not plead fraud, misrepresentation, illegality or the unprocedural acquisition of the Suit Property by the Plaintiff while reiterating that the Defendant was bound by his pleadings.
  21. The Plaintiff also relied on Section 3 (1) of the [Trespass Act](#) and urged the court to award him general damages of Kshs. 3 million for trespass for the damage the Defendant occasioned to his land situated in Nanyuki Business District. He relied on *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* [2019] eKLR where the court awarded Kshs. 10 million as general damages for trespass.
  22. The Defendant submitted that it was not in dispute that Uns. Residential Plot B Nanyuki Municipality and Nanyuki Municipality/ Block 11/33 fell on the same situ based on the evidence of Josphat Wasua. He submitted that the Plaintiff bore the burden to prove the validity of his title to the Suit Property and relied on *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR where the court stated that if a proprietor's root of title was under challenge, it was not sufficient to dangle the instrument of title as proof of ownership and that he had to go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from encumbrances.
  23. He argued that the Plaintiff failed to call the two persons who sold him the land to testify. He added that no lease was produced and argued that the certificate of lease which the Plaintiff produced was inadmissible. He relied on Section 26 of the [Land Registration Act](#) on the grounds upon which a certificate of title can be challenged and contended that the Plaintiff obtained registration over the Suit Property unprocedurally and that the court had jurisdiction under Section 80 of the [Land Registration Act](#) to cancel the registration. He emphasised that as a purchaser, the Plaintiff had a duty to inquire into the root of title of the two vendors who sold the Suit Property to him.
  24. The Defendant referred the court to the finding in *Hubert L. Martin & 2 Others v Margaret J. Kamau & 5 Others* [2016] eKLR on the aspect that when faced with two or more titles, the court has to



investigate the root of the title and follow the processes and procedures that brought forth the titles at hand. The court stated that each party had to show that their title had a good foundation and was passed properly to the current holder. The Defendant argued that the Plaintiff failed to discharge the evidential burden of demonstrating that the root of his title was valid and procedural and argued that the Plaintiff therefore failed to prove his case against him.

25. On the claim for special damages, the Defendant submitted that the Plaintiff failed to prove that he damaged the fence on the Suit Property, and added that the claim for general damages for trespass lacked foundational evidence.
26. In conclusion, the Defendant submitted that the sale agreement was inadmissible for want of stamping pursuant to Section 19 of the Stamp Duty Act and that the same fate befell a majority of the receipts produced by the Plaintiff. He also contended that the photographs which the Plaintiff produced were inadmissible for lack of a certificate of electronic evidence as required by Section 106B of the Evidence Act.
27. The trial court at Nyeri admitted the sale agreement and indicated that it would deal with the objection in the judgment. The Defendant submitted that a similar fate of inadmissibility should befall the receipts which the Plaintiff tendered in evidence. In this court's view, the objection to the production of the receipts should have been taken during the hearing and not in the written submissions.
28. Regarding the sale agreement not being stamped, Section 19 of the Stamp Duty provides that upon production of an instrument chargeable with stamp duty which is not duly stamped, the court is to take notice of the omission and either forward the instrument to the collector or give the person tendering it an opportunity to apply to the collector for leave where the time for stamping has not expired. In other cases, the instrument is to be received in evidence upon payment of the duty and the prescribed penalty to the court for onward transmission to the Collector.
29. The Section does not in the court's view invalidate the agreement but rather deals with the revenue payable to the Government because the validity of contracts for dispositions of land is governed by Section 3 of the Law of Contract Act. Nothing much turns on the sale agreement since the Plaintiff was already registered as the proprietor of the suit land and the official search confirmed this position.
30. The main issue for determination is who between the Plaintiff and the Defendant has a superior claim to the Suit Property. It is not in dispute that both parties claim ownership of the same land. The Plaintiff's claim is that his brother, who gave him a Power of Attorney, purchased the Suit Property from David Ngarariga Gethi and Lawrence Ndungu Gethi vide the sale agreement dated 24/8/2011 and that a certificate of lease was issued to him on 30/8/2011. The certificate of lease issued to Patrick Gitonga Nyaga shows the Government of Kenya as lessor and indicates the term of the lease as 99 years from 1/3/1997. The certificate of lease that was held by the sellers was issued on 14/1/2003.
31. The Defendant denied the Plaintiff's claim and asserted that he was the owner of the land. He relied on the allocation made vide the letter of allotment dated 23/10/1992. The offer required him to accept the offer within 30 days of the date of the letter and make payment of Kshs. 30,110. The letter accepting the offer which was produced in court is dated 9/2/2019 when this suit was partly heard. This means that the Defendant accepted the offer made in 1992 in 2019 and paid the stand premium required under the letter of offer in 2019. There is no indication that the offer for allocation of plot B in Nanyuki Municipality was ever extended beyond the 30 days indicated in the letter of allotment dated 23/10/1992.
32. The offer for allocation of Plot B was made by the Commissioner of Lands in 1992 pursuant to the Government Lands Act, which has since been repealed. The Defendant wrote to NLC on 8/2/2019



