



**Kimani v Njoroge & 2 others (Environment & Land Case
346 of 2013) [2022] KEELC 2867 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 346 OF 2013**

JA MOGENI, J

MAY 18, 2022

BETWEEN

MAGDALINE WANJIRU KIMANI PLAINTIFF

AND

SIMON NDUNGU NJOROGE 1ST DEFENDANT

SAMUEL GITAHI 2ND DEFENDANT

NAIROBI CITY COUNTY 3RD DEFENDANT

JUDGMENT

1. On the 12/03/2013 the Plaintiff sued the Defendants, the plaintiff filed an amended plaint on 1/07/2013 seeking the following orders;
 - a. A declaration that the Plaintiff is the bona fide proprietor of Plot Number 398 Jamhuri Phase II (also known as Nairobi/Block 63/340) within the City of Nairobi.
 - b. An order that the 1st defendant's alleged title to Plot Number 398 Jamhuri Phase II (also known as Nairobi/Block 63/340) within the City of Nairobi be cancelled and/or the Plaintiff be registered as the owner of the Plot Number 398 Jamhuri Phase II (also known as Nairobi/Block 63/340).
 - c. An order of permanent injunction to restrain the 1st defendant from further dealing or interfering with the suit land whether by himself or agents, servants, nominees or any other person claiming under him or in any other manner whatsoever.
 - d. Costs and interest of this suit.
2. It is the Plaintiff's case that at all material times to this suit she is the bona fide and registered owner of the suit property which was allocated to her by way of Letter of Allotment dated 14/02/1992. The



piece of land known as Plot Number 398 Jamhuri Phase II (also known as Nairobi/Block 63/340) within the City of Nairobi.

3. The Plaintiff's claim is that the 1st defendant irregularly and fraudulently acquired the title to the suit property without due regard to the due process and he purported to dispose it off to the 2nd defendant.
4. It is on record that the 1st, 2nd and 3rd defendants were served with the summons to enter appearance together with the amended plaint on diverse dates in 2013 and 2014. The 1st defendant filed a statement of defence dated 3/09/2013 and filed on 4/09/2013, the 2nd defendant filed only a Notice of appointment of advocates dated 17/06/2014, the 3rd defendant filed amended defence dated 8/08/2013 and filed on 12/08/2013. The 2nd defendant did not file a statement of defence within the prescribed time or at all. The record too shows that the amended plaint was served on the 2nd defendant on 14/05/2014 and the hearing notice on 26/04/2021 which did not elicit any attendance to court nor at the hearing that took place on the 18/05/2022.
5. At the hearing of the suit the Plaintiff testified solely and relied on her pleadings and her Witness Statement on record. She stated that by way of Letter of Allotment dated 14/02/1992 she was allotted Plot Number 398 Jamhuri Phase II also known as Nairobi/Block 63/340. It was the Plaintiff's contention that she is the bona fide registered owner of the suit property L.R Nairobi/Block 63/340, having entered into an Agreement for Lease with the 3rd Defendant for a period of 99 years for a consideration of Kshs. 10,800. The plaintiff complied with the terms of the Letter of Allotment and the Agreement for Lease.
6. On several occasions between 20/12/2001 and 13/10/2012 the plaintiff through her advocate requested the 3rd defendants to forward to her the Lease for execution but she was not successful. She was shocked to learn on 13/10/2012 that the records of the 3rd defendant reflected that she had transferred her suit property to the 2nd defendant. The plaintiff reiterates that she is the bona fide proprietor of the suit property and any acquisition by the 1st defendant and subsequent transfer to the 2nd defendant was illegal and fraudulent.
7. The plaintiff attached a copy of a letter dated 25/04/2014 from the Directorate of Criminal Investigations which point to the fact that she reported the alleged fraud to the DCI who were to undertake the investigation. She also attached a copy of the Letter of Allotment from Nairobi City Commission dated 14/02/1992, Beacon Certificate dated 27/09/1999, An Agreement for lease made 21/02/1999 between the City Council of Nairobi and Magdalene Wanjiru Kimani.
8. The plaintiff learnt that the suit property had been transferred to the 1st defendant who had then transferred it to the 2nd defendant and which she testifies that was done illegally and fraudulently and she reported to the DCI. She further stated that he has never sold nor transferred the suit property and the transfer to the 2nd defendant from the 1st defendant was illegal and the 2nd Defendant's registration as the proprietor is illegal and fraudulent. That the 1st and 2nd defendants forged, defrauded and/or connived with the 3rd Defendant to defraud the Plaintiff of her bona fide and legally acquired proprietorship of the suit property.
9. The plaintiff particularized fraud and forgery by the 1st and 2nd Defendants as;- irregularly alleging to have acquired the suit property by colluding with rogue officers of the 3rd defendant:- wrongful acquisition by the 1st defendant of the suit property and disposal of it to the 2nd defendant with the sole purpose and intention of defeating the interest of the plaintiff in the suit property:- the 1st defendant's action of transferring the suit property to himself yet he knew the suit property belonged to the plaintiff:- the 1st defendant's purported transfer of the suit property to the 2nd defendant knowing he



