



Chege v Githunguri Constituency Ranching Company Limited & 2 others (Environment & Land Case 765 of 2017) [2022] KEELC 3615 (KLR) (17 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 765 OF 2017**

BM EBOSO, J

MAY 17, 2022

BETWEEN

MONICA WANJIRU CHEGE PLAINTIFF

AND

**GITHUNGURI CONSTITUENCY RANCHING COMPANY LIMITED 1ST
DEFENDANT**

LUCY WAITHERA BARAZA 2ND DEFENDANT

ASHA ADAM 3RD DEFENDANT

JUDGMENT

1. Through an order made by Gacheru J on April 24, 2019, Thika ELC Case No 756 of 2017 and Thika ELC Case No 765 of 2017 were consolidated. Thika ELC Case No 765 of 2017 was designated as the lead file. The dispute in the two suits revolves around the question of legality of the titles held in the name of Monica Wanjiru Chege [hereinafter referred to as “the plaintiff”] in relation to what was previously registered as land parcel number Ruiru/Kiu Block 2 (Githunguri)/2936. The parcel of land was surveyed within a subdivision scheme owned by Githunguri Constituency Ranching Company Limited [the 1st defendant]. At the time of initiation of the two suits, the original title had been subdivided into twelve subdivisions, namely Ruiru/Kiu Block 2 (Githunguri)/7394 to 7405. The twelve subdivisions are all registered in the name of the plaintiff. The plaintiff contends that she sold the subdivisions more than a decade ago and the purchasers have developed them and are in actual occupation of the subdivisions.
2. The plaintiff challenges the restrictions registered against the above titles by the 1st, 2nd and 3rd defendants and seeks an order vacating the said restrictions. For clarity, the designation of the parties in ELC Case No 765 of 2017 is what will apply in this Judgment. Accordingly, “the plaintiff” means Monica Wanjiru Chege who is the plaintiff in ELC Case No 765 of 2017 and the defendant in ELC



Case No 756 of 2017. Similarly, “the 3rd defendant” means Asha Adam, who is the 3rd defendant in ELC Case No 765 of 2017 and the plaintiff in ELC Case No 756 of 2017.

3. On their part, the 2nd and 3rd defendants want the said titles cancelled and the land restored to the estate of the late Wairimu Mbuthia Gathiaka.
4. Evidence relating to the plaintiff’s case was taken by Gacheru J. I took over the matter at the stage of defence hearing, upon transfer of Gacheru J to Muranga Environment and Land Court.

Plaintiff’s Case

5. The case of Monica Wanjiru Chege is contained in the plaint in ELC Case No 765 of 2017 dated September 13, 2017; the defence and counterclaim in ELC Case No 756 of 2017 dated November 8, 2017; her witness statement in ELC Case No 765 of 2017 dated September 13, 2017; her written statement in ELC case No 756 of 2017 dated March 28, 2018; her oral evidence tendered on October 22, 2020; and her written submissions filed by the firm of Milimo Muthomi & Co Advocates, dated November 8, 2021.
6. In summary, the plaintiff’s case is that on or about September 8, 2008, she purchased parcel number Ruiru/Kiu Block 2 (Githunguri)/2936 at Kshs 350,000 from one John Kareko Kariuki who is now deceased. It is important to note at this point that the said John Kareko Kariuki was a biological brother to Lucy Waithera Baraza [the 2nd defendant] and Asha Adam [the 3rd defendant]. The three siblings were children of the late Wairimu Mbuthia Gathiaka who was the original proprietor of the suit property.
7. The plaintiff contends that she conducted due diligence and confirmed that John Kareko Kariuki was the registered proprietor of the suitland before she purchased it. It is her case that she purchased the land for value and without any notice of the fraud/ illegality/ irregularity/ mistake/ or misrepresentation alleged by the 2nd and 3rd defendants. She subsequently sub-divided the land into the above twelve subdivisions which were all registered in her name. In 2011, the 2nd and 3rd defendants lodged complaints with the 1st defendant, claiming ownership of the land. The three defendants subsequently caused restrictions to be registered against the parcel registers relating to the twelve subdivisions, pending resolution of an alleged ownership dispute.
8. The plaintiff adds that the County Administration and the Police investigated the matter and established that she was an innocent purchaser for value. On August 15, 2017, the Land Registrar advised her to obtain a court order to enable him vacate the restrictions. It is her case that the restrictions are unlawful.
9. Consequently, she brought ELC Case No 765 of 2017 seeking a declaration that she is the bonafide registered proprietor of the suitland; a declaration that the restrictions are illegal and unlawful; and an order directing the Land Registrar to vacate the restrictions. She replicated the same claim and reliefs in her counterclaim in ELC Case No 756 of 2017.

