



**Kibera v Mwangi & another (Environment & Land Case 142'B' of 2021)  
[2023] KEELC 20184 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20184 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 142'B' OF 2021**

**JG KEMEI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**LUCY WAIRIMU KIBERA ..... PLAINTIFF**

**AND**

**ANTONY KIMANI MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**MWANA MUKIA HOUSING COOPERATIVE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff sued the Defendants vide an amended Complaint dated the 30/4/2019 and filed on even date seeking the following orders:-
  - a. An Order of permanent injunction restraining the 1<sup>st</sup> Defendant, either by himself, his agents, servants representatives or any other person claiming under him from trespassing into, entering, constructing, selling, charging, gifting or in any other way dealing with the Plaintiff's parcel of land herein as L.R. NO. RUIRU/KIU BLOCK 8/1144 forthwith, and the purported title deed held by him in respect to the suit land be cancelled.
  - b. An order of injunction compelling the 1<sup>st</sup> Defendant to forthwith remove the illegal structures he has constructed on the Plaintiffs' parcel of land known as L.R. No. Ruiru/Kiu Block 8/1144 and to forthwith vacate from the said parcel of land, failing which he be forcefully evicted and the illegal structures demolished at his cost.
  - c. In the alternative, and without prejudice to the foregoing, and in the event that the Honorable Court makes a finding that the 1<sup>st</sup> Defendant holds a valid title deed to the suit land, then the 2<sup>nd</sup> Defendant herein be compelled by an order of this Honorable Court to compensate the Plaintiff with a plot of a similar value, and within the same locality as the parcel of land known as L.R. NO. RUIRU/KIU BLOCK 8/1144, or in the alternative, to pay the Plaintiff



a monetary compensation equivalent to and or based on the current market value of the suit land upon valuation thereof.

- d. Costs of the suit.
  - e. Any other relief that this Honorable Court may deem just and fit to grant.
2. The Plaintiff avers that she is a member of the 2<sup>nd</sup> Defendant being member No 1740 and the owner of plot No 1144 having been allocated on the 10/1/1989. That a title was issued in her favour on the 6/12/2013.
  3. The Plaintiff averred that she visited the suit land on the 25/10/2015 and found 1<sup>st</sup> Defendant undertaking illegal construction on the suit land and despite being informing him that she was the lawful owner of the land he continued adamantly. The Plaintiff's claim against the 1<sup>st</sup> Defendant is for trespass and illegal constructions thereon.
  4. In the alternative and on a without prejudice basis, the Plaintiff contends that in the event the 1<sup>st</sup> Defendant is found to be the lawful owner, the 2<sup>nd</sup> Defendant be compelled to compensate the Plaintiff with a plot of similar value within the same locality or in the alternative compensate the Plaintiff at current market value of the suit land.
  5. Particulars of illegalities are pleaded under para 11 as follows;
    - a. Failing to procure a proper title deed in favor of the Plaintiff in respect to the parcel of land known as L.R. NO. RUIRU/KIU BLOCK 8/1144.
    - b. Facilitating in procuring of a parallel title deed to third parties in respect to the Plaintiff's parcel of land, and in particular, in favor of third parties, including the 2<sup>nd</sup> Defendant herein, his agents' servants and representatives.
    - c. Failing to keep proper records of members and their respective plots, and hence mixing the details in respect to the plot herein to the detriment of the Plaintiff.
    - d. Failing to secure the interest of the Plaintiff as a member, and in particular in regard to her parcel of land known as L.R. NO. RUIRU/KIU BLOCK 8/1144, and equally failing to ensure that the Plaintiff obtains title documents to an undisputed lot thereof.
    - e. Illegally and unlawfully procuring title deed in respect to the Plaintiffs' parcel of land known as L.R. No Ruiru/Kiu Block 8/1144 in respect to none members of the 2<sup>nd</sup> Defendant.
  6. The 1<sup>st</sup> Defendant denied the Plaintiff claims vide his amended defence dated the 17/11/2015 amended on the 5/8/2019 and filed on 8/9/19.
  7. The 1<sup>st</sup> Defendant contends that he is the lawful owner of the suit land having acquired it on the 21/6/13 and taken possession thereon. He denied trespass and all acts of illegal construction on the suit land. He was of the view that it is the Plaintiff who does not have a good title and urged the Court to dismiss the suit with costs.

