



**Njoroge v Ongera & 6 others (Environment & Land Case
E088 of 2021) [2025] KEELC 3521 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E088 OF 2021**

NA MATHEKA, J

APRIL 30, 2025

BETWEEN

NANCY NDUITA NJOROGE PLAINTIFF

AND

SAMSON ONGERA 1ST DEFENDANT

FAIZA GITAU 2ND DEFENDANT

JIMSLEY GETANGA OMARI 3RD DEFENDANT

ABDIRASHID ADAN HASSAN 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

DIRECTOR OF SURVEY 6TH DEFENDANT

THE ATTORNEY GENERAL 7TH DEFENDANT

JUDGMENT

1. The Plaintiff states that she is the owner of L.R No. 1XX154X4 – I. R 45XX3 and L.R. No. 1XX154X5 – I.R 45XX3. That on or about the 17th August 2020, the Plaintiff herein was informed of persons purporting to be owners of the suit property trying to get access to the same. The Plaintiff proceeded to write a letter to the Mavoko Sub-County administration vide a letter dated 17th August, 2020 informing the office of the illegalities involving the suit property and requesting that the office take note of the fraudsters so as to help her not lose her property to them. On the 18th of August 2020, the Plaintiff, decided to visit the suit property to check on the said property following the illegal claims to it and to her dismay found that this was indeed true as the ‘This land is Not for sale’ that she had placed on the suit property was missing on the premises and had been taken down by the said unknown persons.



2. She decided to rush and report the matter to the OCS at Mlolongo police station and was given an 0B number 411882020 with regards to her complaint with the promise that an investigation would be opened on the same. The Plaintiff was also referred to the DCI to report the same matter and upon reporting the same, the Plaintiff was informed that the suit property was already a subject of investigation with other persons purporting to be owners of the same. The Plaintiff has worked hand in hand with the authorities to aid in investigations regarding the persons who are illegally trying to acquire the land L.R No. 12XX54X4 – I. R 45XX3 and L.R. No. 12715485 – I.R 45XX3 and this has only led to her receiving threatening phone calls and text messages threatening her and her family.
3. The Plaintiff prays for judgment against the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants for:
 - a. A declaration that the Plaintiff is the lawful owner of the parcels of land known as L.R. No. 1XX154X4 – I.R 45XX3 and L.R. No. 1XX15485 – I.R 4XX13 in Machakos County and that the Defendants conduct in arbitrarily interfering with the Plaintiff's Titles and occupation of the said properties is unlawful, unconstitutional, fraudulent and without a colour of right;
 - b. A permanent injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants herein whether by themselves employees, servants, agents, assigns and/or any other person whatsoever from entering, encroaching onto, trespassing, interfering with the Plaintiff's quiet possession, access and/or use, alienating, advertising for sale, offering for sale, taking possession, leasing, transferring, charging, selling, disposing, sub-dividing and/or in any other way dealing with the parcels of land known as L.R No. 12XX54X4 - I.R 45933 and L.R. No. 12XX54X5 – I.R 45XX3 in Machakos County and any resultant titles therefrom together with all other developments therein.
 - c. An order cancelling all entries and transactions made on the Titles L.R. No. 12XX5484 – I.R 45XX3 and L.R. No. 12XX54X5 – I.R 45XX3 and any resultant titles therefrom if at all and the records held by the 5th Defendant be rectified accordingly to reflect the Plaintiff as the lawful and registered number of the parcels of land known as L.R No. 1XX154X4 – I.R. 45XX3 and L.R. No. 12XX5485 – I.R 45XX3.
 - d. General and exemplary Damages for fraud, Trespass, unlawful encroachment and the destruction of the suit property being L.R. No.1XX154X4 – I.R 45XX3 and L.R. No. 1XX154X5 – I.R 45XX3.
 - e. Costs of this suit.
 - f. Interest on (d) and (e) above at court rates.
4. This court has considered the evidence and the submissions therein. The Defendants were served but never filed a defence and the matter proceeded ex parte. The Plaintiff testified that she is the owner of L.R No. 12715484 – I. R 45933 and L.R. No. 12715485 – I.R 45913 having purchased the same from Bildad Mbuthia Abuid and Eunice Mbuthia. She produced the sale agreements as exhibits. The *Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the *Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and



