



**Mwangi v Kimani & 3 others (Environment & Land Case 321 of 2015)
[2023] KEELC 20502 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20502 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 321 OF 2015
J OMANGE, J
SEPTEMBER 29, 2023**

BETWEEN

FRANCIS THUKU MWANGI PLAINTIFF

AND

KAIRU KIMANI 1ST DEFENDANT

TERESIA WANGUI NGANGA 2ND DEFENDANT

ALICE WAMBUI NGANAG 3RD DEFENDANT

COUNTY LAND REGISTRAR NAIROBI COUNTY 4TH DEFENDANT

JUDGMENT

1. This suit arises out of land title Nairobi/block 110/231 hereinafter referred to as the suit property.
2. The plaintiff vide a plaint dated April 22, 2015 seeks the following prayers;
 - a. A declaration that he is the lawful and legally registered proprietor of Nairobi/block 110/231.
 - b. An order compelling the 4th defendant to cancel any parallel Title Deed to Land Parcel Number Nairobi/block 110/231.
 - c. A permanent injunction restraining the 1st, 2nd and 3rd defendants, their servants, workmen and agents, from entering on the plaintiffs said property, or from erecting or causing to be erected any constructions thereon, or from in any way interfering with the plaintiffs use and enjoyment of Nairobi/block 110/231.
 - d. A permanent injunction restraining the 1st, 2nd and 3rd defendants their servants, workmen and agents, from transferring, disposing of, alienating, wasting or in any manner interfering with Nairobi/block 110/231.



- e. Demolition of the developments made by the 1st, 2nd and 3rd defendants on the plaintiff's property.
 - f. Damages for trespass on the suit property.
 - g. Costs of the suit.
 - h. Interest on (f) and (g) above.
3. The plaintiff filed the suit vide a plaint dated April 22, 2015, in which he deponed that Nairobi Block 110/231 which was originally plot 588 Thome Farmers is his property by virtue of a title deed issued on October 26, 2007. He averred that in the year 2005 the 1st defendant started claiming the suit property which prompted his late mother to file a suit against him and register a caution on the property. On or about March 6, 2015 he conducted a search and found that the 1st defendant had since transferred the plaintiff's property to the 2nd and 3rd defendants fraudulently. This prompted the filing of this suit.
 4. The defendant s were duly served with all the relevant pleadings. The 1st defendant did not file any documents. The 2nd and 3rd defendants filed a statement of defence in which they denied participating in any fraud which could have been committed by the 1st defendant. They deponed that they had no information how the 1st defendant acquired the suit property. They claimed that the 1st defendant has been paying rates on the suit property, hence there is no way that the plaintiff can claim to have been paying rates. They contend they purchased the suit property for Ksh 800,000 and are registered proprietors since 2005.
 5. On May 11, 2020 the 2nd and 3rd defendants filed a notice of claim against the 4th defendant claiming indemnity from the 4th defendant on the grounds that they acquired the suit property for consideration of Kshs 800,000 after confirming from the 4th defendant that the 1st defendant is registered owner of the land. They thereafter paid for stamp duty and a transfer was duly effected.
 6. The 4th defendant too filed a defence in which they denied any knowledge of the averments in the plaint.
 7. The plaintiff testified in court on September 21, 2021 and relied on his witness statement dated April 22, 2015 in which he told the court that he is the registered owner of the suit properties herein as a beneficiary to his late father's estate which estate this suit property falls within. That he and his brother visited the suit property in April of 2015 and found that there were people constructing on the suit property and upon inquiry they received a phone call from the 1st defendant claiming he was the rightful owner of the property. This necessitated filing of a complaint at Kasarani Police station that led to the 1st defendant being charged in criminal case No 437 of 2008 at Chief Magistrates court in Nairobi in which the charges included inter alia obtaining registration of land by false pretenses on which count the 1st defendant was convicted. The plaintiff further testified that he conducted a search at the lands registry in 2011 which search indicated he was the registered owner of the property.
 8. PW2 who is the plaintiff's brother corroborated the plaintiff's testimony. The plaintiff also called Dorcas Nanyero who testified as PW 3. She told the court that in 1990 she received a brief from Thome advocates to prepare title deeds for its shareholders. She was given the original register of members which shows block 110/231 belonged to Mwangi Gakeria the plaintiff's father. It was her evidence that a title was fraudulently issued in the name of Kairu Kimani. She forwarded the title for cancellation and reported to Kasarani police station.
 9. The 2nd defendant testified based on her witness statement dated 10th March 2020 that she had legal right over the suit property as she had the title deed in her name and the 3rd defendant's name as proof of ownership. She stated that at the time of purchase from the 1st defendant, she carried out a search at the



