



REPUBLIC OF KENYA



**KENYA LAW**  
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**Githuku v Gitiche & 2 others (Environment and Land Case 101 of 2023)  
[2023] KEELC 21807 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21807 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND CASE 101 OF 2023  
YM ANGIMA, J  
NOVEMBER 23, 2023**

**BETWEEN**

**BENJAMIN NJUGI GITHUKU ..... PLAINTIFF**

**AND**

**MARGARET WAITHIRA GITICHE ..... 1<sup>ST</sup> DEFENDANT**

**ROSE WAMBUI MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**WANJIRU MWANGI GICHUHI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. Plaintiff's Claim**

1. Vide a plaint dated 07.01.2020 and amended on 15.04.2021 the Plaintiff sought the following reliefs against the Defendants:
  - a. A declaration that the Plaintiff is entitled to be registered as the absolute and sole owner of three (3) acres of land from the suit parcel by virtue of being a bona fide purchaser and an order of specific performance do issue to the 4<sup>th</sup> Defendant to transfer to the Plaintiff three (3) acres of land to be excised from all that piece of land known as L.R. Nyandarua/Silibwet/4749.
  - b. In the alternative to prayer (a) above, a declaration do issue that the Plaintiff is entitled to be registered as the sole and absolute owner of three (3) acres of land clearly demarcated from all that piece of land known as L.R. No. Nyandarua/Silibwet/4749 by virtue of the doctrine of adverse possession and a title deed do issue in his name.



- c. A declaration do issue that the actions of the Defendants complained hereof are illegal and amount to trespass and nuisance and have infringed on the Plaintiffs right to quiet enjoyment of his land.
  - d. A perpetual and permanent injunction restraining the Defendants, their agents, servants, employees and or assignees from further trespassing, destroying, claiming and or interfering with the Plaintiff's property being three (3) acres demarcated from L.R. No. Nyandarua/Silibwet/4749 or in any other way dealing with the parcel in a manner inconsistent with the Plaintiff's right of use and enjoyment.
  - e. Compensation to the Plaintiff for malicious damage of demolished properties for the value of re-constructing the same to their former state as shall be assessed by a valuer.
  - f. Compensation to the Plaintiff for damaged and looted properties and destroyed crops as shall be quantified by the court.
  - g. Compensation to the Plaintiff for the cost of renting a house at the rate of Kshs. 10,000/= per month from the date of the month of February, 2020 till the date the Plaintiff is reinstated to his original position.
  - h. General, exemplary and punitive damages for trespass and nuisance.
  - i. Costs of the suit.
  - j. Interest on (d), (e), (f) and (g) above at court rates.
  - k. Any other remedy the court may wish to grant.
2. The Plaintiff pleaded that he was a bona fide purchaser of 3 acres of land from the late Tabitha Njoki Mwangi (the deceased), which he purchased on diverse dates between 2002 and 2005 to be excised out of a larger parcel of land known as Nyandarua/Silibwet/525. The latter parcel was later on subdivided into parcel Nos. 4749, 4750 and 4751 whereupon the deceased remained with parcel 4749.
  3. It was the Plaintiff's case that even though the deceased put him in possession during her lifetime, the Defendants had in February 2020 unlawfully entered his portion of 3 acres, demolished his houses, evicted him therefrom, and looted his belongings hence the suit. The Plaintiff also pleaded that as a result of the actions on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants he had to rent alternative accommodation at a cost of Kshs. 10,000/ per month with effect from February, 2020 which charges shall continue to accrue until he is reinstated into the suit property.

