



Mwaniki v Gatharia (Sued as the Personal Representative of the estate of John Gatharia Karanja (Deceased)) & 2 others (Environment and Land Case Civil Suit 76 of 2019) [2022] KEELC 3518 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 76 OF 2019
FM NJOROGE, J
MAY 26, 2022**

BETWEEN

PATRICK KARIITHI MWANIKI PLAINTIFF

AND

CHARLES GITIYA GATHARIA (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN GATHARIA KARANJA (DECEASED)) 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

HANNAH WAIRIMU GATHARIA (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN GATHARIA KARANJA (DECEASED)) 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 2/07/2001 and filed in court on 20/07/2001 the plaintiff sought the following orders against the defendants:
 - a. A declaration that Mrs. Monicah Njeri Mwaniki is the legal and rightful proprietor of all that parcel of land known as Rare/Teret Block 1/680.
 - b. An order compelling the 1st Defendant to rectify its register by amending the name of the proprietor of Rare/Teret Block 1/680 from John Gatharia Karanja to Monicah Njeri Mwaniki and to issue a fresh title deed in respect of Rare/Teret Block 1/680 in favour of Monicah Njeri Mwaniki.
 - c. The costs of this suit together with interest thereon at Court rates.
 - d. Any other or further relief that this Honorable Court may deem fit and just to grant.



The Plaintiff's Case_

2. The original plaintiff, citing a power of attorney donated to him, instituted the suit on behalf of his principal, one Monica Njeri Mwaniki; his case is that on 3/06/1976, Monicah Njeri Mwaniki was issued with ten ordinary shares by Elburgon Ngwataniro Company Limited vide two share certificates, and thereafter, on or about 2/08/1976, she was allotted land parcel No. Rare/Teret Block 1/680 and issued with ballot paper No. 3563. It was averred that since the allocation, Monicah Njeri Mwaniki has been in possession of the property either directly or through authorized agents; that in the year 1988, the plaintiff on behalf of Monicah Njeri Mwaniki visited the Land Registrar Nakuru to collect the title deed and found out that it had been issued to John Karanja Gatharia (now deceased). On 25/10/1991 the Land Registrar published a notice in the Kenya Gazette of his intention to cancel the title deed issued in the name of the John Karanja Gatharia(deceased) with the intention of reissuing same in the name of Monicah Njeri Mwaniki; subsequently on 5/11/1991, the 1st defendant lodged an objection against the cancellation of the said title deed stating that it had been issued rightfully to his father. The plaintiff also averred that on 26/06/1992, the Nakuru District Land Registrar wrote to the plaintiff's advocates indicating that the register of the land buying company had confirmed that the said property was initially allotted to the Monicah Njeri Mwaniki and later changed to the name of John Gatharia Karanja. He stated that Monica's family has been in possession of the suit land all along and that the refusal by the 2nd defendant to rectify the register in favor of Monicah Njeri Mwaniki continues to subject her to prejudice, injury and damage. The plaintiff claims that he has repeatedly requested the Land Registrar to rectify the register to no avail necessitating the filing of this suit.

The 1st Defendant's Defence and Counter Claim

3. The 1st defendant filed his statement of defence and counterclaim on 7/09/2001 which bears the same date. He averred that the occupation of the land in dispute by the plaintiff was that of a trespasser as the land was registered in the name of John Gatharia Karanja (deceased) who was issued with a title deed on 11/04/1986. He further averred that after the death of John Gatharia Karanja, the property devolved to the 1st defendant as well as Hannah Wairimu Gatharia who subdivided it into land parcel No's Rare/Teret/Block 2459 and 2458. He averred that by virtue of that subdivision, the title N. Rare/Teret/Block 1/680 had been extinguished and that therefore the plaintiff's claim as pleaded merit. He averred that Monicah Njeri Mwaniki is the proprietor of the adjoining parcel of land being Rare/Teret/Block 1/679 which was allotted to her and where she has erected a homestead. He therefore sought for the following orders:
 - a. An order that the plaintiff gives vacant possession of LR No. Rare/Teret/Block 1/2458 to the 1st defendant with mesne profit.
 - b. Costs of the suit together with interest.

