



**Kariuki v Watuthu (Environment & Land Case 12 of 2021)
[2023] KEELC 21983 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 12 OF 2021**

AK BOR, J

NOVEMBER 15, 2023

BETWEEN

ANTHONY KARIUKI PLAINTIFF

AND

SAMSON MUTHAMI WATUTHU DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on 17/5/2012 claiming that he was the registered proprietor of the land known as Tigithi/Matanya Block 3/594 (Matanya Centre) upon which he claimed the Defendant had trespassed and remained on illegally committing waste on the land. He sought a permanent injunction to restrain the Defendant from dealing with that land, an order for his eviction, general damages for trespass, mesne profits and the costs of the suit.
2. From the typed proceedings, the court notes that the matter proceeded to hearing when the Plaintiff gave evidence on 27/2/2013 at the Nyeri Environment and Land Court (ELC) before the Hon. A. Ombwayo J. The Plaintiff stated that he lived in Nyeri and was a farmer. He bought the suit land in 1989 from Matanya Estate Limited. A ballot card was issued to him after making all the necessary payments and thereafter he got the title over the land. He claimed that when he went to the land in February 2012 intending to put up structures because he wanted to relocate from his residence, found there were structures erected on the land without his knowledge. He did not know who was responsible for the developments and could see that the land had been ploughed with farming being evident.
3. He went to report the matter and was advised by the Chief to refer the matter to the District Surveyor to give a report on the ownership of the land. When he was sent back, the Chief advised both parties to present their documents pertaining to the land. He stated that the Defendant did not have documents and they were referred to the Land Registrar who gave them an appointment for 5/3/2012. He concluded his statement by indicating that the Registrar stated that he should be given an eviction order by the court which is what prompted him to file this suit.



4. The Plaintiff produced a copy of his title deed, official search and the demand letter his lawyer wrote to the Defendant. He confirmed that he found a house on the suit land and that the Defendant was still on the land when he produced the Surveyor's report.
5. The Defendant filed the application dated 8/7/2013. A consent was recorded on 17/7/2013 dispensing with that application and allowing the Defendant to file his defence, witness statements and documents. Further, the Plaintiff was to be recalled for cross-examination and the Defendant was directed to pay the Plaintiff Kshs. 20,000/= before the next hearing date.
6. The Defendant filed his defence on 21/7/2013 where he stated that he was defending this suit in his capacity as the legal representative of the late Benson Ndungu Theuri. He averred that his late father was allocated 100 shares by Matanya Estate Limited vide register no. 1213 and that he was allocated plot no. 1073 which came to be known as Tigithi/Matanya Block 3/1073(Matanya Centre) which he gave to the Defendant prior to his death.
7. Further, the Defendant averred that when he started processing titles for the parcels of land which resulted from the subdivision of Block 3/1073 being parcel numbers Block 3/493 to 808 he learnt that the Plaintiff had unlawfully caused Block 3/594 to be registered in his name. He pleaded particulars of fraud including causing the Land Registrar to issue a title in his name through deception and failing to disclose that the suit land belonged to the Defendant. The Defendant was emphatic that the Plaintiff did not acquire a good title to the suit land and that all the dealings with the land were fraudulent and illegal.
8. The Defendant told the court that he was in actual possession of the suit land, had erected structures on it and had been in occupation for more than 50 years. He counterclaimed a declaration that the suit land was fraudulently registered in the Plaintiff's name and sought an order for cancellation of the title held by the Plaintiff.
9. The Plaintiff was cross-examined on 27/7/2017. He told the court that two years before when he visited the land he found somebody had built on it and was keeping livestock. Upon carrying out investigations, he discovered that the house belonged to the Defendant. The Plaintiff maintained that he was allocated the suit land as a member of Matanya Estate Limited after balloting in 1978 pursuant to the one share he held in the company. He added that title deeds were processed and given to them individually as members of Matanya Estate Limited after they completed payment of Kshs. 640/= for one share to the company. He told the court he had the clearance certificate from the company showing the suit property was his land but had not brought it to court. He added that he could produce it if it were required by the court.
10. After the Plaintiff had closed his case, the Defendant gave evidence. He stated that in 1968, his father Benson Watuthu bought land from Matanya Estate Limited where he had 100 shares in the company. The Defendant sought time to produce the original clearance certificate and other documents and was stood down to enable him obtain the original documents. The hearing proceeded on 15/2/2018 when the Defendant told the court that in 1968, his father identified a piece of land belonging to a white settler with an outstanding loan owed to a bank in which and who wanted to sell the land. When the bank informed his father about it, he approached Matanya Company Limited and loaned the company Kshs. 300,000/= to enable it purchase the land. His father was to be given 320 acres from the company and the other members were to share the remainder.
11. The Defendant claimed that the company gave his father 320 acres and a survey was carried out with his land being identified as parcel no. 311. His father fenced off the land and they lived on it for 20 years. After the survey was carried out, the company furnished a list of members and their acreage to



