



**Thagishu (Suing a Legal Representative of the Estate of Dominic Thagishu Karari) v Wanjiru (Sued as the Administrator of the Estate of Francis Mbugua Njoroge) & another (Environment and Land Case Civil Suit 524 of 2002) [2023] KEELC 21154 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 524 OF 2002  
LN MBUGUA, J  
OCTOBER 26, 2023**

**BETWEEN**

**LUKA NDIVA THAGISHU (SUING A LEGAL REPRESENTATIVE OF THE ESTATE OF DOMINIC THAGISHU KARARI) ..... PLAINTIFF**

**AND**

**MARGARET WANJIRU (SUED AS THE ADMINISTRATOR OF THE ESTATE OF FRANCIS MBUGUA NJOROGE) ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL KIBERA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**P leadings**

1. The Plaintiff commenced this suit by a plaint dated 21.3.2002. He avers that in the case HCCC No. 3216 of 1994, the Plaintiff and the Defendants herein were the Plaintiffs, while Joseph Kibera and Francis Kiarie Njiraine were the Defendants. The decree issued in the said court ordered that parcel Dagoretti/Riruta/271 was to be divided among the Plaintiffs in that suit. That in compliance with the said orders, the defendants therein subdivided the parcel Dagoreti/Riruta/271 and transferred the portion known as Dagoretti/Riruta/4809 into his name. Thus the plaintiff was issued with a title on 10.7.2001 while the portion known as Dagoretti/Riruta/4810 was registered in the names of the Defendants in the current suit.
2. The plaintiff contends that the Defendants have refused to vacate his portion known as Dagoretti/Riruta/4809. He therefore seeks the following orders;
  - a. A declaration that the Plaintiff is an absolute owner of land parcel no. Dagoretti/Riruta/4809.



- b. That the Defendants be declared as trespassers.
  - c. That the Defendants be permanently restrained from ever trespassing and/or remaining on the Plaintiff's said parcel Dagoretti/Riruta/4809.
  - d. Costs of the suit.
  - e. Such further or other relief as this Honourable Court may deem fit to grant.
3. The 1<sup>st</sup> Defendant is opposed to the suit vide his statement of defence and counterclaim dated 22.8.2018. She contends that title to Dagoretti/Riruta/4809 was obtained by the Plaintiff fraudulently by concealing facts to the registrar of titles. She contends that she has lived on the suit property for a period of over 30 years.
4. In her counterclaim, she prays for the following orders;
  - i. A declaration that the Land Reference Number Dagoretti/Riruta/4809 is wholly owned by the Estate of the late Francis Mbugua Njoroge (deceased) that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's title and claim to the property are fraudulent, null and void and bereft of any authenticity or substance and the land registrar be ordered to rectify the register to read the deceased as the registered owner.
  - ii. That the register of the land parcel Dagoretti/Riruta/4809 be rectified, so as to remove the entries in favour of 1<sup>st</sup> Defendant (Plaintiff), and the title to revert back to the proprietorship of the Estate of the late Francis Mbugua Njoroge.
  - iii. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants their servants, agents and/or assigns from trespassing and interfering in any way with the Plaintiff's property and the Plaintiff's right to quiet possession.
  - iv. Costs of the suit and interest thereon.
5. The suit is also opposed by the 2<sup>nd</sup> Defendant vide his statement of defence dated 12.4.2003. He avers that the Plaintiff had been allocated a portion of land as per the sale agreement dated 21.3.1990 but he fraudulently altered the survey plans for Dagoretti/Riruta/271 and gave himself the suit land which is the portion of land where the 2<sup>nd</sup> Defendant has resided since his childhood.
6. He contends that the title deed number Dagoretti/Riruta /4809 on the survey plan represents portion 'A' on the mutation forms which portion belongs to him, but the Plaintiff has altered the letter 'A' on the plan to read 'B' , a portion he claims belongs to title deed number Dagoretti/Riruta/4810 for 2<sup>nd</sup> defendant.

