



**Theuri v Kamau (Environment & Land Case 123 of 2016)
[2023] KEELC 21034 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 123 OF 2016
A OMBWAYO, J
OCTOBER 19, 2023**

BETWEEN

GRACE WANGUI THEURI PLAINTIFF

AND

DANIEL KANYINGI KAMAU DEFENDANT

JUDGMENT

Introduction

1. The plaintiff commenced this suit vide a Complaint dated May 12, 2016 against the defendant. She averred that the registered proprietor of Bahati/Kabatini Block 1/7500 the suit property herein. She further averred that the Defendant had unlawfully entered the suit property with the intention of permanently dispossessing her of her land. She sought for the following orders:
 - a. An order of permanent injunction restraining the defendant either by himself, his servants, and/or lawful agents from entering, remaining, cultivating, constructing or otherwise dealing and/or interfering in any other way whatsoever with parcel No. Bahati/Kabatini Block 1/7500.
 - b. An eviction order against the defendant from parcel of land known as Bahati/Kabatini Block 1/7500.
 - c. Vacant possession of the suit property.
 - d. Cost of this suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit to grant.
2. The defendant in response filed his statement of defence and Counter claim dated June 9, 2017. He averred that he is the rightful proprietor of the suit property having bought it from a land buying company. He added that the title held by the Plaintiff was fraudulently obtained. He sought for the following orders:



- a. The plaintiff's (now defendant's) Title Deed be cancelled.
- b. A permanent injunction to issue restraining the plaintiff (now defendant) from trespassing or alienating or in any other manner whatsoever adversely dealing with the defendant's (now plaintiff's) parcel of land known as Title No. Bahati/Kabatini Block 1/7500.
- c. Cost of this suit and interest at court rates.

Plaintiffs' Case

3. Grace Wangui Theuri the plaintiff herein testified as PW1. She produced her witness statement dated 14/4/2016 which was adopted as her evidence in chief. She testified that she claims ownership of Bahati /Kabatini 1/7500 measuring 0.03438Ha.
4. She further testified that the plot belonged to her late husband who had bought it from one Elijah Kinyanjui in 2004 and that they completed payment in 2006. She testified that they had inspected the land before they bought it and in 2006 they were issued with a title in her name. She produced documents as per list dated 12/5/2016 which was admitted in evidence and marked as "PEX1-4".
5. It was her testimony that at the time they purchased the plot it was registered in the name of Elijah Kinyanjui Mugai. She testified that after she obtained the title she was not able to utilize it as her husband started ailing and she concentrated in looking after him. She added that the plot was vacant and unoccupied at the time of purchase.
6. She further testified that in 2012 when she visited the land she found a temporarily structure and a lady on the land. She testified that she did nothing at that time since her husband was seriously ill and when he died in 2014 she filed the instant suit in 2016. She insists that her title is valid and denies the defendant's averments in the counterclaim. She denies that the defendant was in occupation of the suit land in 2001 and added that her name does not appear on the green card.
7. She testified that when they visited the suit property in 2004, there was nothing and that later in 2016 there was a temporary mud house. She concluded her testimony by stating that she obtained her title regularly and urged the court to grant her the orders as prayed in the Plaint.
8. On cross examination, she admitted that they did not have any written agreement. She confirmed that when they we visited the land, they never had any discussion with the neighbors. She further confirmed that they were only with the seller, Mr. Elijah Kinyanjui
9. On re-examination, she stated that they never had any dispute with the person who sold them the land. This marked the close of the Plaintiff's case.

