



**Gathuku v Nakuru Workers Housing Cooperative Ltd & another;  
Kariuki (Suing as the legal representative of the Estate of Joice Wangui  
Kathuku- Deceased) (Proposed Plaintiff) (Environment & Land Case  
100 of 2016) [2023] KEELC 20434 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20434 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 100 OF 2016**

**A OMBWAYO, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JOICE WANGOI GATHUKU ..... PLAINTIFF**

**AND**

**NAKURU WORKERS HOUSING COOPERATIVE LTD ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET MUMBI IGESHA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**BENARD KAMAU KARIUKI (SUING AS THE LEGAL  
REPRESENTATIVE OF THE ESTATE OF JOICE WANGUI KATHUKU-  
DECEASED) ..... PROPOSED PLAINTIFF**

**JUDGMENT**

1. This suit was filed on the 4<sup>th</sup> of April 2016 by Joice Wangui Kathuku who later passed on and the mantle was taken over by Bernard Kamau Kariuki who is now suing as the legal representative of the estate of the said Joice Wangui Kathuku who later amended the plaint on 4<sup>th</sup> November 2022. The plaintiff came to this court against Nakuru Workers Housing Co-operative Society Limited and Margaret Mumbi Igesha claiming that at all material times the plaintiff herein was the rightful, lawful, and beneficial owner and proprietor of the parcel of land known as Plot No.54 now known as Kiambogo/ Kiambogo Block2/19018 (Mwariki), arising from Mwariki 2 Kiambogo Block 2/158 the same having been allocated to the deceased by virtue of her membership in the 1<sup>st</sup> defendant's society in or around the year 1997. The deceased was the holder of ballot number 54 in respect to the suit property as issued by the 1<sup>st</sup> defendant in an exercise carried out on 29<sup>th</sup> November 1997. The plaintiff contends that the deceased paid all the requisite fees for the allocation and was regarded as the lawful and initial allottee



- of the suit property. The deceased was awaiting issuance of the title in respect of the suit property as she had taken possession upon allocation and payment of fees required.
2. The plaintiff prays for judgment thus a declaration that the plaintiff as the legal representative of the estate of Joice Wangui Kathuku (deceased) is the lawful proprietor of the parcel of land in issue.
  3. The plaintiff further prays for a perpetual injunction to issue to restrain the defendants by themselves, their agents, servants or any other person claiming under them from trespassing, entering, disposing, charging, selling, putting development and or erecting structures thereon and or dealing in any other manner with the suit property.
  4. Moreover, the plaintiff prays for an order of eviction against the 2<sup>nd</sup> defendant by herself or any other person claiming authority and or entitlement under the 2<sup>nd</sup> defendant from the suit property.
  5. Lastly, the plaintiff prays for an order directing the Nakuru Land Registrar to recall and cancel any title deed held by the 2<sup>nd</sup> defendant and an order directing the issuance of a title in respect of the suit property in the name of the plaintiff as the legal representative of the estate of the deceased Joice Wangui Kathuku.
  6. The 2<sup>nd</sup> defendant filed defence on 8<sup>th</sup> February 2017 and did not deem it fit to amend the same. She avers that the plaintiff is neither the rightful owner of the suit property nor was allocated the property by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant avers that she is the legally registered owner of the suit property having purchased it from Alice Njeri Gathoni who was the proprietor of the suit land. The defendant prays that the suit be dismissed with costs.
  7. When the matter came up for hearing, PW1 Bernard Kamau Kariuki relied upon the statement of his mother and his statement as evidence in chief. The said statements were admitted in court as evidence. He stated in a nutshell that the plot was given to his mother by Mr Charles Kariuki who had shares in the 1<sup>st</sup> defendant. He produced the share certificate and receipts. His mother went to the ballot and paid Kshs500 for five shares. He produced the ballot card that reads Joyce Wangui Kathuku as evidence of allocation. His mother was given the land but was not given the title deed. Other people came to the land destroyed the fence done by his mother ultimately the title was issued to the defendant. On cross examination she states that the defendant used force to enter the land.
  8. DW1, Margaret Mumbi Igesha a teacher in the United Arab Emirates also relied on her statement filed on 16<sup>th</sup> August 2021 that was adopted as evidence in chief. She states that the land is hers as she bought the same from Alice Njeri Gathimo. She produced the sale agreement and acknowledgment of payment and title deed. She produced the certificate of official search and title deed.
  9. On cross examination she states that she did not do an official search to confirm that the land was registered in the names of Alice Njeri Gathimo. The document was signed by Wellington Oduor Paul. She did not see any power of Attorney. Wellington Oduor Paul was the chairman of Nakuru Workers Housing Co-operative Limited. She confirms that there was no transfer and that she did not see any consent of the Land Control Board. The transaction was done between the chairman and the 2<sup>nd</sup> defendant. She paid cash money to the said Wellington Oduor Paul as the transaction was done between herself and Wellington.
  10. The plaintiff submits he is the rightful owner of the suit property Joyce Wangui Kathuku having balloted for the same as plot No.34. The plaintiff contends that he has proved his case on a balance of probability as he produced receipts issued to the late Joyce Wangui Kathuku who obtained the plot from Charles K Kariuki also deceased. The plaintiff took possession of plot and fenced it. The plaintiff submits that 2<sup>nd</sup> defendant obtained documents to the plot corruptly as the persons selling



