



**Mccloy v Kiniaru & another (Environment & Land Case 39 of 2021)
[2023] KEELC 22566 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 39 OF 2021
AK BOR, J
DECEMBER 13, 2023**

BETWEEN

MARK M. MCCLOY PLAINTIFF

AND

NDIRANGU KINIARU 1ST DEFENDANT

COUNTY LAND REGISTRAR LAIKIPIA 2ND DEFENDANT

JUDGMENT

1. This dispute relates to ownership of the land known as Nanyuki/West Timau Block 1/424 (“the suit property”), which was initially owned by Rugutu Mutirithia Company. In the suit initially filed as Nyeri ELC Case No. 214 of 2016 on 4/10/2016, the Plaintiff claimed that when the company subdivided its land and allocated it to its members, it left two plots. According to the Plaintiff the suit property was registered in his name on 9/10/2010 but on 23/2/2015, the Defendants purported to cause a parallel registration of the same parcel of land in favour of the 1st Defendant. The Plaintiff sought cancellation of the register for the suit property in which the 1st Defendant’s name appeared and restoration of the register which bears his name as proprietor of the land.
2. The Plaintiff pleaded particulars of fraud on the part of the Defendants including causing a parallel and fresh registration of the suit property when another registration was already in place; removing the true register from its domicile and preparing a fresh register for the suit property in an effort to confer proprietorship of the land on the 1st Defendant; falsely purporting that the 1st Defendant had acquired title to the suit property and removing the records showing the Plaintiff’s proprietorship of the land. The Plaintiff claimed that the 1st Defendant had been charged alongside another person with offences relating to fraud in Nanyuki Chief Magistrates Court Criminal Case No. 291 of 2015.
3. The 1st Defendant filed his Defence and Counterclaim on 23/11/2016 in which he denied the Plaintiff’s claim and averred that the criminal proceedings had been determined in his favour. His



counterclaim was against Kibue Gachie Nduro, Mawe Mingi Limited, the Plaintiff and the 2nd Defendant. He claimed that the land buying company purchased land measuring 4880 hectares which it subdivided into more than 400 parcels with each parcel representing one share. Further, that the exercise was concluded in 1981 when the parcels were allocated to the shareholders except for a few reserved for public utility and others left in the company's name. He averred that the suit property was retained in the company's name and listed as "rock" on the register and that it remained vacant.

4. The 1st Defendant claimed that he paid for the share comprised in the suit property and he became the owner and was issued the requisite share and clearance certificate to effect the transfer of the suit property to his name. The suit property was registered in his name on 23/2/2015 and a title was subsequently issued to him. Upon being registered as proprietor of the suit property, he learned that the Plaintiff was claiming ownership of the land and that he was actually in possession of another title over the same land. He claimed that when he sought to establish the nature of the Plaintiff's claim, he was hastily and capriciously arrested and charged with the offence of conspiracy to defraud the Plaintiff of the suit property and obtaining registration of the suit property by false pretenses.
5. He pleaded particulars of fraud against the defendants in the counterclaim including converting the suit property; using false documents to convert the suit property; opening another register and using it to convert the suit property; using a fraudulent register to confer proprietary interest in the suit property to the Plaintiff; and fraudulently transferring the suit property.
6. The 1st Defendant sought a declaration that the register relating to the suit property which was opened on 1/9/1987 was fraudulently opened and that any interest derived from that register was unlawful. He sought a declaration that the register opened on 16/9/1985 was the proper and lawful register. Further, he sought a declaration that Kibue Gachie Nduro did not obtain any proprietary interest in the suit property on 1/11/1988 and that consequently he had no title to pass to Mawe Mingi Limited hence the subsequent transfer to the Plaintiff was of no effect for want of a good title. He sought a declaration that he was the rightful owner of the suit property with exclusive right of possession and an injunction to restrain the Plaintiff from entering, remaining or in any manner interfering with the suit property.
7. The hearing of this suit commenced before Lady Justice L. Waithaka on 5/7/2018 when Kibue Gachie Nduro gave evidence and told the court that he was a shareholder in the company while the 1st Defendant was a director. He told the court that he became a member of the company in the 1970s and explained that out of the share subscriptions the company bought land from a European settler which it subdivided into plots. He was allocated two shares for parcel numbers 42 and 43 while his wife got parcel numbers 40 and 41. He explained that parcel numbers 424 and 425 did not attract members because of their rocky condition and the fact that they were full of human skeletons indicating that they could have been a dumping site for dead bodies of the earlier settlers.
8. He went on to explain that the directors of the company resolved that these two parcels of land would be shared out between Mukurweini and Gachika. Based on this, he was allocated parcel no. 424 since he was a resident of Mukurweini while the 1st Defendant was allocated parcel no. 425 since he was a resident of Gachika. He paid Kshs. 16,000/= for the land together with survey fees and was issued a receipt, ballot and share certificate. The titles were processed and he had to surrender his share certificate and ballot for that purpose. He was issued a title in 1989 and he sold the suit property to Mawe Mingi Limited in 1993. He told the court that on the members' list, plot no. 424 was indicated as rocks. He reiterated that parcel numbers 424 and 425 were not given using the normal ballot process.
9. Douglas Gacheru gave evidence and told the court that he was a director and shareholder of Rugutu Mutirithia since inception and was involved in the subdivision of the company's land. He told the court that when they allocated land to the shareholders of the company, two plots were left because



