



Muiruri & another v Thathi & 4 others (Environment & Land Case 23 of 2020) [2023] KEELC 20877 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 23 OF 2020
MN GICHERU, J
OCTOBER 17, 2023**

BETWEEN

NICHOLAS MUCHINA MUIRURI 1ST PLAINTIFF

KEVIN MBAKA MUIRURI 2ND PLAINTIFF

AND

SALESIO KIARIE THATHI 1ST DEFENDANT

ABDIWAHAB HAJI ISSAK 2ND DEFENDANT

CHRISTOPHER NDWIGA NJIRU 3RD DEFENDANT

NCBA BANK LIMITED 4TH DEFENDANT

**ATTORNEY GENERAL (SUED ON BEHALF OF THE REGISTRAR OF LAND
KAJIADO NORTH REGISTRY) 5TH DEFENDANT**

JUDGMENT

1. The Plaintiffs seek the following reliefs against the five (5) Defendants both jointly and severally.
 - a. A declaration that the Plaintiffs are the legal owners of L.R. Ngong/ Ngong/28954, suit land.
 - b. An order that the purported transfer of the suit land from the Plaintiffs to the 1st Defendant was fraudulent and therefore illegal and void.
 - c. An order of permanent prohibitory injunction be issued to the 3rd, 4th defendants and the Land Registrar at Kajiado North Land Registry, their agents, employees or persons claiming on their behalf or their instructions prohibiting them from entering, remaining in, trespassing, transferring,



leasing or exercising statutory power of sale or otherwise disposing off or developing the suit land.

- d. A mandatory order of injunction be issued directing the Land Registrar Kajiado North Land Registry to cancel any title and rectify the land register to reflect the Plaintiffs as the registered owners of the suit land.
 - e. A mandatory order of injunction be issued directing the Land Registry Kajiado North Land Registry to cancel the charge registered in favour of the fourth Defendant and discharge the suit land forthwith.
 - f. General damages.
 - g. Costs of the suit.
 - h. Any other relief as the court may deem fit and proper to issue.
2. The Plaintiffs' case is as follows. Both of them are brothers and sons of the late Peter Karanja Muiruri who died on 24/7/2011. Their father was the owner of the suit land. Upon the demise of their father, the two Plaintiffs became the jointly registered owners through a succession cause.
 3. During his lifetime, the Plaintiffs father charged the suit land to Family and Equity Banks on 29/8/2007 and 9/2/2011 respectively. Around the years 2012/13, the title deed to the suit land went missing but the Plaintiffs were able to obtain a duplicate thereof vide Gazette Notice No. 1932 of 15/2/2013. Later on, they were able to discharge the charge order over the suit land, in favour of Equity Bank on 27/2/2013. The Plaintiffs became the registered owners of the suit land through transmission on 27/2/2013. They are also in possession of the suit land.
 4. On 5/3/2020, the Plaintiffs received information that some people had visited the land to value it with a view to selling it to third parties. They decided to visit the land registry to find out if all was well with the land. They were shocked to find out that their land had been transferred to third parties without their knowledge.
 5. According to the records available the Plaintiffs had purportedly transferred the suit land to the first Defendant on 18/10/2018. The first Defendant then transferred the suit land to the second Defendant on 11/1/2019. Then on 19/2/2019 the second Defendant transferred it to the third Defendant who again transferred it to one Antony Gaita Warui on 8/8/2019 who then transferred it back to the third Defendant on the same date. After the suit land was transferred to the third Defendant by Antony Gaita Warui, he charged it with the fourth Defendant for KShs. 15.2 Million on 2/10/2019.
 6. The Plaintiffs plead the following particulars of fraud, irregularity, illegality and corruption against the first Defendant and the Land Registrar at Kajiado North Land Registry.
 - a. Fraudulently altering the land register to remove the names of the Plaintiffs.
 - b. Transferring the title of the Plaintiffs' land without instruments of transfer being duly executed by the Plaintiffs.
 - c. Fraudulently retransferring the suit property to the 1st defendant (sic).
 - d. Transferring the suit property without the consent and knowledge of the Plaintiffs who were the legally registered owners.
 - e. Transferring the suit land illegally and unprocedurally.