the plot were not proprietors. The plaintiff further contends that the 2<sup>nd</sup> defendant did not exercise due diligence as she was a party to the fraud. She did not meet Alice Njeri Gathoni and that the person who executed the agreement Wellington Oduor Paul was a stranger to the property. According to the plaintiff the defendant title is tainted with fraud, illegality and corruption hence can't be waived as evidence of ownership. The plaintiff further submits that the registration of the 2<sup>nd</sup> defendant was tainted with illegality as there was no consent of the Land Control Board as required by section 6 of the Land Control Act. The plaintiff submits that the illegally obtained title of the 2<sup>nd</sup> defendant ought to be cancelled and the register rectified. The plaintiff further submits that the 2<sup>nd</sup> defendant does not qualify to be the bona fide purchaser for value without notice. The plaintiff argues that the 2<sup>nd</sup> defendant did not undertake the transaction with due diligence prior to purchasing the property as she does not have a copy of the title in the name of the vendor, no official search was undertaken and that the 2<sup>nd</sup> defendant did not execute a transfer or application to the Land Control Board for a consent and that there is no consent of the Land Control Board and that by entering into agreement with the chairman of the 1<sup>st</sup> defendant the transaction was as sham. The plaintiff submits that he is entitled to the prayers sought with costs.

11. The 2<sup>nd</sup> defendant submits that she has proved her case on a balance of probability as she is the registered owner of the property and that she is in possession. The 2<sup>nd</sup> defendant submits that allegations of fraud were not proved as required by the law. The 2<sup>nd</sup> defendant relies on the provisions of section 26 of the Land Registration Act and the findings in Evaline Karigu (suing as Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichuga) Vrs M' Chabari Kinoro (2022) eKLR.
12. On whether the 2<sup>nd</sup> defendant title ought to be cancelled the 2<sup>nd</sup> defendant submits that there is no evidence to warrant the cancellation and rectification of register ultimately to defendant submits that the 2<sup>nd</sup> defendant was a bona fide purchaser of value without notice of fraud.
13. I have considered the evidence on record and rival submissions and do find that the facts of the matter are that Nakuru Works Housing Co-op Society Ltd acquired land to be distributed to its members who had acquired shares in the company. Charles K Kariuki purchased some shares in the company. The Balloting card was issued to Joice Wangui Kathuku the mother of Charles K. Kariuki who had passed on. I am satisfied with the evidence on record that Joice Wangui Kathuku balloted for the plot no 54. I am further satisfied that parcel of land Kiambogo /Kiambogo/2/19018 (Mwariki) resulted from Kiambogo/Kiambogo/Block 2/158 No. 54. The same was allocated to Joice Wangui Kathuku by virtue of being the mother of the deceased Charles K Kariuki who had purchased the plot.
14. When the land was registered in 2016, the title deed came out in the names of Margaret Mumbi Igesha who claims that she purchased the land from Alice Njeri Gathoni. Alice Njeri Gathoni was not called to give evidence. The defendant produced the title deed that showed the suit parcel was a subdivision of P/No158. The 2<sup>nd</sup> defendant's registration was made as the 4<sup>th</sup> entry on the register and title issued. The 1<sup>st</sup> entry on the register was the 1<sup>st</sup> defendant whereas the 2<sup>nd</sup> entry was Alice Njeri Gathoni. It is not clear how Alice Njeri Gathoni was registered as a proprietor of the land and yet she never was a member of the society, never balloted never paid for the land. This court finds that Alice Njeri Gathoni was a fictitious person planted in by the company officials to defraud the plaintiff of her hard earned land. The agreement produced by the 2<sup>nd</sup> defendant purported to be signed by Alice Njeri Gathoni was a nullity and a fraud as it was not signed by Alice Njeri Gathoni but by Wellington Oduor Paul the Chairman of the company. Wellington Oduor Paul received the money from the 2<sup>nd</sup> defendant on behalf of Alice Njeri Gathoni a non-existent person. Though the 2<sup>nd</sup> defendant is the registered proprietor the title deed was obtained fraudulently as the property was acquired by the