#### **B. 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Response**

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint statement of defence dated 22.05.2020 and amended on 29.04.2021 denying liability for the Plaintiff's claim in its entirety. They admitted that the deceased was the owner of the original parcel 525 but pleaded that any sale agreement between the deceased and the Plaintiff was null and void for want of consent of the Land Control Board. It was further pleaded that at the time the deceased purported to sell the land, the same had already been cautioned hence no valid sale agreement could be made with respect thereto.
5. They denied that the Plaintiff had been in peaceful and exclusive possession of any identifiable portion of 3 acre of land out of parcel 525 between 2003 and 2020 and put him to strict proof thereof. The 1<sup>st</sup>



and 2<sup>nd</sup> Defendants pleaded that vide a judgment rendered in Nakuru HCCC No. 105 of 2003 it was decreed that the deceased was holding parcel 525 in trust for the 3 houses of the late Mwangi Gichuhi and that parcel 525 be sub-divided and distributed accordingly. As a result, parcel 525 was sub-divided into parcel Nos. 4749, 4750 and 4751 out of which parcel 4750 was transferred to the 1<sup>st</sup> Defendant.

6. It was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case that as a result of the Plaintiff's illegal occupation of parcel 4750, she filed Nyahururu SPMCC No. 98 of 2014 seeking his eviction together with other illegal occupants thereof. It was pleaded that upon delivery of judgment against him the Plaintiff failed to vacate voluntarily as a result of which he was forcibly evicted from parcel 4750 in 2017 on the basis of the decree.
7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied that the Plaintiff had ever cultivated, developed or utilized parcel 4749 as claimed or at all. They also denied having demolished the Plaintiff's houses or having destroyed or looted his properties and put him to strict proof thereof. They pleaded that there was an old semi-permanent timber house on the portion of land claimed by the Plaintiff but the same was built by the deceased. It was contended that the said house was demolished in February, 2020 for security reasons as it had become a hideout for thugs.
8. The Defendants further pleaded that the Plaintiff's suit was res judicata by reason of Nakuru HCCC No. 105 of 2003 and Nyahururu SPMCC No. 98 of 2014 hence the same ought to be struck out. It was also pleaded that the Plaintiff had no locus standi to file the suit since the suit property was still registered in the name of the deceased. The Defendants also considered the suit to be incompetent, bad in law and otherwise an abuse of the court process. As a result, they prayed for the suit to be struck out or dismissed with costs.

### **C. 3<sup>rd</sup> Defendant's Response**

9. The 3<sup>rd</sup> Defendant filed a statement of defence dated 13.03.2023 in response to the Plaintiff's claim. She admitted that the Plaintiff had bought a portion of 3 acres of land from the deceased who was her co-wife from her share of parcel 525. She pleaded that she had no problem with the Plaintiff getting his rightful share out of parcel 4749 as a purchaser.
10. It was, however, the 3<sup>rd</sup> Defendant's contention that she was not aware how and when parcel 525 was sub-divided since she had cautioned the same. She pleaded that she was never called upon to remove the caution and neither did she sign my mutation forms. She, therefore, prayed that justice should be granted to the Plaintiff whereafter the remainder of the land may be shared amongst the entitled beneficiaries. The 3<sup>rd</sup> Defendant denied knowledge of any demolition or malicious damage as pleaded by the Plaintiff. She pleaded that during the Plaintiff's occupation of the suit property she never bothered him or disturbed him and his family.

### **D. 4<sup>th</sup> Defendant's Defence**

11. The 4<sup>th</sup> Defendant was joined in the suit as the personal representative of the deceased. He neither entered appearance nor filed a defence to the suit.

### **E. Directions on Submissions**

12. Upon conclusion of the hearing the parties were given timelines within which to file and exchange their respective submissions. The record shows that the 3<sup>rd</sup> Defendant's submissions were filed on 01.09.2023 but the submissions of the rest of the parties were not on record by the time of preparation of the judgment.



## F. Issues for Determination

13. The court has noted that the parties did not file an agreed statement of issues for determination in this suit. As a consequence, the court shall frame the issues for determination as provided for in law. Under Order 15 rule 2 of the *Civil Procedure Rules*, the court may frame issues from the following:
  - a. The allegations contained in the pleadings.
  - b. The allegations contained in statements sworn by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
14. The court has considered the pleadings, evidence and documents in this matter and is of the opinion that the following issues arise for determination herein:
  - a. Whether the Plaintiff is entitled to specific performance of the sale agreement for the portion of 3 acres claimed out of parcel 4749.
  - b. Whether the Plaintiff has proved the alternative claim for adverse possession of the portion of 3 acres.
  - c. Whether the Plaintiff is entitled to compensation for damage to his houses, properties, and crops.
  - d. Whether the Plaintiff is entitled to general damages, exemplary damages and punitive damages.
  - e. Whether the Plaintiff is entitled to the reliefs sought in the suit or any one of them.
  - f. Who shall bear costs of the suit.

