



**Njuguna & another (Suing as the Administrators of the Estate of David
Nganga Njuguna - Deceased) v Karanja & 4 others (Environment & Land Case
390 of 2016) [2023] KEELC 21023 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 390 OF 2016
FM NJOROGE, J
OCTOBER 26, 2023**

BETWEEN

**JACQUELINE NJERI NJUGUNA 1ST PLAINTIFF
JUDY WAIRIMU NJUGUNA 2ND PLAINTIFF
SUING AS THE ADMINISTRATORS OF THE ESTATE OF DAVID NGANGA
NJUGUNA - DECEASED**

AND

**BISHOP ZABLON MBUGUA KARANJA 1ST DEFENDANT
MARY WANJIKU MUNGA 2ND DEFENDANT
TABITHA NJERI MWANGI 3RD DEFENDANT
DAVID NJOROGE NJENGA 4TH DEFENDANT
JOHN MBUGUA WACHIRA 5TH DEFENDANT**

JUDGMENT

1. After the plaintiff's suit was withdrawn as against the 1st 2nd, 3rd and 5th defendants on 27/1/2020, that course of action left the 4th defendant alone on the defence side against the two plaintiffs who are the administrators of the estate of the late David Njuguna Nganga, deceased.
2. According to the amended plaint the plaintiff's case is that they brought the suit on their own behalf and on behalf of the deceased's estate. They aver that at all material times the Land Parcel LR 1556/5 situate South East of Naivasha town in Nakuru County measuring 7.951 ha or thereabouts (hereinafter the suit land or the suit property) was the property of the deceased David Nganga Njuguna. He had purchased it from one John Kamau Nganga and title had been issued in his favour



in 1987. However, in August 2009 the defendants trespassed thereon took possession and constructed houses with an intention of permanently occupying it, yet the deceased had not at any time in his lifetime sold or transferred the suit land or part thereof to any of them or to any other person, and so by reason of that trespass the plaintiffs have been denied the use and enjoyment of the suit land and suffered loss and damage. The plaintiff sought vacant possession and in the alternative eviction orders and also a permanent injunction against the defendants jointly and severally to restrain them from interfering with the suit land.

3. The 4th defendant's defence was filed on 16/12/2019. In the defence he denied trespass and loss. He stated therein that in 2004, he and the deceased and the wife to the deceased negotiated the sale of 5 acres to be carved out of LR 1556/5 him for the consideration of Kshs 1,200,000/=. The said agreement was reduced into writing on 2/3/2004 and executed by the 2nd plaintiff, the deceased's wife and with the deceased's authority. Thereafter the 4th defendant paid the consideration in full. The deceased then engaged a surveyor who excised 5 acres from the main land parcel and put the 4th defendant into possession thereof. Thereafter, the 4th defendant subdivided the suit land into plots measuring 40 feet by 80 feet and sold them to 59 people some of whom took possession of their plots with the knowledge of the plaintiffs and their parents. After the completion of the sale the 4th defendant was approached by the plaintiffs' mother who proposed to sell a further 2 acres to him but they could not agree on the price and the sale fell through. The 4th defendant states that somehow he and the plaintiffs' mother ended up at a local police station in 2006 where the plaintiffs' mother admitted to having sold 5 acres to the 4th defendant. Besides denying the claims of trespass and encroachment the 4th defendant averred that the occupation on LR No 1556/6 Naivasha is by individual purchasers who purchased their portions with the knowledge of the plaintiffs and their parents. He pleads that the plaintiffs and their parents also signed for the purchasers' electricity connection to their respective premises. Owing to the afore pleaded facts, states the 4th defendant, the plaintiffs can not therefore claim to have sustained any losses. He pleads that consideration was paid in full and that he has been in occupation for at least 15 years without any disturbance.
4. The hearing of this suit proceeded on 24/3/2021 when PW1 gave evidence and the respective cases of the parties were closed. By that time the plaintiffs had withdrawn the claim against the 1st-3rd defendant and the 5th defendant.
5. PW1 – Judy Wairimu Njuguna, a co-administrator of the estate of the late David Nganga Njuguna alongside Jacqueline Njeri Njuguna vide a grant of letters of administration in Nairobi HC Succ. 1217/2012 made on 14th January 2013 (P. Exh 1) testified on 24/3/2021 in the plaintiffs' case and adopted her witness statement dated 5th November 2019. The plaintiffs' evidence is that the deceased David, who was her father, passed away on 19th September 2007. He owned LR No. 1556/5 measuring 7.951 hectares which had been earlier owned by John Kamau Nganga. David had purchased it and it was transferred to him through transfer dated 21st September 1987 (P. Exh 2). A certificate of title was issued in her father's name on 20th August 1987 (P. Exh 3). Her father did not dispose any portion of the land to anybody during his lifetime. As administrators, they have also not parted with the land or sold it or any part thereof to David Njoroge Njenga the 4th defendant or to any other person. Her father had established a school known as Vantage High School and Teachers' Training College which occupy a small portion of the land. The two are still operational. PW1 conducted a search on the property on 21st August 2019. It shows that her father still remains the registered owner. Before the present suit was filed, the 4th defendant entered and occupied a portion of the land without their consent as administrators. He encroached on about 7 acres and has workers on the land. He put up some structures on the land and also cultivated portions of the land. The structures are still on the land and he was still cultivating the land as at the time of hearing. As a result, the plaintiffs are not able to use the