did not have any legal interest to transfer:- the 2nd defendant's alleged acquisition of the suit property from someone who did not have any transferable legal interest in the suit property rendering the 2nd defendant's alleged title null and void.

10. The suit was contested and the 1st defendant filed his statement of defence dated 3/09/2013 and denied all allegations by the plaintiff and stated that he was issued with certificate of lease for the suit property on 27/08/2001. He stated that the plaintiff upon being issued with a lease for the suit property by the 3rd defendant entered into a sale agreement with the 2nd defendant and transferred all her rights to the 2nd defendant for a consideration and therefore the plaintiff's interest had been extinguished by the transfer.
11. It is however interesting that at paragraph 8 of the 1st defendant's statement of defence he states that contrary to the allegations the plaintiff never transferred the suit property to him and neither did he, the 1st defendant ever transfer the suit property to the 2nd defendant as alleged and he seeks to put the plaintiff to strict proof. Further at paragraph 10 the 1st defendant states that the plaintiff has been in possession of the suit property since September 2000 and has continuously paid rates to the City Council of Nairobi and has developed the suit property.
12. The 2nd defendant on his part did not file any statement of defence, he filed a Replying Affidavit dated 2/04/2014.
13. The 3rd Defendant filed his defence statement dated 04/04/2013 and amended statement of Defence on 08/08/2013 and largely agreed with the plaintiff that the suit property is registered in the records with the 3rd Defendant, in the name of the plaintiff. The 3rd defendant however denies the alleged or any forgery, connivance or fraud that is purported by the plaintiff and states the plaintiff cannot use this Honorable Court to derive benefit from an illegality.
14. The matter proceeded by way of viva voce evidence wherein the Plaintiff called one witness and closed their case. Despite being served with the Hearing Notice as per the Affidavit of Service dated 28/01/2022, sworn by Edward Mwendwa Kathanzu, the Defendants did not attend Court to defend the suit and the case therefore proceeded without their participation.

The Evidence

15. The hearing of this suit proceeded on 22/02/2022 when the Plaintiff, Magdaline Wanjiru Kimani, PW1, presented her case before the court. She adopted her witness statement dated 12/03/2013 as part of her evidence and she produced a bundle of documents dated 14/02/2019 which she asked the court to adopt as her evidence PW1Exh 1-56. She told the court that she was allotted the suit property by the then Nairobi City Commission on 14/02/1992 and was given a Letter of Allotment, a copy of which she produced in evidence. She testified that she signed an agreement with the 3rd defendant to confirm that she had been allotted the land which she also produced in the evidence it is dated 21/02/1999. She stated that the said allotment was on condition that she makes payment of a total of Kshs. 10800/- comprising of stand premium, among others, which she paid. She produced the receipt in evidence. She further testified that she paid the annual rent in the year 1993, 1994 and the Legal fees receipt dated 26/11/1999. She was issued with the respective receipts, copies of which have been produced. She told the court that she was also issued with a letter dated 6/07/1999 clearing her to be given the beacon certificate. She paid the relevant fees and was issued with a letter which she produced from the Director City Planning addressed to the Director of Land Survey in relation to the beacon certificate. She was issued with the beacon certificate dated 14/02/1992.



