



**Kweyama v Kimani & 2 others (Environment & Land Case  
34 of 2019) [2023] KEELC 16881 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16881 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 34 OF 2019  
MN GICHERU, J  
APRIL 18, 2023**

**BETWEEN**

**GEORGE DESMOND KWEYAMA ..... PLAINTIFF**

**AND**

**FRANCIS MBURU KIMANI ..... 1<sup>ST</sup> DEFENDANT**

**MASHIN CONSTRUCTION COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EUNICE NYOKABI KINUTHIA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff seeks the following reliefs against the first and second Defendants
  - i. A declaration that the registration of a transfer and title deed for L.R.NGONG/NGONG/13885,suit land, dated 6/5/2005 in the name of the first Defendant, subdivisions of the property thereof into four portions namely L.R.NGONG/NGONG/62064, 62065, 62066, 62067 and title deeds thereof in the name of the first Defendant dated 13/11/2013,the transfer and title deed for L.R.NGONG/NGONG/62067 in the name of the second Defendant and subsequent subdivision of the same land into L.R.NGONG/NGONG/63806,63807,63,808,63809,63810,63811 and 638112 and obtained titles thereof in the name of the second Defendant dated 5/8/2014 without the consent of and payment of due compensation to the Plaintiff are fraudulent, obtained through misrepresentation, corrupt scheme and hence illegal, unlawful, null and void ab initio.
  - ii. An order directing the third Defendant whether by herself and or her servants to forthwith deliver up to the Plaintiff and or his nominee the original title deed for L.R.13885 dated 9<sup>th</sup> April,2003 to the Plaintiff.



- iii. An order of cancellation of all entries relating to registration dated 6/5/2005 in relation to the suit land and all subsequent subdivision and the reinstatement of the Plaintiff as the sole owners of the suit land.
  - iv. An order to the first and second Defendants to deliver vacant possession of the suit land to the Plaintiff failure to which they be evicted therefrom.
  - v. An order of permanent injunction restraining the Defendants or anybody claiming through them from occupying the land in question or dealing with it in any manner.
  - vi. General damages for fraud and trespass.
  - vii. In the alternative to (iii) and (vi) above, prompt and due compensation to the Plaintiff for the suit land at the current market value upon valuation ordered by the ordered.
  - viii. Interest on (vi) and (vii) above at court rates from 6/5/2005 until payment in full.
  - ix. Costs of this suit.
  - x. Any other relief that the court may deem fit and fit to grant.
2. The Plaintiff's case is as follows. He is the registered owner of the suit land. It was originally belonged to his mother Wanjiku Wanyee who died when the Plaintiff was still young. His grandmother, Alice Muthoni, became the administratrix of his mother's estate in succession cause no.1374 of 1997 in the High Court of Kenya at Nairobi. The grandmother then transferred the suit land to the Plaintiff on 19/2/2003 and he was issued with a title deed.
  3. The Plaintiff has never sold the suit land to any person. The only thing that he did was to leave the title deed with the third Defendant when he was leaving Kenya for the United States of America.
  4. In the years 2015/2016, the Plaintiff received information from relatives and neighbors that his land had been invaded by the second Defendant through some people claiming under him. It is then that he instructed his advocate to investigate if there was anything amiss regarding his land.
  5. A search at Kajiado Land Registry confirmed that the first Defendant had obtained registration of the suit land on 6/5/2005. The first Defendant later subdivided the suit land into parcels numbers NGONG/NGONG/62064, 62065, 62066 and 62067. This was on 16/4/2013.
  6. Further investigation revealed that on 2/7/2014, the first Defendant transferred parcel no.62067 to the second Defendant. On 5/8/2014, the second Defendant subdivided LR.62067 into parcels numbers NGONG/NGONG/63806,63807,63808,63809,63810,63811 and 63812.
  7. The Plaintiff contends that the transfer of the suit land to the first Defendant is unlawful, illegal, fraudulent and obtained through a corrupt scheme because of the following reasons. Firstly, he did not know the first Defendant and has never met him. He did not therefore sell his land to the first Defendant.