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the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

5. While Section 38 (1) of the *Land Act* states;

Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

6. In Harris JA in *Garvey vs Richards* (2011) JMCA 16 the court in considering the essential components of a contract reflected the following principles;

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

7. The Supreme Court of United Kingdom in *RTS Flexible Systems Ltd vs Moikerei Alois Muller GMBH & Co K. G.* (2010) UKSC 14;

“The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”

8. She later transferred the property to her name and produced the sale agreement and the titles to the property. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows;

“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.”



9. Section 26 (1) of the *Land Registration Act* states as follows;

“The Certificate of Title issued by the Registrar upon registration ... 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... 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; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

10. On the 17th August 2020, the Plaintiff herein was informed of persons purporting to be owners of the suit property trying to get access to the same. The Plaintiff, has proceeded to make inquiries at the relevant land registry and has found that she is the true and legitimate owner of the land L.R No. 1XX154X4 – I.R 45933 and L.R No. 12XX54X5 - I.R 45XX3 L.R. No. 12XX54X4 – I.R 45XX3 and L.R. No. 12715485 – I.R 4XX13 in Machakos County. Copies of titles indicating that L.R No. 12XX54X4 is owned by the 1st and 2nd Defendants and L.R No. 1XX154X5 is owned by the 1st and 3rd Defendants The Plaintiff is therefore convinced that the Defendants have orchestrated a fraudulent and unlawful scheme to dispossess the Plaintiff of her lawfully acquired property. The Defendants have failed to establish the root of their title and hence legitimate ownership of the Same. On the 8th November 2021 the 2nd Defendant entered a consent with the Plaintiff stating that he had no claim to the suit properties and the matter was marked as settled.

11. Section 109 of the *Evidence Act* Cap 80 is clear that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

12. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides 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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

13. In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:



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.

14. Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

15. Section 26 of the *Land Registration Act* which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in *Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012)* (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the *Land Registration Act* (repealed) in light of the provisions of Article 40 of *the Constitution* which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of *the Constitution* which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See *Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another* [2018] eKLR.”

16. I find that the Plaintiff having established that she is the legitimate proprietor of the suit property and hence entitled to part of the said orders in the plaint.

17. Section 80 of the *Land Registration Act* provides as follows;

“ 80.

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

18. This section gives the court powers to order for rectification of a register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the Plaintiff has proved that her property was fraudulently transferred to the Defendants. In the instant case I find that evidence has not been adduced to prove the said trespass. Consequently, I find that the Plaintiff has proved her case on a balance of probabilities and I grant the following orders;



1. A declaration that the Plaintiff is the lawful owner of the parcels of land known as L.R. No. 12XX5484 – I.R. 45XX3 and L.R. No. 12XX54X5 – I.R. 4XX13 in Machakos County.
 2. A permanent injunction be and is hereby issued restraining the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Defendants herein whether by themselves employees, servants, agents, assigns and/or any other person whatsoever from entering, encroaching onto, trespassing, interfering with the Plaintiff's quiet possession, access and/or use, alienating, advertising for sale, offering for sale, taking possession, leasing, transferring, charging, selling, disposing, sub-dividing and/or in any other way dealing with the parcels of land known as L.R. No. 12XX54X4 - I.R. 45XX3 and L.R. No. 12XX54X5 – I.R. 4XX13 in Machakos County and any resultant titles therefrom together with all other developments therein.
 3. An order cancelling all entries and transactions made on the Titles L.R. No. 12XX54X4 – I.R. 4XXX33 and L.R. No. 1XX15485 – I.R. 4XX13 and any resultant titles therefrom if at all and the records held by the 5th Defendant be rectified accordingly to reflect the Plaintiff as the lawful and registered number of the parcels of land known as L.R. No. 12XX5484 – I.R. 45XX3 and L.R. No. 12XX54X5 – I.R. 45XX3.
 4. Costs of this suit to the plaintiff.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE

