



Mbugua & 3 others (Administrators of the Estate of Joseph Kiarie Mbugua - Deceased) v Keingati (Legal representative of the Estate of Teresia King’ati) & another (Both t/a Travellers Cafe) (Environment & Land Case 70 of 2019) [2023] KEELC 19274 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 70 OF 2019**

BM EBOSO, J

JULY 26, 2023

BETWEEN

FLORENCE WAIRIMU MBUGUA, GRACE WANJIKU MBUGUA, PETER CHEGE KIARIE & SYLVIA MURUGI MBUGUA PLAINTIFF

ADMINISTRATORS OF THE ESTATE OF JOSEPH KIARIE MBUGUA - DECEASED

AND

PETER KARUMBI KEINGATI (LEGAL REPRESENTATIVE OF THE ESTATE OF TERESIA KING’ATI) 1ST DEFENDANT

JOHN KANGATI 2ND DEFENDANT

BOTH T/A TRAVELLERS CAFE

JUDGMENT

1. This suit was commenced by way of a plaint dated 5/12/2003. The plaint was subsequently amended on 12/2/2009. The amended plaint was filed on 13/2/2009. Through the amended plaint, the plaintiffs sought the following reliefs against Teresia King’ati and John Kingati: (i) delivery of vacant possession of the suit premises; (ii) ejection from the suit premises; (iii) costs of this suit; and (iv) any other relief this honourable court may deem fit to grant.

Plaintiff’s Case

2. The plaintiff’s case was that, Joseph Kiarie Mbugua [hereinafter referred to “the late Mbugua”] was the lawful registered owner of Land Parcel number Kiambu Municipality Block 11/45 (hereinafter known as “the suit property”) and that the defendants had been carrying on a café/restaurant business on the suit property without his consent. Consequently, they sought the above orders against the defendants.



Defence and Counterclaim

3. Teresia King'ati (hereinafter referred to as "the late Teresia") and John King'ati (the 2nd defendant) entered appearance on 6/2/2014. They filed a statement of defence and a counter-claim dated 23/2/2014. Teresia King'ati died on 10/5/ 2019 and was substituted by Peter Karumbi Keingati, the legal representative of her estate, on 18/1/2022.
4. The defendants averred that the suit property (then known as Plot No. 37) was originally allotted to Kangangi General Trading Company which comprised of three partners, namely, Teresia King'ati, Waite Ngara (now deceased) and Stephen Kabundi Mwenda (now deceased). The defendants further averred that vide an agreement dated 7/8/1995, the partnership was dissolved and the suit property was subdivided into three equal portions, namely, Plot numbers 37A, 37B and 37C. Teresia King'ati was allotted Plot No 37C on which she carried out extensive permanent developments and ran a restaurant business.
5. The defendants added that the personal representatives of the late Waite Ngara together with the late Stephen Kabundi Mwenda sold their two portions of the suit property to Joseph Kiarie Mbugua without the knowledge and or consent of Teresia. They contended that the sale was in breach of the agreement dated 7/8/1995. The defendants added that the late Joseph Kiarie Mbugua subsequently caused the entire suit property to be registered in his name as the absolute proprietor of the entire land, including Plot No. 37C which belongs to Teresia King'ati and which the late Mbugua had not purchased.
6. The defendants listed the following as particulars of fraud by the the late Mbugua: (i) misrepresenting material facts of ownership of the suit premises and having it registered in his own name; and (ii) claiming that he was the absolute owner of the plot, alleging that the same was allotted to him by the Government while he was aware that he was deceiving the defendants or had used fraudulent means to obtain the same.
7. Through their counter-claim, the defendants sought the following reliefs against the plaintiffs: (i) an order that the suit be dismissed with costs; (ii) an order that the plaintiff's title to the suit land be cancelled and new titles be issued to the plaintiff and the defendants respectively according to their respective shares as per paragraph 13 of the plaint; (iii) an order awarding the defendants costs of the counterclaim; and (iv) such further or other relief as the court may deem fit and just to grant.
8. The plaintiff's suit was, dismissed on 2/3/2023 for non-attendance. The plaintiffs never bothered to seek reinstatement of the suit.
9. The plaintiffs filed a reply to defence and a defence to counter-claim dated 25/2/2004 in which they reiterated the contents of paragraphs 3 to 7 of the plaint. In their defence to the counter-claim, the plaintiffs denied each and every allegation contained in the counterclaim. The plaintiffs further averred that the counter-claim was frivolous and an abuse of the court process.