## Analysis and Determination

### **a. Whether the Plaintiff is entitled to specific performance of the sale agreement for the portion of 3 acres claimed out of parcel 4749**

15. The court has considered the material and submissions on record on this issue. The Plaintiff's evidence was to the effect that he first bought 1 acre of land out of parcel 525 from the deceased in 2002 and later in 2005 one more acre from the same parcel at a time when she was the registered owner. The Plaintiff produced copies of the relevant sale agreements dated 19.12.2002 and 21.12.2005 respectively.
16. The 3<sup>rd</sup> Defendant (the deceased's co-wife) conceded that such a sale took place but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (the deceased's step-children) disputed the sale. The court is inclined to accept the evidence of the Plaintiff and the 3<sup>rd</sup> Defendant on the issue of sale. There was credible evidence from both the Plaintiff's witnesses and the 3<sup>rd</sup> Defendant that the Plaintiff took possession of the said portion of 3 acres during the lifetime of the deceased. There is evidence to demonstrate that the Plaintiff built some structures on the land, fenced it and cultivated it during the lifetime of the deceased who never raised any complaint and who never sought his eviction.
17. The court has also noted that both sale agreements were drawn by the firm of M/S Ndegwa Wahome & Co. Advocates which is still operational and which acted for the Plaintiff at the trial. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not question the integrity of the said law firm and they did not suggest that there was any form of forgery or fraud in the preparation and attestation of the two sale agreements.



18. The remedy of specific performance was considered in the case of *Reliable Electrical Engineers (K) Ltd – v- Mantral Kenya Limited* [2006] eKLR where it was, inter alia, that:

“Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the Defendant.”

19. It was common ground that the deceased died in 2011 before she could obtain the consent of the Land Control Board and before she could transfer the portion of 3 acres the subject of the sale. For a long period of time in Kenya it was held by various courts that the absence of the consent of the Land Control Board automatically invalidated a sale agreement for the sale of agricultural land and rendered the same void for all purposes.
20. That was the position until the case of *Willy Kimutai Kitilit – v- Michael Kibet* [2018] eKLR was decided by the Court of Appeal on 17.02.2018. In the said case it was held, inter alia, that:

“(26) For the reasons in paragraphs 20, 21, 22, 23, 24 and 25 above, we are in agreement with the Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the *Land Control Act*, though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy grant the equitable remedy of specific performance.

(27) Turning to the present appeal, the learned Judge made the findings of fact in terms of paragraph 3 above and also made a finding of law that the appellant created a constructive trust in favour of the respondent. It was not in dispute that the appellant sold a 2 acre portion of his land comprising of 2.440 Hectares to the respondent in 2008. He gave possession of the land to the respondent who fenced the land and developed a portion of half an acre by planting trees. The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case.”



21. Similarly, in *Aliaza – v- Saul* (Civil Appeal No. 134 of 2017) [2022] KECA 583 (KLR) (24 June, 2022) (Judgment) it was held by the Court of Appeal that:

“ 40. In my view, from the time the appellant entered the first of the two parcels of the suit land in 2002 and into the subsequent portion that he purchased in 2004, a constructive trust in his favour was created in respect of the land. Such trust, as was found by the court in the case of *Macharia Mwangi Maina*, became an overriding interest over the suit land. The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in Article 10 of the *Constitution*, require that the *Land Control Act* is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the appellant.