- they were designated as rocky. That the directors decided that the two plots would be sold to members from Mukurweini and Kiricho. He told the court that Kibue Gachie Nduro bought one parcel while the 1st Defendant bought the second one. He explained that the two parcels appeared to have been used as a dumpsite for dead bodies because they were full of skeletons.
10. He stated that shareholders were issued title deeds at Rumuruti by Former President Daniel Arap Moi in 1989. He clarified that they were not issuing a clearance certificate as a condition precedent to the issuance of the title deeds because the register compiled was conclusive proof of entitlement of the member to the parcel appearing against their name. He told the court he was the chairman of the company in 1986 and denied that a meeting was held or a resolution made to sell plot number 424 to the 1st Defendant. Further, he denied that the company had authorised any of the people who signed the agreement dated 21/5/1986, which he termed as a forgery. He pointed out that the person who purported to have been the chairman of the company at the time the agreement was signed was a mere director.
 11. On cross-examination, he told the court that all title deeds were issued at once in 1989 and that they were all dated 1988. He added that they prepared a register of the members between 1980 and 1982 which they presented to the lands office in Nakuru. He maintained that all titles were prepared in 1988 and were ready for collection. He told the court that in the register presented to the Land Registrar in Nakuru, parcel number 424 was in Kabui's name while parcel number 425 was in Ndirangu's name. He was emphatic that they did not sign any agreement with the 1st Defendant but added that both of them gave a small token for the two plots.
 12. The case was transferred to the Nanyuki ELC on 18/8/2021. The hearing of the suit continued before this court on 18/10/2023 when the Plaintiff gave evidence. He told the court that he was the registered owner of the suit property which he acquired from his family's company called Mawe Mingi Limited. That company acquired the suit property in 1993 through purchase from Kibue Gachie Nduro who was then registered as its owner. The Plaintiff stated that sometime in February 2016, his employee Charles Mwaniki, informed him that the 1st Defendant had visited the suit property and was claiming ownership of the land. Later, a letter was delivered to him through the Chief's office requiring him to vacate the suit property on the premise that it belonged to the 1st Defendant. The Plaintiff complained to the police who carried out their own investigations which revealed that a parallel register in favour of the 1st Defendant had been opened over the same piece of land. He claimed that since those actions were fraudulent, the 1st Defendant and the Land Registrar were prosecuted for fraud in Nanyuki Chief Magistrates Criminal Case No 291 of 2015.
 13. He produced the two copies of the white cards which were opened on 1/9/1987 and 16/9/1985 in his favour and the 1st Defendant respectively. The one opened on 1/9/1987 shows that the Government of Kenya was registered as proprietor on 1/9/1988. Entry no. 2 shows that a title deed was issued to Kibue Gachie Nduro on 1/11/1988 while entry no. 4 shows that the land was transferred and a title deed issued to Mawe Mingi Limited on 2/11/1993. Entry no. 6 shows that a title deed was issued to the Plaintiff on 9/4/2010. On the other hand, the card opened on 16/9/1985 shows that the Government of Kenya was registered as proprietor on 16/9/1985 and that the land was transferred to the 1st Defendant on 23/2/2015.
 14. The Plaintiff produced copies of the title deed issued in his name on 9/4/2010 and the one issued in the name of Mawe Mingi Limited on 2/11/1993. He also produced a copy of the sale agreement dated 1993 between Mawe Mingi Limited and Kibue Gachie Nduro as well as the acknowledgement of receipt of the sum of Kshs. 102,500/= by Kibue Gachie Nduro on 27/9/1993. He produced a copy of the Land Control Board consent and the title deed issued on 1/11/1988 to Kibue Gachie Nduro. He



