



**Kimani v Kiurire & another (Environment & Land Case
E021 of 2022) [2023] KEELC 18901 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E021 OF 2022**

**LN GACHERU, J
JULY 18, 2023**

BETWEEN

BEATRICE WANARI KIMANI PLAINTIFF

AND

SOPHIA WAMBUI KIURIRE 1ST DEFENDANT

JAMES WAKABA MUCHERU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein vide her claim dated 16th September 2022, sought for Judgement against the Defendants for the following orders; -
 1. A declaration that the transfer of land parcel No. Loc 8/Matharite/652, by the 1st Defendant to the 2nd Defendant is illegal, null, and void;
 2. An order that the 2nd Defendant's title to land parcel No. Loc 8/Matharite/652, be cancelled;
 3. An order that the land parcel No. Loc 8/Matharite/652, be registered in the name of the Plaintiff as the sole registered proprietor of the said land in the light of the decree in Murang'a ELC 42 of 2020;
 4. General damages;
 5. The costs of this suit; and
 6. Interest.
2. The Plaintiff averred that she was awarded land parcel No. Loc 8/Matharite/652, (the suit property) by virtue of Adverse Possession in the Judgment of Murang'a ELC Case No 42 of 2020 (O.S.). She further averred that during the pendency of the ELC Case No 42 of 2020 (O.S.), the 1st Defendant covertly transferred the said suit property to the 2nd



3. Defendant in an attempt to defeat the judgement against the 1st Defendant. The Plaintiff further averred that she remains in occupation of the suit property, while the 2nd Defendant has not made any attempt to take possession. Lastly, the Plaintiff averred that the transfer of the suit property was illegal owing to the doctrine of *lis pendens*, and thus such title ought to be cancelled and the decree of the Court in ELC Case No 42 of 2020 (O.S.) be effected by registering the Plaintiff as the owner of the suit property.
4. The suit was uncontested by the Defendants, who failed to enter appearance and/or file any Defence; The matter proceeded by way of formal proof, through viva voce evidence. The Plaintiff gave evidence for herself and called no witness.

Plaintiff's Case

5. PW1, Beatrice Wangari Kimani, the Plaintiff herein adopted her Witness Statement dated 16th September 2022, as her evidence in chief. She further produced her bundle of documents even dated as Exhibits. 1 to 28. PW1 also testified that her sole claim was for declaration that she owns the suit property, and the transfer of the same to the 2nd Defendant by the 1st Defendant was illegal and did not take her right away.
6. After *viva voce* evidence, the Plaintiff filed her written submissions, through J. N. Mbutia & Co. Advocates, on 3rd July 2023.
7. It was the Plaintiff's submissions that the Decree in Murang'a ELC No. 42 of 2020, awarded her the suit property by virtue of adverse possession, and therefore the subsequent transfer of the suit property from the 1st Defendant to the 2nd Defendant, during the pendency of the trial, was illegal. To buttress this submissions, she relied on the case of *Bernadette Wangare Muriru Vs. National Social Security Fund Board of Trustees & 2 Others* (2012) eKLR, where the Court held that under the doctrine of *lis pendens*, a party cannot be allowed to benefit from an act whose import is to frustrate and render useless the judgement of the Court in the proceedings, which he or she is a party.
8. The Plaintiff further contended that the 2nd Defendant was not party to Murang'a ELC No. 42 of 2020, wherein the subject of the decree was on adverse possession. The Plaintiff contended that the 1st Defendant did not have good title to pass to the 2nd Defendant at the time of the illegal transfer of the suit property, which was extinguished by way of adverse possession. Lastly, the Plaintiff submitted that even before the declaration of adverse possession, the 1st Defendant's capability to pass title was by virtue of the continuing right of the Plaintiff who was in possession, was wanting. The Plaintiff prayed that the Court finds in her favour.
9. Having considered the pleadings by the Plaintiff, the evidence adduced, the filed written submissions, authorities cited and the relevant provisions of law, this Court finds that the main issue for determination is:
 1. Whether the Plaintiff is entitled to the orders sought in her Claim dated 16th September 2022, for cancellation of the transfer of the suit property from the 1st Defendant to the 2nd Defendant?
10. As stated earlier, the Plaintiff seeks for cancellation of the transfer of land parcel No. Loc 8/ Matharite/652, (the suit property) from the 1st Defendant to the 2nd Defendant on the grounds that the transfer was effected during the pendency of Murang'a ELC Case No 42 of 2020 (O.S.), whose consequent judgement awarded the Plaintiff herein the suit property by way of adverse possession.
11. The Plaintiff contended that the 1st Defendant covertly transferred that suit property to the 2nd Defendant in an attempt to defeat the judgement against the 1st Defendant. The Plaintiff further



averred that she was in occupation of the suit property, while the 2nd Defendant has not made any attempt to take possession. The Plaintiff further averred that the transfer of the suit property was illegal, owing to the doctrine of *lis pendens* and thus such title ought to be cancelled and the decree of the Court in Murang'a ELC Case No 42 of 2020 (O.S.), be effected by registering the Plaintiff as the owner of the suit property.

12. Despite the failure to enter appearance and file a Defence, the law requires of the Court to look at the weight of the evidence adduced by the Plaintiff, even where the same is uncontroverted as was held in the case of *Gichinga Kibutha vs Caroline Nduku* [2018] eKLR, where the Court held as follows;

"The hearing referred to above is the one commonly known as "Formal proof". The Civil Procedure Rules do not define "Formal Proof". Black's Law Dictionary defines "Formal" as including "rules established by an institution according to certain processes". This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."

