



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Kinungi & another (Environment & Land Case 8 of 2012)
[2023] KEELC 20097 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20097 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 8 OF 2012
JO OLOLA, J
SEPTEMBER 28, 2023**

BETWEEN

HENRY THERI KARIUKI PLAINTIFF

AND

MARY WANGUI KINUNGI ALIAS MARY WANGU MBOGO . 1ST DEFENDANT

ALICE WANJIRA MIRINGU 2ND DEFENDANT

JUDGMENT

1. By his Plaint dated 26th November 2012 as filed herein on 4th December 2012, Henry Theri Kariuki (the Plaintiff) prays for Judgment against the two Defendants jointly and severally for:
 - (a) Permanent injunctive orders restraining the Defendants, their agents, servants and or employees from dealing, selling, alienating and or disposing land (parcel No.) Makuyu/Kimorori/Block III/251;
 - (b) An order for cancellation of title deed in the name of the 2nd Defendant for land parcel No. Makuyu/Kimorori/Block III/251 and rectification of the register to read the Plaintiff's (name) as the bonafide owner; and
 - (c) Costs of the suit plus interest.

2. Those prayers arise from the Plaintiff's contention that at all times material, he was the registered proprietor of and in possession of the said L.R No. Makuyu/Kimorori/Block III/251 measuring 0.2049 Ha. or thereabout. He asserts that sometime in the year 2004, the 1st Defendant filed a reference before the Makuyu Land Dispute Tribunal. As the matter before the Tribunal was pending before the Central Province Land Appeals Committee, the 1st Defendant fraudulently and unlawfully transferred the suit property to her name and subsequently in the year 2012 transferred the same to the name of the 2nd Defendant in spite of a caution lodged on the title by the Plaintiff.



3. It is the Plaintiff's case that the 1st Defendant lacked the locus standi to deal with the property in the manner she did and she had no good title to be passed to the 2nd Defendant.
4. But in their joint Statement of Defence dated 12th March 2013, Mary Wangui Kinungi alias Mary Wangui Mbogo (the 1st Defendant) and Alice Wanjira Miringu (the 2nd Defendant) aver that the decision of the Makuyu Land Disputes Tribunal was reached after the Tribunal heard the case in accordance with the law and the same was made a Judgment of the Court in D.O. Case No. 29 of 2004.
5. The Defendants further assert that there was no order of status quo made by any Court and the letter from the Appeals Tribunal did not amount to an order. It is the Defendant's case that the transfer of the land was done in accordance with an order issued in the said D.O. Case No. 29 of 2004 and that the same was not fraudulent as stated by the Plaintiff.

The Plaintiff's Case

6. At the trial herein the Plaintiff called two witnesses who testified in support of his case.
7. PW1 – Henry Theri Kariuki is the Plaintiff himself and a civil servant residing in Kabati Sub-Location, Nyandarua. He told the Court he bought the suit property from one Ibrahim Kamau Kimani in 1999 for Kshs.50,000/-. He was issued with a title deed for the same in 2000.
8. PW1 testified that they did an Official Search before the transaction which showed the vendor was the owner of the land. They visited the Chief's Office Makuyu where they were given an introduction letter which they took to the Lands Office. They then obtained the Land Control Board consent after which the title was transferred to his name and he immediately took possession of the land.
9. PW1 told the Court that sometime in 2004, he was summoned to the Makuyu District Land Tribunal. The 1st Defendant had complained to the Tribunal claiming the land belonged to her then deceased mother Peninah Wanjiku Kimungi. The Tribunal ruled in her favour. One day, the 1st Defendant's son told PW1 that they wanted to use the land. PW1 went to Murang'a and carried out an official search only to find that title had been transferred to the 1st Defendant's name and subsequently to that of the 2nd Defendant.
10. In cross-examination, PW1 conceded that the award by the Tribunal was adopted as a Judgment of the Thika Magistrate's Court. He told the Court he did not think the Tribunal had the mandate to hear the matter. He did not however apply to the High Court to quash the decision. PW1 told the Court he went to the Provincial Tribunal which told them to maintain status quo although he could not recall when the order of status quo was made.
11. PW1 told the Court he was unaware of ELC Miscellaneous No. 2 of 2012. He conceded that when the vendor testified as his witness before the Tribunal, the vendor had stated he had no ballot paper for the land and could not recall how much he had paid for it. He told the Court the Tribunal elders were rather hostile to them and that the Judgment issued in the Thika Court was not a proper one.
12. PW2 – Abraham Kamau Kimani is a farmer and a resident of Kabati in Murang'a County. He told the Court he knows the Plaintiff and that he is the one who sold the suit property to the Plaintiff. PW2 testified that the land was bought for him by his father David Kimani. The father bought for him a share and he became a member of Kagaa Farmers Co-operative Society Limited. It is the Society which then gave him a share of the land.



13. On cross-examination, PW2 told the Court he had told the Makuyu Land Tribunal that the land belonged to him and showed them the documents to that effect. He further told the Court that at the time he sold the land, the Plaintiff was not a Chief and that he became a Chief later on.
14. PW2 confirmed that the 1st Defendant produced a ballot before the Tribunal which went ahead to give her the land. He maintained however that the land did not belong to the 1st Defendant. PW2 testified that they appealed after the Court adopted the award as its Judgment. He did not however have anything overturning the Judgment.