- f. Failing to ascertain the rightful registered owners to the suit land.
 - g. Transferring the suit land without ascertaining whether the rightful registered owners had obtained the requisite land control board consent to transfer the suit property.
 - h. Failing to ascertain whether the rightful owners had consented to the transfer of the suit land.
7. In support of their case, the Plaintiffs filed the following evidence.
- a. Witness statement by the second Plaintiff dated 8/5/2020.
 - b. Copies of title deed for the suit land in the names of the Plaintiffs' father, the 1st, 2nd and 3rd Defendants.
 - c. Copies of grant and certificate of confirmed grant.
 - d. Copy of Gazette Notice No. 1932 of 15/2/2013.
 - e. Copies of charge to Family and Equity Banks.
 - f. Copy of discharge of charge on Equity Bank.
 - g. Copies of the application for transfer, registration, documents and title deed.
 - h. Copies of the extract of the register.
 - i. Copy of transfer from the 1st to the 2nd Defendant.
 - j. Copy of charge to NIC Bank Ltd, now CBA.
 - k. Copy of extract of the title.
8. The first and third Defendants did not enter appearance or file a defence. The second Defendant filed a written statement of defence dated 24/2/2022 in which he denies the Plaintiffs' claim against him. He denies having been part of the scheme that fraudulently acquired the Plaintiffs' land. He filed a witness statement in support of his defence in which he says that the signatures on the transfer form are not his and he suspects that his documents in the land registry relating to his own land in Kajiado County were used fraudulently in this case and without his knowledge. He has nothing to do with the Plaintiffs' land and he does not even know where it is situated. He blames the land registry for the use of his documents in the fraud perpetrated against the Plaintiffs.
9. The fourth Defendant, in a written statement of defence dated 28/9/2020 avers that the third Defendant was its customer. In July and September 2019, he applied for a commercial loan for KShs. 15.2 million. When the fourth Defendant asked him for the requisite documents like copy of agreement for sale between him and the seller, title document in his name and all other relevant documents, he was able to present them.
- The fourth Defendant obtained a valuation report and a certificate of official search. After being satisfied that everything was in order, the fourth Defendant proceeded to create a legal charge over the suit property on 30/9/2019. Later on, the third Defendant defaulted on his loan repayment whereby the fourth Defendant instructed its advocates to issue the requisite statutory notice as a prerequisite to exercising its statutory power of sale.



In the absence of any caution, inhibition or court order being registered against the suit property, it was not possible for the fourth Defendant to know if there was any problem with the suit land. The fourth Defendant was therefore justified to presume that the vendor and the third Defendant held a good title. It therefore prays that the Plaintiffs suit as against it be dismissed with costs.

10. In support of its case, the fourth Defendant filed the following evidence.
 - a. A witness statement by Ibrahim Mbogo, a legal officer of the fourth Defendant and another one by Anne Waiganjo.
 - b. Copy of letter of offer dated 16/7/2019.
 - c. Copy of agreement for sale dated 29/5/2019.
 - d. Copy of title deed in the name of Antony Gaita Warui.
 - e. Copy of valuation report dated 11/9/2019.
 - f. Copy of certificate of official search dated 20/8/2019.
 - g. Copy of transfer form dated 18/10/2019.
 - h. Copy of title deed in the name of the third Defendant.
 - i. Copy of first legal charge dated 30/9/2019.
 - j. Copy of certificate of official search dated 2/10/2019.
 - k. Copy of statutory notice dated 11/5/2020.
 - l. Statement of account.
11. In addition to the above, the fourth Defendant served a notice of claim against the 3rd and 5th Defendants dated 4/3/2022, pursuant to Order 1 Rule 24(1) *Civil Procedure Rules*. In the notice the fourth Defendant claims full indemnity and or contribution for any judgment that may be entered in favour of the Plaintiffs. The indemnity sought is for Kshs. 16, 850,685.98 as at 3/3/2022. The particulars of fraud for each of the two Defendants are particularized in the notice.
12. The fifth Defendant in a written statement of defence dated 19/6/2020 generally denies liability to the Plaintiffs. It avers that if there was any transfer of the suit property, this was done in compliance with the fifth Defendants' statutory mandate.

Finally, it is pleaded that the fifth Defendant was not served with the mandatory notice of intention to sue government as required by Section 13A of the Government Proceedings Act. No witness statements or documents were ever filed by the fifth Defendant.
13. At the trial on 8/10/2022 the second Plaintiff, the second Defendant and one Ibrahim Mbogo, a witness for the fourth Defendant, are the only witnesses who testified. They adopted the evidence filed earlier and they were then subjected to cross-examination.
14. Counsel for the Plaintiff and the fourth Defendant filed written submissions on 23/3/2023 and 24/3/2023 respectively. The fourth Defendant identified the following issues.
 - i. Whether the 4th Defendant acquired equitable interest over the suit property as an innocent chargee for value by virtue of the charge dated 29/5/2019 without notice of any defect in title.



- ii. Whether the 4th Defendant is entitled to the reliefs sought against the 3rd Defendant.
- iii. Whether the fourth Defendant is entitled to the reliefs sought against the 5th Defendant.
- iv. Who bears the costs of the suit.

On the other hand the Plaintiffs' counsel identified the following issues.