Defence Evidence

10. John King'ati testified as DW1. He adopted his witness statement filed on 26/11/2019 as part of his sworn evidence-in-chief. He produced the following 16 exhibits: (i) Certificate of Death for the late Teresia; (ii) Ruling issued in High Court Succession Cause No. 1140 of 1990 – Nairobi; in the matter of the estate of Kiengati Wiharo Keingati; (iii) Certificate of Registration of Kangangi General Trading Business given on 13th January 1959; (iv) Agreement dated 7th August 1999; (v) Certificate of Lease for the property being title No Kiambu Municipality Block 11/45 given on 30th June 2003;



- (vi) Certificate of Official Search for Title Number Kiambu Municipality/ Block 11/45; (vii) Letter dated 17th July, 2003 from Kihara, Karani & Co Advocates; (viii) Letter dated September 29, 2003 from Gachoka & Co Advocates; (ix) Letter dated 10th November 2003 from Gachoka & Co advocates; (x) Letter for Surrender of Plots dated 29th January 2004; (xi) Letter for Surrender of Plots dated 4th February 2004; (xii) Letter for Surrender of Plots dated 30th June 2004; (xiii) Letter dated 17th September 2013 to the National Land Commission; (xiv) Memo from the National Land Commission dated 28th October 2013; (xv) Letter dated 2nd May 2017 from the National Land Commission; and (xvi) Photographs relating to the suit premises.
11. It was DW1's testimony that the suit property was initially owned by three parties and that they are all deceased. One of them was his father known as Keingati Waiharo. However, because his father was a civil servant from the colonial days, he was not allowed to own businesses and hence his mother, Teresia Keingati, was designated as the partner instead of his father.
 12. DW1 further stated that it was a term of the agreement dated 7/8/1999 that no party was to lease, alienate, charge or sell any portion of their respective plots without first offering it to the other partners. However, in breach of the agreement and without notice to Teresia King'ati (deceased), the beneficiaries of the estate of Waite Ngara and Stephen Kabundi Mwenda went ahead and sold their respective plots to the late Mbugua who went ahead and processed title for the entire suit property without Teresia King'ati's knowledge or consent.
 13. DW1 asserted that Plot 37C fell within the suit property and therefore, Teresia King'ati's estate was entitled to her share. DW1 further stated that Teresia King'ati (deceased) lodged a complaint with the National Land Commission. The Commission, through a Memo dated 28/10/2013, confirmed that the letter of allotment used to prepare the lease for the late Mbugua was fraudulent and that the suit property was allocated to Waite Ngara (deceased), Stephen Kabundi Mwenda and Teresia King'ati (deceased).

Submissions

14. Parties were directed to file written submissions. The plaintiffs did not file written submissions. The defendants filed their submissions on 13/04/2023 through the law firm of J M Waiganjo & Company Advocates. They deciphered the following as the main issues that fell for determination in the suit: (a) Whether the doctrine of indefeasibility applies to fraudulently acquired property; (b) Whether the plaintiffs' prayers can be granted; (c) What orders ought to be made on costs.
15. It was counsel's submissions that the plaintiff's assertion that the late Mbugua was the first and sole registered proprietor of the suit property and therefore his title to the suit property is indefeasible and cannot be challenged on any ground, fraud included, is a misapprehension of the law. Counsel further contended that the doctrine of indefeasibility is extinguished if it is demonstrated that the property was acquired fraudulently. Counsel relied on article 40 (6) of *the Constitution* and section 26 (1) of the *Land Registration Act*. Counsel asked the court to be persuaded by the holding in the cases of *Henry Muthee Kathurima v Commissioner of Lands & another* (2015) eKLR, and *Mangrove Investments Limited v Attorney General & another* (2020) eKLR.
16. The defendants' counsel further submitted that the plaintiff had failed to discharge the evidential burden of demonstrating that the late Mbugua followed the right procedure in procuring registration of the suit property in his name. Counsel submitted that section 80 of the *Land Registration Act* vested in the court the power to order rectification of the land register if it is satisfied that a registration was obtained fraudulently or by mistake. Counsel relied on the decision in the case of *Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & another* (2018) eKLR.