plaintiff through purchase and as she was waiting to be registered, the officials of the 1<sup>st</sup> defendant conspired to defraud her. 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, 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.”

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 –

- 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.”

15. The law is clear that, 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 – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. This court in considering this matter referred to the case of [Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another](#) (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, un-procedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

16. The plaintiff has satisfied the court that the 2<sup>nd</sup> defendant title was obtained unprocedurally , illegally and through a corrupt scheme of the 1<sup>st</sup> defendant.
17. Whether the 2<sup>nd</sup> defendant was an innocent purchaser for value without notice, I do find that the 2<sup>nd</sup> defendant never met Alice Njeri Gathoni and could not testify as to how she looked like. The agreement was executed between the 2<sup>nd</sup> defendant and the said Wellington Oduor Paul an alleged representative of Alice Njeri Gathoni. The 2<sup>nd</sup> defendant was not shown any Power of Attorney Executed between Alice Njeri Gathoni and Wellington Oduor Paul.
18. The 2<sup>nd</sup> defendant should have questioned the rights of the said Wellington Oduor and should have known that he had no power to sell the land.



19. In - *Katende v Haridar & Company Limited* [2008] 2 E.A.173 where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as 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 that:

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.”

20. The 2<sup>nd</sup> defendant does not fit the description of an innocent purchaser for value without notice as she did not enter into agreement with Alice Njeri Gathoni , the alleged proprietor of the land.

21. In my view, the conduct of the 2<sup>nd</sup> defendant was not of a diligent bona fide purchaser as described in *Katende V Haridar & Company Limited* (supra). The 3<sup>rd</sup> appellant is not an illiterate person. She was a teacher by profession who definitely knew or ought to have known how to go about a land transaction; particularly the need for a written sale agreement signed by the proprietor of the land and not a third party. The parties signed the agreement before an advocate by the name Muthanwa who allegedly witnessed the agreement as well as payment of the purchase price. The said advocate was not called as a witness by the 3<sup>rd</sup> respondent.

22. The upshot of the above is that the plaintiff has proved his case on a balance of probabilities and I do allow the suit and do grant a declaration that the plaintiff as the legal representative of the estate of Joice Wangui Kathuku(deceased) is the lawful proprietor of the parcel of land in issue.

23. The court further grants a perpetual injunction to restrain the defendants by themselves, their agents, servants or any other person claiming under them from trespassing, entering, disposing, charging, selling, putting development and or erecting structures thereon and or dealing in any other manner with the suit property.

24. Moreover, the court grants an order of eviction against the 2<sup>nd</sup> defendant by herself or any other person claiming authority and or entitlement under the 2<sup>nd</sup> defendant from the suit property.

25. Lastly, the court grants an order directing the Nakuru Land Registrar to recall and cancel any title deed held by the 2<sup>nd</sup> defendant and an order directing the issuance of a title in respect of the suit property in the name of the plaintiff as the legal representative of the estate of the deceased Joice Wngui Kathuku and to hold the same in trust for the beneficiaries of the estate. Costs to the plaintiff.

**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**A O OMBWAYO**



**JUDGE**

