



REPUBLIC OF KENYA



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**Ndungu v Kanja & another (Environment & Land Case 14 & 743A of 2017
(Consolidated)) [2023] KEELC 19023 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 14 & 743A OF 2017 (CONSOLIDATED)**

BM EBOSO, J

JULY 24, 2023

BETWEEN

LUCY WAIRIMU NDUNGU PLAINTIFF

AND

JOHN KANJA DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 743A OF 2017

BETWEEN

LUCY WAIRIMU NDUNGU PLAINTIFF

AND

DENNIS MUNGAI MITHIGA DEFENDANT

JUDGMENT

Introduction

1. Vide an order made by this court on 27/10/2021, Thika ELC Case No 14 of 2017 and Thika ELC Case No 743 “A” of 2017 were consolidated. The file relating to Thika ELC Case No 14 of 2017 was designated as the lead file. Lucy Wairimu Ndungu is the plaintiff in both suits. John Kanja is the defendant in Thika ELC Case No 14 of 2017. Dennis Mungai Mithiga is the defendant in Thika ELC Case No 743 “A” of 2017.
2. Two key common issues fall for determination in the two suits. The first issue relates to the question as to who between Lucy Wairimu Ndungu [the plaintiff], on one part, and one David Kamau Njoroge, on the other part, is the legitimate owner and registered proprietor of land parcel number Gatwanyaga/



Ngoliba Block 1/1084 [hereinafter referred to as “the suit land”]. The second issue is whether the defendants in the two suits are trespassers on the above parcel of land.

3. Registration of the suit land in the name of David Kamau Njoroge was alleged by the two defendants who waved a title deed alleged to have been issued to him by the Thika Land Registry on 13/11/2012. The two defendants neither joined the said David Kamau Njoroge as a party to the suit nor called him as a witness. Unverified statements were made by the two defendant to the effect that he is deceased. The defendants did not bother to apply for joinder of his estate as a party to this suit.
4. The Land Registrar who is alleged to have issued the title deed that the defendants hold, Pamela Muthoni Mutegi, testified as DW3. She disowned the title deed, stating that the signature and the rubber stamp on the title deed which the two defendants are waving are not hers. The Land Registrar in charge of the Thika Land Registry at the time of trial, Mr Joseph Kamuyu, similarly disowned the title which the defendants are waving, stating that the title deed was not issued by the Thika Land Registry. Before I dispose the two key issues, I will outline the parties’ respective cases, evidence and submissions.

Plaintiff’s Case and Evidence

5. Through the two complaints filed in the two suits, the plaintiff contended that she was the registered proprietor of the suit land. It was her case that John Kanja had encroached on the land and was constructing a house and a perimeter fence within the land. As against Dennis Mungai Mithiga, the plaintiff averred that he had encroached on the land, erected a three roomed structure on the land, and dug a pit latrine on the land. The plaintiff sought injunctive orders restraining the defendants against entering, cultivating, constructing on, or trespassing on the land. She also sought eviction orders and awards of costs of the two suits.
6. At trial, the plaintiff testified as PW1. She adopted her written statements in the two suits as part of her sworn evidence-in chief. Her evidence was that she was the registered proprietor of the suit land, having acquired it from M/s Gatundu Nyakinyua Company Limited through acquisition of shares in the company. She stated that M/s Gatundu Nyakinyua Company Limited conveyed the land to her on 2/6/2016.
7. She produced the following documents: (i) Pictures of ongoing constructions on the land; (ii) Official Search and Title Deed; (iii) Demand Letter dated 8/9/2016; (iv) Share Certificate No 2315 dated 15/12/1981 issued to her by M/s Gatundu Nyakinyua Company Limited; (v) Ballot No 1084; (vi) Payment Receipt Number 76 dated 15/3/2021 relating to the title deed; (vii) Letter of Consent to transfer dated 31/10/2013; (viii) Transfer registered on 26/2016; (ix) Application for transfer dated 2/6/2016; (x) Letter dated 22/4/2021 from the Land Registrar; (ix) Certified copy of the Land Register relating to Gatwanyaga/Ngoliba Block 1/1084.
8. The Thika Land Registrar, Mr Joseph Kamuyu, testified as PW2. His evidence was that upon receiving court summons from this court, he retrieved the relevant land register and parcel file. He responded to the accompanying letter from the plaintiff’s advocates. He stated that in his response to the plaintiff’s advocates, he inadvertently referred to the registered proprietor of the suit land as Lucy Wanjiku Ndungu instead of Lucy Wairimu Ndungu. He said the middle name “Wanjiku” was an inadvertent typographical error.
9. It was the evidence of PW2 that the records held by the Land Registry reflected Lucy Wairimu Ndungu [the plaintiff] as the registered proprietor of the suit land. He added that the title held in the name of David Kamau Njoroge did not originate from the Land Registry. It was his evidence that the suit land previously belonged to M/s Gatundu Nyakinyua Company Limited who transferred it to Lucy Wairimu Ndungu in 2016. He produced: (i) Letter dated 19/4/2021 from the plaintiff’s advocates; (ii)