registry and there being no restrictions, she went ahead to execute a sale agreement at a consideration of Ksh 800,000/=. She asked that the plaintiffs suit be dismissed and in the alternative the 4th defendant do indemnify her for the losses as they had issued a search certificate confirming the suit property belongs to the 1st defendant on the basis of which she purchased the property and paid stamp duty.

10. The 4th defendant filed their defence and denied any knowledge of the allegations in the plaint except for the descriptive parts. They stated that the plaint raised no allegation of wrong doing by the 4th defendant. DW4 testified as the competent person on behalf of the 4th defendant by virtue of being the Land Registrar. He stated that the 1st defendant had transferred title to the 2nd and 3rd defendants on August 28, 2014 and that the title issued was not supported by the records at the land's registry. The names of the 2nd and 3rd defendants did not appear in the register. This casts doubt on the title produced by the 2nd and 3rd defendants as proof of ownership.
11. Counsel for the plaintiff submitted that the plaintiff had adduced evidence that he acquired the property as a beneficiary of his father's estate and supported the claim with a confirmation of grant and copy of the title. He testified that he had been receiving rates alert from Nairobi City Council and paying the same. The plaintiff further produced evidence of receipt payment to Thome Farmers of survey fees and share certificate with his father's name. Lastly counsel referred the court to proceedings in criminal case 437 of 2008 in which the 1st defendant was convicted of obtaining registration of land by false pretenses.

Counsel submitted that the 2nd and 3rd defendants had not carried out due diligence before purchasing the suit property. Had they carried out due diligence they would have known that a caution had been placed by the plaintiff's mother who was then administrator in the estate of his late father. Counsel referred the court to the case of *Daniel Kipruto Metto v Chase Bank (Kenya) Limited* [2018] eKLR, wherein the court stated that it was the defendant's duty to carry out due diligence.

The court was also referred to the case of *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR to establish that the 2nd and 3rd defendants were not bona fide purchasers of the suit property as the property was purchased without proof of evidence of purchase, stamp duty evidence, and transfer fees.

Counsel for the 2nd and 3rd defendants submitted extensively on whether fraud had been sufficiently proved. Counsel referred the court to the case of *Athi Highway Developers Limited v West End Butchery Limited and others* in which the Court of Appeal emphatically stated the law on fraud and indefeasibility of title. Counsel further submitted that the 2nd and 3rd defendants were innocent purchasers for value. Lastly, counsel submitted that the 2nd and 3rd defendants are entitled to indemnity by the 4th defendant.

12. I have considered the evidence by both parties, the submissions filed herein and identify the following issues for determination; Who between the plaintiff and the 2nd and 3rd defendants has valid claim over Nairobi/block 110/231? Whether the plaintiff is entitled to damages for trespass? Whether the 2nd and 3rd defendants are entitled to indemnity from the 4th defendant?
13. Section 26 (1) of the *Land Registration Act* provides;

