



**Mburu v Kongo (Environment and Land Case Civil Suit
371 of 2015) [2022] KEELC 123 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 371 OF 2015**

LC KOMINGOI, J

APRIL 28, 2022

BETWEEN

JOHN NJOROGE MBURU PLAINTIFF

AND

WAITHERA NJUNGE KONGO DEFENDANT

JUDGMENT

1. By a plaint dated 8th May 2015, the Plaintiff prays for judgement against the Defendant for:-
 - a. A permanent injunction restraining the Defendant by herself, her servants or agents from entering, remaining in or utilizing land parcel No.Ndeiya/Nduma/T.44.
 - b. An order of eviction of the Defendant, her servants or agents from Land parcel No.Ndeiya/Nduma/T.44.
 - c. Costs.
2. The Plaintiff's case is that he is the registered owner of land parcel No.Ndeiya/Nduma/T.44 and on or about March 2015, the Defendant unlawfully entered and trespassed onto his parcel of land by digging holes and planting trees and has since refused to vacate the land and continues to trespass therein.

The Defendant's case

3. The Defendant entered appearance vide the Memorandum of appearance dated 26th May 2015 filed by S.M Chege & Company Advocates and filed the Amended defence and counterclaim dated 9th February 2016.
4. The Defendant's case is that she is lawfully in occupation of the suit land and as such, the Plaintiff must have obtained title to it unlawfully. She stated that the suit land belongs to her late husband,



- Paris Njunge Kongo (deceased), who was lawfully allocated the said parcel by the now defunct Kiambu County Council.
5. She counterclaimed against the Attorney General as the 1st Defendant and the Plaintiff as the 2nd Defendant contending that the official records for the property were fraudulently and illegally tampered with by the Defendants in the counterclaim leading to issuance of the title to the 2nd Defendant by the Ministry of lands, Housing and Development through the Kiambu District Lands Registry acting at the behest of the Chief Land Registrar. She further contended that the 2nd Defendant's ownership of the deceased's plot and the purported registration of the same by the defunct Kiambu Land Registrar was tainted with illegality and the same was fraudulent. She particularized fraud and illegality against the Defendants in the counterclaim.
 6. Her prayers in the counterclaim are:-
 - a. A permanent injunction order do issue restraining the 2nd Defendant in the counter claim by himself, his agents, servants and /or employees or any other persons acting on his behalf from trespassing into and/or encroaching on the Plaintiff's suit property.
 - b. A declaration be and is hereby made by the court that Paris Njung'e Kongo (deceased) also known as Njung'e Kongo "B" is and was at all material times the lawful and bonafide allottee of plot No.44 in the Ndeiya/Karabai Arable scheme in the Ndeiya and Karai area which on official registration became title No.Ndeiya/Nduma/T.44 and therefore its legal owner.
 - c. An order do issue directing the Chief Land Registrar to rectify the register and cancel the title deed and all entries made in the register at the Kiambu land Registry in relation to John Njoroge Mburu, the 2nd Defendant regarding title No.Ndeiya/Nduma/T.44.
 - d. The chief land registrar be ordered to rectify the register by expunging from the register all documents unlawfully issued to the 2nd Defendant in relation to title No.Ndeiya / Nduma/T.44.
 - e. The Chief land registrar be ordered to issue a title deed for the property to Paris Njung'e Kongo(deceased) also known as Njung'e Kongo "B" or in the alternative to the Plaintiff as the administratrix of the estate of the deceased.
 - f. General damages.
 - g. Costs of the counterclaim.
 - h. Such other and /or further relief as this Honourable court may deem fit and just to grant.

The Plaintiff's evidence

7. PW1, John Njoroge Mburu, the Plaintiff, testified on 9th May 2019. He adopted his witness statement dated 8th May 2015 in which he stated that he is the registered owner of Land Parcel No. Ndeiya/ Nduma/T.44 which was allocated to him by the Kiambu County Council in 1992 and a title deed was issued on 8th February 1993.He further stated that in the year 2003, the Defendant entered the land but she vacated when the matter was reported to the chief.
8. He stated that in March 2015, the Defendant again unlawfully entered the land, dug holes and planted trees and when he demanded that she vacates, she refused. He produced the documents in his list of



documents dated 8th May 2015 as exhibits. He told the court that he is the one in occupation of the suit land and prayed that the prayers in the plaint be granted.

9. When cross-examined, he stated that the plot was allocated to him by the Kiambu County Council and that he has a ballot which is stamped by Kiambu County Council. He further stated that the suit land is situated on Ndeiya/Nduma scheme and that he took his ballot, made payments and was issued with a title at the lands registry in Kiambu.
10. He stated that the suit land is a township plot and he was given consent by the County council of Kiambu to be issued with title. He also stated that he pays rates and he has availed receipts. He stated that in those days, allotment letters were not issued, ballots were issued and if he did not have a ballot, he would not have been issued with title. He stated that the receipt of Kshs.1000 was payment in respect of the title deed. He stated that the plot was allocated to him, not the Defendant's husband and that he has been on the plot for forty-one (41) years.