Secondly, the purported transfer from the Plaintiff to the first Defendant is not supported by an agreement for sale of the suit land, application for consent of the local land control board, transfer form duly executed by the Plaintiff and evidence of payment of stamp duty. These records are not available at the Kajiado land registry.

Finally, at the time of the purported transfer of the suit by the Plaintiff to the first Defendant, the Plaintiff was away in the United States of America.



8. Upon discovering of all this fraud, the Plaintiff reported to the District Land Registrar Kajiado who wrote a report dated 4/5/2016 whose effect is that there seems to be an element of fraud and misrepresentation regarding the transfer of the suit land. The Land Registrar then referred the parties to this court.
9. In support of his case, the Plaintiff filed the following evidence.
  - a. Copy of his witness statement dated 23/3/2019.
  - b. Copy of his identity card and passport.
  - c. Copy of application for official search.
  - d. Copy of identity card for the first Defendant and P.I.N Certificate.
  - e. Copy of title deed dated 6/5/2005 in the name of the first Defendant.
  - f. Copies of greencards for L.R. NGONG/NGONG/62064-7.
  - g. Copies of greencards for L.R.62067 and its subdivision of 63806-12.
  - h. Copy of Land Registrars' summons dated 7/3/2016 and 4/4/2017, report of the Land Registrar and receipt dated 25/4/2017.
  - i. Other relevant documents
  - j. Copy of the title deed dated 9/4/2003 in the name of the Plaintiff.
  - k. Copy of letter dated 14/10/2019 by the DC1 to the Principal Secretary, Ministry of Lands.
  - l. Copies of letters dated 14/10/2019 touching on the investigation relating to the suit land
10. The Second Defendant through counsel on record filed a written statement of defence and counterclaim dated 28/10/2020. In the said defence, fraud is denied on the part of the second Defendant. He avers that he purchased the suit land lawfully and followed all the legal procedures. At the time of purchase of L.R.62067 from the first Defendant, he was the registered proprietor of the land. The second Defendant's title deed was therefore acquired lawfully. Alternatively, the second Defendant avers that it is an innocent purchaser for value for having acquired the land through a normal sale and for value. It therefore prays for the dismissal of the Plaintiff's suit.
11. In addition to the above, the second Defendant in its counterclaim prays for a permanent injunction restraining the Plaintiff or anybody claiming through him from interfering with the Defendants enjoyment of parcels numbers 62066, 62067 and 63806-12. It also prays for the costs of the suit and any other relief as may be appropriate in the circumstances.
12. In support of its case, the second Defendant filed the following evidence.
  - a. Copy of witness statement by its director Abdinasir Mohamed Nur dated 29/10/2020
  - b. Copy of application for consent for L.R.62066.
  - c. Copy of consent dated 19/11/2013 for L.R.62066 and 62067.
  - d. Copy of agreement for sale of L.R.62066 and 62067 dated 10/12/2013.
  - e. Copy of transfer form L.R.62066 dated 10/12//2013.
  - f. Copy of mutation form for L.R.13885 dated 8/11/2013.