41. Contrary to the submission by the respondent, in the face of these constitutional provisions, the fact that the appellant had not pleaded a constructive trust in his counterclaim does not preclude this Court from inferring such a trust. Moreover, in his written submissions dated 30<sup>th</sup> August 2016, the appellant raised the issue of an implied or constructive trust having arisen in his favour. The respondent did not address this issue in his submissions dated 26<sup>th</sup> September 2016. I take the view, on the authority of the decisions in *Odd Jobs v Mubia* [1970] EA 476 and, among other decisions, *Ann Wairimu Wanjobi v James Wambiru Mukabi* [2021] eKLR that though unpleaded, the issue of a constructive or implied trust was left for the determination of the trial court. The trial court did in fact address itself to the issue in its decision in which it stated as follows:...”

22. In both the Willy Kimutai Kitilit Case and the Aliaza Case the vendors had sold their respective portions of land, received the full purchase price and put the respective purchasers in possession. In both cases, the purchasers developed their respective portions of land. In both cases, the consent of the Land Control Board was never obtained just like in the instant case. In both cases, the Court of Appeal held that a constructive trust arose in favour of the purchasers and that the respective vendors could not resile from the sale on account of lack of the Land Control Board consent. In the Aliaza Case, it was held that the court could still imply a constructive trust even if it is not specifically pleaded by the purchaser.

23. The court is thus satisfied that the Plaintiff has demonstrated that he is a purchaser for value of a portion of 3 acres out of parcel 525 before its sub-division. The court is satisfied on the basis of the material on record that he paid the purchase price for the land and that he was put in possession by the deceased purchaser. The court is further satisfied that the Plaintiff developed the said portion of land over the years and that he built some semi-permanent houses, fenced the land and cultivated crops thereon with the full knowledge of the deceased. In the premises, the court is satisfied that the Plaintiff is entitled to succeed in his claim for specific performance of the relevant sale agreements.

24. The court has taken note of the judgment and decree of the High Court in Nakuru HCCC No. 105 of 2003 dated 15.02.2008. The judgment stated that the deceased vendor was holding parcel 525 in trust for the 3 households of her husband Mwangi Gichuhi and that the same be sub-divided into 3 equal portions amongst them. It is evident that the deceased was to get 1/3 of the 24 acres comprised in



parcel 525 just like the other 2 households. The court is thus satisfied that it is possible for the Plaintiff to get his 3 acres out of the 8 acres to which the estate of the deceased is entitled.

25. The court has noted that when parcel 525 was sub-divided into parcel Nos. 4749, 4750 and 4751 the 1<sup>st</sup> Defendant got parcel No. 4750 whereas the 3<sup>rd</sup> Defendant got parcel 4751. It is thus obvious that the remainder being parcel 4749 was to go to the deceased. It is not clear why the 1<sup>st</sup> Defendant was resisting to have the Plaintiff get the portion of 3 acres he purchased from the deceased whereas she got parcel 4750 on behalf of her household. The fact that the deceased did not have biological children could not legally preclude her from selling part of her land.

**b. Whether the Plaintiff has proved the alternative claim for adverse possession**

26. The court is aware that a claim for specific performance of a sale agreement and a claim for adverse possession are mutually exclusive. A litigant can only succeed in respect of one but not both of them. The court has already found that the Plaintiff has proved his claim for specific performance of the sale agreements for the sale of 3 acres. In the event, it is not necessary to consider and to determine the alternative claim for adverse possession.

