



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngoto v Irungu & 13 others (Environment & Land Case
29 of 2018) [2023] KEELC 18202 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 29 OF 2018**

JG KEMEI, J

JUNE 13, 2023

BETWEEN

GRACE WANJIKU NGOTHO PLAINTIFF

AND

MARTHA NYAMBURA IRUNGU 1ST DEFENDANT

SAMUEL MUTUGI 2ND DEFENDANT

STEPHEN KARANJA 3RD DEFENDANT

LYDIA NJOKI 4TH DEFENDANT

MARTHA WANGARI 5TH DEFENDANT

MIRIAM WAITHIRA 6TH DEFENDANT

RACHEL THIONG'O 7TH DEFENDANT

MARGARET WAMBUI NYOIKE 8TH DEFENDANT

EMMY NJERI 9TH DEFENDANT

PHYLIS WAYUA MWATU 10TH DEFENDANT

SUSAN WANJIKU KIRITU 11TH DEFENDANT

STEPHEN OKALOKUYA 12TH DEFENDANT

LUCY WAITHIRA GABRIEL 13TH DEFENDANT

SAMUEL MAINA KABETU 14TH DEFENDANT



JUDGMENT

1. The Plaintiff filed suit against the Defendants vide an Amended Plaint dated 28/11/2018 seeking the following orders: -
 - a. That there be a declaration that the Plaintiff is the legal registered owner of the suit land parcels No. LR 10823/150 and LR 10823/151.
 - b. Order of permanent injunction restraining the Defendants by themselves, their agents, servant, employees, proxies and/or any person claiming under them from alienating, selling, transferring, trespassing, trading, allocating and/or evicting the Plaintiff from the suit property and/or otherwise however from interfering with the Plaintiff quiet possession of the suit properties.
 - c. An order for mesne profit and damages against the Defendants for trespass on the Plaintiff's land and destruction of the Plaintiff's property.
 - d. Costs of this suit.
 - e. Such other and/or further orders as this Honourable Court may deem fit and just.
2. It is averred that the Defendants have trespassed onto the Plaintiff's land without her consent and knowledge. The particulars of trespass are set out in paragraph 10 (a-f) of the Plaint as follows: -
 - a. The Plaintiff had taken constructive possession of the land by fencing around the suit premises;
 - b. The Defendants by themselves and/or their agents intended to enter unlawfully into the Plaintiff's property;
 - c. Repeated entry into the Plaintiff's property without the permission or consent of the Plaintiff;
 - d. Destruction of property (the perimeter fence) on the Plaintiff's property.
 - e. Retaining possession of the suit with knowledge that he has no good title.
 - f. Subdividing and advertising the suit land parcel to 3rd parties with intention of disposing the said parcels.”
3. Vide the statement of defence filed on 2/3/2018 the 1st, 2nd, 4th – 7th Defendants denied the Plaintiff's claim and sought to put her to strict proof. They averred that Christopher Kang'ethe Kigwe was not the registered owner of parcels No. L.R 10823/150 & L.R 10823/151 in 1988 and therefore could not have sold the same land to the Plaintiff.
4. The Defendants contend that if ever the Plaintiff became the registered owner of the suit land, then its acquisition was tainted with fraud. Particulars of fraud were pleaded under paragraph 5 of the defence as follows: -
 - a. Influencing the District Land Disputes Tribunal to decide on matters relating to title to land while knowing or having reason to know that Section 3(1) of the Land Disputes Tribunals Act, 1990 (repealed) did not confer to the tribunal jurisdiction over matters of title to land.
 - b. Failing to serve the registered proprietor or the Defendants with notice of proceedings before the said District Land Disputes Tribunal or before Thika Chief Magistrate's Court so that Thika DO Case Number 75 of 2008 said unchallenged and unopposed.



- c. Taking advantage of judicial processes to obtain registration of land into the Plaintiff's name.
 - d. Obtaining land other than through lawful purchase from the registered proprietor.
 - e. Securing a false transfer of land.
5. In addition, they contend that they have been in open and continuous occupation of land for more than 20 years without any interference from the Plaintiff.
 6. The 3rd Defendant in his defence and counterclaim filed on 22/5/2018 denied the Plaintiff's claim and stated that if any purchase of land by the Plaintiff took place, the same was not identified on the ground. That he purchased parcel 61 from the 1st Defendant, took possession and constructed a house thereon. He denied any acts of trespass levelled against him in the plaint.
 7. On the 8/11/2018 the Plaint was amended with the leave of Court to enjoin the 8th – 14th Defendants. These Defendants did not file any defence.