16. She testified that she went to see the suit property in 1999 and there was no one on the property when she was shown. She testified that she got the lease, but she did not have the lease agreement.
17. It was her testimony that she never sold the property to the 1st and 2nd defendants neither did she get payment from the 2nd and 3rd defendants. She testified that in her bundle of documents on page 86 there is a copy of a cheque addressed to Magdaline Wanjiku Kimani, but she stated that her name is Magdaline Wanjiru Kimani. She produced a copy of her ID which is the old version and a copy was also included in her bundle and the names thereon are Magdaline Wanjiru Kimani.
18. It was her testimony that in her bundle of documents at page 164 she annexed a letter from the Nairobi Town Clerk dated 13/10/2012 written by one Karisa who was the Town Clerk and he says that the suit property is owned by Simeon Njoroge. She testified that after getting this letter she reported the issue to the police when her lease got lost on 25/04/2014. She also stated that the 3rd defendant amended their defence statement on 08/08/2013 to confirm that she was the owner of the suit property and stating that the 1st and 2nd defendants were strangers to the suit property.
19. The advocate for the 3rd Defendant Mr. Mugane who was in court waved their right to cross-examination. This therefore marked the close of the plaintiff's case. The Counsel for the 3rd Defendant also closed their case.

Issues for Determination

20. The following are the issues that arise in this suit for determination:
 - a. Who, as between the Plaintiff and the 1st and 2nd Defendants, is the lawful owner of the suit property.
 - b. Whether to issue an order of rectification of the land register in respect of the suit property to reflect the Plaintiff as the registered proprietor.
 - c. Whether to issue an order of permanent injunction restraining the 1st and 2nd Defendants from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff's possession and or ownership of the suit property.
 - d. Who shall bear the costs of the suit and interest.

Analysis and Determination

a. Who, as between the Plaintiff and the 1st Defendant, is the lawful owner of the suit property.

21. The Plaintiff went to great lengths to convince this court that she is the lawful owners of the suit property. The Plaintiff told the court that she was allotted the suit property by the 3rd Defendant on 14/02/1992. She produced to this court a copy of her Letter of Allotment, whose validity was not challenged at all by the Defendants. She also demonstrated to the court that she made the required payment of stand premium and annual ground rent amounting to Kshs. 10,800/- and she produced copies of the receipt issued by the 3rd defendant which are contained in the bundle on pages 171A-171B to pages 175. She also produced a copy of payment for the beacon certificate dated 14/02/1992 and a letter dated 21/02/1999 from the Director of Planning to the Director of Survey asking that the plaintiff is shown her beacons having paid the requisite fees for the allotted plot No. 398 Jamhuri Phase II. To further support this claim over the suit property, she produced a copy of the Beacon Certificate dated 14/02/1992 issued to her in respect of the suit property by the 3rd Defendant. Additionally, she produced a copy of a receipt issued by the 3rd Defendant for legal fees being her payment of



conveyancing fees amounting to Kshs. 3,200/- which was for the preparation of an Agreement for Lease in respect of Plot No. 398 Jamhuri Phase II. None of the Defendants challenged the validity of any of these documents. Infact the 3rd defendant challenged the validity of the registration alleged by the 1st and 2nd defendants and categorically stated that the suit property is registered in the name of the plaintiff and not the 1st or 2nd defendant. They however did not lead evidence to confirm this statement and it remains as such. The urged the Court to grant her the reliefs she has sought for.

22. The Plaintiff thereafter, filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds as follows; -

23. It is not in doubt that though the Defendants filed their statements of Defence, they did not give evidence in Court to support their pleadings and since pleadings are not evidence, the statements of Defence remain mere allegations. Infact the 2nd defendant only filed a replying affidavit and never filed a defence. All the defendants did not give evidence and thus the allegations have not been substantiated. However, the Plaintiff still had an obligation to prove her case on the required balance of probability. See the case of *Gichinga Kibutha vs Caroline Nduku* [2018] eKLR where the Court held;

“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest”.

24. The Plaintiff sought for various orders amongst them, a Declaration that she is the bonafide owner of the suit property; cancellation of the alleged registration of title to plot Number 398 Jamhuri Phase II (also known as Nairobi/Block 63/340) to the 2nd defendant and an order of permanent junction to restrain the 2nd defendant from further dealing or interfering with suit property.

25. The position of the holder of a title deed over a parcel of land is well stated in Section 26(1) of the [Land Registration Act](#) which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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, unprocedurally or through a corrupt scheme.”

