



Kabura (Suing as the administrator of the Estate of Johnstone Njuguna Mwangi) v Muchene & another (Environment and Land Case Civil Suit E057 of 2021) [2023] KEELC 20404 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E057 OF 2021
MD MWANGI, J
SEPTEMBER 26, 2023**

BETWEEN

ANNAH WANJIRU KABURA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHNSTONE NJUGUNA MWANGI) PLAINTIFF

AND

ANNE NJERI MUCHENE 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

JUDGMENT

Background

1. By the Plaintiff dated 16th February, 2021, the Plaintiff sought for;
 - a. An order directed to the 1st Defendant to cease forthwith interfering with the Plaintiff's possession of parcel Number LR 12672/73 9 (hereinafter referred to as 'the suit property').
 - b. A declaration that the suit land LR Number 12672/73 belongs to the Plaintiff and or the Estate of Johnstone Njuguna Mwangi.
 - c. An order directed to the 2nd Defendant to cancel and or revoke any title and or transfer done in favour of the 1st Defendant and to thereafter process fully registration of grant issued in favour of the Plaintiff and subsequently issue the Plaintiff with a provisional title to LR No. 12672 IR 91087. The Plaintiff having reported loss of the original title and advertised the said loss.
 - d. Costs of this suit
 - e. Any other or further relief as this court may deem just.



2. The Plaintiff avers that suit property was registered in the name of the late Johnstone Njuguna Mwangi, her late husband. The Plaintiff is the legal administrator in the estate of her late husband.
3. The Plaintiff states that sometime in the year 2019, she misplaced and or lost the original title of the suit property, which loss she reported to the police station and was issued with Occurrence Book Number OB59/11/12/2019. Prior to reporting the said loss to the police, she had conducted both manual and online searches of the title to the suit property both of which confirmed that the suit property was still registered in the name of the deceased.
4. Subsequently, and in accordance with the laid down procedure, an advertisement was placed in the Newspaper on the 28th May, 2020. A provisional or duplicate certificate was to be issued by the 2nd Defendant. However, during the pendency of the advertisement, the Plaintiff avers that the 1st and 2nd Defendants fraudulently transferred the property to the 1st Defendant. The Plaintiff accuses the Defendants of using forged documents to effect the transfer of the title to the suit property. She alleges that the 2nd Defendant intentionally delayed registration of her documents so as to give way to the illegal transfer to the 1st Defendant.
5. The Plaintiff alleges that the 1st Defendant through his agents has now embarked on evicting her from the Suit property, trespassing thereon and using force to destroy the Plaintiff's well, interfered with the fence, beacons and growing crops. All these actions are aimed at denying the Plaintiff entry to and possession of the suit property. She particularizes the 1st Defendant's acts of trespass in her plaint.

1st Defendant's Defence

6. The 1st Defendant filed a Statement of Defence dated 16th May, 2022 claiming that she purchased the land from the deceased. She claims that at the time of purchase, the deceased claimed to have lost his title. She therefore applied for a copy of the original title number 12672 where title number 12672/73 had emerged from. Upon verification that the deceased had indeed been issued with a title from the mother title, she proceeded to purchase the land and was subsequently issued with a title in the year 2006. She alleges to have been in possession of the land since then where she undertakes farming.

2nd Defendant Defence

7. The 2nd Defendant on the other hand filed a Statement of Defence dated 18th March, 2021. The 2nd Defendant denied being engaged in any fraudulent act or unprocedurally registering the land in the name of the 1st Defendant and puts the Plaintiff to strict proof. The 2nd Defendant prays that the Plaintiff's claim against it be dismissed with costs.

Evidence adduced

8. During the hearing, the 1st Defendant despite being served with a hearing notice, did not attend court to testify. The 2nd Defendant on the other hand though represented in court did not call any witness.
9. The Plaintiff, Annah Wanjiru Kabura, testified in support of her case as PW 1. She adopted her Witness Statement dated 16th February, 2021 as her evidence in-chief. She also produced the documents in the Plaintiff's List of Documents dated 16th February, 2021 as exhibits which were marked 'PE 1-10'.
10. PW I asserted that they had not sold the suit property. The grant of letters of administration in respect of the estate of the deceased were issued in Thika Succession Cause No. 120 of 2018 were confirmed on 4th July, 2019. The suit property was listed as part of the deceased's properties. The 1st Defendant did not file any objection in the Succession proceedings.



11. In cross-examination by counsel for the 2nd Defendant, PW 1 stated that her late husband died in 2016. That the 1st Defendant is a stranger to her. She denied that the 1st Defendant has been in possession of the suit property since 2006 as alleged.
12. It was her evidence that although she accuses the Chief Land Registrar in her witness statement of not advising appropriately, she confirmed that she had not adduced any document evidencing a complaint to the Land Registrar. She had only complained at the County Government's Offices.

Court's directions

13. At close of the hearing, the court directed parties to file their respective written submissions. The Plaintiff and the 2nd Defendant complied. The Plaintiff's submissions are dated 23rd March, 2023 whereas the 2nd Defendant's submissions are dated 9th June, 2023.