Reply to Defence and Counter Claim

4. On 5/10/2001, the plaintiff filed a reply to defence and counterclaim denying the matters set out therein and reiterated that the disputed property belongs to Monicah Njeri Mwaniki.

The 3rd Defendant's Defence and CounterClaim

5. The 3rd defendant filed her statement of defence and counter claim dated 12/10/2002 on 16/10/2002. The statement of defence and counter claim reiterated the contents of the 1st defendant's statement of defence and counter claim and sought the following orders:



- a. An order that the plaintiff gives vacant possession of LR No. Rare/Teret/Block 1/2459 and to the 3rd defendant with mesne profit.
- b. Costs of this suit together with interest.

The Plaintiff's Evidence

6. At the hearing of the case on 1/11/2021, the plaintiff gave his evidence and adopted his statement dated 7/10/2019 as part of his evidence-in-chief. and stated that he is the brother to Samuel Mbatia Mwaniki who had given him a power of attorney to enable him represent him. It was further his evidence that: that the title deed to land parcel number Rare/Teret Block 1/680 was erroneously issued to the wrong person; that the title deed belonged to Monicah Njeri Mbatia Mwaniki his sister-in-law who is married to Samuel Mbatia; that she got the property by balloting in Ngwaraniro Farmers Co. Ltd; that she paid the membership fee in 1976, the Survey fee of Kshs. 100 and after balloting was given ballot number 3563; that she took possession of the suit property in 1976 and planted blue gum and cypress trees; that a problem arose when the titles were to be issued in 1986; that Ngwaraniro Farmers Co. Ltd was taken over by the government; that he went to the D.O Njoro together with his brother Samuel Mbatia to ascertain his plot and the plot of his sister in law; that his brother's plot was no. 968 with the old number as 679 while his sister in law's plot was No. 680; that after ascertaining the plot numbers, his brother Samuel Mwaniki went to the Lands office where he paid the transfer fee; that when he went to collect the title deed in 1987 the same was not given to him; that in 1988, his sister-in-law signed a power of attorney in favor of his brother which he was to use to collect the title deed; that when his brother went to collect his title deed, he found out that the title had been issued to John Gatharia; that he went to the District Officer to facilitate the correction and that in 1989 they found the said John Gatharia; that his brother went to the Land Disputes Tribunal which decided in his favour; that the award was taken to the Lands Registry, the Chief and the District Officer's offices; that the Lands Offices gazetted the title and John Gatharia's family raised an objection stating that he was deceased and that the title should not be cancelled; that later the land was subdivided; that according to the Company Register which he had gotten through the Chief Land Registrar, plot 968 is alongside share certificate 4202 and 4207; that Monica's name was cancelled with a pen; that her share certificate numbers are still there; that Monica has been in possession of the land through him since the year 1976 which has been for forty five years; that in 1982 the local administration was told by the president to visit every land and confirm the members; that during that confirmation, they signed against the back of the owner's document while standing on the land; that all his documents were signed; that it was agreed that the title be issued in the name of Monica. He prayed that the title deed in the name of Gatharia be cancelled and a title be issued in the name of Monica. He then
7. On cross-examination he was referred to the Power of attorney dated 1/08/1988 and he confirmed that it was given to Samuel by Monica to enable him collect the title deed. He was also referred to the power of attorney dated 14/11/2016 and he stated that it was given to Samuel by Monica to enable him file this case and had a stamp unlike the power of attorney dated 1/08/1988 (P. Exh 8.) He was further referred to the Revocation dated 27/09/2016 and he stated that Samuel revoked that power of attorney. He also confirmed that plot No. 680 was subdivided into plot No's 2458 and 2459; that as per the title deed, entry no. 2 was made on 14/04/1986 when John Gatharia was registered as the owner; that entry No. 8 showed that the subdivision was done on 22/08/1997; that he lives on the land; that the payment of the transfer fees was done in 1987; that Monica was removed from plot 680 and taken to 679; that as per the letter dated 30/07/1993, their advocates Waruhiu and Muite were communicating with the Lands office; that Monica did not know of the sub-division; that as per the verdict dated 25/04/1990 by the Tribunal, the plot number is 3563 and no reference is made to plot



No. 680; that the names of the persons affected were not in the document; that the ballot No. 3563 states that Samuel Mbatia Mwaniki is the owner of plot No. 968.

