



**Mathenge v Gathuthi & 2 others (Environment & Land Case
30 of 2018) [2023] KEELC 16831 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16831 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 30 OF 2018**

**BM EBOSO, J
APRIL 13, 2023**

BETWEEN

JANE MUTHONI MATHENGE PLAINTIFF

AND

EPHRAIM MUNYAO GATHUTHI 1ST DEFENDANT

LAND REGISTRAR, THIKA 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. Through a plaint dated February 5, 2018 and amended on April 9, 2021, the plaintiff, Jane Muthoni Mathenge, seeks the following verbatim reliefs against the defendants:
 - a. A declaratory order that the plaintiff is the sole lawful and registered proprietor of title number Ruiru/Ruiru East block 3/1709.
 - b. An order of permanent injunction restraining the 1st defendant whether by himself, his servants and or agents from trespassing on, selling, advertising for sale, conveying, transferring and or in any manner interfering with the plaintiff's quiet ownership and enjoyment of the suit property known as title number Ruiru/Ruiru East Block 3/1709.
 - ba) A declaratory order that the title deed issued on August 12, 2005 and registered in favour of the 1st defendant is illegal, null and void and an order directing the Land Registrar to cancel the same.
 - ab. An order directing the Land Registrar to restore in the proprietorship section of the land register the plaintiff's title to the suit property known as title number Ruiru/Ruiru East Block 3/19709 issued on April 17, 1997.



- c. An order directing the 2nd defendant to forthwith cancel entry number 2 in the proprietorship section of the land's register of title Number Ruiru/Ruiru East Block 3/1709.
 - d. Costs of the suit.
 - e. Such further or other relief which the honourable court may deem fit to grant.
2. Her case is that she is the widow of the late Ephraim Mathenge Waruingi who died in 1991 [hereinafter referred to as the 'the deceased']. She is also the administrator of the estate of the deceased. The deceased owned shares in Mwalimu Savings and Credit Co-operative Society [hereinafter referred to as 'the Sacco']. By dint of his shareholding in the Sacco, the deceased was allocated a parcel of land in the Sacco's subdivision scheme in Ruiru, measuring approximately four (4) acres. The land was subsequently surveyed as land parcel number Ruiru/Ruiru East Block 3/1709 and registered in her name on April 17, 1997 pursuant to the Certificate of Confirmation of Grant that was issued to her on September 16, 1995 in Eldoret High Court Succession Cause No 91 of 1991. The deceased, and subsequently herself, have been in possession of the suit property since the time the deceased acquired it from Mwalimu Sacco through balloting.
 3. The plaintiff adds that in 2017, her caretaker of the suit property informed her that a man by the name Ephraim Gathuthi [the 1st defendant] had visited the suit property alleging to be the registered proprietor of the suit property. This prompted her to apply for an official search relating to the suit property. The Land Registry did not issue to her an official search and instead indicated to her that the suit property had two titles issued to different proprietors. Her further enquiries established that the Land Registry had a register indicating that the 1st defendant had been registered as proprietor of the suit property on August 12, 2005.
 4. The plaintiff contends that registration of the suit property in the name of the 1st defendant in 2005 was obtained fraudulently because she was the registered proprietor of the suit property as at August 12, 2005 and she never sold nor transferred the suit property to the 1st defendant. She has itemized various particulars of fraud.
 5. The 1st defendant did not enter appearance. He did not file a defence. The 2nd and 3rd defendants entered appearance and filed a joint defence dated March 5, 2018. They averred that according to the records held in the Lands Registry, the 1st defendant was registered a proprietor of the suit property and issued with a title deed on August 12, 2000 [sic]. They denied the allegation of fraud.
 6. When the case came up for hearing, the 2nd and 3rd defendants attended the hearing through Ms Ndundu, Senior State Counsel, but did not lead evidence.
 7. The plaintiff testified as PW1. She adopted her witness statement dated February 5, 2018. She produced nine (9) exhibits, among them, a title deed issued to her on April 17, 1997 and an extract of the land register allegedly opened on November 19, 2001 in the name of the Government of Kenya, showing that on August 12, 2005, the Government of Kenya allegedly transferred the suit property to Ephraim Munyoro Gathuthi. She reiterated her case as summarized above and urged the court to grant her the orders sought in the plaint.
 8. Alphonse Dommy Nyoroh testified as PW2. He is a retired secondary school teacher, education administrator and resident of Kahawa West. He adopted his witness statement dated August 11, 2020. His testimony was that the deceased and him graduated from the University of Nairobi in 1997 and were members of Mwalimu Sacco. The deceased and him balloted for land within a subdivision scheme that was owned by Mwalimu Sacco. He balloted for Parcel number 1804 while the deceased balloted for