The Evidence

8. PW1 – Hezekiel Kamanu Ngotho testified and relied on his statement dated 1/3/2022 as his evidence in chief. In support of his case he produced documents marked as PEX1-22.
9. He stated that he is the son of Grace Wanjiku Ngotho (Wanjiku), the original registered owner of the land who died on 9/6/2021. That Wanjiku purchased the land measuring 5 acres from Christopher Kangethe Kigwe in November 1995 who identified the land and beacons to her. That upon his failure to transfer the land to her, the Court ordered the Deputy Registrar vide the Court Order dated 10/8/2010 to transfer the same to Wanjiku, whereupon a title was registered in her favour on 29/12/2016. She took possession and fenced the land in 1999 – 2000. In 2017, she got information that the Defendants had encroached onto the land, destroyed the fence, beacons and constructed structures thereon.
10. That on inquiry Wanjiku was informed by the illegal occupants that they purchased the land from the 1st Defendant. Despite proving that she is the legitimate owner of the suit land, the Defendants refused to vacate the land.
11. The witness stated that her mother purchased 5 acres to be excised from LR No. 10823/5 owned by Christopher Kangethe Kigwe / Kigwe Ltd. She paid the full purchase price but the said Christopher Kangethe Kigwe refused to transfer the land to her. The Court directed the Executive Officer to execute the transfers in favour of Wanjiku.
12. He added that after subdivision of the land the parcels were registered as Parcel 150 and 151, both measuring 2 and 3 acres each (totalling 5 acres).
13. PW2 – Alex Mwangi Munyiri testified that he is a registered Surveyor working with Gathome & Associates. He stated that in February 2022 he was commissioned by PW1 to identify Parcels 150 & 151. He acquired FR 303/84 map and armed with copies of titles and official searches, he visited the ground and identified the parcels. He stated that the parcels were subdivisions of LR 10823/5. He located the beacons and showed the parcels to the Plaintiff. On the land he found permanent and semi-permanent houses constructed thereon by people unknown to his client, the PW1.
14. In cross, he stated that there were only 2 excisions from the land being the subject parcels: 150 & 151. The subdivision was submitted in 2000 to the Director of Surveys and the plans were registered on 26/11/2002.



15. Martha Nyambura Irugi testified as DW1. She relied on her witness statement filed on 5/3/2018 and produced documents marked as DEX No. 1-5. She stated that she purchased the land from Christopher Kang'ethe Kigwe in 1997 at the cost of Kshs. 200,000/- and paid in full by way of instalments.
16. That she was showed the beacons in 1999 by Christopher Kang'ethe Kigwe. She subdivided the land in 1989 and thereafter sold to third parties, including the 3rd Defendant. That the Plaintiff has never lived on the land nor raised any complaint for over 13 years in which the Defendants have occupied the suit land. That she was not aware of any adverse claim on the land in favour of the Plaintiff. She stated that Christopher Kangethe Kigwe, the seller is yet to transfer title to her name.
17. DW2 – Stephen Karanja Kungu testified that he is a real estate consultant and relied on his witness statement dated 21/5/2018 and produced documents marked as DEX 6 – 8 in support of his case.
18. The witness stated that he purchased the portion of the land measuring 40X60 feet from the 1st Defendant vide an agreement dated 29/5/2012 for the sum of Kshs. 220,000/-. The plot is No. 61 in Block 2 Kalimoni area. He took possession and begun constructing his house thereon.
19. On the question of due diligence, the witness stated that he was shown the agreement between the 1st Defendant and the Christopher Kang'ethe Kigwe, the seller and later shown the land by 1st Defendant. That he did not carry out any search on the land before he entered into agreement. That he relied on the sale agreement and the assurance by 1st Defendant that she would deliver the completion documents. That he holds a Share Certificate but no title.

Written submissions

20. The Plaintiff submitted that the Defendants have not succeeded in impeaching her title. Relying on Section 26 of *Land Registration Act*, the Plaintiffs reiterated that the suit land belongs to his late mother.
21. The 1st, 2nd, 4th, 5th, 6th and 7th Defendants filed written submissions on 8/12/2022. They submitted that the Defendants are in possession of the suit land and faulted the Plaintiff for filing suit seeking orders to restrain the Defendants from evicting the Plaintiff yet he does not enjoy quiet possession of the land. That the Plaintiff has not acknowledged that the Defendants are in actual possession of the land to warrant eviction or an order for mesne profits. The Defendants posit that the suit of the Plaintiff should fail because no mandatory orders were sought.
22. That both the Plaintiff and the 1st Defendant purchased land from the common vendor, Christopher Kang'ethe Kigwe. That the Land Dispute Tribunal award which was confirmed by the Court did not show the location of 5 acres on the expansive estate. That the Plaintiff alienated land already occupied by the Defendants. They submitted that the Plaintiff is the author of her own misfortune.
23. Further the Defendants submitted that by 2011 the Defendants had been in continuous occupation of the land for a period of 16 years and therefore have acquired rights to the land by prescription.
24. The Defendants relied on the case of *Munyu Maina Vs. Hiram Gathiba Maina* [2013] eKLR & Peter Njuguna Kariuki Vs. James Njogu Kagunda [2021] eKLR to support their proposition that the Plaintiff did not prove the root of her title.
25. The 3rd Defendant filed written submissions on the 16/2/2023 and stated that he is a bonafide purchaser for value without any notice of an adverse claim in favour of the Plaintiff. That he relied on an agreement between 1st Defendant and Christopher Kang'ethe Kigwe entered in 1997. He blames the