### **The evidence**

8. The Plaintiff's case was led by the Plaintiff who testified as PW1. She relied on her witness statement dated the 27/10/2015 in evidence in chief and produced documents in support of her case marked as PEX No. 1-7.



9. She introduced herself as a Professor at the University of Nairobi. That she is a member of the 2<sup>nd</sup> Defendant No 1740 as shown in the 2<sup>nd</sup> Defendant's members register and confirmed by the letter dated the 4/12/2013 authored by the 2<sup>nd</sup> Defendant. That she acquired the shares vide Share Certificate No 1740 issued on the 10/1/1989.
10. In cross she stated that her title was issued on 6/12/13. That there are two green cards opened for the same land. That the 1<sup>st</sup> green card shows that there were other registered persons on the title being Francis Kariuki and Grace Njuguna before the 1<sup>st</sup> Defendant. That she did not enjoin the first two persons in the suit. That the second green card shows registration in her favour, being entry No. 2. That when she got registered in 2013 the 1<sup>st</sup> register shows the land was already registered in the name of the 1<sup>st</sup> Defendant. That she was yet to fence nor develop the land and that the photos showing developments on the suit land were carried out illegally by the 1<sup>st</sup> Defendant. That Susan Wanjiru Kamau is not a witness though she works for the 2<sup>nd</sup> Defendant and she processed the title for her. That she collected the title on 25/1/2014 from the 2<sup>nd</sup> Defendant. That the letter dated the 4/12/2013 contains the names of 4 persons whose titles were ready for collection and hers was one of them.
11. With that the Plaintiff closed her case.
12. The Defendant's evidence was led by 2 witnesses. DW1- Antony Kimani Mwangi relied on his witness statement dated the 17/11/2015 and produced documents marked as DW1-9 in support of his case. He introduced himself as a Quantity Surveyor working for gain in the Republic of Tanzania.
13. The witness stated that she was approached by Grace Wanjiru Njuguna on or around the 13/5/13 with a plot for sale and on carrying out a search at the lands office he found out that the plot was indeed registered in the name of the seller. At that time the suit land was charged to Family Bank. That they entered into an agreement of sale and paid the full purchase price of Kshs 1.3 Million out of which Kshs 500,000/- was paid to the bank to clear the loan. The land was registered in his name on the 23/7/13 and was duly issued with a title. That little had he commenced developments on the suit land than the Plaintiff visited the suit land in the month of October 2015 and alleged that she is the owner of the land. That alarmed he informed the seller the new developments who proceeded to seek another search at the lands office which showed that he was the registered owner. However, that he carried out a second search in December 2017 whose results showed that the land was registered in the name of the Plaintiff. That the Land Registrar requested him to hand over the original title to him and informed him that the land belonged to the Plaintiff and that he should look for her to explore a solution on the matter.
14. In cross the witness informed the Court that he learnt from the Land Registrar that the title was duplicated. That Mercy Wangui Kimani his wife entered into the agreement for sale on the 2/5/12 with Grace Wanjiku Njuguna, the previous owner of the land. That he did not make any inquiries at the office of the 2<sup>nd</sup> Defendant to verify the history of the suit land. He admitted that indeed there are two registers in respect to the same parcel of land. That both himself and the Plaintiff have titles to the same parcel of land. That he does not know Githinji the first registered owner who sold the land to Grace W Njuguna.
15. DW2- Grace Wanjiru Njuguna testified and stated that she lives in Githurai 44 and is a business woman. She relied on her witness statement dated the 17/11/2015 in evidence in chief. That on the 7/10/10 she purchased the suit land from Francis Githinji Kariuki at the price of Kshs 500,000/- and thereafter issued with a title deed on the 15/10/10. That in the year 2013 she sold the suit land to the 1<sup>st</sup> Defendant. That she lives next to the plot and she knows that it belonged to the 2<sup>nd</sup> Defendant who subdivided the large parcel into small plots and allocated to its members. That she did not ask Githinji if he was a member of the 2<sup>nd</sup> Defendant before purchasing the land. That she bought the land



