



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL CASE NO 36 OF 2018

GICHIA WAKIUNYU.....APPELLANT

=VERSUS=

CECILIA WAMWERU NDUATI.....1ST RESPONDENT

NYAKINYUA INVESTMENT LIMITED.....2ND RESPONDENT

(Being an Appeal from the Judgment of Thika Chief Magistrate Court

(Honourable G. Omodho, SRM) delivered on 26/11/2018

in CM Civil Case No. 475 of 2012)

JUDGMENT

1. Through a plaint dated 19/6/2012, **Cecilia Wamweru Nduati** [the 1st respondent in this appeal] sued **Nyakinyua Investment Limited** [the 2nd respondent in this appeal] and **Gichia Wakiunyu** [the appellant in this appeal] in **Thika CMC Civil Case No 475 of 2012**. She amended her plaint on 26/4/2016. She sought the following verbatim reliefs against both the 2nd respondent and the appellant in this appeal:

- a) *A permanent injunction restraining the 2nd defendant from trespassing, alienating, interfering, selling, transferring and dealing in any way with Plot No 3785 or Ruiru/Ruiru East Block 2/3785 aforesaid.*
- b) *A mandatory injunction compelling the 1st defendant to transfer Plot Number 3785 to the plaintiff.*
- c) *An order of cancellation of the 2nd defendant's title in relation to Land Parcel Ruiru/Ruiru East Block 2/3785 and the same to be transferred in the plaintiff's name.*
- d) *That the 1st defendant be compelled to issue the plaintiff with all the clearance documents in relation to Plot Number 3787 for purposes of obtaining title to Ruiru/Ruiru East Block 2/3786 at Thika Lands Registry.*
- e) *Costs of the suit.*
- f) *Any other relief that this honourable court may deem fit and just.*

2. Her case in the trial court was that, vide an agreement dated 6/3/2003, between her and one **Patrick Kamau Gachanja** [son to **Naomi Muthoni Gachanju** alias **Muthoni Gachanju**], she purchased Plot Numbers 3785 and 3786, each measuring one acre, at Kshs 500,000. The allottee of the two plots at the time was Naomi Gachanju who consented to the said sale. The two plots were subsequently surveyed as **Ruiru/Ruiru East Block 2/3785** and **3786** respectively. She paid the requisite internal transfer fee to the 2nd respondent. The 2nd respondent pointed out the two plots and she took possession thereof. She subdivided the two plots and sold the sub-plots to members of the public who subsequently developed them and are in possession of the sub-plots.

3. It was her case that the 2nd respondent failed to process title in her name and had instead, with fraudulent intent, conveyed Parcel Number 3785 to the appellant. She itemized various particulars of fraud on part of the 2nd respondent.

4. The 2nd respondent filed a statement of defence dated 28/9/2012 in which it denied the substantive averments made in the statement of claim, specifically denying them. The appellant filed a statement of defence and counterclaim dated 10/8/2012 which she subsequently

amended on 27/5/2016. The appellant denied the 1st respondent's claim and averred that he was the registered proprietor of Parcel Number **Ruiru/ Ruiru East Block 2/3785** measuring 0.4 hectares, having acquired it as a gift from his mother, **Martha Njeri Gichia** who was a shareholder of **Nyakinyua Investment Limited** and an allottee of the said parcel. He contended that the 1st respondent's occupation of Parcel Number 3785 was wrongful and unlawful. By way of counterclaim, he prayed for the following reliefs against the 1st respondent: (i) *A permanent injunction restraining the 1st respondent together with her servants/agents/employees and any other person claiming through her, against interfering with, constructing on or further wasting Parcel Number 3785;* (ii) *An order of eviction against the plaintiff, her agents/employees/ persons laying claim to parcel No 3785;* and (iii) *Costs of the suit and the counterclaim.*

5. Trial proceeded before **Hon G Omodho (SRM)** who thereafter rendered a judgment dated 26/11/2018. On the primary suit, the trial court made a finding in favour of the 1st respondent. The court dismissed the appellant's counterclaim and issued the following disposal orders: (i) *A permanent injunction restraining the appellant against trespassing, alienating interfering with, selling or dealing with parcel number 3785;* (ii) *A permanent injunction restraining the appellant against transferring Parcel Number 3785;* (iii) *An order cancelling the appellant's title relating to Parcel Number 3785;* and *An order compelling the 2nd respondent to issue the 1st respondent with all clearance documents in relation to Parcel Number 3785;* and (v) *Costs of the suit.*

6. Aggrieved with the judgment, the appellant brought this appeal, advancing the following verbatim grounds:

a) The learned trial court erred in law and in fact when it made a finding that the appellant was aware and /or privy to errors made by the 2nd respondent in the entries made in the register.

b) The learned trial magistrate erred in law and in fact when it gave judgment which is per incuriam for want of lawful procedure to cancel title to land.

c) The learned trial magistrate erred in law and in fact when it failed to appreciate that the 1st respondent had no capacity and/or locus standi to bring these proceedings.

d) The learned trial court erred in law and in fact when it held that the appellant was party to alteration of the register and actual double allocation without proof of evidence.

e) The learned trial court erred in law and in fact when it dismissed the appellants defence and counterclaim without assigning any reason for doing so.

f) The learned trial court erred in law for making judgment of which she was not seized with pecuniary jurisdiction.

7. The appeal was canvassed through brief written submissions dated 8/11/2021, filed through the firm of *Muturi Njoroge & Co Advocates*. Counsel for the appellant identified the following as the three key issues falling for determination in the appeal: (i) Whether the appellant was aware and / or privy to errors made by the 2nd respondent in the entries made in the register; (ii) Whether the 1st respondent had the capacity and /or locus to initiate the suit in the trial court; and (iii) Who should bear costs of the suit.

8. On whether the appellant was aware and/or privy to errors made by the 2nd respondent in the entries made in the register, counsel for the appellant submitted that the register produced as an exhibit during trial indicated that Ballot Number 1795 was assigned to "two different numbers" and that the 2nd respondent's witness had admitted that there was an error in the register and indicated that she could not rule out existence of fake documents. It was the submissions of counsel that the error in the register should not have been "meted on the appellant." Counsel faulted the trial court for disregarding the contents of the register which showed that the appellant was the owner of the suit land.

9. On whether the 1st respondent had the capacity and/or *locus standi* to bring the suit in the trial court, counsel for the appellant submitted that the 1st respondent having pleaded and testified that she sold the suit land to third parties, she did not have the *locus standi* to institute the suit in the trial court because she no longer had an interest in the suit land. Counsel added that the suit in the trial court was initiated without the authority of the third parties. Relying on Order 4 rule 4 of the **Civil Procedure Rules**, counsel faulted the trial court for not finding that the 1st respondent lacked the legal capacity to commence the suit. On costs, counsel cited **Section 27(1)** of the **Civil Procedure Act** and urged the court to award the appellant costs of the appeal. Counsel urged the court to allow the appeal.

10. The 1st respondent filed written submissions dated 20/7/2020 through the firm of *Kanyi Kiruchi & Co. Advocates*. Counsel for the 1st respondent identified the following as the two issues falling for determination in this appeal: (i) Whether the appellant's or the 1st respondent's documents gave rise to Ruiru/Ruiru East Block 2/3785, and (ii) Whether the appeal is merited.

11. On whether the appellant's or the 1st respondent's documents gave rise to Ruiru/Ruiru East Block 2/3785, counsel submitted that the parcel of land was previously owned by the 2nd respondent and that the 2nd respondent was a women only organization which was allocated tracks of land in Maguguni Area and Murera (Ruiru) Area. Counsel added that land in the two schemes was held through shares. A shareholder who satisfied the requirements of the company was eligible to participate in balloting. After balloting, a ballot register would be prepared. Counsel added that a survey number is not the same as a ballot number because often, balloting would be done before survey is done.

12. It was the submission of counsel that the appellant's ballot number was 3785 and that the ballot number relating to the suit property was number 1795, not ballot number 3785 which was held by the appellant's mother. Counsel contended that ballot number 1795 gave rise to parcel numbers 3785 and 3786 and since the appellant's mother was not the owner of ballot number 1795, the appellant who claimed through her mother was not the owner of parcel number 3785.

13. On whether the appellant's appeal was merited, counsel submitted that it was clear from the evidence presented to the trial court that the appellant's title was obtained through a corrupt scheme since her mother was not the holder of ballot number 1795. Counsel contended that

since the title was obtained illegally, it was null and void and it was incapable of being transferred to the appellant. Counsel urged the court to dismiss the appeal.

14. The 2nd respondent did not file written submissions in this appeal. Consequently, its position regarding this appeal is not known. However, during trial, its director, **Lucia Nyagaki**, testified as DW1. Her evidence was that Martha Njeri Gichia [mother to the appellant] was the legitimate allottee of the suit property. She produced a register. She indicated that it was an error to have two different people with similar ballot number.

15. I have considered the entire record of the trial court, the grounds advanced in this appeal; and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The appellant itemized six grounds of appeal. Ground number 3 revolves around the question of the 1st respondent's *locus standi* as a party to the suit in the trial court. I will dispose this ground first.

16. In paragraphs 4 and 5 of the amended Plaint dated 26/4/2016 which formed the basis of the trial leading to the impugned judgment, the 1st respondent pleaded as follows:-

“4. At all material times one NAOMI MUTHONI GACHANJU now deceased was a shareholder of the 1st defendant owing 200 shares denoted vide share certificate numbers 2755 and 2754 dated 13th April 1991 and had by virtue of her shares in the 1st defendant been allotted 2 acres of land by the 1st defendant at the defendants land at Githombokoini denoted by ballot paper no 1795 for plots no 3785 and 3786 being one acre each respectively.

5. By an agreement dated 6th June 2003 between the plaintiff and one Patrick Kamau Gachanja the son and the beneficiary of the said NAOMI MUTHONI GACHANJU ALIAS MUTHONI GACHANJU the said Patrick Gachanja sold to the plaintiff the shares and plots referred to in paragraph 4 above for a consideration of Kshs. 500,000/- and a transfer of the said shares and plots was effected by the 1st defendant and the plaintiff duly paid to the 1st defendant the sum of Kshs. 6,000/- to enable the 1st defendant to process the title deeds in the names of the plaintiff.”

17. Further, the 1st respondent pleaded as follows in paragraph 8 of the amended Plaint:-

“8. The plaintiff avers that she has been in actual possession of both plots 3785 and 3786 now RUIRU/RUIRU EAST/BLOCK 2/3785 and 3786 and the same are adjacent to each other has subdivided the same into sub plots and sold them off to members of the public who have since constructed thereon with the full knowledge of the defendants.”

18. It is clear from the above pleadings that as at the time of initiating the suit in the trial court, there were third parties with interest in the two parcels of land. The 1st respondent, however, elected not to make them parties to the suit. In my view, at the very list, the 1st respondent should have made them interested parties to the suit in the trial court.

19. Of greater concern is that, the appellant elected to bring a counterclaim and did not join, as parties to the counterclaim, the people who subsequently purchased the sub-plots from the 1st respondent, developed the sub-plots, and are in actual possession of the sub-plots. Were this appeal to succeed on merits, those people who were not parties to the proceedings in the trial court and who are not parties to this appeal will face eviction without being heard by any of the two courts. Our Constitution and our civil legal system do not countenance that. In my view, having elected to file a counterclaim, the appellant was obligated to join the 1st respondent and all the subsequent purchasers as parties to the counterclaim. For the same reason, his contention that the 1st respondent did not have *locus standi* cannot hold. The 1st respondent sought to nullify the appellant's title and to compel the 2nd respondent to issue her with requisite documents which would enable her to procure the title which she would ultimately convey to those she sold the sub-plots to. Further, she was a necessary party to the appellant's counterclaim because she was the one who subdivided and sold the suit property. The contention that she lacked *locus standi* cannot be upheld in the circumstances.

20. Lastly, what emerges from the pleadings which were before the trial court is, firstly, that the 1st respondent purchased the suit property from one **Patrick Kamau Gachanja [the vendor]**. The vendor allegedly sold to the 1st respondent parcel Numbers 3785 and 3786. He was purportedly selling the two plots after being gifted them by his mother, Naomi Muthoni Gachanju, who was alive at the time. The internal register presented as an exhibit shows that Parcel Number 3786 belongs to Njoki Muturi. The two parcels were supposed to be plots belonging to the holder of Ballot Card Number 1795. The 1st respondent contended to be the owner of the two parcels but did not join Njoki Muturi (or any other registered proprietor of the parcel as a party to this suit).

21. The totality of the foregoing is that the court finds that there were serious omissions by the parties to the suit in the trial court and by the trial magistrate to the extent that necessary parties were not joined to the suit. This court is certain that there would be serious prejudice if the question of ownership of the two parcels were to be determined by this appellate court in the absence of the necessary parties who were left out of the suit in the trial court. In the circumstances, I will set aside the proceedings and judgment of the trial court and direct that the suit be heard afresh by a different magistrate after all the necessary parties have been joined. Parties will bear their respective costs of this appeal. To avoid future prejudice, I will not comment of any other ground of appeal in this appeal.

22. In the end, the court makes the following disposal orders in this appeal:-

(a) The trial proceedings and judgment of the Magistrate Court in Thika CMCC No. 475 of 2012; Cecilia Wamweru Nduati v Nyakinyua Investment Limited & another are hereby set aside.

(b) The plaintiff in the primary suit and the claimant in the counterclaim shall amend their pleadings to join either as substantive parties or, where appropriate, as interested parties, all necessary parties to the dispute relating to Parcel Numbers Ruiru/Ruiru East Block 2/3785 and Ruiru/Ruiru East Block 2/3786 including Njoki Muturi who appears in the internal register of Nyakinyua Investment Ltd as the co-holder of Ballot Card No 1795 and all the persons who are alleged to have purchased and developed

and to be in possession of sub-plots out of the suit property in this suit.

(c) The suit shall thereafter be heard afresh on priority basis before a magistrate other than the one who rendered the judgment leading to this appeal.

(d) Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF JANUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Mwangi for the Appellant

Mr Warutere for the 1st Respondent

Court Assistant: Lucy Muthoni