8. On re-examination he stated that as per the copy of verdict dated 25/04/1990, the share certificates for Monicah were No. 4203 and 4204; that he is following up on plot No. 680 that was subdivided into Plot No. 2458 and 2459; that he is on plot 2458 and that he is not a beneficiary of Gatharia's estate and even after sub-division, the defendants have never gone to take possession of the land.

Evidence for the defence

9. On 14/12/2021, Charles Gitiya Gatharia testified as DW1. It was his evidence that he is the personal representative of John Gatharia Karanja who died on 9/06/1991. He then adopted his witness statement dated 31/01/2020 and filed on 4/02/2020 as his evidence-in-chief; that the documents that he produced show that the land belonged to his late father; that after the death of his father he was given the grant of letters of administration in respect of his estate; that the property was sub divided into two with one portion registered in his name and the other in the name of Hannah Wairimu Gatharia; that the titles were issued on 25/08/1997; that by the time this matter was filed on 2/7/2001 the land had already been subdivided; that there had been a dispute between the father of the 1st defendant and the plaintiff which had gone to other fora such as the provincial administration and lands office; that as per the letter dated 30/7/1993 written to Waruhiu and Muite Advocates who were acting for the plaintiff, it indicated that the list of members was supplied by the directors and the Land Registrar was duty bound to accept them as supplied; that when the company forwarded the list to the lands office it indicated that plot No. 680 belonged to his father; that as per the final register of members, his father's name is listed against plot No. 680; that listed against plot No. 968 is the name of Samuel Mbatia Mwaniki; that the initial claim was brought by Samuel Mbatia Mwaniki the husband of Monica Njeri Mwaniki; he then prayed that the plaintiff's suit be dismissed and the orders sought in the counterclaim be granted.
10. On cross-examination he stated that he is not in occupation of plot number Rare/Teret Block 1/680; that the plaintiff has been in occupation of the land; that the matter was raised with the provincial administration; that he had the land subdivided into two and took surveyors to the ground; that his father had bought shares owned by Stephen Ngugi Njoroge; that as per the final register of members Monica's name is against parcel No. 679; that John Gatharia's name is against plot No. 680; that as per the register of members produced by the plaintiff, Monica's name was cancelled; that he has never occupied the land; that in 1991, the title was gazetted for cancellation.
11. On re-examination he stated that the version of the register he produced had no cancellation and that he does not know who did the cancellation.

Submissions

12. The plaintiff in his submissions submitted that the plaintiff has been in occupation of the suit property since the year 1976 while the defendant acquired the title in the 1980's. It was also submitted that while the plaintiff produced the share certificate of Mutukanio Farmers Company, the defendant produced shares of Makongeni Farmers Company Limited that deleted the original names of Stephen Ngugi Njoroge and replaced them with the name of the 1st defendant's deceased father. That no nexus was established between Mutukanio Farmers Company Limited and Stephen Ngugi Njoroge.
13. The 1st defendant in his submissions submitted that the plaintiff did not have the requisite capacity to institute the present suit as the power of attorney dated 1/8/1988 was not registered and he relied on the case of *Francis Mwangi Mugo v David Kamau Gachago* [2017] eKLR; that further, land parcel



No. Rare/Teret Block 1/680 ceased to exist when it was sub-divided and the power of attorney did not give the donee powers to institute or defend a suit with regard to title numbers Rare/Teret Block 1/2458 and Rare/Teret Block 1/2459. It was his submission that the plaintiff's documents show that Monica Njeri Mwaniki was a shareholder of Elburgon Ngwataniro Co. Ltd but that no document was produced connecting the share certificate nos 4203 and 4204 to Rare/Teret Block 1/680 or ballot paper No. 3563 to Rare Teret Block 1/680. He submitted that his documents were not challenged and no fraud was pleaded against John Gatharia Karanja (Deceased) and he therefore sought for his counterclaim to be allowed.