land. However, the plaintiffs have managed to secure a portion of the school and college compound. They however are apprehensive that he may effect further encroachment. They had demanded that he vacates prior to the filing of the present case. No other witness testified in the plaintiffs' case.

The defendants' evidence.

6. Ex parte judgment was passed against the 4th defendant but he successfully applied to have it set aside by court and he was allowed to call his evidence. The 4th defendant later prosecuted his defence on 2/5/2023 and 5/6/2023 through his own oral evidence. He also produced documents in support of his case among them the original file in Naivasha Principal Magistrate's Court Case Number 540 of 2008 *David Njoroge Njenga v Jemimah Njuguna*.
7. The 4th defendant's evidence as per his oral evidence and his witness statement filed in court is as follows: he traded under the name of Danjo Agencies. The summary of the dispute is that he purchased 7 acres from the authorized agents of David Nganga Njuguna, the registered proprietor, and the sale transaction was reduced into writing on 2/3/2004. In elaboration, he stated that sometime in 2004 he met the said David Nganga Njuguna and his wife Jemimah Nyambura Njuguna who informed him of their desire to sell a portion of the suit land; he became interested and by an agreement dated 2/3/2004 the parties contracted for the sale. David authorized his wife and daughter to sign the agreement on his behalf. 5 acres went for Kshs 1,200,000/= which he overpaid by Kshs 100,000/= upon which Jemimah agreed to sell him 2 more acres at Kshs 450,000/ per acre. He paid in full but a dispute arose later when Jemimah turned around and demanded Kshs 600,000/= per acre. Immediately he purchased the land David, caused the 5 acres to be excised for him from the main parcel- LR 1556/5- and the plaintiff took possession and subdivided the same into 59 subplots which he sold to various individuals who took occupation thereof with the knowledge of David and Jemimah and the 2nd plaintiff. He further pointed out that in a statement that Jemimah made with the police dated 19/10/2006 she stated that some people had built on land which she had sold him without payment of full consideration of the two extra acres.
8. The 4th defendant's evidence on cross-examination by Mr Karanja is that David Nganga Njuguna sold him the suit land though the seller was named as "J. Njuguna" in the agreement dated 2/3/2004. He knew that the land belonged to Jemimah Njuguna and admitted to not conducting any search over the suit land prior to purchase of the land. David Nganga was alive while the agreement was being executed; he and his wife agreed to sell the suit land and he received the consideration for the suit land. Payment was vide bank deposits though the account was not in the name of David Nganga Njuguna; his wife received the money as David had directed the plaintiff to her. David died in 2013.
9. The 4th defendant's further evidence is that in 2008 he sued Jemimah over the same land while David was still alive but the suit was dismissed. No consent of the Land Control Board was obtained for the agreement. He lodged an appeal against the decision dismissing his case but the same was dismissed for want of prosecution. He lodged another case NKR HCCC No 15 of 2010 but it too was dismissed for want of prosecution. He never saw any Power of Attorney issued by David Nganga. It was David who showed him the suit land, but the 4th defendant nevertheless sued Jemimah for title. However, upon re-examination by Mr Gichuki he stated that the plaintiffs were children of Jemimah and David; he has sued them in another case pending before the High Court at Nakuru; that the buyers had also sued him alongside the plaintiffs herein but he did not specify in which case; that he paid some money in cash to a Standard Chartered Bank account in Westlands branch and some by cash to Jemimah. According to him the land would not have been sold without Jemimah's consent. The 4th defendant also testified that the plaintiffs in the present suit also received part of the consideration for the suit land.