### **The Evidence**

7. PW1 was Lucas Ndiva Thagichu, the substituted Plaintiff and a son to the original Plaintiff, Dominic Thagishu Karari (deceased). He adopted his witness statement dated 9.11.2021 as his evidence, and he produced 11 documents in his list of documents dated 8.5.2015 as P. Exhibit 1-11.
8. His testimony is that the 2<sup>nd</sup> Defendant is the one who is in current occupation of the land known as Dagoretti/Riruta/4809. He avers that by a sale agreement dated 28.11.1990, his father entered into an agreement with Francis Mbugua Njoroge (now deceased) who was the original first Defendant and Daniel Kibera (2<sup>nd</sup> Defendant) where the Defendants sold to him 0.16 acres out of parcel Dagoretti/



- Riruta/271 for ksh.130,000/= being land they were entitled to as beneficiaries of the estate of Njiraine Kibera (deceased), of which his father paid the entire purchase price.
9. He further states that in Nairobi HCCC No. 3216 of 1994, the plaintiffs therein were the current plaintiff and defendants. They had sued the Estate of the late Njiraine Kibera in order to get a portion of parcel Dagoretti/Riruta/271. That by consent, the said parcel was to be divided whereby the current plaintiff was to get 0.16 acres of that land.
  10. That subsequently, a subdivision plan was approved for Dagoretti/Riruta/271 in which the parcel was divided into 3 portions being parcels numbers 4809, 4810 and 4811 and which were marked as 'A', 'B' and 'C' respectively and the area map was amended reflecting the new parcels created.
  11. That his father was entitled to parcel number 4809 marked 'A' and a Land Board consent for the transfer of the said land parcel to him by the Defendants was obtained from the Dagoretti Land Control Board. The subdivided parcels were then registered and his father was registered as proprietor of Dagoretti/Riruta/4809 and was issued with a title deed.
  12. That on the other hand, the Defendants became the registered proprietors of Land parcels No. Dagoretti/Riruta/4810 which they later subdivided into Land Parcels Dagoretti/Riruta/5360 and 5361, but they refused to vacate the Plaintiff's portion of land.
  13. PW1 also avers that his father (original Plaintiff) had no role in the processing of the sub-division of the Land Title No. Dagoretti/Riruta/271 which was done by the administrators of the estate of Njiraine Kibera (deceased). Further, he had no role in the subsequent registration of the resultant sub-divisional parcels, and as such he committed no fraud and was not capable of committing any in the process.
  14. Upon cross-examination by counsel for the 1<sup>st</sup> Defendant and when referred to the sale agreement dated 28.11.1990 between his father and Francis Mbugua Njoroge and Daniel Kibera, he stated that there is no evidence of payment of the balance of the purchase price.
  15. Referred to the application for consent of land control board at page 108 of the further bundle of pleadings and documents dated 19.9.2019, he stated that the consent given to his father was by Joseph Kibera Njiraini and Francis Kiarie Njiraine and the land his father purchased was from owners of parcel 271.
  16. Referred to the mutation at page 35 of the bundle dated 28.8.2018, he stated that it was prepared by Francis Kiarie Njiraini and Joseph Kibera Njiraini.
  17. He further stated that his father used to stay on the land occupied by Daniel, and he even built there but he was removed through a case and was to go stay in parcel 4809. However, he has never stayed there as the 2<sup>nd</sup> Defendant is the one on the suit land.
  18. Upon cross-examination by counsel for the 2<sup>nd</sup> Defendant, PW1 stated that he was born in 1976 so he was young when the suit parcel was being purchased. It is his father who was pursuing subdivision of parcel 271 and that he had never seen the mutation forms for the parcel.
  19. He averred that the mutation form at page 35-36 of the 2<sup>nd</sup> Defendant's bundle, shows that parcel Dagoretti/Riruta/271 was subdivided into parcel A, B and C and there's a road, but at page 36, numbers A and B appear erased a bit.
  20. Upon re-examination, PW1 stated that the sale agreement dated 28.11.1990 shows that the sellers who are the Defendants herein were selling their share out of parcel 271 registered in the name of Njiraine Kibera.



21. The case for the 1<sup>st</sup> defendant was advanced by Margaret Wanjiru (DW1), the wife of the original 1<sup>st</sup> Defendant, Francis Mbugua Njoroge (deceased). She adopted her witness statement dated 17.8.2018 as her evidence. She avers that her husband (deceased) had informed her that the Plaintiff and the 2<sup>nd</sup> Defendant had entered into a sale agreement for sale of a plot of land. That the Plaintiff was shown his portion and developed it, but he later turned around and claimed that he had a title deed for the land she and her family have occupied for a period over of 30 years and that is where she has established her matrimonial home.
22. She points out that her husband denied selling land to the Plaintiff, thus disputes his alleged signature on the sale agreement dated 28.11.1990 and that consideration never passed, thus a transfer could not have been effected.
23. Upon cross-examination by counsel for the Plaintiff, DW1 stated that she stays with the 2<sup>nd</sup> Defendant on parcel 4809. That she has no evidence that her husband sold the land in 1990, and that the land was ancestral, belonging to the father of her late husband and the 2<sup>nd</sup> Defendant. She further stated that the 2<sup>nd</sup> Defendant sold the portion near the road and since the mother title had not been subdivided, he could not have sold without her husband's authority.
24. She stated that the Plaintiff was shown the portion near the road but he no longer stays there. She also stated that to her knowledge, she cannot recall if the land was subdivided but there was fraud since the Plaintiff got a title. She added that she has no evidence of fraud and she does not know whether the suit land was subdivided.
25. In re-examination, DW1 stated that she has been on the suit land since 1971 and that there are 2 roads and the parcel the Plaintiff bought is on the side of Joseph Kibera and Francis Kiarie.
26. The 2<sup>nd</sup> defendant Daniel Kibera, advanced his own case as DW2. He adopted his witness statement at page 55-57 of his bundle as his evidence and produced 23 documents at page 1-52 of the same bundle as D. Exhibit 1-23. He admits that on 28.3.1990, they signed a sale agreement relating to the property belonging to the estate of their grandfather who died many years ago, of which, they sold a portion measuring 0.16 of parcel 271 measuring 0.66 acres.
27. The title was in possession of Joseph Kibera and Francis Kiarie Njiraine whom they sued in HCCC No. 3216 of 1994. In that suit, it was ordered that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein were to be given 0.17 acres to be shared equally, the Plaintiff was to get 0.16 acres while Joseph Kibera and Francis Kiarie Njiraini were to get 0.5 acres to be shared equally. The Plaintiff got his share but he demolished the houses on his portion.
28. That in year 2000, the Plaintiff subdivided parcel 271 into 3. That the portion measuring 0.057 Ha "A" is LR Dagoretti/Riruta/4809, the other portion of 0.057 ha. marked "B" is Dagoretti/Riruta/4810, while "C" is Dagoretti/Riruta/ 4811 measuring 0.115 ha. He avers that the portion, marked as 4809 and 4810 are the portions belonging to him and his brother (1<sup>st</sup> defendant) and he doesn't know the owner of the portion measuring 0.115 ha.
29. He states that his brother did not sign the mutation dated 28.7.2000, and that the Plaintiff committed forgery by altering 'B' to look like 'A'.
30. In cross examination by counsel for the Plaintiff, DW2 stated that Njiraini Kibera owned the whole of Dagoretti/Riruta/271. That Joseph Kibera Njiraini and Francis Kiarie Njiraini are children of his uncle Tito and were also given plots hived from Dagoretti/Riruta/271.



31. When referred to the consent at page 31 of his bundle of documents, he stated that they wanted to subdivide Dagoretti/Riruta/271 and they went to the board at Do's Office. He admitted that together with his brother, the 1<sup>st</sup> Defendant, they did sell a portion of parcel 271 to Dominique as per the sale agreement, but they did not transfer to him.
32. He contends that he did not approve the subdivision of parcel 271, thus the Plaintiff defrauded and stole his title. He contends that he has no title for the portion where he stays.
33. In cross-examination by counsel for the 1<sup>st</sup> Defendant, DW2 stated that vide the sale agreement dated 1990, they were selling a portion of parcel 271. They never went to the land board as required by law. When referred to a consent dated 5.9.1989, he admitted that they went to the land board and were guided by the Plaintiff but since he is illiterate, he cannot tell what is supposed to come first between a sale and application for consent. He added that that for subdivision of parcel 271, he went with Njiraini and Kiarie to the land board but the subdivision did not take place as he has the original title to parcel 271 where he resides with his brother, their elder mother and a small child.
34. In re-examination, DW2 stated that the Plaintiff was not given any land in the initial case where they were allocated the suit land. DW2 also availed the original title for parcel Dagoretti/Riruta/271 issued on 18.1.1989 to Titus Njiraini Kibera.