The Defence Case

15. On their part, the two Defendants testified as such in support of their case.
16. DW1 – Alice Wanjira Miringu is a business woman residing in Kenol, Murang'a and the 2nd Defendant herein. She told the Court she bought the land from the 1st Defendant for purposes of constructing a building thereon. When she bought the land there was no indication that it had any dispute. They went to the Chief and conducted an official search before she bought the land.
17. On cross-examination, DW1 told the Court they had a written Sale Agreement with the 1st Defendant even though they had not produced the same in Court. She further told the Court she had other documents indicating she bought the land including the transfer. She had however not produced them in Court. DW1 told the Court she had no knowledge the land belonged to the Plaintiff as when they did a search, it was the 1st Defendant's name that came up. She also did not know the land had a dispute in Court until after she bought it.
18. DW2 – Mary Wangui Mbogo is a resident of Mwea and the 1st Defendant herein. She told the Court the suit land previously belonged to her mother. When the mother passed away, DW2 and her brother became the owners of the land. The brother also subsequently passed away.
19. DW2 testified that they initially had a case before the elders in Thika. The elders told the Plaintiff that the land did not belong to him. That decision of the elders was adopted as an order of the Court in Thika.
20. On cross-examination, DW2 conceded that her mother passed away on 20th February, 2001. On 31st August 2004, they went to the Tribunal and DW2 told the elders that the land belonged to her mother. She told the Court she had never seen the Green Card produced by the Plaintiff. DW2 denied having received any letter urging for the maintenance of the status quo.
21. DW2 conceded that she did not file any Succession Cause to administer her mother's estate. She told the Court she did not know PW2 and that she had no idea that he is the one who sold the land to the Plaintiff. She had however seen him before with the Plaintiff.

Analysis and Determination

22. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities to which I was referred by the Learned Advocates representing the Parties herein.
23. By his Complaint dated 26th November 2012, the Plaintiff has urged the Court to issue an order of permanent injunction restraining the Defendants from dealing with, selling, alienating and/or disposing off the parcel of land known as Makuyu/Kimorori/Block III/251 (the suit property). The Plaintiff further urged the Court to cancel the title deed for the suit property presently in the name of



the 2nd Defendant and to have the register for the same rectified to reflect the name of the Plaintiff as the bona fide proprietor thereof.

24. The basis for those prayers is the Plaintiff's contention that he was previously the registered proprietor of the said parcel of land and that the 1st and 2nd Defendants caused the property to be registered in their names through an illegal and fraudulent process.
25. On their part, the two Defendants have denied any wrong doing. It is their case that they had a dispute over the suit property which was heard and determined by the Makuyu Land Disputes Tribunal in August, 2004. The award of the Tribunal in the 1st Defendant's favour was adopted as a Judgment of the Court on 23rd December, 2004 after which the 1st Defendant executed the same and had the suit property transferred to herself. It is further their case that the 2nd Defendant subsequently purchased the suit property from the 1st Defendant as a bona fide purchaser without notice of any defect in the title.
26. From the material placed before me, the Plaintiff was registered as the proprietor of the suit on 7th January, 2000. It was the Plaintiff's case that he had purchased the suit land the previous year from Abraham Kamau Kimani (PW2) at a consideration of Kshs.50,000/-. That registration is apparently what triggered the dispute herein as the Plaintiff moved in to take possession of the land.
27. Sometime in the year 2004, the Plaintiff was summoned before the Makuyu Divisional Land Disputes Tribunal following a complaint lodged thereat by the 1st Defendant. It was the 1st Defendant's case that the suit property belonged to her mother one Peninah Wanjiku Kinungi who had by then passed away. The Plaintiff was therefore required to explain to the Tribunal the circumstances under which he had taken over the land.
28. In its decision apparently rendered on 31st August 2004, the Tribunal found in favour of the 1st Defendant stating that the suit property belonged to her deceased mother. The decision of the Tribunal was subsequently adopted as an award of the Thika Magistrates Court in District Officer's Case No. 29 of 2004 and a decree issued in terms thereof on 11th January, 2005 as follows:
 - “ 1. That Registration members No. 1982, Share Certificate dated 3rd October, 1976 and Ballot No. 25 (property sealed) dated 8th September 1984 belongs to Penina Wanjiku Kinungi;
 2. That the Defendant Mr. Henry Theri Kariuki bought the same land from Mr. Abraham Kamau Kimani who was unable to produce a proper document related to the parcel No. 251 as referred above.
 3. That though Mr. Theri has the title accused regarding the above mentioned land, this Tribunal has found out that the seller Mr. Abraham Kamau Kimani used unfair means to acquire it. We therefore found that the deceased Peninah Wanjiku Kinungi mother to the complainant is rightful owner of the Parcel No. 251 and it should revert back to her and that the claimant Miss Mary Wangui Kinungi should follow the matter through the right channel.”
29. As it were, it was not exactly clear as to what the Tribunal meant by requiring the 1st Defendant to follow the matter through the right channel. After waiting a few years and following an application



she filed dated 27th October, 2010 in the same Thika District Officer's Case No. 29 of 2004, an order was made by the Honourable K. W. Cheruiyot – DM II on 14th March, 2011 as follows:

“ Order

Upon reading the application dated the 27th day of July, 2010 filed with this Honourable Court under Order XXI Rule F 28(5) of the Civil Procedure Rules and the sworn Affidavit of Mary Wangui Kinungi and Upon Hearing the Counsel for the Plaintiff/Applicant in the absence of the Defendant/ Respondent who was duly served, It Is Hereby Ordered:-

- (a) That the Executive Officer be and is hereby authorised to sign all the necessary documents to have title number Makuyu/Kimorori/Block 3/251 transferred to the Plaintiff herein; and
- (b) That the costs of this application be and is hereby provided for.”

30. That order was registered on the title for the suit property on 30th August, 2011 and a title deed was subsequently issued in the name of the 1st Defendant on 1st September, 2011.

31. As it were, the jurisdiction of the Land Disputes Tribunals was provided for under Section 3(1) of the Land Disputes Tribunal Act (now repealed) as follows:

“ 3.

(1) Subject to this Act, all cases of a civil nature involving disputes as to –

- (a) the division of, or the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land

Shall be heard and determined by a Tribunal established under Section 4.”

32. Clearly, a reading of the above provision reveals that the Tribunal had no jurisdiction to deal with the ownership of the suit property. As the Court of Appeal restated in Joseph Malakwen Lelei & Another v Rift Valley Land Disputes Appeals Committee & 2 Others [2014] eKLR:

“On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabor it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

“3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to:

- (a) the division of, or determination of boundaries to land, including land held in common;
- (b) a claim to occupy, or work land; or
- (c) trespass to land.”

Evidently the above provision does not include jurisdiction to deal with issues of determination of title or ownership of registered land ... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate



on the matter before them, then all other grounds become moot. We say so because it is trite that where a Court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision or award that results from such a process must be construed as a nullity ...”

33. In the matter before me, the Makuyu Divisional Land Disputes Tribunal clearly acted in excess of its jurisdiction when it purported to find that the deceased Peninah Wanjiru Kinungi (mother to the 1st Defendant) was the rightful owner of the suit property. That decision as stated by the Court of Appeal in the Joseph Malakwen Lelei case (supra) was null and void and every other decision including the decree, emanating from its adoption as an order of the Court must be construed as a nullity.
34. That being the case, the next question that this Court must grapple with is whether or not the 2nd Defendant was a bona fide purchaser for value without notice of any defects on the 1st Defendant’s title. It was the 2nd Defendant’s case that she did purchase the suit property from the 1st Defendant after conducting an official search and establishing that indeed the suit property belonged to the 1st Defendant as per the records held at the Lands Registry.
35. From a perusal of the Green Card produced for the suit property, it is apparent that the 2nd Defendant was registered as the proprietor of the suit property on 16th February, 2012, just about five (5) months after the 1st Defendant’s name was entered on the Register of the suit property.
36. Black’s Law Dictionary 11th Edition defines a bona fide purchaser as follows:

“Someone who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims”

37. Considering that provision in the Ugandan case of *Katende v Haridar & Company Limited* [2008] 2 EA 173 [cited with approval in *Mohamed v Dubai & Another* [2022] KECA 442 (KLR)], it was 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) purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not a party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against a claim of any prior equitable owner.”



- 38. In support of her claim herein, the 2nd Defendant informed the Court that they had executed a Sale Agreement with the 1st Defendant and that she had other documents including a duly executed transfer to prove that she bought the land. None of those documents were however placed before the Court. No evidence was adduced before me as to when the sale was done and as to the consideration that passed therefor.
- 39. As provided under Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which she asserts must prove that those facts exist. In the matter herein, the 2nd Defendant has not produced any iota of evidence to support the fact that she acquired the property as a bona fide purchaser and that she holds an absolute right over the property.
- 40. In the premises, I am persuaded that there was merit in the Plaintiffs case and that the Plaintiff has proved his case on a balance of probabilities.
- 41. Accordingly, Judgment is hereby entered for the Plaintiff as against the Defendants as follows:
 - (a) A permanent order of injunction is hereby issued restraining the Defendants, their agents, servants and/or employees from dealing with, selling, alienating and/or disposing land parcel No. Makuyu/Kimorori/Block III/251.
 - (b) An order is hereby issued directing the Land Registrar to cancel the title deed in the name of the 2nd Defendant for land parcel No. Makuyu/Kimorori/Block III/251 and to rectify the register thereof to read the Plaintiff's name as the proprietor thereof.
 - (c) The Plaintiff shall have the costs of this suit.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 28TH DAY OF SEPTEMBER, 2023.

In the presence of:
Ms Wambui Mwai for the Plaintiff
Ms Lucy Mwai for the Defendants
Court assistant – Kendi

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J. O. OLOLA
JUDGE