- His response dated 22/4/2021; (iii) Certified copy of the Land Register; (iv) Parcel File relating to the suit land, containing the application for transfer; (v) Receipt serial number C9273807 dated 2/6/2016; (vi) Valuation requisition; (vii) Transfer executed by M/s Gatundu Nyakinyua Company Limited and registered on 2/6/2016; (viii) Application for consent; Letter of consent dated 31/10/2013; (ix) ID Card; (x) KRA PINs; (xii) KRA Stamp Duty Slip; and Bank Deposit Slip; relating to Stamp Duty.
10. It was the evidence of the Land Registrar that the land register relating to the suit land was opened on 30/10/2013 and the opening of the register was triggered by the company that owned the subdivision scheme, Gatundu Nyakinyua Company Limited. On the same day, 30/10/2013, the land was registered in the name of the company, M/s Gatundu Nyakinyua Company Limited. He added that Entry No 2 in the land register related to a transfer by the company to Lucy Wairimu Ndungu which was effected on 2/6/2016.
 11. During cross-examination, he testified that there was a typographical error relating to numbering of entries in the title issued to Lucy Wairimu Ndungu, stating that the entry relating to registration of Lucy Wairimu Ndungu as proprietor should be number 2 while the entry relating to issuance of the title to her should be entry number 3.

Defence Case and Evidence

12. John Kanyi [the defendant in Thika ELC Case No 14 of 2017] filed a defence dated 13/4/2017. His case was that he was a purchaser for value of a portion of land title number Gatwanyaga/Ngoliba Block 1/1084, having purchased the said portion from one David Njoroge Kamau on 8/1/2015. He contended that the said David Njoroge Kamau was deceased. He added that upon purchasing the portion, he took possession and started developing it. It was his case that he was on the suit land as of right and he was entitled to proceed with his developments on the land. He urged the court to dismiss the plaintiff's case.
13. David Kanja testified as DW1. His evidence was that on 8/1/2015, he entered into an agreement for purchase of Plot No 1 out of land parcel number Gatwanyaga/Ngoliba Block 1/1084 with one David Njoroge Kamau who is now deceased. He added that David Njoroge Kamau was the registered proprietor of the land at the time of purchase. He paid him the agreed purchase price of Kshs 650,000 and immediately took possession of the plot. He embarked on development of the land. He contended that he believed he was "rightly in the land as a purchaser for value in possession". He produced the following documents: (i) Agreement dated 8/1/2015; (ii) Title Deed dated 13/11/2012 bearing David Kamau Njoroge as proprietor; (iii) Copy of title deed in the name of Lucy Wairimu Ndungu dated 2/6/2016; and (iv) Extract of the Land Register relating to the suit property.
14. During cross-examination, he testified that his son, David Gikara, is the one who introduced him to David Kamau Njoroge. He added that he subsequently got to learn that the land was a subdivision out of land that was owned by M/s Gatundu Nyakinyua Company Limited. He stated that he lost the search which he had obtained at the time of purchasing the portion of land from David Njoroge Kamau. He further stated that he did not enquire into the history of the land at the time of purchasing it, adding that he only relied on the title which the vendor had. DW1 further stated that the vendor did not give him documents relating to his acquisition of the suit land from the previous owner. Lastly, he stated that he did not conduct a search at the offices of M/s Gatundu Nyakinyua Company Limited prior to entering into the purchase agreement.
15. In re-examination, DW1 stated that he entered into the transaction on the basis of the title which the vendor had. He added that they did not go to the Land Control Board for consent. Lastly, he stated that the vendor died in 2015 but he could not remember the exact date.