Submissions.

10. None of the parties filed submissions in the matter despite the order of court.

Determination.

11. The issues that arise for determination in the present suit are as follows:
- a. Whether the defendant trespassed onto all that land known as LR 1556/5;
 - b. Whether the defendant should be ordered to give vacant possession of the suit land;
 - c. Whether a permanent injunction ought to issue;
 - d. Whether damages should be awarded to the plaintiff against the defendant for trespass;
 - e. Who ought to bear the costs of the present suit.
12. Regarding the first issue as to whether the defendant trespassed onto the suit land it is the defendant's defence that he purchased 7 acres out of LR 1556/5 from the owner through his wife as his agent and that the 2nd plaintiff also participated in the transaction, claims which the plaintiffs entirely deny, putting the defendant to strict proof. It is therefore necessary to examine the defendant's evidence regarding sale.
13. The defendant stated that he became interested in the land and that by an agreement dated 2/3/2004 he purchased 5 acres and later on purchased 2 acres. What the 4th defendant relied on at the hearing was a handwritten agreement dated 2/3/2004. The agreement states as follows:

Agreement.

This is to confirm that Mrs J Njuguna will sell Naivasha land to Mr. David Njoroge Njenga.

The agreed portion of 5 (five) acres at a price of 240,000/= per acre.

Total amount will be Kshs 1,200,000/=

Today the 2nd March 2004 have (sic) received amount of Kshs 280,000/= (two hundred and eighty thousand.)

The outstanding balance of Kshs 920,000/= shall be cleared before any transaction is done.

Amount required is 1,200,000/=-

Amount paid is 280,000/=

Balance due is 920,000/=

Sign.... (purchaser)

Sign.... (vendor)

Date 2/3/2004.

14. There are some endorsements of receipts of various sums on various dates on the face of that agreement and the name of the 2nd defendant appears thereon as having received some money. The agreement is not made before an advocate and neither is it witnessed. Besides this agreement the defendant produced deposit slip dated 9/10/2006 for Kshs 200,000/= paid to pre-school international, another one dated 28/5/2008 for Kshs 180,000/= a third one dated 27/10/2008 for Kshs 400,000/=. The original court



file in Naivasha CMCC 540 of 2008 was produced in evidence. The supporting affidavit of Jemimah Njuguna dated 29/11/2020 is contained therein. In that affidavit, Jemimah Njuguna states as follows:

- “ 1. That my husband, David Nganga Njuguna (now deceased) entered into an agreement for purchase of land reference number 1556/5 on 21/09/1987 from John Kamau Nganga.
 2. That on 2/3/2004 I entered into an agreement with the defendant/respondent for the purchase of five (5) acres.
 3. That after the purchase the plaintiff took two (2) extra acres of land which had not been sold to him and claimed to have purchased the two (2) acres.”
15. There is an express admission in the lower court suit that Jemimah indeed sold 5 acres to the 4th defendant. I have no difficulty in holding, and I do hereby hold, that the land comprising of 5 acres was thus sold to the 4th defendant by the deceased David Nganga Njuguna.
16. In the lower court suit mentioned herein above, the plaintiff who is the 4th defendant herein had sued Jemimah who is the present plaintiffs’ mother for a permanent injunction to restrain her from dealing with the suit land contrary to his interests, and also for a mandatory injunction to compel the defendant to deliver to the plaintiff a title deed free from all encumbrances relating to the 5-acre parcel of land, general damages for breach of contract and costs. The decree in that suit reads that the entire suit was struck out on 30/4/2009. The ruling issued by the trial magistrate states that the basis upon which the suit was struck out is that there was no compliance with the provisions of Sections 6 and 7 of the Land Control Act Cap 302, and proceeding with the suit to hearing would be in futility. Besides, it was stated in the same ruling that Jemimah lacked capacity to dispose of the suit land as she did not have title to the land, it being in the name of her deceased husband. This court observes that the lower court’s finding as to lack of capacity by not being owner of title contrasts sharply with Jemimah’s express admission that her husband had sold the land to the 4th defendant. Be as it may, the only appropriate conclusion is that the 4th defendant did not set out as a trespasser from the beginning but as a purchaser.
17. Did the 4th defendant, after the determination of the lower court suit become a trespasser? With the striking out of his suit in the lower court and the declaration that the transaction between him and Jemimah was null and void for the lack of a Land Control Board consent and also for Jemimah’s want of capacity to dispose of land belonging to her late husband, there was a clear indication by the trial magistrate, supported by the provisions of Section 7 of the LCA, that the 4th defendant herein was entitled to a refund of the purchase price that he had undoubtedly paid. There was no indication at the hearing of the present suit that the plaintiffs or the deceased or Jemimah has ever refunded the 4th defendant the said consideration. No pleading was made on the issue by either party. Section 6 of the LCA provides that a controlled transaction is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the LCA.
18. Section 7 of the LCA provides as follows:
- “Recovery of consideration
- If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to Section 22.”



19. Section 8 of the [LCA](#) provides as follows:

“Application for consent

1. An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto...”

20. Section 22 of the [LCA](#) provides as follows:

“22. Acts in furtherance of void transaction

Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—

- (a) pays or receives any money; or
- (b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.”

21. This dispute simmered before the lower court for some time before the suit was struck out and the transaction declared void under Section 6 of the [LCA](#). The question here is whether the 4th defendant became a trespasser on the land immediately the judgment against him was pronounced in the lower court case.

22. As seen from Section 8 of the [LCA](#) any of the parties to a controlled transaction can apply for the LCB consent. However, it is observable that a lone purchaser would appear out of place in a Land Control Board meeting without the company of a vendor or his agent to confirm that the sale is genuine; it may be for that very reason that in the bulk of land disputes concerning want of an LCB consent the purchaser never took the initiative to lodge the application and he inevitably became disadvantaged. Reliance on lack of a LCB consent was often the last recourse available to a mendacious or opportunistic vendor desiring to avoid a sale which he has no other method of escaping from. Long before the [Constitution](#) of Kenya 2010 came into force, Potter, J.A. delivered himself in [Ngobit Estate Ltd v Violet Mabel Carnegie](#) [1982] eKLR (CA), as here under:

“The case of the respondent plaintiffs unhappily founders on the merciless rock of the [Land Control Act](#). In the appeals which come before this court in which the [Land Control Act](#) is involved, it is invariably the case that the Act is not being relied upon by a party in order to fulfill the intended purposes of the Act but by a vendor of an interest in land in order to deprive the purchaser of the benefit of his contract ... However, the function of the judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the



judges to apply such a law as it stands. To do otherwise would be to usurp the legislative functions of Parliament.”

23. In the *Ngobit case* (*supra*) Miller JA stated as follows of the *Land Control Act*:

“It may be said that this is a hard and narrow view of the law; but my answer is that Parliament (has) thought it expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute, because it may lead to apparent hardship.”

24. This is the position taken by numerous other cases. This continued until courts began taking a clearer moral and legal perspective of the matter, until a series of decisions of this court and of the Court of Appeal identified the loophole through which many a hapless purchaser were losing the purchased land, and sometimes also the consideration, to unscrupulous vendors upon the vendor’s pretext that the transaction transgressed Section 6 of the LCA. The courts’ decisions in the *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and *Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri* [2014] eKLR cases are just an example of how the courts dealt with the issue. In *Willy Kimutai Kitilit* (*supra*), the court imported the doctrines of constructive trust and proprietary estoppel to the *Land Control Act* and stated that by Article 10(2) (b) of the *Constitution* of Kenya, equity is one of the national values which binds the courts in interpreting any law (Article 10(1) (b)) and also that “by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the *Constitution*.”