- produced the letter dated 18/3/2018 from Chweya and Associates demanding that he vacates the suit property and demolishes the structures on it failing which eviction proceedings would be commenced against him. He also produced the memorandum and articles of association of Rugutu Mutirithia Estate Limited.
15. On cross-examination, he conceded that the sale agreement which Mawe Mingi Limited entered into with Kibue Gachie Nduro was not witnessed. Regarding the criminal proceedings against the 1st Defendant being concluded, he told the court that the trial court referred the matter to the Environment and Land Court for determination.
 16. Charles Mwaniki was also called by the Plaintiff to give evidence. He told the court that he was employed by Mawe Mingi Limited as manager of the suit property. He explained that the suit property was largely vacant but was developed with residential houses for occupation by the McCloy family members. His colleague Aggrey, a cook reported to him in February 2015 that some people visited the land and told him that it belonged to the 1st Defendant. The following month, the area Chief told him that a letter addressed to his employer had been delivered to the Chief's office. He collected the letter and sent a copy to the Plaintiff.
 17. Hiram Warui Ndirangu, the son of the 1st Defendant gave evidence and relied on the concluded proceedings in Nanyuki Chief Magistrate Criminal Case No. 291 of 2015. When his father died he substituted him in the suit. He produced copies of the green cards and title deeds issued to the Plaintiff and Mawe Mingi Limited. He also produced a copy of the register for Rugutu Mutirithia Estate Limited which the court notes that instead of a name being entered against parcel no. 424, "rocks", is what is indicated on the register. He also produced documents relating to the registration of the company and correspondence regarding issuance of title deeds for Rurugu Mutirithia shareholders. The sale agreement which he produced is dated 21/5/1986 and was between Rugutu Mutirithia Estate Limited and the 1st Defendant showing that parcel no. 424 was sold to the 1st Defendant at Kshs. 5,000/=.
 18. On cross-examination, he confirmed that his father's name was registered as proprietor of the suit property on 23/2/2015. He told the court that between 21/5/1986 and 23/2/2015 there was no one on the suit property. He did not know why his father did not pick his title all that while. He confirmed to the court that his father was not staying on the land. His father was the one following up the case. He confirmed that entry no. 425 on the register showed his father's name but he did not know where that parcel of land was. He believed it could have been sold when his father was still alive.
 19. After the 1st Defendant had closed his case, the Plaintiff's advocate applied to call the Land Registrar to give evidence on the two differing green cards for the suit property. The matter was adjourned to 30/10/2023 for the Land Registrar to be summoned to attend court.
 20. Charles Nyangicha, the Land Registrar, Laikipia County, attended court and produced copies of the green cards for the suit property. He confirmed to the court that there were in fact two copies of green cards for the same parcel of land. He could not certify the copies because he did not find the original cards at the lands registry. He elaborated that that was because an order was issued in Milimani Misc. Application No. 401 of 2015 directing them to surrender the records to a Police Officer from the Directorate of Criminal Investigations (DCI). He produced a copy of the court order and told the court that he did not know whether the investigations by DCI were concluded. He confirmed that the parcel file for the suit property was also taken away by the DCI officer.
 21. The Land Registrar told the court that in the ordinary course of business, there ought to be one green card for one parcel of land. He confirmed that of the two cards which he produced, the first indicated