16. Dennis Mungai Mithiga [the defendant in Thika ELC Case No 743 “A” of 2017] filed a defence dated 13/8/2019. His case was that he purchased “Plot No 4 in Gatwanyaga/ Ngoliba Block 1/1084” on 17/1/2015 from one David Kamau Njoroge who is now deceased. He added that he took possession of the plot upon purchasing it and he had made developments on the land. He contended that he was “oblivious of the plaintiff and her claim to an interest” in the land. He denied putting up a three-roomed structure on the land. It was his case that the plaintiff had failed to show that she had an interest in the suit land.
17. Dennis Mungai Mithiga testified as DW2. He adopted his witness statement dated 13/8/2019 in which he stated that he purchased “plot No 4 in Gatwanyaga/ Ngoliba 1/1084” on 17/1/2015 from David Kamau Njoroge. It was his evidence that he had “settled on the land and put up a pit latrine.”
18. DW2 produced: (i) Sale agreement dated 17/1/2015; (ii) Copy of Title Deed dated 13/11/2012 bearing the name of David Kamau Njoroge; (iii) Copy of Title Deed dated 2/6/2016 bearing the name of Lucy Wairimu Ndungu; and (iv) An extract of the Land Register relating to Gatwanyaga/ Ngoliba Block 1/1084.
19. During cross-examination, DW2 stated that he lost the search which he obtained prior to purchasing the plot from David Kamau Njoroge. He added that after purchasing the land, he got to learn that it was a subdivision out of land that belonged to M/s Gatundu Nyakinyua Company Limited. It was his evidence that he relied on the title held by David Kamau Njoroge at the time of purchasing the plot. He stated that he did not know the exact date when David Kamau Njoroge died. He added that David Kamau Njoroge’s parents had told him that they would not initiate succession proceedings relating to his estate while these suits were still pending.
20. Pamela Muthoni Mutege testified as DW3. Her evidence was that she is a Land Registrar. She was stationed at Nanyuki Land Registry at the time of giving evidence. Her number as a Land Registrar is 065. She stated that she worked at the Thika Land Registry in 2012. When shown the original title deed held in the name of David Kamau Njoroge, she stated that the title deed was not genuine for the following reasons: (i) the purported signature on the title deed was not hers; (ii) the rubberstamp on it was not the one she was using at the time of the purported issuance; (iii) the seal on it was not the one they were using at the Thika Lands Registry at the time; (iv) The texture of the paper was not the same as the texture of the papers they were using at the Thika Land Registry at the time. It was the evidence of DW3 that the title deed which the defendants were waving was not a genuine title. She denied issuing the title deed to David Njoroge Kamau.
21. In cross-examination, she reiterated her assertion that the title deed which the defendants were waving was fake, adding that it was not signed by her. She associated herself with the contents of the Land Registrar’s letter dated 22/4/2021.

Plaintiff’s Submissions

22. The plaintiff filed written submissions dated 7/3/2023, through M/s Jesse Kariuki & Co Advocates. Counsel for the plaintiff submitted that the plaintiff had tendered evidence demonstrating how she acquired the suit land from M/s Gatundu Nyakinyua Company Limited. Counsel added that the plaintiff’s ownership had been confirmed by the Land Registrar, Mr J W Kamuyu who had tendered both the land register and the corresponding parcel file, indicating that the plaintiff was the lawful proprietor of the suit land. Counsel added that the Land Registrar had confirmed that the title deed held by the plaintiff was a genuine land ownership document that originated from the Thika Land Registry.



23. Counsel for the plaintiff further submitted that both the current Land Registrar and the Land Registrar who was alleged to have issued the title deed relied on by the defendants disowned the said title deed, adding that Pamela Muthoni Mutegi denied signing nor issuing the title deed and termed it as fake. Counsel argued that neither defendants tendered evidence on how David Kamau Njoroge became owner of the suit land. It was the position of counsel for the plaintiff that the defendant had been conned by David Kamau Njoroge and their recourse lay in a claim for recovery of purchase price from the estate of David Kamau Njoroge. Counsel urged the court to grant the plaintiff the reliefs sought in the two plaints.