### **Submissions**

35. This matter was mentioned a record three times for submissions; that is on 12.6.2023, 4.7.2023 and 25.7.2023, and in the end, only the 1<sup>st</sup> Defendant complied with the court's directions on filing of submissions. Her submissions are dated 1.8.2023 where she addresses the following issues;
  - a. Whether the Plaintiff acquired good title to the suit property.
  - b. Whether the subdivision and titles thereof were obtained fraudulently without proper information being given to the registrar of titles.
  - c. Whether the Plaintiff had fraudulently misrepresented in the decree which portion of land he had been issued with.
  - d. Whether the Defendant is entitled to the orders sought in the counterclaim.
36. On the 1<sup>st</sup> issue, it was submitted that the Plaintiff never obtained a clean title to the suit property since none of the Defendants had capacity to sell the land at the time the impugned sale agreement was executed. She points out that parcel 271 was in the name of Njiraine Kibera (deceased) and the only persons who had authority to transact in the property were administrators of his estate. She further submits that the 2<sup>nd</sup> Defendant could not have signed the sale agreement dated 28.3.1990 since he is illiterate and that the 1<sup>st</sup> Defendant was never involved in its making thus it is a forgery. She adds that the Plaintiff did not complete payment of the purchase price as set out in the impugned sale agreement.
37. On the 2<sup>nd</sup> issue, it was submitted that the standard procedure in a subdivision is that the original title is surrendered, thus the fact that the 2<sup>nd</sup> defendant still holds the original title to Parcel 271 is prima facie evidence that no proper subdivision of the parcel was done. That the only reasonable explanation is that the Plaintiff colluded with officials of the land registry to fraudulently effect subdivision of parcel 271.
38. She also submits that the Plaintiff's allegation that the administrators of the estate of Njiraine Kibera procured registration of the subdivision was not proved, thus there is an unrebutted presumption that



his title was obtained fraudulently. She cites the case of Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh [2021] eKLR.

39. On the 3<sup>rd</sup> issue, she submits that the Plaintiff has come to equity with unclean hands as he has come to enforce a title acquired through fraud and misrepresentation of material facts.
40. On the 4<sup>th</sup> issue, the 1<sup>st</sup> Defendant submits that the plaintiff is not entitled to the prayers sought and as such his title should be revoked.

## DETERMINATION

41. The issues falling for determination are;
  - a. Whether the Plaintiff is entitled to parcel Dagoretti/Riruta/4809.
  - b. What is the ground position of Dagoretti/Riruta/4809?
  - c. What orders should be granted in the circumstances of this case?
42. The undisputed facts are that the defendants herein are close relatives of the initial owners of the original parcel 271. To this end, the initial defendants herein (Francis Mbugua and Daniel Kibera) are brothers, of which one Tito Njiraine Kibera was their father's brother. The children of Tito were Joseph Kibera Njiraine and Francis Kiarie Njiraine. It appears that the family land was in the hands of the Njiraines. The two brother in this suit Francis Mbugua Njoroge and Daniel Kibera, had also sold a portion of the mother land 271 to the current plaintiff. They (all the parties in the current suit) had then sued the Njiraines (read Joseph Kibera and Francis Kiarie) in the case HCCC 3216 of 1994 of which, the case was brought to an end through a consent. A decree was hence issued in terms of that consent.
43. During the subsistence of the current case, the 1<sup>st</sup> defendant died on 27.7.2010 and was substituted with his wife, Margaret Wanjiru, the current 1<sup>st</sup> defendant. The plaintiff also passed away on 31.12.2020 and was substituted with his son Luka Ndiva the current plaintiff.
44. It is trite law that Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See Section 107 and 109 of the *Evidence Act*.
45. In Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”
46. The plaintiff has a title to parcel 4809, but he has no possession of the said land. His claim is anchored on the sale agreement of 1990, and the decree in case no. 3216 of 1994. The defendants on the other hand allege that the title held by the plaintiff was procured fraudulently. Each party therefore bears the burden of adducing evidence to buttress their respective claims.
47. The first port of call is the decree issued in Nairobi HCCC No. 3216 of 1994 whose existence is not disputed. The orders issued therein on 27.6.1997 read as follows;

“BY CONSENT ORDERED:-



- a. That the Land Reference Number Dagoretti/Riruta/271 be registered as follows:-

PLAINTIFF FRANCIS MBUGUA NJOROGI and

PLAINTIFF DANIEL KIBERA NJOROGI 0.17 IN

EQUAL SHARES

3<sup>RD</sup> PLAINTIFF DOMINIC THAGISHU KARARI 0.16

1<sup>ST</sup> DEFENDANT JOSEPH KIBERA and 2<sup>ND</sup> DEFENDANT FRANCIS KIARIE NJIRAINI 0.5  
IN

EQUAL SHARES

- (b) That the Plaintiff's claim over LR No. Dagoretti/Riruta/271 be withdrawn.