- accepting the offer for allotment yet by that time the law on allocation of public land had already changed. By that time the suit land was already surveyed and registered in the Plaintiff's name.
33. Despite the lease being prepared and sent to Nanyuki for registration on 16/11/2021, the Land Registrar could not possibly have registered the lease in favour of the Defendant because the land already had another registered proprietor. It is evident that the Defendant commenced the steps to obtain a lease over the suit land in 2018 long after the offer for allocation of the plot made in 1992 had expired.
  34. The Defendant claimed that he paid the stand premium indicated in the letter of allotment on 26/8/1994. It is not clear why a receipt was not issued to him and why he did not pursue the survey of the plot and issuance of a lease over the land soon after it was allocated to him or in 1994 when he claims he paid the stand premium. Just as delay defeats equity, so would it defeat the Defendant's claim to the suit land. From the evidence tendered in court, it is apparent that the Defendant did not go to the Suit Property or take possession of the land allocated to him in 1992 until 2012 when he found it fenced. He was not diligent and did not proceed with alacrity to get the land registered in his name soon after the offer for allotment was made to him.
  35. *Hubert L. Martin & 2 Others v Margaret J. Kamau & 5 Others* [2016] eKLR which the Defendant relied on is distinguishable from this case in that there is only one certificate of lease in this matter and the court is not called upon to determine a dispute where there are two titles over the same land. The Defendant relied on a letter of allotment which is not a title but was only the first step towards obtaining a title over land.
  36. It is clear from the evidence of Robert Simiyu, the Assistant Director in Land Administration that by the time the Defendant attempted to process a title over the Suit Property in 2019, the land was already surveyed and the RIM had been amended to reflect the parcel. If another title were to be issued to the Defendant, it would not rank higher than the Plaintiff's which was first in time. The court notes that F/R 247/36 was authenticated in 1994 and was a subdivision of L.R. No. 2787/1500 -1505 and created parcel numbers 32 to 37.
  37. The documents the Plaintiff produced including the rent and rates clearance certificates and the search done on the Suit Property emanated from the Lands office and other Government offices. No evidence was led to show that the Plaintiff obtained the title over the Suit Property through fraud, misrepresentation or illegality. In the circumstances, the Plaintiff enjoys the protection afforded by Sections 24 and 25 of the *Land Registration Act* and his certificate of lease is conclusive evidence of his proprietorship in light of Section 26 of that Act.
  38. The Defendant admitted in the penultimate paragraph of his witness statement that his removal of the fence around the plot and the structures on it was based on the fact that he was the legal owner of the plot and that he was exercising his rights of protecting the property. The Plaintiff seeks special damages of Kshs. 252,714/= being the cost of fencing, building the site house, toilet, water installation and labour. Based on the Defendant's admission, the court awards the Plaintiff this sum as special damages. The court is not satisfied on a balance of probabilities that the costs incurred on accommodation and transport were necessary for all the days tabulated because they do not correspond with the evidence in the witness statement. The court awards the Plaintiff the costs for 11/11/2011 and 12/11/2011 of Kshs. 14,000/= and Kshs. 18600/= incurred on 3/2/2012 to 5/2/2012 when the Plaintiff went to fence the land. In total, he is awarded special damages of Kshs. 285,314/=.
  39. The Plaintiff sought general damages for trespass of Kshs. 3 million without any justification on how this figure was arrived at. He was granted an injunction when he moved the court and has been



in possession of the Suit Property. An award of Kshs. 100,000/= as general damages is therefore reasonable in this court's view.

40. The Plaintiff has proved his claim for ownership of the Suit Property on a balance of probabilities. An order of injunction is issued to restrain the Defendant or his agents or servants from entering, destroying, uprooting, trespassing or in any way interfering with the Plaintiff's possession of Nanyuki Municipality/Block 11/33. The Plaintiff is awarded the costs of the suit.

**DELIVERED VIRTUALLY AT NANYUKI THIS 26<sup>TH</sup> DAY OF APRIL, 2023.**

**K. BOR**

**JUDGE**

In The Presence Of: -

Mrs. Muia Mwanzia the Plaintiff

Mr. Mwangi Muchiri for the Defendant

Ms. Diana Kemboi- Court Assistant