Parcel Number 1709. He processed his title in 1995. At that time, the deceased had died. He confirmed that the deceased was the owner of parcel number 1709.

9. Francis Wainaina testified as PW3. His evidence was that he lived on the suit property which he had been leasing from the plaintiff. He grew maize, vegetables and French beans on the suit property. He is the one who alerted the plaintiff about the 1st defendant's claim over the suit property.
10. The plaintiff filed written submissions dated February 28, 2023 through M/s Kale Maina & Bundotich Advocates LLP. I have read the said written submissions. I will not rehash what counsel stated in the written submissions.
11. I have considered the parties' pleadings together with the evidence and the submissions tendered. It does emerge from the affidavit of service sworn on June 18, 2018 by Omambia Mososi Godfrey that, in the company of one Tom Mugambi [a private investigator], he served the 1st defendant on March 1, 2018 in Gakuyo Sublocation, Magutu Location, Nyeri County. The 1st defendant did not, however, enter appearance. Secondly, although the 2nd and 3rd defendants entered appearance, filed a joint defence and partly attended trial, they did not lead evidence.
12. Given the above circumstances, the single issue to be determined in this Judgment is whether the plaintiff has proved her case to the required standard.
13. Both PW1 and PW2 testified that the deceased acquired the suit property through balloting as a shareholder of Mwalimu Sacco. They both testified that at the time Mwalimu Sacco processed titles relating to the subdivision scheme, the deceased had died. PW1 testified that pursuant to a confirmed grant that had been issued to her, she caused the land to be registered in her name and she was issued with a title deed on April 17, 1997.
14. It does emerge from the evidence that was presented to the court that while the plaintiff held a title and was in possession of the land, another register relating to the same land was opened in the name of the Government of Kenya on November 19, 2001. It does also emerge from the evidence that was presented to the court that on August 12, 2005, the Government of Kenya allegedly transferred the suit property to Ephraim Gathuthi. The defendants elected not to step forward and tender evidence on how they obtained registration of the land which at time was already registered in the name of the plaintiff.
15. The totality of the above evidence is that, the registrations procured in the name of the Government of Kenya and subsequently through transfer into the name of Ephraim Gathuthi were illegal. Consequently, the court is satisfied that the plaintiff has proved her case against the defendants.
16. In the end, Judgment is entered in favour of the plaintiff against the two defendants in the following terms:
 - a. It is hereby declared that Jane Muthoni Mathenge is the lawful registered proprietor of land parcel number Ruiru/Ruiru East Block 3/1709.
 - b. Ephraim Gathuthi is hereby restrained against trespassing on, selling, advertising for sale, conveying, transferring or in any manner interfering with the plaintiff's ownership and enjoyment of the said land.
 - c. It is hereby declared that the land register bearing Ephraim Gathuthi as proprietor of the suit land and the registrations therein are fraudulent and illegal and are hereby cancelled and expunged from the Land Records.



- d. The Land Registrar is ordered to forthwith open a new register bearing Jane Muthoni Mathenge as proprietor of land parcel number Ruiru/Ruiru East Block 3/1709.
- e. The 1st and 2nd defendants shall bear the plaintiff's costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF APRIL 2023

B M EBOSO

JUDGE

Court Assistant: Hinga