- through a land broker. Save for the title that Githinji held, he did not give her any documents to show his membership with the 2<sup>nd</sup> Defendant.
16. With consent of the Learned Counsels of the parties summons were issued against the Land Registrar Ruiru to testify in Court. DW3- Robert Mugendi Mbuba introduced himself as the Land Registrar No 327 currently serving at Ruiru Land Registry.
  17. The witness informed the Court that from the land records the suit land has two registers opened on the 2/8/2010 and 5/12/13 respectively. He produced the documents marked as DEX No. 10-11. The witness confirmed the Block 8 KIU belonged to the 2<sup>nd</sup> Defendant who subdivided the land into subplots and that before 2012 the first registration on the title of such lands was the GOK on behalf of the 2<sup>nd</sup> Defendant (allottee of the land of its members). That the company would forward the names of the allottees to the Commissioner of Lands for titling and issuance of titles. He stated that he had no evidence or documents to show that Francis Githinji was ever a member of the 2<sup>nd</sup> Defendant. That with respect to the title of the Plaintiff, it was registered in the name of the 2<sup>nd</sup> Defendant first before that of the Plaintiff.
  18. The witness informed the Court that he cannot state with certainty who the registered owner of the land is. That there are no documents from the 2<sup>nd</sup> Defendant to open either of the green cards. That one title was duplicated in the small book and another in the binder. These were endorsed on the green cards for each register. That the 2<sup>nd</sup> Defendant would be in a position to tell who the owner of the land according to their records and register of its members is as they are the custodians of the same. He was categorical that the processing of the titles was undertaken by the 2<sup>nd</sup> Defendant on behalf of its members.
  19. The 2<sup>nd</sup> Defendant did not file any defence nor present any evidence at the hearing of the suit.

### **The written submissions**

20. The Plaintiff submitted that the crux of the dispute lies in determining the root of the title. That the 2<sup>nd</sup> Defendant the original owner of the land subdivided the land into plots and allocated its members, one of which is the Plaintiff. That according to the Secretary of the 2<sup>nd</sup> Defendant one Susan Wanjiru Kamau the Plaintiff is their member and not Francis Githinji Kariuki. That they neither cleared the title for processing in his name nor registered him as a member. That it was upon the 1<sup>st</sup> Defendant to demonstrate the root of title an obligation that he failed to do so.
21. It was the view of the Plaintiff that she discharged her burden of proof by establishing the root of her title however the 1<sup>st</sup> Defendant failed to proof the same.
22. The 1<sup>st</sup> Defendant objected to the admission in evidence of the Affidavit of Susan Wanjiru Kamau on the basis that the 2<sup>nd</sup> Defendant failed to file a defence and secondly the said witness ought to have testified to allow for cross examination and the testing of the veracity of the evidence.
23. Further that the 1<sup>st</sup> Defendant was an innocent purchaser for value. That in the absence of any evidence by the 2<sup>nd</sup> Defendant it would be impractical to hold that the Plaintiff is the owner of the land. Further the Plaintiff was queried why it took her 24 years to process the title and in addition he submitted that the Plaintiff was hoodwinked by the 2<sup>nd</sup> Defendant that she was its member and refused to come to Court to tender any evidence in support.