1st Defendant’s Case

10. The 1st defendant filed a statement of defence dated February 27, 2018 in ELC Case No 765 of 2017. They did not, however, lead evidence. Similarly, they did not file written submissions. They stated in their defence that if the plaintiff was the registered proprietor of the suit land and the subsequent subdivisions, then the said registrations were procured fraudulently and are null and void. They added that the restrictions were put in place to safeguard the land against adverse dealings pending resolution of the dispute. They urged the court to dismiss the plaintiff’s suit.



2nd Defendant's Case

11. The 2nd defendant's case is contained in her statement of defence and counterclaim dated December 13, 2017; her witness statement dated December 13, 2017; her bundle of documents dated December 13, 2017; her oral evidence tendered on October 18, 2021; and the written submissions filed by her advocates, M/s JA Guserwa & Company Advocates, dated December 14, 2021. In summary, her case is that land parcel number Ruiru/Kiu Block 2 (Githunguri)/2936 belongs to her late mother, Wairimu Mbuthia Gathiaka, who was allocated the land by dint of being a member of Githunguri Constituency Ranching Company Limited. She contends that her late mother did not transfer the land to any one during her lifetime and that she died intestate on November 21, 1999. She contends that the plaintiff is a trespasser on the suit land. It is her case that she is the administrator of her late mother's estate and that the suit land devolved to her and to the 3rd defendant by dint of the Certificate of Confirmation of Grant issued to her in February 2017.
12. In her oral evidence in court, she stated that her mother had not finalized her payments to the company by the time she died. Upon the demise of her mother, she paid the outstanding balance and the company issued to her a share certificate in her name relating to the suit land. She added that she subsequently carried out succession to her late mother's estate and the land devolved to her and to the 3rd defendant.
13. She stated that John Kareko Kariuki was her biological brother who had since died. She could not remember the year when he died. Her late mother was buried on the suit land.
14. In her testimony during cross-examination, she testified that the money she paid to the company was for a clearance certificate and the said payment was made in 2011. She added that the share certificate she is relying on was issued to her in 2011, prior to her initiating succession proceedings relating to her late mother's estate. She stated that she was not contesting the fact that her late mother was registered as proprietor of the suit property in 1993.

3rd Defendant's Case

15. The 3rd defendant's case is contained in the plaint filed in ELC Case No 756 of 2017, dated September 28, 2017; the defence filed in ELC Case No 765 of 2017 dated December 6, 2017; the witness statement in ELC Case No 756 of 2017 dated January 16, 2018; the oral evidence of her attorney [son], Abdullahi Kariuki Adam, tendered on October 18, 2021; the four documents produced as exhibits during trial; and her written submissions filed through the firm of BN Kilonzo & Co Advocates, dated December 10, 2021.
16. In summary, the 3rd defendant's case, by and large, is the same as the case of the 2nd defendant. She contends in paragraph 5 of her plaint that after the demise of their mother [Wairimu Mbuthia Gathiaka], on November 21, 1999, their late brother, John Kareko Kariuki, illegally and fraudulently caused the suit land to be transferred and registered in his name and a title deed was subsequently issued to him in 2009. She adds in paragraph 6 of the plaint that their late brother later transferred the suit land to the plaintiff [Monica Wanjiru Chege]. She urges the court to declare that the land belongs to the estate of their late mother. Further, she seeks an order cancelling the plaintiff's titles.
17. During cross-examination, the 3rd defendant's attorney (DW2) stated that the late John Kareko Kariuki did not receive the 3rd defendant's consent to dispose the suit land. He stated that succession relating to the estate of the late John Kareko Kariuki had not been carried out. He further testified that the late John Kareko Kariuki's next of kin are the 2nd and 3rd defendants. He added that this dispute was reported to the Assistant County Commissioner who listened to the parties and made a



determination on it. He further stated that the DCI had similarly investigated the dispute and made a decision on it. It was the evidence of DW2 that he was not challenging the registration of the suit land in the name of the late Wairimu Mbuthia Gathiaka in 1993.