Plaintiff for electing to acquire title over land that he and other Defendants have settled yet Christopher Kang'ethe Kigwe, the seller had over 900 acres which she should have settled on particularly any vacant land within the expansive estate.

26. He urged the Court to find that there is no evidence that the portion of the land sold to the Plaintiff is the same one on which the Defendants have occupied. In the circumstances the Court was urged not to disturb the Defendants currently enjoying quiet possession of the suit land.

Determination

27. The issues for determination are:-

- a. Whether the 1st, 2nd, 4th – 7th Defendants have proven fraud on the part of the Plaintiff.
- b. Whether the 3rd Defendant was a bonafide purchaser for value without notice.
- c. Whether the title belongs to the Plaintiff.
- d. Whether the Defendants have trespassed the land.
- e. Who pays the costs of the suit?

28. The 8th – 14th Defendants did not file any defence to the Plaintiff's claim. The Plaintiff's case against them is therefore undefended.

29. It is the case of the 1st, 2nd, 4th – 7th Defendants that the Plaintiff acquired the suit land through fraud. Fraud is defined as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

30. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court held as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

31. The next step is to examine whether fraud has been proven by the Defendants against the Plaintiff as alleged in his counterclaim.

32. The 1st Defendant led evidence that she bought land from Christopher Kang'ethe Kigwe vide an agreement dated 14/11/1997. Thereafter she subdivided the land and sold it to the Defendants despite not obtaining title from the vendor. She contended that she was shown the beacons of the land in 2000.

33. I have perused the said agreement of sale which indicates under Clause 1 that the 1st Defendant purchased 4 acres of the land out of LR. No. 10823/5 Thika Municipality. It was warranted by the vendor that the purchaser, 1st Defendant would get a title by or before 31/3/1998.

34. It was the 1st Defendant's case that she paid the monies in full. However, she did not table any evidence in support. Of note is the letter dated 18/2/2010 from Walker Kontos Advocates addressed to the 1st Defendant calling for the purchase price by close of business of 12/3/2010 in default the agreement shall stand terminated, deposit forfeited and land repossessed by the seller. The letter dated 4/5/2004



to the seller on behalf of the 1st Defendant discloses that Christopher Kang'ethe Kigwe sold 4 acres of land to the 1st Defendant. Neither the agreement dated 14/11/1997 nor the said letter disclose the location of the land on the then expansive estate.

35. The Court finds that there is no evidence that the 1st Defendant obtained a good title from the seller. There is no evidence of full payment of the land nor that a beacon certificate was given to her as to the identity of the 4 acres of land she allegedly purchased.
36. The Court also finds that the Defendants have not proven any influence or collusion between the Land Dispute Tribunal and the Plaintiff in arriving at the award which was confirmed by the Court. There was no evidence that the said Judgment has been set aside, appealed and or vacated.
37. In totality the Court finds that the Defendants have failed to prove fraud. This limb is disallowed.

Bonafide purchasers

38. It is to be noted that none of the 2 – 14 Defendants (except the 3rd Defendant) led evidence on how they acquired the land. The 1st Defendant led evidence on her own behalf and on behalf of the rest of the Defendants. The Court finds that the gist of her evidence is that she acquired the land from Christopher Kangethe Kigwe and sold to the Defendants. No evidence of the said sale and none of the Defendants presented any evidence at all in support of their claims, if any. The Court is of the considered view that the Plaintiffs case against the said Defendants largely remained undefended. They appear to have placed their fate in the hands of the 1st Defendant.
39. The 1st Defendant was clear that she did not obtain any title from the seller hence she passed no title to the Defendants.
40. I have seen the sale agreement between the 3rd Defendant and the 1st Defendant in respect of 40X60ft out of LR No. 10823/5. The 3rd Defendant failed to show a beacon certificate which shows that his title was independent from that of the Plaintiff. The 3rd Defendant being a consultant in land deals ought to have at least carried out due diligence and obtained an official search, a basic document in land acquisition and satisfied himself that the 1st Defendant could pass a good title to him. Having failed to carry out due diligence there is no bonafides at all on his part.
41. The Court relies on the case of *Katende Vs Haridar & Company Limited* (2008) 2EA 173 as follows:-

“.....A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:-

- a) He holds the certificate of title;
- b) He purchased the property in good faith;
- c) He had no knowledge of the fraud;
- d) The vendor had apparent valid title
- e) He purchased without notice of any valid fraud;
- f) He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”



42. Finally, it is the holding of the Court that the Defendants did not carry out any due diligence; the 1st Defendant held no title in the suit land; passed no title to the Defendants and the Defendants acquired no title in the suit land.
43. The Court finds that the 3rd Defendant failed to establish that he is a bonafide purchaser for value without notice.