- g. Copy of title deed for L.R.62066 in the name of the first Defendant.
- h. Copies of title deed for L.R.63806-63812 all in the name of the second Defendant.
13. The Plaintiff filed a defence to the counterclaim which is dated 28/9/2021. In it, the Plaintiff avers as follows.
- Firstly, the title acquired by the second Defendant is not a clean one as it is tainted with illegality, corruption and failure of requisite procedure.
- Secondly, the protection of the second Defendant's rights to property does not extend to any property unlawfully acquired as per Article 40(6) of the Constitution of Kenya. He therefore prays for the dismissal of the counterclaim with costs.
14. The first Defendant did not file a defence or even enter appearance. The case against him proceeded ex parte and as undefended.
15. Through a notice of withdrawal dated 25/10/2019, the Plaintiff withdrew his case against the third Defendant on the ground that she had given him back the title deed to the suit land.
16. At the trial on 22/9/2021 and 31/10/2022, the Plaintiff and the Director of the second Defendant testified on oath and they adopted their witness statements and documents. They were then subjected to cross-examination by counsel for the adverse party.
17. Counsel for the Plaintiff filed written submission on 14/11/2022 and again on 16/11/2022. No submissions were filed by the Defendant's counsel by 30/1/2023 or even later.
- Counsel for the plaintiff identified two issues for determination as follows.
- a. Whether the Plaintiff is the bonafide registered owner of the suit property?
- b. Whether the Plaintiff is entitled to the relief sought?
18. I have carefully considered all the evidence adduced by the Plaintiff and the second Defendant including the witness statements, documents and the oral evidence at the trial.
- I have also considered the submissions by the learned counsel for the Plaintiff. I agree that the two issues would determine the suit but I will add a third one, namely-
- c. Whether the second Defendant acquired a good title that can be protected by the law?
19. On the first issue, I find that the Plaintiff is the registered owner of L.R. NGONG/NGONG/13885. In making this finding, I rely on the following evidence.
- Firstly, the Plaintiff has the original title deed issued to him on 9/4/2003. He had this title deed in court when he testified on 22/9/2021 in open court. Had he sold the land, he would have surrendered the original title deed.
- Secondly, the Plaintiff was able to prove how he acquired the suit land. It was transferred to him by his grandmother Alice Muthoni who had acquired it from the Plaintiff's mother Wanjiku Wanyee through a succession cause No.1374 of 1947(Nairobi). The Plaintiff's mother had died when he was a minor.
- Thirdly, the Plaintiff's testimony in court was credible and consistent. It was unshaken in cross-examination.
- Finally, the Land Registrar, in his report dated 4/4/2017, stated that there was fraud and misrepresentation when L.R.13885 was transferred from the Plaintiff to the first Defendant. I find



that all the particulars of fraud pleaded in paragraph 15 of the Plaint as against the first Defendant have been proved

20. On the issue of whether the second Defendant acquired a good title that can be protected by the law, I find that it did not. Here are the reasons for this finding.

Firstly, under Article 40(6) of the Constitution of Kenya, it is provided as follows, “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”

In this case L.R.13885 was not lawfully acquired by the first Defendant because there was no sale agreement between the Plaintiff and the first Defendant as required by Section 3 of the Law of Contract Act.

Secondly, there was no consent of land control board issued to the Plaintiff because he did not apply for it. Neither were the other prerequisites to a lawful conveyance of the land proved in this case.

Thirdly, under Section 26 of the Land Registration Act (Act No.3 of the 2012), a title deed issued through fraud, misrepresentation or acquired illegally, unprocedurally or through corrupt scheme cannot be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof.

21. On the second and final issue, I find that the Plaintiff is entitled to some of the reliefs sought in paragraph 25 of the Plaint dated 16/4/2019. Prayer (ii) has already been overtaken by events because the original title deed was surrendered to the Plaintiff by the third Defendant. Prayer (vi) has not been proved because there is scanty evidence on occupation of the suit land by the second Defendant.

Regarding prayer (vii), I find that it is not necessary because there is no evidence that the land has been occupied by the first Defendant fully or that its character has changed to such an extent that it cannot be used for purpose originally intended by the Plaintiff. Since prayer (viii) was dependent upon prayers (vi) and (vii) which have not been allowed, it too, cannot be allowed.

For the above stated reasons, I enter judgment for the Plaintiff against the first and second Defendant’s jointly and severally as prayed for in prayers (i), (ii), (iii), (iv), (v) and (ix) of paragraph 25 of the Plaint dated 16/4/2019. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18<sup>TH</sup> DAY OF APRIL, 2023.**

**M.N. GICHERU**

**JUDGE**