“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
14. On the first issue on the validity of the title, the plaintiff traced the root of his title which was transmitted to him following the administration of the estate of late father Benson Gakere Mwangi. The suit property which was initially Plot 588 Thome farmers and issued to his late father on the basis of Share Certificate 3296 which was produced in court. He produced a receipt which confirmed that his father had paid for the share certificate. He narrated to the court the steps that first his mother and then himself took when they became aware that the 1st defendant was claiming the suit property. This action resulted in the 1st defendant's conviction of Obtaining Registration of Land by False Pretenses.
 15. On the other hand, the 2nd and 3rd defendants produced a sale agreement dated April 22, 2004 and a title deed which was transferred to them on August 28, 2014. The two defendants further produced an application for official search dated November 8, 2004 and a search dated December 8, 2004. The 2nd and 3rd defendant s insist that they have established that they hold a valid title more so considering that the title by the 1st defendant which was transferred to them was first in time.
 16. There is no question that the title deed issued to the 1st defendant was issued on February 19, 2004 which is earlier than the title issued to the 2nd defendant on October 26, 2007. However, it now settled law that where there are two titles it is not enough to brandish the title and expect the court to protect it. The court must inquire into the root of the title. In this instance the criminal case convicted the 1st defendant of Obtaining Land Registration by false pretenses. This decision was not appealed against hence stands. A conviction of a criminal offence is sufficient proof that the 1st defendant obtained the title illegally. This squarely brings the title held by the 1st defendant within the exceptions envisaged by section 26 (2) of the *Land Registration Act*. It follows that the 1st defendant could not pass a good title to the 2nd and 3rd defendants.
 17. Could the 2nd and 3rd defendants be considered innocent purchasers for value? I am afraid not. They did not carry out any due diligence. The certificate of search shows it is the 1st defendant who was the vendor who applied for a search. As purchasers the 2nd and 3rd defendants made no effort to do so. There are no transfer documents to illustrate how the title was transferred to them. However, even of greater concern is that the title was issued to them when there was already a court case in which they were party as evidenced by the charge sheet of the criminal case in which the 2nd defendant was named as the complainant. They cannot therefore claim to have been unaware of the issues surrounding the title. It is even more disturbing that they chose not to testify in the criminal case in which they were named as complainants in the count of obtaining by false pretenses.
 18. On the second issue of trespass, the 2nd and 3rd defendants confirmed vide the testimony of DW 1 that they had constructed a site house in the suit property thus denying the plaintiff use of the property. The plaintiff is entitled to general damages.
 19. The last issue is whether the 2nd and 3rd defendants are entitled to an indemnity from the 4th defendant. The two defendant s did not produce a search carried out under their names before they purchased the suit property. Neither did they adduce any transfer or other documents signed by the 4th defendant. A Title deed which was issued after a criminal case had already been filed against the seller who sold them the Suit Property cannot entitle them to indemnity. As such the indemnity claim fails.



20. In view of foregoing I find that the plaintiff has proved the case on a balance of probabilities. Judgement is entered for the plaintiff against the defendants as follows;
- a. A declaration that the plaintiff is the lawful and legally registered proprietor of Nairobi/block 110/231.
 - b. The 4th defendant is to cancel any parallel Title Deed to Land Parcel Number Nairobi/block 110/231.
 - c. A permanent injunction restraining the 1st, 2nd and 3rd defendants, their servants, workmen and agents, from entering on the plaintiffs said property, or from erecting or causing to be erected any constructions thereon, or from in any way interfering with the plaintiffs use and enjoyment of Nairobi/block 110/231.
 - d. A permanent injunction restraining the 1st, 2nd and 3rd defendants their servants, workmen and agents, from transferring, disposing of, alienating, wasting or in any manner interfering with Nairobi/block 110/231.
 - e. Demolition of the developments made by the 1st, 2nd and 3rd defendants on the plaintiff's property.
 - f. General Damages for Kshs 500,000 for trespass.
 - g. Costs of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF SEPTEMBER 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Njoroge for plaintiff

Mr. Githinji for 2nd and 3rd defendants

Steve - Court Assistant