### **Analysis and determination**

24. The key issue for determination is whether the Plaintiff has proven her case.



25. The undisputed facts of this case is that there are two registers created for one parcel of land. The green card for the parcel held by the 1<sup>st</sup> Defendant was created on the 2/8/10 in the name of the GOK. On even date it was registered in the name of Francis Githinji Kariuki and a title issued. On the 14/10/2010 the land became registered in the name of Grace Wanjiru Njuguna who testified that she purchased it from Kariuki. She charged the suit land to Family Bank of Kenya Limited on the 26/1/2011 and discharged on the 4/6/18. On the 21/6/13 the title was registered in the name of the 1<sup>st</sup> Defendant and title was issued to him on the 23/7/13.
26. The second register was opened on the 5/12/13 in the name of the 2<sup>nd</sup> Defendant and on even date transferred to the Plaintiff who got a title issued in her name on the 6/12/13.
27. It is the Plaintiff's case that in 1989 she joined the membership of the 2<sup>nd</sup> Defendant as member No 1740 and was issued with a Share Certificate dated the 10/1/1989. That she was allocated plot No 1144 as shown in the said Share Certificate. That in 2013 she paid the 2<sup>nd</sup> Defendant the sum of Kshs 35,000/- being title deed processing fees and thereafter collected the title issued in her name on the 6/11/2013.
28. The 1<sup>st</sup> Defendant on the other hand led evidence that he is the owner of the suit land having purchased the same from Grace W Njuguna took possession and developed the same.
29. Title to land is governed by law. Section 26 of the *Land Registration Act* mandates this Court to take the certificate of title issued by the Land Registrar upon registration or to a purchaser of land upon transfer or transmission as prima facie evidence that the person registered therein as proprietor of the land is absolute and indefeasible owner subject to the limitations and conditions permitted in law. The law also provides for the circumstances in which a title may be impeached that is to say;
  - 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.
30. The issue of duplication of titles has been a source of dispute in this country for a while and Courts have more than once expressed itself on the matter. I will refer to some illuminating decisions as a guide in this matter.
31. In resolving a case of duplication of title and registers Courts look into the root of each title to determine who the rightful owner is. It is not enough to have a title but the process of acquisition of the same must be one that accords with the law. On the root of title the 1<sup>st</sup> Defendant relied on the case of *Hubert Martin & 2 Others Vs. Margaret J. Kamar & 5 Others* (2016)eKLR; where the Court stated as follows:-
 

“ A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain.”
32. The Court of appeal while dealing with the same matter of duplicated titles in the case of *Wreck Motors Enterprises Vs. Commissioner of Lands* (1997) stated as follows;
 

“ .... like equity keeps teaching us first in time prevails.”



33. The decision of the Court of Appeal above is exceptional in that there must be absence of fraud illegality or unprocedurally save for mistake.
34. With the above in mind I shall now examine the evidence led in this case. It is not in dispute that the 2<sup>nd</sup> Defendant was the original owner of the land which it subdivided and allotted to its members. For one to acquire land he first of all had to become a member of the company. The Plaintiff presented a Share Certificate showing that she was member No 1740 and allotted plot No 1144. The members register presented in evidence attests to this position that the Plaintiff was indeed a member of the 2<sup>nd</sup> Defendant. PW1 and DW3 were in agreement that the 2<sup>nd</sup> Defendant did process titles for its members. PW1 presented a receipt of payment dated the 11/11/12 being the title processing fees paid to the 2<sup>nd</sup> Defendant. Further vide a letter dated the 4/12/2013 authored by the 2<sup>nd</sup> Defendant disclosed the names of land owners whose titles were undergoing processing, one of which was the title of the Plaintiff. PW1 led evidence that she collected her title from the 2<sup>nd</sup> Defendant. Such is the foundation of the title of the Plaintiff.
35. The Plaintiff having asserted the genesis of her title the onus shifted to the 1<sup>st</sup> Defendant to show how he acquired his title. The 1<sup>st</sup> Defendant led evidence that he purchased the title from Grace W Njuguna. The witness stated as follows;
- “I entered into agreement with the vendor ... signed the agreement and paid Kshs 1.3 Million... The sale agreement was between Grace W Njuguna and Mercy Wangui Kimani, my wife.. ... I did not carry out a search before entering into the agreement of sale. I knew the seller well ... I did not visit the offices of the 2<sup>nd</sup> Defendant to verify if the land had been issued to Francis Githinji Kariuki..... I did not know Kariuki who allegedly sold the land to Ms Njuguna.”
36. The evidence of the 1<sup>st</sup> Defendant is very telling in the manner he casually purchased the land through his wife Mercy. He continued to lead evidence that he only visited the Lands office in December 2015 after the Plaintiff had raised a claim over the suit lands. In his own words he stated as follows;
- “However, that he carried out a second search in December 2017 whose results showed that the land was registered in the name of the Plaintiff. That the Land Registrar requested him to hand over the original title to him and informed him that the land belonged to the Plaintiff and that he should look for her to explore a solution on the matter.”
37. The evidence above shows that the 1<sup>st</sup> Defendant did not carry out due diligence on the land before purchasing it from the said Njuguna.
38. DW2 in her evidence stated she was shown the land by a broker and not Kariuki and while she knew the plot originally belonged to the 2<sup>nd</sup> Defendant, she did not see the need to carry out due diligence at the 2<sup>nd</sup> Defendants office as to whether or not the said Kariuki was their member. She said that it is the broker who informed her that the land belonged to Kariuki and she added that since the land was a “hot cake” she proceeded to buy it without wasting time. That Kariuki did not show her any documents to demonstrate that he was a member of the 2<sup>nd</sup> Defendant’s company.
39. From the evidence above, it is clear that Ms Njuguna did not carry out due diligence and indeed her evidence is testament that she acquired the property in haste. The 1<sup>st</sup> Defendant too never carried out



