



**Mwai v Muthaithi (Environment & Land Case 37 of 2019)
[2023] KEELC 22459 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 37 OF 2019**

JO OLOLA, J

DECEMBER 15, 2023

BETWEEN

MOSES JACKSON MWAI PLAINTIFF

AND

MOSES NDEGWA MUTHAITHI DEFENDANT

JUDGMENT

Background.

1. By his plaint dated 21st November 2019 as amended on 3rd November 2022, Moses Jackson Mwai (the Plaintiff) prays for judgment against the Defendant for:-
 - i). A declaration that the land parcel known as Nyeri/Municipality/Block II/705 measuring about 0.0254 Hectares belongs to the Plaintiff;
 - ii). General damages for trespass;
 - iii). Interest on (ii) from the date of judgment till payment in full;
 - iv). An order for a permanent injunction restraining the defendant whether by himself, his agents, servants or employees from in any way whatsoever, gaining entry into, trespassing, dealing, alienating, wasting, constructing buildings (s) and or developing on Nyeri/Municipality/Block II/705;
 - v). An order of eviction against the Defendant from land parcel known as Nyeri/Municipality/Block II/705 under the supervision of the Officer Commanding Station, Nyeri Police Station;
 - vi). An order for cancellation of the Defendant's title over land parcel number Nyeri/Municipality Block II/705 (Kiawara);
 - vii). Costs and interest of the suit; and



- viii). Any other relief that the Honourable Court may deem fit to grant.
2. Those prayers arise from the Plaintiff's contention that at all times material, he was the registered and legal owner of the suit property. The Plaintiff asserts that sometimes in 1992 or thereabouts, the National Housing Corporation (NHC) initiated a Third Urban Project for the residents of Kiawara Shauri Yako in Nyeri town for purposes of developing infrastructure. The Plaintiff asserts further that he paid the requisite Kshs. 200/= that was required to participate in the allocation of the plots and that he was thereafter issued with a ballot card and receipt.
 3. The Plaintiff avers that he was subsequently allocated plot No. Residential 8 (R8) Kiawara Shauri Yako and that he paid the recovery cost of Kshs. 39,446.20/- as advised by the Nyeri Municipal Council which was acting on behalf of the National Housing Corporation (NHC). It is the Plaintiff's case that he was then shown the said property on the ground by the council's Surveyor after which he processed title and was issued with a certificate of lease on 1st July 2019.
 4. The Plaintiff further avers that to his utter shock and surprise, he visited the parcel of land on 23rd March 2018 only to find that the Defendant had started constructing a permanent building thereon. He asserts that the Defendant's actions amounts to trespass and the same ought to be stopped forthwith to prevent further wastage and loss of the land.
 5. Moses Ndegwa Muthaithi (the Defendant) is opposed to the grant of the orders sought by the Plaintiff. In his Statement of Defence dated 13th March 2020 as amended on 15th December 2022, the Defendant denies that the Plaintiff is the registered proprietor of the parcel of land known as Nyeri/ Municipality Block II/705 (Kiawara). On the contrary, the Defendant avers that he has been in occupation and possession of the said parcel of land as the legal proprietor after the same was transferred to him by the original owner.
 6. The Defendant denied that all plots situated at Kiawara Shauri Yako including the said parcel of land were leaseholds held in trust by the National Land Commission on behalf of the National Government. On the contrary he avers that he is the registered owner of a freehold title number Nyeri Municipality Block II/705 (Kiawara).
 7. The Defendant avers further that he has no knowledge that the Plaintiff was issued with a certificate of lease for the land. It is his case that he commenced development on the land in the year 2017 without the Plaintiff stopping him. He denies that he is a trespasser on the land and or that he obtained title thereto irregularly and un-procedurally as contended by the Plaintiff.

The Plaintiff's case.