17. On the issue of costs, counsel submitted that costs follow the event. Citing the decision in the case of *Jasbir Singh & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, counsel urged the court to award costs to the defendants.

Analysis and Determination

18. The court has considered the pleadings, the evidence, the submissions, and the authorities cited. The primary suit having been dismissed, the following are the three issues that fall for determination in the counterclaim: (i) Whether the registration of Joseph Kiarie Mbugua as proprietor of land parcel number Kiambu Municipality Block 11/45 was procured irregularly/fraudulently, (ii) Whether the reliefs sought in the counterclaim are available in the circumstances of this case, and (iii) What order should be made in relation to costs of this suit. I will make a brief analysis and disposal of the three issues.
19. The primary suit was dismissed. What remains to be determined is the counterclaim. The defendants are the ones who made allegations in the counter-claim. Therefore, they had the duty of proving their allegations on the required standard of the balance of probabilities. It is trite that he who alleges must prove as required by section 107 of the *Evidence Act* which states as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
20. Put differently, it is settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or set of facts, has the legal obligation to provide evidence that will best facilitate the proof of the existence of the facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.
21. DW1 produced an agreement dated 7/8/1995, confirming that Plot Number 37 had been allocated to Kangangi General Trading Company and that the partners of the said entity were Waite Ngara, Stephen Kabundi Mwenda and Teresia Nduta King'ati. The said agreement also confirmed that Plot number 37 (the suit property) was sub-divided into three portions and the late Teresia was allocated Plot 37C. DW1 also produced a letter dated 30/4/2004 from the Town Clerk of the Municipal Council of Kiambu addressed to Kangangi General Trading Company confirming their allocation of Plot No. 11/45 (37). The defendants further tendered evidence indicating that the beneficiaries of the estate of Waite Ngara together with Stephen Kabundi Mwenda sold their portions of undivided shares comprised in Plot No. 37A and Plot No. 37B to the late Mbugua. The defendants also adduced a memo from the National Land Commission stating that the letter of allotment used to prepare the lease for the late Mbugua was fraudulent. The authenticity of the memo was not controverted by the plaintiffs.
22. Whereas there was evidence that the share of the late Waite Ngara and the share of the late Stephen Kabundi Mwenda were sold to the late Mbugua, there was no evidence that the late Teresia Keingati sold her plot to the late Mbugua. It is therefore clear that the late Mbugua irregularly and fraudulently procured a lease and a registration relating to the entire land yet he had only acquired the shares of the duo. From the evidence presented to this court, he was only entitled to Plot Nos 37A and 37B, which he had purchased. He was not entitled to Plot No 37C.



23. Section 26 (1) of the *Land Registration Act* states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except –

- i. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- ii. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

24. For the above reasons I am satisfied that the registration of the late Mbugua as proprietor of land parcel number Kiambu Municipality Block 11/45 was obtained irregularly and fraudulently, hence it stand to be cancelled as sought by the estate of Teresia Kiengati. In the absence of special circumstances, the estate of the late Mbugua will bear costs of this suit. I therefore find that the defendants have proved their counterclaim on a balance of probabilities.

Disposal Orders

25. In the end, the primary suit by the estate of the late Joseph Kiarie Mbugua and the counterclaim by the defendants are disposed as follows:

- a. The primary suit by the estate of the late Joseph Kiarie Mbugua is marked as dismissed with costs, in tandem with the dismissal order made on 2/3/2023.
- b. An order is hereby issued directing the Land Registrar - Kiambu, to cancel the registration of Joseph Kiarie Mbugua as proprietor of land parcel number Kiambu Municipality Block 11/45 and cause one third 1/3 of the said land to be surveyed and registered in the name(s) of the administrators of the estate of Teresia Nduta Kingati also known as Teresia Nduta Keingati.
- c. The one third portion shall comprise of the portion developed and occupied by the estate of Teresia Nduta Kingati also known as Teresia Nduta Keingati.
- d. The rest of the land shall vest in the names of the administrators of the estate of Joseph Kiarie Mbugua as trustees
- e. Costs of both the primary suit and the counterclaim shall be borne by the estate of the late Joseph Kiarie Mbugua.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF JULY 2023

B M EBOSO

JUDGE