- the Registrar of companies. Later the provincial administrator went and subdivided the land again. He added that the Chiefs who were carrying out the exercise did not listen to them and while his father was on his way to Nairobi in 1989, he was killed by some members. The Plaintiff claimed that the area Chief interfered with the land and issued fresh ballot papers and that the Plaintiff was among the people who purchased the land from the Chief. The Defendant claimed that the Chief had approached him to negotiate an out of court settlement but he refused. He also claimed that he had approached the President who referred him to Kituo cha Sheria.
12. The Defendant clarified that the house erected on the suit land was not a temporary structure. His father built it in 1970. He added that it even had electricity. He maintained that according to the register held by the Registrar of Companies, plot no. 594 was registered in his father's name. He added that the Land Registrar tried to resolve the matter and asked the Plaintiff among other parties to return the title deeds but only one out of five people returned the title. The Defendant told the court that he was unable to avail any of the original documents.
 13. On cross-examination, the Defendant confirmed that he had attended a meeting at the Chief's office with the Plaintiff and that that was the same Chief who fraudulently sold the suit land to the Plaintiff. The Defendant claimed that the Chief asked him for the ballot which he did not have because the Chief and the other Administrators had stolen the original ballot to the land. He maintained that the Land Registrar asked the Plaintiff to return the title deed he held over the suit land. He clarified that the Matanya Company had to ascertain that one was a registered member who had fully paid for the shares and that he had a ballot card before issuing a title to the member. He reiterated that he could not produce any ballot because his father's ballot cards were stolen from the Chief's office.
 14. After giving evidence, the Defendant applied for an adjournment to enable him bring witnesses. Nothing happened in this matter until it was transferred to this court in September 2021. The court fixed the matter for hearing on 29/9/2022. The hearing could not proceed on that day because the Plaintiff's advocate sought time to familiarise himself with the case. The matter was fixed for hearing on 20/2/2023 but could not proceed on that day because the Defendant's advocate was under the weather.
 15. The matter was fixed for hearing on 9/5/2023. The Defendant adopted his witness statement dated 30/6/2014. He informed the court that he wished to produce the documents in his bundle and the Plaintiff advocate objected on the basis that she took over conduct of the matter from the Plaintiff's previous advocate and did not have the trial bundle. She demanded to see the originals. The Defendant who was conducting the matter in person because his advocate was not in court sought time to bring the originals and to call the Land Registrar. He told the court he had another problem, that thugs have been sent to kill him. The court advised the witness to report any criminal activity to the police. The court reluctantly adjourned the matter to give the Defendant time to bring the original documents and to call the Land Registrar. The matter was to be heard on 30/5/2023.
 16. On 30/5/2023, Mr. Warutere Advocate who represents the Defendant told the court that they had looked at the typed proceedings which confirmed that the Defendant gave evidence on 15/2/2018. The other witness they were to call was dead. He closed the Defendant's case and the court gave directions for the filing of submissions.
 17. Parties filed submissions which the court has considered. The Plaintiff submitted that he was a shareholder of Matanya Estate Limited and that he paid for and was issued a ballot card after making the necessary payments. He stated that he became a member around 1978 and that upon balloting, he was allocated the suit property and was issued a title over the land on 27/5/1998 upon being cleared by the company and the Registrar of Lands. When he went to the land, he found the Defendant on it



and that he had built structures on it. He tried to have the matter resolved by the Chief and the Land Registrar but the Defendant refused to move out of the land.

