



**Wangombe v Ndungu (Environment & Land Case 367 of 2013)  
[2023] KEELC 18096 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18096 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 367 OF 2013**

**A OMBWAYO, J**

**JUNE 20, 2023**

**BETWEEN**

**ELIJAH KOMBO WANGOMBE ..... PLAINTIFF**

**AND**

**LEAH WANGECI NDUNGU ..... DEFENDANT**

**JUDGMENT**

1. Elijah Komba Wang'ombe hereinafter referred to as the plaintiff sued Leah Wangechi Ndungu hereinafter referred to as the defendant. The plaintiff claims that at sometimes this year, the defendant/Respondent trespassed into the plaintiffs land without due regard to privacy and ownership interrupted the plaintiff's peaceful enjoyment of his property and started preparing to plant on the plaintiff's land after ploughing the same.
2. The defendant also entered into the plaintiff's land at night and buried all the trenches that the plaintiff had dug for construction of a dwelling house. As a result of the said trespass, the plaintiff has suffered loss and damages.
3. The plaintiff claims general damages and an injunction of the defendant whether by herself, her agent, and or her servants from entering, remaining in trespassing or in any other way interfering with the plaintiff peaceful and quiet enjoyment of his property.
4. Demand and notice of intention to sue has already been given but the defendants have failed and/or neglected to make good the plaintiffs claim necessitating this suit.
5. There is no other suit neither has there been any with regard to the same subject matter as between the plaintiffs and the defendants.
6. The plaintiff prays that the defendant whether by herself, he servants, and or her agents or any of them or otherwise be restrained by a permanent order for injunction from doing the following act or any of



them, that is to say from entering, remaining in, trespassing, and or otherwise howsoever interfering with the plaintiff's right of possession and quiet enjoyment of this property.

### **General damages.**

### **Costs of this suit.**

7. The defendant filed defence and counterclaim stating that she is the registered owner of land title number Subukia / Subukia block 1/522 (Tetu) and was issued with a title deed in her favour on October 17, 2006.
8. The defendant refers to paragraph 6 of the plaint and denies all the particulars of trespass and loss / damage particularized therein. The Defendant avers that the Plaintiffs title for land title Number Subukia/ Subukia 1/522 (Tetu) is unclean and it does not confer any proprietary right to him.
9. The defendant avers in the counter-claim that the plaintiff has no reasonable cause of action as she is the registered proprietor of the suit land and that she has never transferred the land to the plaintiff. She avers that plaintiff fraudulently caused the transfer of the land into his name. The defendant prays for a declaration that she is the lawful owner of land title number Subukia /Subukia Block1/522 (Tetu) and that the plaintiff has no legal rights to deal with the said land in any manner whatsoever. She prays that the title deed issued to the plaintiff be cancelled. She further prays for a perpetual injunction restraining the plaintiff his servants and agents from entering, trespassing, interfering, selling an or dealing with land title number Subukia/Subukia/block 1/522 in any manner whatsoever. Lastly, she prays for costs of the suit.
10. When the matter came up for hearing the plaintiff testified that he is the registered owner of all the property known as Subukia/Subukia/Block1/522 (Tetu) measuring approximately 10.43 hectares which I have been in possession of since 11 May 2011 when the same was sold to me by Jerome Ndungu Wangombe and transferred to my name on the 24<sup>th</sup> May 2011. That sometimes this year after she was in possession of the suit property, the defendant without due regard to his privacy and ownership trespassed into the suit property. He had dug trenches for construction of a dwelling house on her land but the defendant entered the property. On cross examination he states that the land belonged to his brother, Leah's husband who transferred the land to him. He did not produce the transfer. He did not produce the green card. Leah Wangechi Ndungu testified that She is the registered owner of Subukia/ Subukia Block1/522 (Tetu) and was issued with a title deed on October 17, 2006.
11. That sometime on March 2, 2011 when it became apparent that Jerome Ndung'u Wang'ombe who is was her husband was transferring her parcels of land, she lodged a restriction to protect her interests on the aforesaid parcel of land. She further conducted official search on the parcel of land on 6<sup>th</sup> May, 2011 and confirmed that the land was still in her name. She is shocked to see the plaintiff with another title deed for the same parcel of land because I am not one who transferred my land to him.
12. I have looked to see the plaintiff sale agreement dated May 11, 2011 and I confirm that my husband who is the Vendor therein. In vie of the foregoing I verily believe that the plaintiff colluded with my husband so as to disposes me my parcel of land by irregularly transferring it in his favour.
13. I have considered the evidence on record and rival submissions and the evidence on record and do agree with the plaintiffs submissions that section 24 (a) of Land Registration Act 2012 provides for the right of a registered owner. However, section 26 provides as follows:-
  26. Certificate of title to be held as conclusive evidence of proprietorship



- (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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

14. I do find that this court is faced with 2 titles hence it has to investigate both titles. It is clear from the evidence before court that the defendant's registration and issuance of title are captured as entry Number 1 and 2 in the green card whereas the plaintiff registration and issuance of title are captured as entries number 7 and 8. This implies that the defendants' rights were registered first. The plaintiff's rights were registered on May 20, 2011 and title issued on May 24, 2011. This was almost 9 years after the defendant was registered as the proprietor and 5 years after he was issued with a title deed. There is no evidence that the defendant transferred the suit property to the plaintiff and therefore the plaintiff's title is suspect. The plaintiff's title does not have a good foundation as it was issued subsequent to the defendant's title. It is a principle of equity that where equities are equal, the first in time prevails and therefore the defendants title prevails .
15. I do find that this court is faced with 2 titles hence it has to investigate both titles. It is clear in evidence before court that the defendants registration of title captured as entry Number 1 and 2.
16. Whereas the plaintiff registered title are captured as entries number 7 and 8. This implies that the defendants right were registered first. The defendant rights were registered on May 20, 2011 and title issued on May 24, 2011. This was almost 9 years after the defendant was registered as the proprietor and 5 years after he was issued with a title deed. There is no evidence that the defendant that the defendant transferred the suit property to the plaintiff and therefore the plaintiffs title is suspect. The plaintiff's title does not have a good foundation as it was issued subsequent to the defendant's title. It is a principle of equity that where equities are equal, the first in time prevails and therefore the defendants title prevails .
17. I do agree with my brother Justice Munyao's holding in the case of *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others* [2016] eKLR, as follows;

'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no



advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

18. This position was emphasized in the case of *Wreck Motors Enterprises vs. The Commissioner of Lands and others* Civil Appeal Civil Appeal No. 71 of 1997, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority’

19. The same position was held in the case of *Gitwany Investment ltd vs. Tajmal Ltd & 3 others* (2006) eKLR where the court held that:-

‘...the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

20. I find that the defendants title was the first in time and as equity espouses in its maxim that; “when two equities are equal, the first in time prevails”, then the defendant’s title deed was the first in time and should prevail.

Article 40 (6) of the of *the constitution* provides:-

40. Protection of right to property

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

21. The upshot of the above is that the plaintiff’s case fails and the defendants counter-claim succeeds. I do give judgment for the defendant in the terms that the title deed issued to the plaintiff be cancelled and is hereby cancelled. Further, I do grant a perpetual injunction restraining the plaintiff his servants and agents from entering, trespassing, interfering, selling an or dealing with land title number Subukia/ Subukia/block 1/522 in any manner whatsoever. Lastly, I do grant costs of the suit to the defendant. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20<sup>TH</sup> DAY OF JUNE 2023.**

**A. O. OMBWAYO**

**JUDGE**