The Defendant's evidence

11. DW1, Esther Waithera Njunge Kongo, the Defendant, testified on 1st March 2021. Her witness statement filed in 2016 was adopted as part of her evidence in chief. She stated that she is the administratrix of the estate of Paris Njung'e Kong'o also known as Njung'e Kongo "B" (deceased) who is her late husband. She added that her late husband was and has always been the bona fide owner of plot No.Ndeiya/Nduma/T.44 which was allocated to him in a committee meeting held at the Council's committee room on 28th July 1981 being minute No.11/75 by the former Kiambu County Council in the Ndeiya/Karai arable scheme in the Ndeiya and Karai area.
12. She stated that on diverse dates, the chief of Ndeiya location wrote to the District officer Limuru and informed the District officer of her husband's intention to pay the requisite fee to enable him obtain the requisite title deed over plot No.Ndeiya/Nduma/T.44. She further stated that after her husband died in the year 2002, she learnt that the plot was registered in the name of John Njoroge Mburu and reported the same to the Chief, Ndeiya location and the dispute was then reported to the County Clerk, County Council of Kiambu.
13. She stated that the County clerk wrote to the District officer and confirmed that from their official records that her husband was the official allottee of the suit property and the suit property was never transferred to anyone using the council's authority. She added that the claim by the 2nd Defendant that he is the registered and rightful owner of the suit land is not true as the property was in all circumstances fraudulently and unlawfully attained as the 2nd Defendant fraudulently and illegally obtained official records and used the same to register the suit land in his name and obtained illegal title to the suit land.
14. When cross-examined, she stated that she has been on the suit land for many years but she could not recall how many years they were. She further stated that she first cultivated and planted crops and she still ploughs the suit land. She told the court that her husband was allocated the land by Kiambu County Council and he had an allotment letter. She stated that when he passed on, some documents got lost hence she does not have the ballot paper and allotment letter.
15. She stated that she knows John Njoroge Mburu but she does not know whether he worked with Kiambu County Council Office or the Lands registry. She further stated that he worked with the Forest Service. She also stated that she does not recall when the documents to the suit land were tampered with but the documents with John Njoroge are not genuine.
16. When referred to the letter dated 12th February 1993 addressed to the District Officer stating that Paris Njung'e Kongo was allocated the suit plot but it got lost, and referred to the handwritten entry stating,



- 'sorry he is in list No.261 as Njung'e Kongo (B), she stated that she does not know who made the said entry. She further stated that she is the one who told the chief that the ballot was lost then the chief drafted the letter dated 12th February 1993 and gave it to her after seeing the documents that she had. She added that they reported to the police that the ballot was lost.
17. She told the court that she went to the chief because he knew everything about the land. It was her testimony that they forgot to pay the necessary fees to Kiambu County Council. As regards the letter dated 1st March 1996 addressed by the Chief to the District Officer Limuru, she stated that she does not recall whether she took the second letter from the chief. She also stated that she did not have the full list of the people who were given plots in 1975 and that she did not know that the Plaintiff had a title by then.
 18. She stated that Gathoni Waitongi who used to work at Kiambu Council sold the plot to Njoroge and Njoroge has been claiming the plot but she did not sell to him and that is when she went to the chief who asked Njoroge to stop interfering with her plot. She added that they went to the District Officer but he did not say anything and she did not take the case to court.
 19. She told the court that she has not paid for the title as she was told that the title is not ready. She further stated that the Plaintiff should surrender his title so that she is issued with hers. She stated that many people have not been issued with titles. She told the court that she does not reside on the suit land but she ploughs it and that she resides on ½ an acre of land which is for her children. She stated that they have never been summoned to appear before Kiambu County Council but she has the original extract of minutes from Kiambu County council allotting the suit land to her late husband.
 20. When re-examined, she stated that she did not report the loss of the ballot to the police. She also stated that they paid some money for the titles but the council did not issue them with receipts.
 21. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's submissions

22. They are dated 2nd November 2021. Counsel for the Plaintiff submitted that the Defendant's case is that her husband was lawfully allotted the suit property and she admitted being in possession and admitted that title to the suit property is in the name of the Plaintiff but alleged the Plaintiff acquired it fraudulently and illegally.
23. He further submitted that the Defendant has not proved the allegation that the Plaintiff fraudulently acquired title over the suit land and neither did she prove the allegation that the Plaintiff tampered with official records used to register the suit land. He added that there was no evidence that the Plaintiff's title is tainted with illegality. He relied on the case of *Hassan Mohammed Haji v Mohamed Keynan & another* [2019] eKLR and the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR to submit that Section 24 of the *land Registration Act* protects a title which can only be defeated under Section 26 of the Act and the Defendant did not prove any particulars of fraud raised in her counterclaim.
24. The Defendant did not file written submissions.
25. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the Plaintiff and the authorities cited. The issues for determination are:-
 - i. Whether the plaintiff acquired the suit land lawfully and procedurally?
 - ii. Whether the title issued to the plaintiff in respect of the suit land is indefeasible and capable of being protected by law?



iii. Whether the Defendant has proved the prayers sought in the counterclaim.