Issues for Determination

14. In this Court's opinion, the issues for determination are as follows;
 - a) Whether the Plaintiff has established that the deceased was the lawful owner of the suit property;
 - b) Whether the 1st Defendant's title to the Suit Land should be cancelled and the same reverted to the deceased's estate; and
 - c) Who bears the costs of this suit?

Analysis and Determination

A. Whether the Plaintiff had established that the deceased was the lawful owner of the suit property

15. As stated earlier, the Defendants filed Statements of Defence denying allegation levelled against them in the Plaintiff. The Defendants did not however call any evidence to prove the allegations in their their statements of defences. It follows then that the Defendants' Statements of Defence remained mere allegations. In the case of North End Trading Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited vs. City Council of Nairobi (2019) eKLR the court stated that:-

“...where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.”

16. However, although the Plaintiff's case is undefended, the duty imposed on her of proving the issues of fact pleaded in the case is not taken away by the fact that the suit is undefended. The burden of proof being on the Plaintiff to prove her case is not in doubt. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

17. Sections 109 and 112 of the same Act further provide as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.



112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
18. The Plaintiff avers that she is the administratrix of her late husband’s estate. She produced the Grant of Letters of Administration to that effect. The deceased died on the 15th March, 2016. She further adduced a Certificate of Title in respect of IR Number, 91087 registered in the deceased’s name in 2002 as proof of ownership. That numerous searches conducted at the lands office do confirm the said position.
19. She stated that she had cleared all rates arrears with the County Government of Nairobi. She accuses the Defendants of fraudulently transferring the suit property to the 1st Defendant when she sought for a provisional title having lost the original title. Further, that the suit property forms part of the deceased Estate as per the confirmed Grant of Letters of Administration, and that the 1st Defendant never objected to the Succession proceedings.
20. Although the 1st Defendant alleges that she purchased the suit property from the deceased before his demise, she did not adduce evidence to prove the assertion. In any case, the allegations contained in the Statement of Defence remain mere allegations.
21. I find that the Plaintiff has satisfied this court on a balance of probability that her late husband Mr. Johnstone Njuguna Mwangi was the rightful owner of the suit property. Upon his demise, the suit property devolves to his beneficiaries. The Plaintiff’s title should therefore prevail. No evidence was called by the Defendants to challenge the same.
22. The second aspect that I must address is the import of the issuance and confirmation of the grant of letters of administration in the estate of the late Johnstone Njuguna Mwangi to the Plaintiff.
23. In the case of the Estate of the late Kabuta Kamara Nguuro alias Pharis Njegegu (deceased) (2002) eKLR, the Court cited with approval the decision in the case of Rose Wanjiku Kuria vs. Ng’ang’a Mugwe (2003) eKLR where the Court held that by virtue of Section 79 of the Law of Succession Act, an administrator gets all the property of the deceased vested in him. The Black’s Law Dictionary, 11th Edition, defines the term ‘Vest’ as, “to confer ownership (of property) on a person.”
24. In other words, the confirmation of the grant has already conferred ownership of the suit property upon the Plaintiff.

B. Whether the 1st Defendant’s title to the Suit Land should be cancelled and the same reverted to the deceased’s estate;

25. Section 26(1) of the Land Registration Act provides as follows:

“the Certificate of Title issued by the Registrar upon registration, 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 the 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



- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme.
26. As may be observed, the law is extremely protective of title and provides only two instances for the 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 illegally, un-procedurally or through a corrupt scheme.
27. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR, held as follows:
- ‘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 and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’
28. Under Section 80 of the Registration of *Land Act*;
- (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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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. From the foregoing, the transfer of the title to the suit property from the name of the deceased to that of the 1st Defendant is shrouded in mystery. It is not clear and no explanation has been offered how the title was transferred. The Plaintiff has been able to demonstrate that the deceased was the lawful owner of the suit property. She was categorical that the deceased never sold the suit property to the 1st Defendant or to any other person for that matter. The acquisition of the title by the 1st Defendant was not only unprocedural but also obtained by a corrupt scheme.
30. That said and done I hold that the Plaintiff has proved his case on a balance of probabilities and is entitled to the prayers sought in the plaint. Consequently, I hereby make a finding in favour of the Plaintiff in the following terms:
- a. An order be and is hereby issued directing the 1st Defendant to cease forthwith interfering with the Plaintiff’s possession of parcel Number L.R 12672/73.
- b. A declaration be and is hereby issued declaring that the suit land LR Number 12672/73 belongs to the Estate of Johnstone Njuguna Mwangi and should be dealt with in accordance with the grant of letters of administration issued in Thika Succession Cause No. 120 of 2018 and confirmed on 4th July, 2019.
- c. The 2nd Defendant be and is hereby directed to cancel and or revoke any title and or transfer done in favour of the 1st Defendant and to thereafter process full registration of the grant in favour of the Estate of Johnstone Njuguna Mwangi and subsequently issue the Plaintiff with



a provisional title to LR No. 12672 IR 91087; the Plaintiff having reported loss of the original title and advertised the said loss.

- d. The costs of this suit are awarded to the Plaintiff against the 1st Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Njonjo for the Plaintiff

Ms. Mwalози for the 2nd Defendant

No appearance for the 1st Defendant