8. At the trial herein the Plaintiff called two witnesses in support of his case.
9. PW1- Moses Jackson Mwai is the Plaintiff himself and a retired Civil Servant. Adopting his Amended Statement dated 3rd November 2022 as filed in court on 7th November 2022, he told the court that sometimes in 1992, the National Housing Corporation (NHC) initiated a project to develop infrastructure for the residents of Nyeri Town.
10. PW1 testified that he paid the required Kshs. 200/= to participate in the process of allocation and allotment of the plots after which he was issued with a ballot card and receipt. Upon winning, he was allocated plot No. Residential 8 (R8) Kiawara Shauri Yako. Later that year, the Nyeri Municipal Council acting on behalf of National Housing Corporation (NHC) informed him that the project had been completed and he was therefore required to pay Kshs. 39,446.20/= as the recovery cost to his plot.



11. PW1 told the court that when he finished paying the sum in 1996, the Council issued him with a clearance letter. On 28th July 1997, the Council wrote to National Housing Corporation (NHC) informing them that PW1 had paid the cost recovery amount. Accordingly, on 27th January 1999, the National Housing Corporation (NHC) wrote to the Commissioner of Lands urging them to process title for the property which was now known as Nyeri/Municipality/Block II/705. PW1 was then shown his plot on the ground by the surveyor.
12. PW1 testified that Plot No. Residential 8 (R8) Kiawara Shauri Yako and Nyeri/ Municipality/Block II/705 are one and the same property and that all the plots situated in the area are leaseholds held in trust by the National Land Commission for the National Government. He told the court on 26th November 2018, the Commission issued him with a letter of allocation and lease after he paid the requisite fee of Kshs. 25,620/=. On 1st July 2019, he was issued with a certificate of lease for the property.
13. PW1 told the court that on 23rd March 2018, he went to check on the land only to find to his shock and surprise that the Defendant had commenced construction of a permanent building thereon. It is his case that the Defendant's action amounts to trespass as he did not give any approval, consent or authority to the Defendant to do so.
14. PW2 – William Mwiriga Ngatia is a retired teacher and a cousin of the Plaintiff. Adopting his statement dated 3rd November 2022, he reiterated the Plaintiff's testimony as to the history on how the Plaintiff acquired the land. He told the court he had accompanied his cousin to the ground on the date PW1 was shown the allocated plot by the Council Surveyor.
15. PW2 further told the court that he accompanied the Plaintiff on 23rd March 2018 when he went to check on the land. They found the Defendant had started constructing a permanent building on the parcel of land. They reported the matter to the Police before filing this suit.

The Defence Case.

16. The Defence equally called two witness in support of their position at the trial.
17. DW1 – Moses Ndegwa Muthaithi is the Defendant and a businessman in Mukurweini. Relying on his statement dated 13th March 2020, he told the court that around the year 2017, he was informed of a plot being offered for sale in Nyeri Town. He was told the owner was one Samuel Gichini.
18. DW1 testified he then met the said Samuel Gichini and together with other people they went and saw the plot. It was an empty undeveloped plot. DW1 told the court they negotiated and agreed on a price for the plot number R8 (Kiawara). DW1 went to check the records at the County Government Offices where he found that the land had been transferred to Samuel Gichini by one Moses Mwai. They then proceeded to an Advocate in town and executed a Sale Agreement.
19. DW1 testified that they subsequently began the transfer process after he paid the full purchase price. He paid all the necessary fees and the plot became his own. During the registration, the plot number changed from R8 (Kiawara) to Nyeri Municipality Block II/705 (Kiawara) which is a freehold title.
20. DW1 told the court he then caused a plan to be drawn after which he began construction. When the building reached second floor, some two people accompanied by a CID Officer went and told him he was building on someone's land. They went to the CID Offices where DW1 showed them all the documents of ownership. He then left the CID looking for Samuel Gichini who had sold the land to him. DW1 testified that he does not know how far the CID Officers had gone in tracing the seller.