18. The Plaintiff relied on Section 26 (1) of the [Land Registration Act](#) on the certificate of title issued by the Registrar upon registration being taken as prima facie evidence by the court that the person named as proprietor of the land was the absolute and the indefeasible owner subject to the conditions or restrictions endorsed on the certificate. Such a title can only be challenged on the grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate was acquired illegally, unprocedurally or through a corrupt scheme. The Plaintiff maintained that he had produced the ballot card to confirm he was a member of Matanya Estate Limited and was allocated the suit land through balloting. He also relied on the search and the surveyor's report indicating the position of the land on the ground. The Plaintiff argued that the Defendant failed to tender evidence proving to the required standards that the suit land was acquired fraudulently. He also questioned why the Defendant did not challenge his title and instead waited until 2012 when he sued him to claim fraud.
19. The Plaintiff relied on Section 3 (1) of the [Trespass Act](#) on the definition of trespass and argued that the Defendant had trespassed on his land. He claimed damages because he was unable to take occupation and relied on Section 24 of the [Land Registration Act](#). The Plaintiff sought general damages of Kshs. 1.2 million for trespass and relied on [John Chumia Nganga v Attorney General and Another](#) (2019) eKLR.
20. The Defendant relied on the definition of fraud in Black's Law Dictionary, 10th Edition. He stated that the transfer of the suit property was tainted with illegality and urged that a title obtained through fraudulent and corrupt means did not confer a clean title. He cited several authorities on nullification of titles.
21. He relied on Section 26 of the [Land Registration Act](#) on the issue that the registration of title to land was absolute and indefeasible to the extent that it was created in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that the registration was procured through a person or a body which claims and relies on that principle has not himself been part of a cartel which schemed to disregard the applicable law and the public interest.
22. The Defendant submitted that he could not produce the original documents because they were stolen or lost but that he had availed copies including the letter dated 29/6/2007 which confirmed that his father was a member of Matanya Company as member number 1213, the Gazette Notice showing that his father, Benson Watuthu held 100 shares in Matanya Company and the clearance certificate issued to his father on 28/11/1990. He added that there was proof of the payment of Kshs. 1,000/= made to Matanya Company Limited for ballot no. 1073. He pointed out that the Plaintiff had failed to disclose his member number and that he had also failed to prove how he obtained the title over the suit land. Further, that he did not produce his clearance certificate, which in the Defendant's view was indicative of the fact that the Plaintiff obtained the title over the suit land through fraud. The Defendant urged the court to cancel the Plaintiff's title under Section 80 of the [Land Registration Act](#).
23. The court directed parties to file trial bundles containing the documents relied on at the hearing before the suit was transferred to Nanyuki. The Plaintiff's advocate filed a trial bundle containing the documents which he produced as the trial including copies of the title deed, search done on the suit land and the surveyor's report dated 10/4/2012 confirming that the suit property was in the correct position on the ground as shown on the map. The surveyor pointed out that what was in dispute was ownership but not the physical position of the plot on the ground. The Plaintiff produced a copy of ballot card no. 1072 signed by the District Officer Central Division and the demand letter his lawyer issued to the Defendant.