- that the register was opened on 19/11/1987 and the first title was issued on 1/11/1988 before it was transferred. The second white card showed that the register was opened on 16/9/1985 and the first title was issued on 23/2/2015.
22. Upon conclusion of the hearing the Plaintiff's advocate applied to have the court visit the site. The site visit took place on 9/11/2023 in the presence of the Plaintiff and his advocate. The 1st Defendant did not come to the site. After the site visit, the court directed parties to file their written submissions. Parties filed submissions which the court considered.
 23. The Plaintiff submitted that he called five witness who explained the history of how the suit property was bought and subdivided by the company excluding public utilities and how the Plaintiff and the 1st Defendant purchased parcel numbers 424 and 425 respectively. He relied on his registration as the owner of the suit property and stated that he had been living in the suit property since 1993 when the family company acquired the land until 2010 when it was transferred to his name. He submitted that he had made major developments on the suit property since 1993. He relied on the documents which he produced and the evidence of the other witnesses whom he called to testify.
 24. The Plaintiff relied on a decision where it was held that once a title was issued under the law, the holder acquired an indefeasible title which could not be taken away except in accordance with the law. The Plaintiff relied on Sections 24 and 26 of the [Land Registration Act](#). He submitted that unlike him, the 1st Defendant failed to meet the grounds set out in Section 26 of the [Land Registration Act](#) regarding the manner in which he acquired his title. He maintained that the 1st Defendant failed to prove fraud while on his part he testified that the people who executed the sale agreement did not hold those positions in the land buying company at the time it is alleged they executed that sale agreement in favour of the 1st Defendant.
 25. The Plaintiff relied on *Mbira v Gichubi* (2002) EA 138 where the court stated that if there was a dispute on ownership rights of land, and the person with the title was in actual possession then the other person was a trespasser. The court did not have the benefit of that decision. He also relied on [Wreck Motors v the Commissioner of Lands and Others](#) Nairobi Civil Appeal No. 71 of 1997 where the court stated that if there are two competing titles, the one registered earlier takes priority. The Plaintiff also referred the court to [Gitwany Investment Ltd v Tajmal Ltd and 3 Others](#) (2006) eKLR where the court found that the first title in time would prevail based on the maxim in equity that when two equities are equal, the first in time prevails.
 26. The Plaintiff maintained that the 1st Defendant's title over the suit property was obtained by fraud while urging that his rights over the suit property were protected by Article 40 of the [Constitution](#) and Section 26 of the [Land Registration Act](#). He invited the court to declare the 1st Defendant's title and green card void and uphold his title based on Section 80 of the [Land Registration Act](#). The Plaintiff adverted to the site visit conducted on 9/11/2023 and concluded that the court was able to verify and confirm the location of the land and its physical occupation besides ascertaining the developments on the land as well as the existing natural vegetation.
 27. In his submissions, the 1st Defendant submitted that both he and the Plaintiff held titles to the suit property. He relied heavily on the evidence adduced in Nanyuki Chief Magistrate's Court Criminal Case No. 291 of 2015 and reproduced parts of the evidence given by the witnesses in that matter. He also relied on the evidence of the Land Registrar on the manner in which land belonging to a land buying company was apportioned and transferred to its members.
 28. He contended that he had specifically pleaded fraud and illegalities which he had proved to the required standard to vitiate the Plaintiff's register and sanitise his own. He referred to his counterclaim and



argued that the Plaintiff's title was invalid. He maintained that the Plaintiff's root of title was illegal and urged the court to impeach it. He prayed for exclusive possession of the suit property with an injunction against the Plaintiff while contending that that was the right conferred by Section 24 of the *Land Registration Act*.

29. The issue for determination is who between the Plaintiff and the 1st Defendant has a superior title to the suit property. In Nanyuki Chief Magistrates Criminal Case No 291 of 2015, the 1st Defendant and Beatrice Wairimu Mwai, a civil servant employed at the Nanyuki District Lands Office, were jointly charged with conspiracy to defraud contrary to Section 317 of the Penal Code. The particulars of the offence were that on 25/2/2015 at Nanyuki Land Registry they conspired with intent to defraud the Plaintiff in this suit of his land known as Laikipia/Nanyuki West Timau Block 1/424. The 2nd accused person also faced a count of destroying evidence contrary to Section 116 of the Penal Code.
30. Beatrice Mwai confirmed during the criminal trial that she issued a title deed to the 1st Defendant and that she signed the green card. She told the Learned Magistrate that she never saw the green card opened on 1/9/1987 when she was dealing with the transaction relating to the 1st Defendant because it was opened a different year hence a different registrar but for the same parcel of land (see page 14 of the judgment). She went on to explain that she issued the title deed to the 1st Defendant after he produced a clearance form from the estate, copy of his identity card and the transfer form. She told the court that she did not know that another file existed for 1987 and that what was availed to her was the estate binder for 1985. She maintained that the Plaintiff who was the complainant in the criminal case had never lodged a complaint with her regarding double issuance of title deeds.
31. The 1st Defendant and Beatrice Wairimu were acquitted of the criminal charges. The Learned Magistrate noted in the judgment that it was not for that court to make a finding on whom between the complainant and the 2nd accused person legally owned the suit property. She observed that each of the parties possessed a title to the suit property and that that was an issue which the parties were to escalate to the Environment and Land Court as the court with jurisdiction to make the decision on the ownership of the suit land.
32. The 1st Defendant claims to have purchased the suit property from the land buying company vide the sale agreement dated 21/5/86. The evidence of Douglas Gacheru who told the court that he was the chairman of the company in 1986 and who denied that a resolution was passed by the company to sell plot number 424 to the 1st Defendant was not controverted. If Douglas Gacheru was the chairman of the company in 1986 then the persons who signed the sale agreement in 1986 which the 1st Defendant bases his claim on, including H.K. Wanderi who signed as the chairman may not have been authorised by the company to enter into that agreement. Although not very legible, the court can decipher that paragraph 2 of that agreement stated that that agreement superseded any other agreement which the company directors or other parties had signed and invalidated any other agreements. This was an acknowledgement that the company could have entered into other transactions over the same land.
33. Hiram Warui Ndirangu produced a list of directors which bears the name of Ndirangu Kiniaru at number 4. Douglas Gacheru is also listed as a director. If indeed he was a director and purchased the suit property in 1986, then the 1st Defendant would not have waited for almost 30 years to process his title deed. He would also have taken possession of the land. During the site visit the court confirmed that the suit property was developed by the Plaintiff. There was no explanation given why the 1st Defendant did not process his title from 1986 until 2015.
34. The company's register which Hiram Warui Ndirangu produced shows that the 1st Defendant was allocated plot number 425 while the name appearing against plot number 424 is "rocks". The court prefers the evidence of Douglas Gacheru, the former director of the company, who testified that the



suit property was sold to Kibue Gachie Nduro, who was issued a title deed over the land on 1/11/1988. He sold the land to Mawe Mingi Limited and a title deed was issued to Mawe Mingi Limited on 2/11/1993 before the company transferred the land to the Plaintiff on 9/4/2010. The evidence of the Land Registrar in the criminal proceedings was that when she issued the title deed to the 1st Defendant in 2015 she was not aware that another title had already been issued over the same land to the Plaintiff. The Plaintiff's title deed was first in time and takes precedence over the 1st Defendant's title.

35. The Plaintiff has proved his case on a balance of probabilities. The register for Nanyuki/West Timau Block I/424 in which the name of Ndirangu Kiniaru appears as proprietor will be cancelled and the name of Mark M. McCloy reinstated on the register as the proprietor of that land. The Plaintiff is awarded the costs of the suit to be borne by the Land Registrar, Laikipia County.
36. The 1st Defendant failed to prove his counterclaim against the Plaintiff. It is dismissed with each party bearing its costs for the counterclaim.

DELIVERED VIRTUALLY AT NANYUKI THIS 13TH DAY OF DECEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Mr. G. Muthee and Mr. H. Langat for the Plaintiff

Ms. Stella Gakii- Court Assistant

No appearance for the Defendants