21. DW1 told the court he proceeded to build and that he had now reached the third floor. It was his case that the sale from Moses Mwai to Samuel Gichini was proper and the transfer from Samuel to himself was in order.
22. DW2 – Stephen Kariuki Mwai is a businessman in Nyeri Town. He told the court that around 2017, one Gichini Gichingiri wanted to sell his plot near the slaughter house. The Defendant showed interest in buying it. One day DW2 accompanied DW1 together with the seller and one other friend to the undeveloped plot which was next to the road.
23. DW2 testified that the following day he had accompanied the Defendant to the County Government Offices to inspect the documents. After being satisfied with the details of the plot in the council's file, the Defendant agreed to buy the plot. Later the Defendant asked DW2 to accompany him to an Advocate's Office where they executed a Sale Agreement. The Defendant thereafter took over the land and started constructing a building thereon.

Analysis and Determination.

24. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced by the parties herein. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
25. The Plaintiff herein urges the court to declare that he is the lawful proprietor of all that parcel of land known as Nyeri/Municipality/Block II/705 measuring approximately 0.0254 Ha. He also prays for general damages for what he terms the Defendant's trespass over the suit land as well as an order of a permanent injunction restraining the Defendant, his servants and or agent from entering, dealing with alienating, wasting or carrying on construction on the said property. In addition, the Plaintiff has urged the court to issue an order of eviction of the Defendant from the said parcel of land and to have the title registered in the Defendant's name cancelled.
26. Those prayers arise from the Plaintiff's contention that at all times material, he was the registered proprietor of the suit property, the same having been allocated to him some time back in 1992. It is the Plaintiff's case that on 23rd March 2018, he visited the suit property with the intention of commencing some development thereon. To his utter shock and surprise, he found that the Defendant had deposited building materials and had commenced construction of a permanent building thereon.
27. It is the Plaintiff's case that he had neither authorized nor consented to the construction being put up by the Defendant and asserts that the Defendant is a trespasser who is illegally trying to dispossess him of the suit property.
28. The Defendant does not deny being on the suit property. It is however his case that he is on the land by right having purchased the same from the original owner thereof. It is his case that he is now the registered owner of the land having been in occupation and possession of the same since the year 2017 when he acquired the same.
29. In support of his case, the Plaintiff narrated that sometimes in 1992 or thereabout, the National Housing Corporation (NHC) initiated what was dubbed as the Third Urban Project for the residents of Kiawara Shauri Yako area within Nyeri Town. The said project meant to develop infrastructure in the area required willing participants to pay a sum of Kshs. 200/= pursuant to which they would be issued with ballots entitling them to be allocated land in the area.
30. In that respect, the Plaintiff told the court that he paid the sum and was issued with a receipt and ballot paper. He was subsequently allocated plot number R8 (Residential 8) Kiawara Shauri Yako on



8th September 1995 and was issued with a letter of allocation by the Nyeri Municipal Council which was in charge of the project on behalf of the National Housing Corporation (NHC). Before then the Council had required him in 1992 to pay the sum of Kshs. 39,446.20/= being the cost of recovery amount for the said Plot No. Residential 8 (R8) Kiawara Shauri Yako.