25. One more milestone beyond the holding that a constructive trust or proprietary estoppel applies even where LCB consent is lacking is now before this court in the form of a question as to whether a purchaser who has been dragged through the court corridors by a tergiversating vendor should be declared a trespasser after a court judgment has found that he is indeed owed the consideration he had paid. When faced with a situation such as that of the present suit, the court must direct itself that the issue at hand transcends land ownership and indefeasibility of the claimant’s title into a delicate realm of determination of how the application of equity, now a national principle, should shape the permissible consequences of the abortion of a voluntarily contracted land transaction. In determining this consciousness must be had of the fact that declaring a person a trespasser is no frivolous business, whether pursuant to statute or common law, for it completely robs him of a right to be on the suit premises and subjects him to risk of certain eviction at any time no matter the circumstances attendant to that occupation. It is for that reason that in the determination of what are the permissible consequences of a failed land transaction, the two common forms of trespass in law must be distinguished: 1) trespass arising out of willful and totally unjustified encroachment by one upon another’s premises and 2) trespass emanating from a failed land sale or lease transaction in which liberty to possess sold premises had been earlier accorded the alleged trespasser. The alleged trespass in the present suit squarely falls in the latter category. In the second category of trespass, it must be stated that both parties were at one-point *ad idem* and until the purchase price is refunded to the purchaser in full and vacant possession given to the vendor, it is only fair just that they be treated as equals to the final end when each party has been reinstated to their position *ante*. Holding otherwise would leverage the sharp edged sword of the provisions of Section 6 as read with Sections 7 and 22 of the *LCA* against the throat of one of the parties and therefore work against the equitable principles of “he who comes to equity must do equity” and “he who comes to equity must come with clean hands”. In the present case there is no insistence that the purchase price has been refunded in full. Holding that the 4th defendant is a trespasser liable to immediate eviction in this case is tantamount to leveraging the legal sword of the *LCA* provisions against him to favour the plaintiffs while they have in thus court’s opinion come



with unclean hands before this court to seek eviction - for indeed by failing to refund the consideration willingly paid and received and yet asking for orders of eviction their hands stink of manifest injustice. I would have been persuaded otherwise had the plaintiffs demonstrated full refund of the consideration at the hearing of the suit. In this court's view, it would grind against the vital constitutional principles of equity, social justice, equality and non-discrimination espoused in Article 10 of the Constitution of Kenya 2010 to tacitly condone unjust enrichment among a section of our citizenry under the pretext of strict observance of Section 7 and Section 22 of the LCA. In this court's view, the bar to "remaining in possession in furtherance of the avoided transaction or agreement" mentioned in Section 22, when construed in the light of the fore stated national principles, must be subjected to a very lenient and elastic interpretation in favour of a person whose refund under the impugned transaction is yet to be effected in order to safeguard that creditor's rights to property and thus balance the scales of justice for both parties. I therefore decline to hold that the 4th defendant is a trespasser on the suit land despite the judgment and decree of the lower court.

26. I have perused the original plaint dated 2/6/2016 filed by Eliakim Owala & Co Advocates and found that one Bishop Zablon Mbugua Karanja was sued on his own behalf and on behalf of 114 others, the plaintiffs' claim against them being for general damages for trespass to the suit land, a mandatory injunction compelling them to vacate the suit land and a permanent injunction. An amendment was sought vide application dated 17/7/19 to include the 4th defendant. The 4th defendant was therefore not sued on behalf of any other person in respect of the suit land in the present case. If he is personally occupying any land part of LR 1556/5 then that portion alone is the land to which this judgment applies.
27. Regarding general damages for trespass I find that no evidence was adduced to show that the plaintiffs sustained any damage or as to the quantum of damages expected and in any event the plaintiffs have failed to establish trespass. Pursuant to that observation and pursuant to the fact that the dispute arose from a transaction in which both parties were willing, I find that no damages are awardable.
28. Regarding costs of the present suit, I order that in view of the fact that the matter arose from a transaction between the parties which was admitted and which the plaintiff's mother balked at proceeding with, each party shall bear their own costs of the suit.
29. The upshot of the foregoing is that I find that the plaintiffs have failed to establish their claim on a balance of probabilities and I hereby issue the following final orders:
 - a. The plaintiffs' suit is hereby dismissed.
 - b. Each party shall bear their own costs of the present suit.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