- i. What is the effect of failure by the 5th Defendant to call a witness.
- ii. Whether the Plaintiffs have ever transferred the suit land to the first Defendant.
- iii. Whether the 2nd, 3rd and 4th Defendants acquired good title over the suit land.
- iv. Whether failure to join Antony Gaita Warui as a Defendant is fatal to the plaintiffs' suit.
- v. What reliefs should the court issue under the circumstances.

15. I have carefully considered all the evidence adduced by all the parties including the witness statements, documents and testimony at the trial. I have also considered the written submissions by the counsel for the Plaintiffs and the fourth Defendant including the case law cited therein. I make the following findings on the issues raised by the parties.

16. On whether the fourth Defendant acquired an equitable interest over the suit property as an innocent chargee without notice of defect in title, I find that it did not. Article 40(6) of the Constitution of Kenya provides as follows.

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”

There is no doubt that the Plaintiffs' property was acquired unlawfully by the first and third Defendants. I am satisfied that the Plaintiffs did not transfer the suit land to the first Defendant or to any other person and the purported transfer to the first Defendant was fraudulent null and void as are the subsequent transfer.

In the case of Dina Management Limited v County Government of Mombasa and 5 others Petition No. 8 (E010) of 2021, it was held as follows at paragraph (iii)

“Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending to any property that has been found to have been unlawfully acquired. Having found that the first registered owner did not acquire title regularly, the ownership of the suit property by the Appellant thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged, as we already noted above the Appellant could not benefit from the doctrine of bona fide purchaser”.

17. On the second and third of the fourth Defendant's issues, I find that it is entitled to the reliefs sought against the third and fifth Defendants. The third Defendant did not defend the suit. Since he is a beneficiary of a fraudulent transfer from a person who had no title, he too did not acquire title. He is a fraudster. Under the terms and conditions of the letter of offer dated 16/7/2019, the third Defendant



covenanted to pay the principal sum with interest. He is therefore bound to indemnify the fourth Defendant.

18. The Land Registrar at Kajiado North Land Registry is equally liable to indemnify the fourth Defendant for the loss that it may suffer as a result of this decision. Under Section 7 of the [Land Registration Act](#), it is the duty of the Land Registry to maintain among others, (1) (c), “parcel files containing the instruments and documents that support subsisting entries in the land register”.

- (e) presentation book in which shall be kept a record of all applications numbered consecutively in the order in which they are presented to the registry”.

Had the Land Registrar maintained these records as he is required to do by the law, this unfortunate fraud would not have occurred. To add insult to injury, the land registry did not care about participating in this case to shed light as to exactly what happened and to assure us that it would not happen again.

19. To answer the first of the Plaintiffs’ issues, the effect of failure by the fifth Defendant to call a witness is an admission of the averments made against the office. This is especially so when Land Registrar is under a duty imposed by law to maintain all the records outlined in Section 7 of the [Land Registration Act](#).

Though the Land Registrar had no burden of proof in this case, a rebuttal of the flagrant fraud proved by the Plaintiffs was necessary especially when such fraud seems to have been perpetuated in the registrar’s office. He was expected to avail records of the Land Control Board including the consents and the application forms for such consent, the transfer instruments duly executed by all the parties especially the Plaintiffs, the assessment of stamp duty etcetera.

Failure to appear means that such records do not exist and that the suit land was transferred from the lawful owners, the Plaintiffs, unprocedurally.

20. Regarding the issue of the Plaintiffs transferring the suit land to the first Defendant, I find that they did not. As already mentioned in paragraph (19) above, none of the documents which precede the lawful transfer of the suit land were availed by the Land Registrar or any of the other Defendants. For the same reasons given here and in paragraph 19, above, I find that the 2nd, 3rd and 4th Defendants did not acquire good title to the suit land. Since the owners of the suit did not transfer it to the first Defendant, there was no lawful transfer at all to any of the Defendants.

21. Failure to join Antony Gaita Warui who transferred the land to the third Defendant is not at all fatal to the Plaintiffs’ case. Since there was no lawful transfer in the first place, the fraudulent transaction between the Defendants do not qualify to be called transfers. The necessary parties in this case are the Plaintiffs’, the Land Registrar and the bank. The first and third Defendants were necessary parties too but as has been proved, they were fraudsters. The only Defendant who has acquitted himself is the second one because he at least came forward and explained that he too was a victim of the fraud committed by the first and third Defendants together with the Kajiado North Land Registry.

22. In conclusion, I enter judgment for the Plaintiffs against the first, third, fourth and fifth Defendants as prayed for in the plaint.

Secondly, I enter judgment for the fourth Defendant against the third and fifth Defendants as per the notice of claim dated 4/3/2022.

Finally on costs, I order that the costs of the Plaintiffs, the second and fourth Defendants be borne by the first, third and fifth Defendants.



It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 17TH DAY OF OCTOBER, 2023.

M.N. GICHERU

JUDGE