31. The Plaintiff testified that upon completion of the payment, the Council wrote to the National Housing Corporation (NHC) on 28th July 1997 confirming that he had paid the cost recovery amount in full. He told the court that by then the area had undergone a survey and having completed the payment, he was shown his plot which had now been renamed as Nyeri/Municipality/Block II/705 on the ground by the Council surveyor. On 1st July 2019, he was issued with his certificate of lease for the same.
32. On his part, the Defendant asserted that he is the registered proprietor of title No. Nyeri/ Municipality Block II/705 (Kiawara). He told the court that unlike the lease hold parcel of land claimed by the Plaintiff, his own parcel was a freehold title and that he had acquired the same after purchasing the said property from one Samuel Gichini Gichingiri.
33. The Defendant told the court that prior to the purchase, they went to the site where he was shown the suit property which was an undeveloped parcel of land. They then proceeded to the County Council offices where they confirmed that the said Samuel Gichini Gichingiri was the registered owner. Upon confirming that position, the Defendant executed a sale Agreement with the said Samuel Gichini Gichingiri and thereafter commenced construction of a storeyed building thereon.
34. It was interesting to note that according to the Defendant, the records he perused at the County Government Offices had indicated that the land was transferred to the said Samuel Gichini Gichingiri by the owner known as Moses Mwai. That also happens to be the name of the Plaintiff herein. Indeed in his testimony at the trial, the Defendant stated that Samuel purchased the land from the Plaintiff.
35. As it were, it was not disputed that when the Plaintiff discovered that the Defendant was carrying on that construction on the suit property in March 2018, he had reported the matter to the Police. The Defendant confirmed that when the building he was putting up reached the 2nd floor he was summoned by the Directorate of Criminal Investigations over the ownership of the land. As to the whereabouts of the said vendor Samuel Gichini Gichingiri, this is what the Defendant states at paragraph 5 of his statement dated 13th March 2020.

“I caused a plan to be drawn and I began construction. When it reached the second floor, one day, 2 people came and one CID Officer and claimed that I was building on their plot. We went to the CID officer and I showed them all the documents of ownership. I left the CID to look for the one who sold the plot to me and pursue the issue. I do not know how far they have gone.”

36. From the foregoing, it was apparent that the Defendant was unable in the year 2020 to produce the alleged vendor before the Directorate of Criminal Investigations. Some three years later while testifying before this court he told the court that once they finished the deal the vendor went away but he could look for him if he was needed.
37. Going by his conduct, it was clear to me that the Defendant was being very economical with the truth. The Plaintiff herein does not admit to have sold his land to anyone and it was indeed strange, if not shocking, that the Defendant could come to court and pretend that he did not know it would be important to call the alleged vendor as a witness in his case.



38. It was also clear to me that the documents he had brought to court did not even back the lies and falsehoods that he had come with to court. While he stated that the Plaintiff and the said Samuel Gichini were the previous owners of the land, the Green card he produced as evidence before the court purports that the land belonged to the County Government of Nyeri on 25th May 2017 when the same was transferred to him.
39. The Agreement the Defendant allegedly signed with Samuel Gichini on 18th May 2017, identifies the property as Plot No. R8- Kiawara. From the Green Card he produced in court, it was apparent that the parcels of land in the area had been surveyed and, going by his own story, the same was already registered in the name of the County Government. There was no explanation on his part how the parcel of land changed from being Plot No. R8 Kiawara to the said Nyeri/Municipality Block II/705 (Kiawara).
40. As the Court of Appeal stated in *Munyua Maina –vs- Hiram Gathitia Maina* [2013] eKLR.
- “.....when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
41. As it were, the Plaintiff has established the root of his title from the time the plots were advertised for allocation under the Third Urban Project which had been initiated by the National Housing Corporation way back in 1992. From a perusal of the Plaintiff’s exhibits 1 to 19, it was apparent that he was issued with a ballot card and receipt that enabled him to participate in the allocation exercise.
42. The Plaintiff has produced evidence to show that he was allocated Residential Plot No. 8 Kiawara Shauri Yako on 8th September 1995 by the defunct Nyeri Municipality Council and that he paid the cost recovery amount of Kshs. 39,446.20/= for the project as confirmed by a letter dated 28th July 1997 written by the Council to the National Housing Corporation. Further there was evidence to demonstrate that on 26th November 2018, the Plaintiff was issued with a Letter of Allotment and Lease by the National Land Commission after he paid a sum of Kshs. 25,620/= . He was issued with a certificate of lease over the suit property on 1st July 2019.
43. By asserting that one Samuel Gichini Gichingiri purchased the suit land from the Plaintiff, the Defendant was indeed tacitly recognizing the fact that the Plaintiff was the owner of the land. The Defendant had not produced any Sale Agreement between the said Samuel and the Plaintiff and/or any document of transfer purporting to show that the plaintiff had divested his rights and interest over the suit property to any third party.
44. If the Defendant did not know about it, the general rule is that no person can pass a better title to another than what he has. That rule is embodied in the Latin Maxim “*nemo dat quod non habet*”. Explaining that rule in *Daniel Kiprugut Maiywa –vs- Rebecca Chepkurgut Maina* [2019] eKLR, Onyango J. observed as follows:-
- “The *nemo dat* principle means that one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title receives nothing”.