Defendant's Case

10. Daniel Kanyingi the defendant herein testified as DW1. He produced his written statement dated 12/06/2017 which was adopted as his evidence in chief. He testified that he does not know the plaintiff yet she has sued him for his land. He testified that he bought the land from Mwirani Self Help Group where he was a member. He further testified that he paid his share and was allotted after paying Kshs. 25,000. He stated that they were to contribute Kshs. 35,000 which he paid. He produced the documents which were marked as PEX1-PEX12.
11. It was his testimony that he paid and took possession of the land in 2000 where he lives with his family. He testified that he got the title in 2001 and that Elijah brought him the said title and later asked for it but never returned it. He testified that the Plaintiff sued him in 2004 which he reported to the chief



- and CID. He testified that Elijah had disappeared with his title. He further testified that he has lived on the land since 2012 and he has constructed a house. He added that he did a search and found that the title was on another person's name.
12. On cross examination, he admitted that he was a member of Mwireri Self Help Group from 2000 but he did not have a membership card. He confirmed that he was not given a share certificate and added that they each contributed Kshs. 35,000. He further confirmed that he was given the transfer documents and that the office was following up on the same. He confirmed that Elijah Theuri was a registered member but he admitted that he never sued him. He further confirmed that he did not know the alleged rogue land registrar as his name is not on the green card. He stated that Elijah took his title in 2005 and that he reported to the police in 2012. He admitted that he did not have any statement from the police.
 13. On re-examination, he stated that they were not given membership cards or share certificates.
 14. Paul Kariuki Njogu testified as DW2. He produced his witness statement dated 12/06/2017 which was adopted as his evidence in chief. He testified that the Self-Help Group had been registered at a social service and that he was a member as well as the secretary. He testified that he used to keep the members' records which are with the chairman. He further testified that the Defendant bought the suit land from Kariuki Macharia who was not in court. It was his testimony that the Defendant was the first to settle in the year 2000.
 15. On re-examination he stated that he could not recall the land and added that Elijah Kinyanjui Theuri was their chairman who disappeared.
 16. Joseph Kungu testified as DW3. He produced his statement filed on 12/07/2017 which was adopted as his evidence in chief. He testified that he- is a tailor and lives in Kirina Nakuru County.
 17. On cross examination, he admitted that he did not have a membership card. He confirmed that the Defendant was allocated the suit land in the year 2000. He added that they contributed money to which they had receipts.
 18. On re-examination he stated that they had not been issued with membership cards.
- That marked the close of the Defence case.

Submissions

19. The Plaintiff filed her submissions dated 4th August, 2023 on 8th August, 2023. She gave a brief background of the case and identified two issues for determination. One is whether the Plaintiff is entitled to the reliefs sought. She relied on the case of *Stephen Maina Muriithi v Wangu Ngari & another* (2016) eKLR and submitted that it is not in dispute that the Plaintiff holds the title deed to the suit land. She added that the same can be confirmed from the green card and that the defendant did not produce any evidence to the contrary. The plaintiff submitted that the defendant did not show that the plaintiff's title was obtained fraudulently. She cited section 107 of the *Evidence Act*.
20. She relied on the case of *Keiyan Group Ranch v samwel Oruta & 9 others* (2021) eKLR and submitted that the registration of the Plaintiff as the legal owner of the suit property has not been challenged by any evidence from the Defendant. She submitted that she has proved her case to the required standard thus deserving of the orders sought. The Plaintiff submitted that she has demonstrated that the right of protection of her title tilts in her favor. She cited section 24(a) and 25(1) of the *Land Registration Act*.
21. The second issue for determination is whether the Defendant is entitled to the orders sought in the counter claim. She submitted that the defendant failed to discharge his onus in order to deserve the



orders sought. She submitted that the defendant's allegation of fraud was never supported by any evidence and further that the defendant was unable to produce any evidence of his registration as the legal proprietor of the suit land. In conclusion she submitted that the defendant's counter claim is devoid of merit and should be dismissed with costs.

The defendant did not file any submissions.