Plaintiff's Submissions

18. Counsel for the plaintiff identified the following as the issues falling for determination in the two consolidated suits: (i) Who is the registered legal owner of the suit land; (ii) Whether Monica Wanjiru Chege's titles were acquired fraudulently; (iii) Whether Monica Wanjiru Chege is a trespasser on the suit land; and (iv) Who should bear the costs of the suits.
19. On who is the registered legal owner of the suit land, counsel for the plaintiff submitted that the consent exhibited confirmed that the late John Kareko Kariuki was gifted the suit land by his mother in 1998. Counsel added that at the time John Kareko Kariuki sold the land to the plaintiff in 2008, it was registered in his name and registration of the land into the plaintiff's name was procured procedurally. Counsel submitted that the plaintiff was the absolute proprietor of the suit land.
20. On whether the plaintiff's title was acquired fraudulently, counsel submitted that the allegations of fraud and or misrepresentation by the plaintiff had not been proved. Counsel added that the plaintiff had demonstrated how she acquired title to the suit land. Counsel faulted the 2nd and 3rd defendants for concealing from the succession court the fact that the suit land was registered in the name of the plaintiff and for illegally procuring a share certificate and a clearance certificate from the 1st defendant in the name of the 2nd defendant while aware that the land was registered in the name of the plaintiff.
21. On whether the plaintiff is a trespasser on the suit land, counsel submitted that as the registered proprietor of the suit land, the plaintiff would not be a trespasser on her own land. Reliance was placed on Section 24 of the *Land Registration Act*. Counsel urged the court to uphold the plaintiff's titles and dismiss the claim by the 2nd and 3rd defendants.

2nd Defendant's Submissions

22. Counsel for the 2nd defendant itemized the following as the issues falling for determination in the suits: (i) Whether the late Wairimu Mbuthia Gathiaka transferred the suit land to her son, the late John Kareko Kariuki, as a gift; (ii) Whether the late John Kareko Kariuki [brother to the 2nd and 3rd defendants] had capacity to pass the suit land to the plaintiff; (iii) Whether the plaintiff had knowledge of the defects in the title; and (iv) Whether the plaintiff is a trespasser.
23. On whether the late Wairimu Mbuthia Gathiaka transferred the suit land to her late son, John Kareko Kariuki, counsel for the 2nd defendant submitted that no evidence had been tendered by the plaintiff to demonstrate that the late Wairimu Mbuthia Gathiaka duly executed documents disposing the suit land to her late son. Counsel added that in the absence of a duly executed instrument, the late John Kareko Kariuki did not have a title to convey to the plaintiff. Counsel argued that the suit land never passed from the late Wairimu Mbuthia Gathiaka to her son, the late John Kareko Kariuki.
24. On whether John Kareko Kariuki had capacity to pass the suit land to the plaintiff, counsel for the 2nd defendant submitted that since there was no evidence that the suit land passed from their late mother to their late brother, it follows that their late brother had no title to pass to the plaintiff. Counsel added that because the sale agreement between the plaintiff and their late brother was entered into after the death of their mother, their late brother ought to have obtained a grant before disposing the suit land. Counsel for the 2nd defendant contended that John Kareko Kariuki had no legal capacity to dispose the suit land.



25. On whether the plaintiff had knowledge of the defects in their late brother's title, counsel for the 2nd defendant submitted that the exhibited parcel register indicated that the suit land was transferred to their late brother on 9/10/2009 which was after the plaintiff had entered into a sale agreement with their late brother, and this was evidence that the plaintiff was aware that their late brother was not the registered proprietor at the time he sold to her the suit land. Referring to the evidence of the plaintiff in cross-examination, counsel submitted that the plaintiff had knowledge that their brother did not have a title to the suit land and that their mother had passed on and succession had not been carried out. Counsel for the 2nd defendant argued that the plaintiff had knowledge of the defects in the title.
26. On whether the plaintiff is a trespasser on the suit land, counsel for the 2nd defendant submitted that having established that the late John Kareko Kariuki had no capacity to pass the suit land to the plaintiff and that the plaintiff had knowledge of the defects in the deceased's title, it follows that the plaintiff is a trespasser on the suit land. Counsel for the 2nd defendant urged the court to dismiss the plaintiff's case and allow their claims.

3rd Defendant's Submissions

27. Counsel for the 3rd defendant submitted that the issue for determination in the two suits was whether the plaintiff legally and lawfully acquired the suit land. Counsel submitted that there was no evidence demonstrating that the suit land passed to the late John Kareko Kariuki as a gift. Counsel added that the suit land was registered in the name of the plaintiff on December 24, 2009 after the death of John Kareko Kariuki. Counsel contended that there was no evidence that succession relating to the estate of the late John Kareko Kariuki was conducted. Counsel for the 3rd defendant added that John Kareko Kariuki's signature on the sale agreement dated 3/9/2008 differed with the signature on the application for consent.
28. Counsel for the 3rd defendant argued that the reason why the 3rd defendant did not produce documents to prove ownership of the suit land by their late mother is that their late brother, John Kareko Kariuki, illegally obtained the documents and fraudulently caused the suit land to be transferred to himself and subsequently to the plaintiff. Counsel added that the transfer of the suit land from John Kareko Kariuki to the plaintiff was tainted with illegality because John Kareko Kariuki did not have a clean title capable of being transferred to the plaintiff. Counsel urged the court to dismiss the case of the plaintiff and allow the claims of the 2nd and 3rd defendants.