45. In the matter herein, the Defendant is claiming the suit property on the basis that the same was transferred to him on purchase by one Samuel Gichini Gichingiri. Whoever he was, that Samuel Gichini Gichingiri had no capacity to transfer the suit property to the Defendant since he was not the registered proprietor thereof. In the circumstances herein and from the Defendant's very conduct as observed herein, it was apparent to me that the transfer of the suit land to the Defendant and the subsequent issuance of title to him was procured through an illegality, un-procedurally and /or through corrupt and fraudulent schemes.
46. As Lord Denning MR stated in *Lazarus Estates Limited –vs- Beasley* [1956] 1 All ER 341 as 193.
- “No court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...”
47. Given that the Defendant did not lawfully and procedurally acquire the land, his action of constructing a permanent building thereon which he confirms is now occupied by various tenants was clearly an act of trespass in gross violation of the Plaintiff's right to a quiet and peaceable enjoyment of his land. The developments the Defendant has made on the land do not confer ownership rights over the same.
48. As was stated in *Park Towers Ltd –vs- John Mithamo Njika and Others* [2014] eKLR:
- “I agree with the Learned Judges that where trespass is proved a party need not prove that he has suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”
49. In the matter before me. the Defendant and his witness confirmed the Plaintiff's accusation that the Defendant has constructed a three (3) storey building on the suit land. The Defendant has been earning rent from the tenants thereon and the Plaintiff will certainly incur substantial expenses to restore the land to its previous condition before the Defendant's intrusion. In the circumstances herein, I am in agreement with the Plaintiff's submission that an award of Kshs. 1,000,000/= is reasonable as general damages for the Defendant's trespass.
50. In the premises, I am satisfied that the Plaintiff has proved his case against the Defendant to the required standards. Accordingly judgment is hereby entered for the Plaintiff as against the Defendant in the following terms:
- i). A declaration is hereby made that the land parcel known as Nyeri/Municipality/Block II/705 measuring about 0.0245 Ha. belongs to the Plaintiff.
 - ii). An order is hereby issued cancelling the title in the Defendant's name for a parcel of land described as Nyeri/Municipality/Block II/705 (Kiawara).
 - iii). The Plaintiff is hereby awarded General Damages for trespass in the sum of Kshs. 1,000,000/=.
 - iv). The Defendant is hereby directed to remove any building and /or structures that he has erected on the said parcel of land known as Nyeri/Municipality/Block II/705 within 45 days from today failure to which the Plaintiff shall be at liberty to remove any such buildings and /or structures at the Defendant's expense.



- v). Upon expiry of the said 45 days, a permanent order of injunction shall issue restraining the Defendant whether by himself, his agents, servants or employees from in any way whatsoever gaining entry into, trespassing, dealing, alienating, wasting, constructing buildings and /or in any manner whatsoever dealing with the said parcel of land known as Nyeri/Municipality/Block II/705.
- vi). The costs of this suit shall be borne by the Defendant.

51. It is so ordered.

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2023.

In the presence of:

Mr. Onyari for the Plaintiff.

Mr. Kebuka Wachira for the Defendant.

Court Assistant: Millicent.

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J. O. OLOLA

JUDGE