26. PW1, John Njoroge Mburu, the Plaintiff produced a title deed for Land Parcel No Nduya/Nduma/T.44 issued to him on 8th February 1993. He also produced two letters from the District Officer Limuru to the District Commissioner Kiambu and Kiambu County Council respectively, confirming that the Plaintiff had been allocated the suit plot. He also produced a demand letter to the Defendant seeking that she vacates the suit plot. The Plaintiff also produced an extract of Minutes of Kiambu County Council of a meeting held on 28th July 1981 in which the Plaintiff was confirmed as the allottee of the Plot No 44 Ndeiya/Nduma. The letter is signed by the Clerk of the Council. He also produced receipts confirming payments made to the Kiambu County Council in respect of the said plot.
27. I have no doubt that the Plaintiff is able to trace the root of his title.
28. The Plaintiff led evidence that upon allocation of the suit land by Kiambu County Council, he was issued with a ballot which he used to obtain the title deed upon payment of the requisite fees. The Defendant claimed that the suit land was allocated to her late husband Paris Njung'e Kong'o who was issued with an allotment letter. It was the Defendant's testimony that the said allotment letter and ballot to the suit land got lost but she did not report the loss to the police. The Defendant relied on a copy of minutes of committee meeting of Kiambu County Council of 28th July 1981 and several correspondences from the chief and the District Officer to prove her proprietorship.
29. The question is; was the suit land allocated to the Defendant by Kiambu County Council? In the absence of any allotment letter or ballot issued to the Defendant's husband, he cannot be said to have been allocated the suit property and therefore acquired ownership of the suit property through the minutes of Kiambu County Council produced dated 28th July 1981. The suit land was available for allocation to any other person. In the case of *County Council of Meru & 2 others v P.C.E.A thro' the Registered Trustees* [2020] eKLR, the court held, "Minutes alone do not confer any proprietary interest in land. This is because minutes are an expression of an intention to allocate land. The commitment to actualize the intent to allocate is manifested in the issuance of the letter of allotment from the allotting authority. Demarcation of the parcel of land in question is then carried out through the process of survey. Thus the resolution of the council as captured in the minutes must be put into effect in order to give rise to a bundle of rights in land capable of being protected."
30. The Plaintiff produced a ballot to the suit land issued by Kiambu County Council and receipts towards payment for title deed which was subsequently issued on 8th February 1993. The process of acquiring the title deed was procedural.
31. Section 26 (1) of the *Land Registration Act* provides as follows: "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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, un-procedural or through a corrupt scheme".
32. The plaintiff has produced a copy of title in respect of the suit land. I have already opined that the title was acquired lawfully and procedurally. The Defendant in her defence and counter-claim sought to have the title issued to the plaintiff cancelled on grounds that it was acquired unlawfully since official records for the property were fraudulently and illegally tampered with. However, she did not lead any evidence to show that the title was unlawfully acquired.



33. In paragraph 7 of the amended statement of defence and counter claim the particulars of fraud and/or illegality are levelled against the Plaintiff herein. I find that the Defendant has failed to prove any of the allegations of fraud as particularized.
34. In *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR, the court of Appeal upheld a title that was alleged to have been fraudulently obtained. It held; “.....the burden of proof was on the Appellant to prove her case is not in doubt. From the sum total of the evidence, it is clear that the Appellant’s lone evidence fell too short of establishing fraud on the part of the Respondent.” The Plaintiff herein had the burden of proof as provided under section 107 of the *Evidence Act*. She did not tender any evidence to show how official records relating to the suit land were tampered with. There is isn’t evidence that would impeach the Plaintiff’s title.”
35. In *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR, the court of Appeal stated, “to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding”.
36. In conclusion, I find that the Plaintiff has proved his case on a balance of probabilities as against the Defendant.
37. Consequently, he Defendant’s counterclaim fails and the same is dismissed.
38. Accordingly, Judgment is entered in favour of the Plaintiff as against the Defendant as follows:-
 - a. That a permanent injunction is hereby issued restraining the defendant by himself, her servants and or agents from entering, remaining in or utilizing land parcel No Ndeiya/Nduma/T.44.
 - b. That the Defendant is hereby directed to vacate Land parcel No Ndeiya/Nduma/T.44 within sixty (60) days from the date of this Judgment. Failure to whichthe plaintiff be at liberty to use lawful means to evict him from land parcel no Ndeiya/Nduma/T.44.
 - c. That the Plaintiff shall have costs of the suit and interests.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF APRIL 2022.

.....
L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kimani for the Plaintiff

No appearance for the Defendant

Steve - Court Assistant