any due diligence as to the root of the title. I am guided by the decision of the Court of Appeal in the case of *Munyu Maina Vs Hiram Gathiha Maina* where the Court had to say the following;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

40. Going by the above decision it follows that the 1<sup>st</sup> Defendant failed to prove the root of title that he allegedly acquired. It is undisputed that the land belonged to the 2<sup>nd</sup> Defendant and that the 1<sup>st</sup> Defendant has not succeeded in proving that it acquired a good title from Ms Njuguna. Ms Njuguna in turn failed to show that she too acquired a good title from Kariuki. The Court is therefore not persuaded that the 1<sup>st</sup> Defendant has proven bonafides in the manner that he acquired the land. I find that the title in the hands of the 1<sup>st</sup> Defendant falls under the 2<sup>nd</sup> limb of Section 26 of the [Land Registration Act](#) which states as follows;

“Where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.”

#### **Cancellation of title**

41. Having held that the title of the 1<sup>st</sup> Defendant cannot stand the test of the law, the same is found to be illegal. The title cannot be afforded any protection in law on account of its illegality. Mandated by Section 80 of the [Land Registration Act](#), this Court proceeds to hold that the title and the register be and are hereby cancelled. This is to avoid the same being used for other ulterior motives and at the expense of unsuspecting citizenry.

#### **Costs**

42. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Plaintiff's case is merited and therefore entitled to costs.

43. In the end I find that the Plaintiff has proven her case and consequently enter judgement as follows;

- a. An Order of permanent injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant, either by himself, his agents, servants representatives or any other person claiming under him from trespassing into, entering, constructing, selling, charging, gifting or in any other way dealing with the Plaintiff's parcel of land herein as L.R. NO. RUIRU/KIU BLOCK 8/1144 forthwith, and the purported title deed held by him in respect to the suit land be cancelled.
- b. An order of injunction be and is hereby issued compelling the 1<sup>st</sup> Defendant to forthwith remove the illegal structures he has constructed on the Plaintiffs' parcel of land known as L.R. NO. RUIRU/KIU BLOCK 8/1144 and to forthwith vacate from the said parcel of land within a period of 60 days from the date of Judgment, failing which he be forcefully evicted and the illegal structures demolished at his cost.
- c. Costs of the suit shall be in favour of the Plaintiff.

44. Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Mwangi for Plaintiff

Ms. Waithira Mwangi for 1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant – Absent