Analysis and determination

14. After considering the pleadings, evidence and submissions the issues for determination that arise are as follows:
 - a. Whether the plaintiff had the capacity to institute the suit;
 - b. If the answer to (a) above is in the affirmative, who between the plaintiff and the 1st defendant is the lawful owner of the suit property;
 - c. Who should bear the costs of the suit.

Whether the plaintiff had the capacity to institute the suit.

15. It was the plaintiff's evidence that Monicah Njeri Mwaniki was the lawful allottee of plot No. 680 after balloting in a land buying company known as Elburgon Ngwataniro Company Limited. It was further his evidence that she signed a power of attorney in favor of Samuel Mbatia Mwaniki in respect of land parcel No. Rare/Teret Block 1/680 on 1/08/1988. A perusal of the said power of attorney shows that while it was signed by Monicah Njeri Mwaniki, the same was not registered.
16. The suit was filed on 20/07/2001 by Samuel Mbatia Mwaniki on behalf of Monica Njeri Mwaniki who had donated a power of attorney to him. The suit was filed pursuant to the power of attorney dated 1/08/1988 which as indicated before, was not registered.
17. Section 4 of the [Registration of Documents Act](#) provides as follows:

4. Documents to be registered

All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) shall be registered as hereinafter prescribed:

Provided that the registration of the documents following shall not be compulsory—

- (i) any composition deed;
- (ii) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;
- (iii) any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or



otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;

- (iv) Any endorsement upon or transfer of any debenture issued by any such company
- (v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;
- (vi) any lease or licence of land for any term not exceeding one year; or
- (vii) any document registrable under the provisions of the Government Lands Act (cap. 280), the Registration of Titles Act (cap. 281), the Land Titles Act (cap. 282) or the Registered Land Act (cap. 300):

Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this Act.

18. Section 9 of the [Registration of Documents Act](#) provides as follows:

- 9. Every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya.

19. Since the power of attorney declares rights over immovable property it needs to be registered but the power of attorney dated 1/08/1988 was not registered at the time of institution of the suit. Vide the power of attorney dated 14/11/2016, Monicah Njeri Mwaniki donated a power of attorney to Patrick Kariithi Mwaniki that was registered on 16/03/2017. Patrick Kariithi Mwaniki was then substituted in the place of Samuel Mbatia Mwaniki as the plaintiff. for the reason that the second power of attorney given to Patrick Kariithi Mwaniki was registered, I am persuaded that the plaintiff has the locus to prosecute this suit.

20. The plaintiff in support of his case, produced a share certificate No. 4204 from Elburgon Ngwataniro Co. Ltd in the name of Monica Njeri Mwaniki. The share certificate is dated 7/06/1982. He also produced a copy of share certificate from Elburgon Ngwataniro Co Ltd No. 4203 in the name of Monica Njeri Mwaniki dated 3/06/1976 with No. 680 written on the face of it. He also produced a share capital receipt dated 27/03/1976 together with a membership receipt dated the same date from Elburgon Farmers Ngwataniro Co. Ltd. The plaintiff further produced a receipt dated 9/01/1987 which was transfer fee for No. 680. A list was also produced which shows that the name of Monica Njeri was crossed out and the name of John Gatharia put in place with the fourth column indicating No's 4203, 4204 and 680. From the face of the list, it is not easy to tell what the list was made for. The Kenya gazette No. 5011 dated 25/10/1991 was also produced and it indicated the Kiambu District Land Registrar's intention to cancel the title deed in the name of John Gatharia Karanja as he had been erroneously issued with a title deed for land parcel No. Rare/Teret Block 1/680 if no objection was received within twenty-one days.

21. The 1st defendant's case on the other hand is that the suit property always belonged to John Gatharia Karanja (deceased) and upon his death, it was subdivided into land parcel No's 2458 and 2459 and



registered in the name of the 1st and 3rd defendant. To demonstrate how the late John Gatharia Karanja (deceased) acquired the suit property, he produced a share certificate from Nakuru Mutukanio Farmers Co. Ltd dated 16/04/1982. It has the name of Stephen Ngigi Njoroge that is crossed out and the name of John Gatharia Karanja handwritten on it. The 1st defendant explained on cross-examination that his father had bought shares that had been owned by Stephen Ngigi Njoroge; he also produced a share transfer from Stephen Ngigi Njoroge to John Gatharia Karanja which clearly indicates it was issued by Makongeni Farmers Company. On its face there is No. 138 that is crossed out and No. 480 which is also crossed out and No. 680 indicated. The 1st defendant also produced another transfer of share from Stephen Ngigi Njoroge to John Gatharia Karanja with the name of the company obscured and no numbers indicated on it as was indicated on the share transfer.