Defendants' Submissions

24. The two defendants filed joint written submissions dated 9/5/2023, through M/s S. Ng'ang'a Ndungu & Co Advocates. Counsel for the defendants faulted the demeanor of the plaintiff, contending that the plaintiff feigned ignorance in an attempt to avoid cross-examination on the contents of her exhibits. Counsel argued that the plaintiff displayed a sufficient grasp of the English language and literacy. Counsel argued that the plaintiff was unable to explain the discrepancy relating to the numbering of entries in the land register in relation to the numbering of entries in the title held by her.
25. Counsel for the defendants faulted the Land Registrar for failing to tender records relating to the mother title despite having been requested to do so through a letter dated 2/11/2021. Counsel argued that there was "deliberate effort to conceal some information or avoid venturing into some of the details of the mother title". Counsel added that the Land Registrar had conceded that there were discrepancies in the numbering of entries in that the entries in the title held by the plaintiff did not tally with the entries in the land register tendered by the Land Registrar. Counsel argued that, from the records produced by the Land Registrar, "it was clear that the title in the name of the defendant is marked with inexplicable discrepancies and irregularities" (sic).
26. Counsel cited the following discrepancies: (i) the discrepancy relating to numbering of entries; and (ii) discrepancy relating to the date of opening of the parcel register vis-à-vis the date of the letter of consent to transfer. Counsel contended that the above discrepancies made it unrealistic for the court to "comfortably say that the plaintiff has proved she is the bonafide registered proprietor of the suit property". Counsel urged the court to find that the plaintiff had failed to prove her proprietary interest in the suit land.

Analysis and Determination

27. I have considered the parties' respective pleadings in the two consolidated suits. I have also considered the evidence and the submissions that were tendered in the two consolidated suits. Further, I have considered the relevant legal frameworks and jurisprudence. As observed in the introductory part of this Judgment, two key common issues fall for determination in the two consolidated suits. The first issue relates to the question as to who between Lucy Wairimu Ndungu and the alleged late David Kamau Njoroge is the legitimate owner and registered proprietor of land parcel number Gatunyaga/ Ngoliba Block 1/1084. The second issue is whether the defendants are trespassers on the above land. I will dispose the two issues sequentially in the above order.
28. The plaintiff is waving a title she alleges was issued to her by the Thika Land Registry on 2/6/2016. On their part, the two defendants are waving a title they allege was issued to one David Kamau Njoroge by the Thika Land Registry on 13/11/2012 following his alleged registration as proprietor on 12/9/2012.
29. Under Section 107 of the *Evidence Act*, the burden of proof is ordinarily on the claimant. In a case of parallel titles such as the present suits where the defendants are waving a parallel title but have



not brought counterclaims, the burden of proof is on the plaintiff. Upon the plaintiff discharging the burden of proof, the burden shifts to the defendants, as holders of a purported parallel title, to sufficiently controvert the plaintiff's evidence by demonstrating how the parallel title they are waving was acquired by the alleged David Njoroge Kamau.

30. The Court of Appeal outlined the above principle in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR in the following words:-

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title.”