C. That each party do bear its won costs."

48. In light of the contents of the aforementioned decree, the defendants are estopped from challenging the sale agreement of 1990. If the defendants were aggrieved by the decree, the logical course of action would have been to challenge the same through an appeal. But again, how could they have challenged the decree when the same arose out of a consent order!
49. The 2<sup>nd</sup> Defendant also argues that he has stayed on the suit parcel for more than 30 years and that the Plaintiff fraudulently obtained a title to his parcel whereas he had already been shown his portion at the time of purchase.
50. As per the sale agreement dated 28.11.1990 between the Plaintiffs and the Defendants, the Plaintiff purchased plot marked 'A' on the sketch map. Clause 3 of the sale agreement indicates that the vendors were on the said portion, but were required to shift so that the Plaintiff would take up possession. To this end, the current defendants new very well that they were selling the land which they were occupying!
51. What I understand to be the dispute is that the Defendants did not shift from that portion 'A', on parcel 271, but the plaintiff went ahead to process title to that portion "A". Thus the Defendants are in possession of the land that the Plaintiff was to take possession of in 1990.
52. The title deed to Dagoretti/Riruta/4809 and the green card indicate that the suit land is registered in the name of the Plaintiff. There is no evidence that the Plaintiff was registered fraudulently. The court had decreed the manner in which parcel 271 would be subdivided and that is what was done.
53. The defendants have made feeble attempts to trash the decree by advancing all sorts of excuses, ranging from; that the suit land is the one they have occupied all their lifetime, it is their matrimonial home, that no full payments were made, that the land belonged to a deceased person, that they never participated in the mutation processes, that they still have the original title and that plaintiff holds a fraudulent title.
54. What more, the alleged original title that the defendants were unleashing to the court is in the name of Titus Kibera Njiraini issued way back on 6.11.1988. However the evidence availed by the plaintiff is that Joseph Kibera Njiraine and Francis Njiraine the sons of the owner of that land are the ones who caused subdivisions of the mother parcel 271. This averment is supported by both the mutation process and the registration records, particularly the green cards.



55. The aforementioned arguments of the defendants are nothing but a clear case of circumventing an order of the court which came about through a consent. It is not lost to this court that DW2 has stated in cross examination that “At plot 271, there is no place which is not built up”, yet the plaintiff has no possession of his land. None of the defendants have given the slightest explanation as to where in that built up place, the plaintiff was supposed to take up possession.
56. The decree in the case of 1994 had stated that the plaintiff was to get 0.16 acres of land. 1 acre=0.405 hectares, while 1 hectare = to 2.47 acres. In terms of the above mathematics, the acreage given to the plaintiff in the decree in hectares is 0.064. The title which the plaintiff has contains the acreage of 0.054. The shortfall in the acreage can be attributed to provisions of amenities like a road. In essence, the plaintiff’s acreage as captured in the title is in tandem with the decree in the 1994 case.
57. The plaintiff has also availed green cards showing that parcel 4810 was registered in names of the two defendants (Daniel and Francis) of which a further subdivision was done to give rise to parcels 5360 (0.0180 ha) and 5361 (0.0360 ha) still registered in the name of the two defendants.
58. It follows that this is simply a case of the defendants embracing the adage “having your cake and eating it” or “having a second bite of the cherry” by making deliberate steps to ignore the court order in the 1994 case.
59. The Court of Appeal in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR stated that:
- “Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
- ““That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think its more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not”.
60. The upshot of the findings herein is that the plaintiff acquired his title pursuant to a court order, and there is no evidence to indicate that the same was obtained through fraud. I also find that on the ground, the defendants are in occupation of the land. For decades, the plaintiff was prevented from enjoying the fruits of his judgement until his demise in year 2020.
61. This court cannot allow the defendants to perpetuate an illegality by circumventing an order of the court. In that regard, I find that the plaintiff has proved his case on a balance of probabilities.
62. Final orders:
- a. The Counterclaim of the 1<sup>st</sup> defendant is hereby dismissed.
  - b. An order is hereby issued declaring that the Estate of Dominic Thagishu Karari is the absolute owner of land parcel no. Dagoretti/Riruta/4809.
  - c. An order is hereby issued declaring that the defendants are trespassers upon parcel Dagoretti/Riruta/4809.



- d. An order is hereby issued requiring the defendants to vacate the land Dagoretti/Riruta 4809 within a period of 45 days, failure to which eviction is to take effect.
- e. The defendants are hereby condemned to pay costs of the suit and interests thereof at courts rates from the date of filing the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023  
THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Mwathe for Plaintiff

M/s Odhiambo holding brief for Mbuthia Kinyanjui for 1<sup>st</sup> Defendant

Mrs Gulenywa for 2<sup>nd</sup> Defendant

Court Assistant: June