Declaratory orders

44. It is on record that the Plaintiff holds title to the two parcels whose certified copies of titles were produced before the Court. The agreement of sale between the Plaintiff and the seller is dated 16/11/1995. The land sold is 5 acres at the price of Kshs. 525,000/-.
45. Vacant possession was given at the execution of the agreement. The Plaintiff was given the liberty by the seller to subdivide and sell the 5 acres of land and in default of payment of the purchase price the vendor had the liberty to repossess it. The import of the above is that the Plaintiff purchased land in 1995 and by 1997 the same land was unavailable for purchase by the 1st Defendant from the said seller.
46. Vide a letter dated 16/2/2000 the Commissioner of Lands approved the subdivision of L.R. No. 10823/5 into two portions of 2 and 3 acres. Upon acceptance of the conditions of subdivision the final approval was given on 18/2/2000. Accompanying the approval was a plan FR No. 225/61 produced in Court by the surveyor. This evidence is critical in locating the land on the ground. Unlike the Plaintiff the Defendants failed to show the location of the land they purchased from Christopher Kigwe on the ground.
47. The above evidence shows that it is the seller who subdivided the land into portions of 2 and 3 acres. The Court therefore finds that the Plaintiff acquired a good title from Christopher Kigwe, the seller.

Trespass

48. Trespass is defined in the [*Trespass Act*](#) as follows:-

“An unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”
49. Trespass has also been defined by Clerk and Lindsell on Torts, 18th edition at Pg.23 as;

“Any unjustifiable intrusion by one person upon the land in possession.”
50. The Court having held that the Defendants have unsuccessfully impugned the title of the Plaintiff, the Plaintiff has every right under Section 24 and 25 of the [*Land Registration Act*](#) to the enjoyment of title free from interference from any other parties, the Defendants included.
51. The Defendants have not given a justifiable reason why they should continue occupying the land. Their remedy lies elsewhere, perhaps with the 1st Defendant.
52. On the material placed before me in this case, the Court is satisfied that the Plaintiff holds title to the land and the Defendants having entered onto the Plaintiff’s suit land without any lawful or justifiable cause, the Defendants are therefore trespassers.



General damages for trespass

53. In assessing the quantum of general damages payable to the Plaintiff, I rely on the decision in the *Park Towers Limited versus John Mithamo Njika & 7 others* (2014)eKLR, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

54. In the case of *Philip Aluchio Vs. Crispinus Ngayo* [2014]eKLR, the Court held as follows:-

“.... The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less”

The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass.....”

55. Having not provided the actual value of the land before the alleged trespass, the Court proceeds to award a nominal figure of Kshs.300,000/- (Three Hundred Thousand Shillings Only) as general damages for trespass.

Mesne profits

56. Mesne profits are in the category of special damages and a Court is required to satisfy itself that the claimant has proved the same. The claim under this heading though pleaded, the Plaintiff failed to lead any evidence and in the absence of any evidence in support, it is hereby disallowed.

Costs of the suit

57. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. In this case I find no justifiable cause to deny the Plaintiff’s costs of the suit and the Counterclaim.

58. Final orders for disposal: -

- a. That it is hereby declared that the Plaintiff is the legal registered owner of the suit land parcels No. LR 10823/150 and LR 10823/151.
- b. It is hereby ordered that a permanent injunction be and is hereby issued restraining the Defendants by themselves, their agents, servants, employees, proxies and/or any person claiming under them from alienating, selling, transferring, trespassing, trading, allocating and/or evicting the Plaintiff from the suit property and/or otherwise however from interfering with the Plaintiff quiet possession of the suit properties.
- c. An order for mesne profits is disallowed.
- d. Damages against the Defendants for trespass on the Plaintiff’s land and destruction of the Plaintiff’s property in the sum of Kshs. 300,000/- (Three Hundred Thousand Shillings Only) payable jointly and severally by the Defendants.



e. Costs of this suit shall be in favour of the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF JUNE, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Wachira for Plaintiff

Nyongesa for 1st and 2nd Defendants

Gikonyo for 3rd Defendant

Nyongesa for 4th – 7th Defendants

8th – 14th Defendants – Absent; never participated in the hearing of the suit.

Court Assistant – Kelvin/Lilian