31. The plaintiff in the two suits tendered evidence showing that the suit land is a subdivision in a scheme that was owned by M/s Gatundu Nyakinyua Company Limited. The said company is the one that had the power to convey the subdivision to the balloted shareholder. The plaintiff tendered share certificate number 2315 dated 15/12/1981 showing that she owned 50 shares in Gatundu Nyakinyua Company Limited. She also tendered as evidence, Ballot No 1084, showing that she balloted for the suit property. She produced receipts relating to acquisition of shares in the company. She further tendered evidence showing that the land register relating to the suit property was opened on 30/10/2013 and the suit land was registered in the name of Gatundu Nyakinyua Company Limited on the same day. She further tendered evidence showing that on 31/10/2013, the company obtained a Letter of Consent from the relevant Land Control Board authorizing it to transfer the land to her. She tendered evidence showing that subsequently, the land was valued for the purpose of stamp duty which she duly paid and upon presenting the application for registration, she was registered as proprietor of the land. The plaintiff tendered evidence indicating that the two suits were triggered by the two defendants' entry into the suit land.
32. On their part, the two defendants relied on the sale agreements and on the title deed held in the name of David Kamau Njoroge. They had the original title, notwithstanding their contention that they only acquired Plot Nos 1 and 4, respectively, from David Kamau Njoroge. They did not tender any evidence on how David Kamau Njoroge came to be registered as proprietor of the land.
33. Pamela Muthoni Mutege, the Land Registrar who was alleged to have issued the title deed to David Kamau Njoroge testified as DW3. Her evidence was that she never issued the title deed that the two defendants are waving. She termed the signature and the rubber stamp on the title deed as fake.
34. The Land Registrar who was in charge of the Thika Land Registry at the time of trial testified as PW2. He tendered the land register and the parcel file relating to the suit property. Both the land register and the parcel file indicate that the plaintiff is the registered proprietor of the suit land. PW2 confirmed that the Thika Land Registry issued the title which is held by the plaintiff. He testified that the Thika Land Registry did not issue the title deed held by the defendants.
35. The totality of the above evidence is that the plaintiff fully discharged her burden of proof. On their part, the defendants were unable to explain how David Kamau Njoroge got to own the suit land which was a subdivision within a scheme owned by Gatundu Nyakinyua Company Limited. The title they waved was disowned by the alleged issuing Land Registrar.
36. The defendants' counsel made lengthy submissions focusing on the discrepancy relating to the numbering of entries in the land register vis-à-vis the title held by the plaintiff. The question of acquisition and ownership of the suit land goes beyond typographical errors in the numbering of entries. The suit land is a subdivision within a scheme that was owned by a land buying company.



The root of legitimate land ownership in the scheme begins with acquisition of shares in the company and the subsequent balloting. What follows balloting is the conveyance of the land to the balloted beneficiary. The plaintiff was able to demonstrate how she acquired the land and the title she is holding. A typographical error in the numbering of entries can not be a proper basis to warrant a finding that negates the plaintiff's ownership of the suit land.

37. I have not seen any discrepancy in the fact that the land register was opened on 30/10/2013 and the letter of consent was issued on 31/10/2013. The land register was opened in the name of Gatundu Nyakinyua Company Limited as the proprietor of the subdivision scheme and the first registered proprietor of the subdivision. Thereafter, the company obtained a letter of consent to facilitate transfer of the subdivision to the plaintiff. I find no anomaly in the sequence of events.
38. Similarly, it is clear from the application for registration that the transfer for registration of the plaintiff as proprietor of the land was booked in June 2016 as number 055/6/16.
39. For the above reasons, my finding on the first issue is that Lucy Wairimu Ndungu is the legitimate owner and registered proprietor of the suit land, Gatuanya/ Ngoliba Block 1/1084.
40. Are the two defendants trespassers on the land? My answer to the above question is in the affirmative. I find so because it does emerge from the evidence on record that David Kamau Njoroge sold to the defendants land that he knew he did not own. It is not surprising that he never bothered to carry out a proper survey exercise relating to the portions that he purported to create on the suit land. For the same reason, he never bothered to convey the portions to the defendants. Given that David Kamau Njoroge had no legitimate title to the land, he had no title to sell to the defendants. The defendants were simply conned. They are trespassers on the suit land which belongs to the plaintiff.

Disposal Orders

41. In the end, the two consolidated suits are disposed as follows:
 - a. Judgment is hereby entered in favour of the plaintiff in Thika ELC Case No 14 of 2017 in terms of prayers (a) and (b).
 - b. Judgment is hereby entered in favour of the plaintiff in Thika ELC Case No 743 "A" of 2017 in terms of prayers (a) and (b).
 - c. The plaintiff is awarded costs in the two suits.
 - d. There shall be a stay of execution for 60 days to enable the defendants to vacate the suit land peacefully.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF JULY 2023

B M EBOSO

JUDGE

In the presence of:-

Mr Ratemo Amenya for the Plaintiff /Applicant