22. Further in support of the 1st defendant's case, he produced various receipts issued to Stephen Ngigi which are crossed out by hand and the name of John Gatharia Karanja written. The receipts are from Makongeni Farmers Company Limited and they are dated 15/04/1978 and have number 138 written on them. They were produced as D. Exh 3a and 3b. The 1st defendant also produced a receipt dated 14/04/1986 for transfer for plot No. 680. He also produced the gazette notice dated 23/10/1991 that was also produced by the plaintiff that was giving a notice of the cancellation of the title deed issued to John Gatharia Karanja within 21 days.
23. The 1st defendant on the other hand produced receipts from Makongeni Farmers Company Limited that bore some unexplained alterations together with a share certificate from Nakuru Mutukanio Farmers Co. Ltd and no co-relation between the two companies and Elburgon Farmers Ngwataniro Co Ltd was established by way of evidence. It is my opinion that it is not clear how the altered documents led to the late John Gatharia Karanja to pay transfer fees and to have the suit land, whose number is not reflected thereon, registered in his name.
24. Both the plaintiff and the 1st defendant are claiming land parcel No. Rare/ Teret/ Block 680 that was subdivided into land parcel No's Rare/Teret/ Block 2458 and 2459. It was the plaintiff's evidence that they have been in occupation since the 1970's which evidence the 1st defendant admits.
25. Exh 10 is a copy of the proceedings and verdict of a panel of elders that deliberated on the instant dispute. It found that the plot no 3563 belonged to Monica Njeri Mwaniki. It observed that Samuel Mbatia Mwaniki had repeatedly failed to attend the panel's hearings when called upon to demonstrate how he came to be allocated the plot no 3563.
26. The deceased filed no suit claiming the land or eviction of the plaintiff therefrom. It is only in response to the plaintiff's suit that a defence and counterclaim were filed by both the 1st and 3rd defendants as administrators to the estate of the deceased John Gatharia Karanja, claiming trespass by the plaintiff and seeking vacant possession. However, it is my view that from the totality of the evidence produced by the plaintiff leads to the conclusion that the suit property is owned by Monica Njeri Mwaniki; The share certificate produced by the plaintiff in the name of Monica Njeri Mwaniki has number 680 written on the face of it. Further the plaintiff produced a receipt for payment of transfer fees dated 9/1/1987 with respect to plot No. 680. There is also evidence that the plaintiff has been in occupation of the suit land since the 1970's without interruption.
27. In conclusion therefore, the plaintiff has proved his case on a balance of probabilities. Consequently, I enter judgment for the plaintiff and I issue the following final orders:
 - a. The 1st and 3rd defendants' respective counterclaims are hereby dismissed;
 - b. A declaration is hereby issued declaring that Mrs. Monicah Njeri Mwaniki is the legal and rightful proprietor of all that parcel of land known as Rare/Teret Block 1/680;



- c. The mutation and subdivision of land reference no Rare/Teret Block 1/680 into LR Nos Rare/Teret Block 1/2458 and Rare/Teret Block 1/2459 is hereby cancelled;
- d. The titles issued in the name of Charles Gitiya Gatharia and Hannah Wairimu Gatharia in respect of LR Nos Rare/Teret Block 1/2458 and Rare/Teret Block 1/2459 are hereby cancelled;
- e. The 2nd defendant shall rectify the land register by reinstating parcel no Rare/Teret Block 1/680 into the register and he shall rectify the proprietorship section to read that parcel no Rare/Teret Block 1/680 belongs to Monicah Njeri Mwaniki and he shall issue a fresh title deed in respect of Rare/Teret Block 1/680 in favour of Monicah Njeri Mwaniki;
- f. Each party shall bear their own costs of this litigation.

It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 26TH DAY OF MAY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