24. The Plaintiff's advocate incorporated the Defendant's documents in his bundle including the sketch maps of the plot, summons issued by the Land Registrar to the Plaintiff on 23/5/2003 and the District Commissioner's letter dated 18/10/1990 identifying the ten plots which the Defendant was entitled to as 1072, 1073, 1074, 1075, 1076, 1087, 1088, 1089, 1090 and 1091. Through that letter, the District Commissioner instructed the Defendant to remove his fencing wire and materials where it infringed on plots belonging to his neighbours. The letter also instructed the Chief to end the long standing dispute by having the fence to mark out the ten plots so that the neighbours could fence their respective plots.
25. Some of the other documents produced by the Defendant are not legible. He produced some maps bearing different numbers with the name Benson Ndungu written at the top. He also produced letters dated 29/6/2007 confirming that his father Benson Ndungu Theuri was a member of Matanya Estate Limited and was registered as no. 1213 and that he paid 100 shares to the company. The letter sought to have the Lamuria Divisional Tribunal court await the directors' decision to know the owner of plot no. 1073. The other documents are a ballot and the receipt for 1,000/= payment of survey and title fees. He produced a copy of a clearance certificate issued by the District Officer on 28/11/1990 confirming that Benson Ndungu was the owner of plot no. 1073. The letter dated 27/4/2007 from the office of the President directed the District Officer Lamuria Division to investigate the case concerning parcel number 1073 Matanya and submit the report to the District Commissioner, Laikipia.
26. The other documents in the bundle include a register with the name Ndungu, Benson indicated as member no. 1213 with 100 shares reflected against it as well as the Gazette notice which is not very clear but one can make out the name Benson Ndungu as the allottee of 100 shares under plot no 311. There is another letter issued by Matanya Estate Limited on 16 October although the year is cut out, confirming that Benson Ndungu Theuri owned 10 plots. The letter was signed by the officials of Matanya Estate Limited. Another document bearing the stamp of Matanya Estate Limited shows Benson Ndungu Wututhu's name against numbers 594, 595, 513, 514, 515, 516 and 517. The register gives the old numbers and the new numbers with 595 and 594 being the new numbers in relation to 1072 and 1073 respectively.
27. The issue for determination is whether the Plaintiff proved his case on a balance of probabilities. His case is that he was a member of Matanya Estate Limited in 1978. He did not tender the evidence on when the balloting was done and the process followed for him to be registered and issued a title on 27/5/1998. It is not clear why he waited until 2012 to take possession of the land which was allocated to him by the company, if at all it was allocated to him in 1978 as he claimed. He does not deny that he found the Defendant on the suit land and that the Defendant had erected structures on the land. On the other hand, the Defendant claims that his father was a member of the land buying company and was allocated the suit land where he constructed and they were living on it before his father died in 1989.
28. The Plaintiff holds a title over the suit land issued in 1998. Under Section 26 of the [Land Registration Act](#), that title can be challenged on the grounds which include that it was obtained through fraud to which the proprietor was a party, or that it was issued unprocedurally or through a corrupt scheme. The Defendant pleaded that the Plaintiff obtained the title over the suit property fraudulently. The Plaintiff produced a copy of the ballot card and a surveyor's report dated 10/4/2012 describing the location of the suit land.
29. Apart from making a general claim to the suit property while placing great reliance on the title deed issued on 27/5/1998, Plaintiff did not lead credible evidence on when it is he purchased the suit land from the land buying company and the steps taken by the company to allocate him the suit land specifically. According to the evidence he gave, he learned in 2012 that the Defendant was on the land. He did not explain whether the suit land was occupied or not at the time he obtained the title.



30. On his part, the Defendant produced letters dated 29/6/2007 confirming that his father Benson Ndungu Theuri was registered as member number 1213 of Matanya Estate Limited and that he paid 100 shares to the company. He also produced the ballot and the receipt for 1,000/= being payment of the survey and title fees. The clearance certificate issued by the District Officer on 28/11/1990 confirmed that Benson Ndungu was the owner of plot no. 1073. The register of the company has Ndungu, Benson indicated as member no. 1213 with 100 shares while the Gazette notice bears the name of Benson Ndungu as the allottee of 100 shares under plot no 311.
31. The Defendant stated that the company gave his father 320 acres and a survey was carried out with his land being identified as parcel no. 311. This is the number appearing on the gazette notice. He stated that his father fenced off the land and they lived on it for 20 years and that his father unfortunately died in 1989. If that is the case, then the suit land could not have been allocated to the Plaintiff after being allocated to the Defendant's father who had been in occupation for more than 20 years.
32. Weighing the evidence of the Plaintiff against that of the Defendant, the court is not satisfied that the Plaintiff proved that he has a superior claim to the suit property. His suit is dismissed with costs to the Defendant.

DELIVERED VIRTUALLY AT NANYUKI THIS 15TH DAY OF NOVEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Kendi Kiruki for the Plaintiff

No appearance for the Defendant