Analysis and Determination

21. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:
 - i. Who between the plaintiff and the defendant is the lawful owner of the suit property?
 - ii. Whether the plaintiff should be granted the prayers sought.
 - iii. Whether the orders sought in the defendant's defence and counter-claim should be granted.
 - iv. Who should bear the costs of the costs of this suit?
22. On the first issue for determination, the plaintiff testified that in 2004, together with her late husband, they bought the suit property from Elijah Kinyanjui. She produced a title deed issued on March 17, 2006. It was her evidence that she did not immediately take possession or utilize the land since she was taking care of her sick husband. She also produced a copy of the official search and green card. On cross examination, she admitted that she did not have a written agreement.
23. The defendant DW1 on the other hand testified that he bought the suit land from Mwirani Self Help Group where he was a member. It was his evidence that he paid for the same and took possession in 2000. He testified that Elijah took the title from him and disappeared. He produced a title deed in his name issued on February 15, 2001. During cross examination, he admitted that he did not have a membership card of the Self-Help Group and that his name is not in the green card. DW2 on the other hand gave evidence that the Defendant had bought the suit property from Kariuki Macharia. DW3 also testified that he was a member of the group but that they were never issued with membership cards.
24. From the above, it is clear that both the Plaintiff and Defendant claim ownership of the suit property. They have presented before this court two title deeds issued to both of them on the same property. It is this court's view that the Defendant's case points to the fact that the transaction for the purchase of the suit property by the DW1 was suspect. The chronology of the testimony from DW1 to DW3 was riddled with a lot of inconsistencies, from the procedure in which he came to acquire the suit property was clearly not in line with the documentary evidence produced. DW2 testified that DW1 bought the suit property from Kariuki Macharia yet the Defendant testified that he had bought it from a land buying company. The green card produced by the Plaintiff indicated that the suit property was initially owned by Samuel Kimani Muchiri then Elijah Kinyanjui Mungai and finally the Plaintiff herein. Furthermore, the said green card was never challenged by the Defendant.

Section 24(a) of the *Land Registration Act* provides that:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”



Section 26(1) of the [Land Registration Act](#) further provides that:

“...the certificate of title issued by the Registrar upon registration, or 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 that 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, unprocedurally or through a corrupt scheme.” [Emphasis mine]

25. In the case of [Kinyanjui Kamau v George Kamau](#) [2015] eKLR expressed itself as follows; -

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

26. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

27. In the case of [Daudi Kiptugen v Commissioner of Lands & 4 others](#) (2015) eKLR the court held as follows:

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

28. The defendant alleged that the plaintiff acquired the suit property fraudulently, however, he did not adduce any evidence to prove the same. It is this court’s view that even though the defendant may hold a title to the suit property he failed to convince this court how he acquired it.

29. From the overall evidence and testimonies given by both parties, this court finds that the Plaintiff is indeed the lawful owner of the suit property. This means that the title held by the Defendant over



the suit property is invalid and of no legal effect for the reason that it was obtained illegally and unprocedurally.

30. On the second issue for determination, having already established that the suit property belongs to the Plaintiff, it is this court's view that the Plaintiff is therefore entitled to the orders sought in her plaint dated May 12, 2016.
31. This court having found that the defendant acquired the title to the suit property unprocedurally, the defendant is therefore not entitled to the prayers as sought in his Defence and Counterclaim.
32. In the upshot, having found that the Plaintiff proved her claim to the required standard of probabilities, judgment is hereby entered in favour of the Plaintiff in the following terms:
 - a. A declaration that the Plaintiff is the lawful proprietor of Bahati/Kabatini Block 1/7500.
 - b. An order of permanent injunction is issued restraining the defendant by himself, his servants or lawful agents from trespassing upon, entering, remaining, dealing in or otherwise in any other manner whatsoever from interfering with Bahati/Kabatini Block 1/7500.
 - c. An eviction order is hereby issued against the Defendant to vacate the said property within 90 days failure to which the Plaintiff is at liberty to engage the OCS Bahati Police Station to assist on the same.
 - d. An order is hereby issued directing the Nakuru Land Registrar to recall and cancel the title held by the Defendant in respect to Bahati/Kabatini Block 1/7500.
 - e. The Defendant shall bear the costs of the suit.

It is so ordered.

JUDGMENT, DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF OCTOBER 2023

A.O. OMBWAYO

JUDGE