**c. Whether the Plaintiff is entitled to compensation for damage to his houses, properties and crops**

27. The court has considered the material and submissions on record on this issue. There is no doubt from the material on record that the Plaintiff's houses, crops and other properties were destroyed as a means of getting him out of the portion of 3 acres on which he had settled. There is some evidence on record to demonstrate that he reported the various incidents to the Kenya Police Service.
28. There is, however, no direct evidence linking any of the Defendants to the demolition of houses and destruction of crops and other properties. None of the Plaintiff's witnesses were able to tender any credible evidence on who was actually involved in the demolition and destruction of property. The Plaintiff may have had a strong suspicion that the Defendants were involved, but mere suspicion is not enough. The mere fact that one of the workers or relatives of the 1<sup>st</sup> Defendant was seen salvaging or picking some material from the site of demolition is not necessarily evidence of involvement in the actual demolition of the houses.
29. The court is further of the opinion that the Plaintiff's claim for compensation was not pleaded with particularity as required by law. A claim for compensation for loss and destruction of property is usually in the nature of special damages which should be specifically pleaded and strictly proved. A monetary loss for demolition of a house and for theft of personal effects can be assessed and quantified by relevant experts. In the premises, the court is not satisfied that the Plaintiff's claim for compensation is awardable. See *Ouma - v- Nairobi City Council* [1976] eKLR.

**d. Whether the Plaintiff is entitled to general damages, exemplary damages and punitive damages**

30. The court has considered the material and submissions on record. The court has noted from the evidence on record that even though the 1<sup>st</sup> Defendant admitted using and cultivating parcel 4749 together with some of her family members the Plaintiff also admitted that for several years while he was in occupation of the 3 acres he bought from the deceased, he was also cultivating a portion 4750 registered in the name of the 1<sup>st</sup> Defendant.
31. Although the Plaintiff is entitled to general damages for trespass to land, the court must, nonetheless, take into account his previous cultivation and utilization of a portion of parcel 4750. The material on record further shows that when the 1<sup>st</sup> Defendant sued him for eviction in Nyahururu SPMCC No. 98 of 2014, he conceded the claim and recorded a consent for his eviction from parcel 4750 since he



had no claim on that parcel. In the premises, the court is not inclined to award the Plaintiff general damages for trespass to land. The court finds no basis upon which exemplary or punitive damages may be awarded against the Defendants or any of them.

**e. Whether the Plaintiff is entitled to the reliefs sought in the suit or any one of them**

32. The court has already found and held that the Plaintiff has demonstrated his claim for specific performance. The court has found that the Plaintiff's claim for compensation for demolition of his houses, destruction of crops and other properties was not pleaded with particularity and strictly proved as required by law. The court has also held that the Plaintiff is not entitled to general damages for trespass to land, punitive damages or exemplary damages in the circumstances of this case. In the event, the court is inclined to grant the Plaintiff the remedy of specific performance as well as an injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to restrain them from interfering with the Plaintiff's portion of 3 acres, out of parcel 4749.

**f. Who shall bear costs of the suit**

33. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons – v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to deprive the successful party of the costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only. The 3<sup>rd</sup> Defendant shall not pay any costs since there was no evidence to link her to any wrong doing.

**H. Conclusion and Disposal Order**

34. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his claim for specific performance with respect to the portion of 3 acres the subject of the suit on a balance of probabilities. Accordingly, the court makes the following orders for disposal of the suit:
- a. A declaration be and is hereby made that the Plaintiff is entitled to be registered as the absolute owner of 3 acres out of Title No. Nyandarua/Silibwet/4749 as a purchaser for value.
  - b. An order of specific performance is hereby granted against the 4<sup>th</sup> Defendant in his capacity as the administrator of the estate of the deceased vendor, Tabitha Njoki Mwangi, to transfer the said portion of 3 acres out of Title No. Nyandarua/Silibwet/4749 to the Plaintiff in default of which the Deputy Registrar of the court shall sign all the necessary forms, documents and instruments on his behalf to facilitate the transfer to the Plaintiff.
  - c. A permanent injunction be and is hereby granted restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their agents, servants or assignees from further trespassing on the Plaintiff's portion of 3 acres to be excised from Title No. Nyandarua/Silibwet/4749 or from howsoever dealing with the said portion in a manner inconsistent with the Plaintiff's use and enjoyment thereof.
  - d. The Plaintiff is hereby awarded costs of the suit to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.
  - e. Any prayer sought which has not been specifically granted herein is deemed to have been denied.

It is so decided.



**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023  
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

N/A for the Plaintiff

Mr. Kinyua Njogu for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for the 3<sup>rd</sup> Defendant

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