13. The burden of proof is placed on the person alleging the occurrence of an event, and where there is no evidence to challenge the allegations, the standard of proof automatically is high. Indisputably, owing to the nature and extent of orders for cancellation of title, the burden is even higher.

14. The burden as stated above, lies on the Plaintiff to demonstrate that she has met the requirements for the cancellation of the transfer of the suit property between the Defendants, and the cancellation of the title held by the 2nd Defendant. The Plaintiff is the one who has alleged and therefore she must prove as provided for under Sections 107 and 108 of the *Evidence Act*, which provide as follows:

107 (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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

15. Having perused the judgement in Murang'a ELC Case No 42 of 2020 (O.S.), it is undeniable that this Court awarded the suit property to the Plaintiff by way of adverse possession. Thereafter, through a Decree dated 23rd December 2021, this Court ordered that title to the suit property be registered in the Plaintiff's name. This Court further notes that the suit property was transferred from the 1st Defendant to the 2nd Defendant and said transfer was registered on the Green card of the suit property on 29th April 2021, which is clearly after the filing of Murang'a ELC Case No 42 of 2020 (O.S.), which had been filed on 19th December 2020.

16. Considering the above controversies surrounding the transfer of the suit property, this Court will now consider the requirements for cancellation of transfer and title as provided for under Kenyan Law.

17. It trite that a certificate of title is conclusive evidence of ownership and is *prima facie* evidence that the registered proprietor of the suit property is the owner. Section 24 of the *Land Registration Act*, gives the registered proprietor absolute rights over land. It states as follows:

Subject to this Act—



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”
18. On the other hand, Section 26(1) of the [Land Registration Act](#) gives sanctity to title and makes provisions when such title can be cancelled or revoked. It states:
- (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.”
19. This Court is further guided by Section 80 of the [Land Registration Act](#), which provides for rectification of title by way of an Order of the Court. It states:
- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
20. Rectification by Court would entails cancellation or amendments of title, under the above circumstances. In Kisumu Misc. No. 80 of 2008: [Republic v Kisumu District Lands Officer & another](#) [2010] eKLR the Court held that: -
- "It is clear that it is only the Court that can cancel or amend where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.
21. Further, the Court of Appeal in Mombasa Civil Appeal No. 98 of 2016; [Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others \(Interested Parties\)](#) [2018] eKLR, agreed with the trial Court which had previously held as follows:
- "The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.



22. In the present case, the Plaintiff claims that the transfer of the suit property from the 1st Defendant to the 2nd Defendant during the pendency of the trial was against the doctrine of *lis pendens*, which principle prohibits parties in a suit from improperly benefiting from actions that would frustrate the Court, or render the judgement useless upon delivery.
23. The definition of the term *lis pendens* was provided for in the case of [*Shivji Naran Virji v Ogla Jemeli Barngetuny*](#) [2021] eKLR, wherein the Court stated as follows:
- "The doctrine of *lis pendens* has been addressed by superior Courts in many decisions including in the case of *Ruth Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, where the Court of Appeal had the following to say;
- Black's Law Dictionary 9th edition defines *lis pendens* as the jurisdictional, power or control acquired by a Court over property while a legal action is pending.
- Lis pendens* is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of *lis pendens*, *Turner L.J, in Bellamy vs Sabine* [1857] 1 De J 566 held as follows;
- It is a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."
24. Further, in the case of *Bernadette Wangare Muriu vs National Social Security Fund Board of Trustees & 2 Others* [2012] eKLR, as submitted by the Plaintiff, the Court held as follows; -
- "The necessity of the doctrine of *lis pendens* in the adjudication of land matters pending before the Court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice.."
25. The common law doctrine of *lis pendens* was originally a doctrine of common application to both the Courts of law and equity. It rested on the principle that every suit would simply be defeated once property was disposed of, and the claimant forced to bring a new suit against the new owner, only for the latter to dispose of the new suit and the claimant to start all over again. Therefore, it holds that were it not for the *lis pendens* doctrine being the guiding factor in immovable litigations, no suit in a case where the subject matter is constantly being transferred would ever be successfully prosecuted. Thus, the doctrine of *lis pendens* is based on justice, equity, expediency and good conscience. It is based on sound policy.
26. The law will not allow or encourage litigants to give rights which are still under dispute to others, who are not litigants and in the process prejudice fellow litigants.
27. From the above holding, it is evident that the 1st Defendant transferred the suit property to the 2nd Defendant to defeat the outcome of Murang'a ELC No. 42 of 2020. Indeed, after the Judgement was entered in favour of the Plaintiff herein, she could not have the said suit property transferred in her name as the title holders had changed. The said transfer was illegal and not made in good faith.
28. Under Section 80 of the [*Land Registration Act*](#), the register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of



which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

29. This Court keenly notes that the 1st Defendant, the former proprietor of the suit property, was aware of the pending suit during the completion of the transfer of the suit property.
30. Having carefully considered the available evidence, the Court finds that the Plaintiff has proved her case against the Defendants herein on the required standard of balance of probabilities.
31. Consequently, Judgement is entered for the Plaintiff against the Defendants herein in terms of prayers No. I, II & III of the Plaint dated 16th September 2022. The Plaintiff is also entitled to costs of the suit and interest thereon.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 18TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Mr Mbuthia for the Plaintiff

1st Defendant

Absent

2nd Defendant

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

18/7/2023