26. In this particular suit, it is alleged by the Plaintiff that the 1st Defendant’s purported transfer of the suit property to the 2nd defendant had no legal basis because he had no legal interest that he could transfer. The 1st and 2nd defendants did not come to court and therefore did not lead evidence on how they acquired the lease that is subject of the instant suit. The 3rd defendant on their part have confirmed that the name that is in their records for allotment of Plot No. 398 Jamhuri Phase II is that of the plaintiff. It therefore follows that any title can only be issued in the name of the plaintiff. Any title acquired by any other person without using the records of the 3rd defendant point to illegality. I seek to rely on the



following observation of the court in the case of Daudi Kiptugen versus Commissioner of Lands & 4 Others (2015) eKLR:

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

27. The 3rd Defendant is the one which has custody over the records for, among others, the suit property. In its pleadings, the 3rd Defendant confirmed that it allotted the suit property to the Plaintiff and according to its records, the suit property remains in the name of the Plaintiff. The 1st Defendant does not appear to have done a search with the 3rd Defendant because if he did, he would have come to know that the suit property had already been allotted to the Plaintiff. In the case of *Republic versus City Council of Nairobi & 3 Others* (2014) eKLR, Odunga, J. had this to say about land that has already been allotted:

“once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

28. No evidence was produced by the 1st Defendant and 2nd Defendant that the Letter of Allotment issued by the 2nd Defendant to the Plaintiff in respect of the suit property was ever cancelled or was invalid in any way. The failure of the 1st Defendant to ascertain the true owner of the suit property prior to purchasing the same from the 2nd Defendant is a failure in undertaking the due diligence required of him. Had he conducted that search in the records of the 3rd Defendant, he would have found out that the 2nd Defendant is not the rightful owner of the suit property. He proceeded to deal with the 2nd Defendant and even the transaction with the 2nd Defendant is riddled with inconsistencies. The name of the person who sold him land is stated as Magdaline Wanjiku Kimani whereas the plaintiff's name is Magdaline Wanjiru Kimani and she has produced both her work ID and the National Identity Card showing that her name is Magdaline Wanjiru Kimani. So the person in the sale Agreement with the 2nd Defendant is not the plaintiff. But then again the 1st and 2nd defendants did not attend court on the day of the hearing and therefore did not lead evidence and the plaintiff's case remains uncontroverted as far as the evidence of the 1st and 2nd defendant is concerned. The 3rd defendant seemed to agree with the plaintiff exempt on issues of fraud, forgery and connivance of its officers to defraud the plaintiff



of the suit property. Again the 3rd defendant did not also lead any evidence in court and therefore the evidence of the plaintiff is uncontroverted.

29. Overall, this court finds that the Plaintiff is the rightful owner of the suit property and the Certificate of Lease held by the 1st Defendant over the suit property is invalid and of no legal effect for the reason that it was obtained illegally and unprocedurally.

b. Whether to issue an order of rectification of the land register in respect of the suit property to reflect the Plaintiff as the registered proprietor.

30. The Court is empowered by the provision of Section 80 of the [Land Registration Act](#) to order for the rectification of the Land Register, if it is satisfied that any registration was made fraudulently. See Section 80 of the [Land Registration Act](#), 2012. Which provides;

“ 80 (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.”

31. Having established that the suit property belongs to the Plaintiff and not the 1st Defendant, this court hereby issues an order for the rectification of the land register to reflect the Plaintiff as the registered proprietor of the suit property.

c. Whether to issue an order of permanent injunction restraining the 1st Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff’s possession and or ownership of the suit property.

32. With the above finding that the Plaintiff is the duly registered proprietor of the suit property, it follows that the Plaintiff has the rights over the suit property as set out in section 24(a) of the [Land Registration Act](#) which provides as follows:

“ Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

33. I find that the Plaintiff is entitled to have exclusive use and possession of the suit property to the exclusion of the 1st Defendant. I therefore issue an order of permanent injunction restraining the 1st Defendant from trespassing, constructing in or in any other way whatsoever interfering with the Plaintiff’s possession and or ownership of the suit property.

d. Who shall bear the costs of the suit and interest.

34. In light of the above, Judgment is entered in favour of the Plaintiff as set out herein with costs. The Plaintiff is entitled to impose interest at court rates on his costs of this suit until the same are paid in full.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF MAY, 2022

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MOGENI J

JUDGE

In the presence of



Mr. Kenyatta for the Plaintiff

Mr. Owang' for the 1st and 2nd Defendant

Mr. Vincent Owuor.....Court Assistant