Analysis and Determination

29. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not frame a common statement of issues to be determined by the court. From the pleadings, evidence, submissions and the relevant law, the following are the key issues that fall for determination in the parallel claims: (i) Whether the key questions raised in the claims by the 2nd and 3rd defendants can be effectually and completely adjudicated upon and settled by this court in the absence of the estate of the late John Kareko Kariuki and the third parties who are said to have purchased and developed, and are in actual occupation of the subdivisions parceled out of the suit land; (ii) Whether the 2nd and 3rd defendants have satisfied the criteria upon which a registered title is impeached under Section 26 of the *Land Registration Act*; (iii) Whether the reliefs sought in the claims by the 2nd and 3rd defendants are available in the circumstances of the rival claims; (iv) Whether the plaintiff is entitled to the reliefs sought against the defendants; and (v) What order should be made in relation to costs of this suit. I will make brief sequential pronouncements on the five issues in the above order.



30. The first issue is whether the key questions raised in the claims by the 2nd and 3rd defendants can be effectually and completely adjudicated upon and settled by this court in the absence of the estate of the late John Kareko Kariuki and the third parties who are said to have purchased and developed the subdivisions parceled out of the suit land and are in actual possession of the land. At paragraphs 5 and 6 of Asha Adam's [3rd defendant's] plaint in ELC Case No 756 of 2017, she averred that upon the demise of their mother [Wairimu Mbutia Gathiaka] on November 21, 1999, their brother, John Kareko Kariuki [now deceased] illegally and fraudulently caused the suit land to be transferred and registered in his name and a title deed was issued in his name in 2009. She added that their late brother subsequently transferred the suit land to Monica Wanjiru Chege [the plaintiff] fraudulently and illegally in 2009.
31. The 2nd and 3rd defendants have throughout their pleadings, evidence and submissions, challenged the manner in which their late brother procured registration of the suit land in his name and subsequently caused the suit land to be sold and transferred to the plaintiff. They, however, did not join the estate of their late brother, as a defendant in this suit. In my view, the party to properly respond to the above allegations of fraud and illegality is the estate of their late brother John Kareko Kariuki. It does appear from the evidence presented to the court by the rival claimants that the plaintiff acquired a registered title from John Kareko Kariuki. Indeed, this fact is what informed the decision by the Director of Public Prosecutions and the DCI to refer the 2nd and 3rd defendants to a civil court for civil redress. In his letter dated December 15, 2014, the Director of Public Prosecutions noted thus:
- “It's therefore my conclusion that John Kareko registered the land Ruiru/Kiu Block 2 (Githunguri) 2936 in his name fraudulently. E1 may have been an innocent buyer but since the process was fraudulent from the beginning, she is a victim of fraud and it's unfortunate that the person who sold the land to her is deceased. The deceased could not have sold what does not belong to him.”
32. It is therefore apparent from the pleadings, evidence and submissions in the two consolidated cases that the estate of John Kareko Kariuki was a necessary party for the complete and effectual adjudication and settlement of the key questions relating to the challenge against the titles currently held in the name of the plaintiff. The 2nd and 3rd defendants, for unknown reasons, elected not to join the estate of their late brother as a defendant in their respective claims. Consequently, those questions cannot be effectually and completely answered and settled by this court in the absence of the estate of their late brother.
33. Similarly, it did emerge from the evidence presented during trial that the suit land was subdivided and sold to third parties in 2011. It was contended through evidence that the third parties have developed the subdivisions and are in actual occupation of the land [see the letter dated 4/2/2011 by the plaintiff to Githunguri Ranching Company Limited]. In the circumstances, it was incumbent upon the 2nd and 3rd defendants to join the said third parties as defendants in their respective claims. The plaintiff too had an obligation to join the said third parties as interested parties in her suit. This was not done. The result is that the court is asked to settle critical questions relating to title to and occupation of land in the absence of parties who are the current beneficial owners of the land and are directly affected by those questions.
34. For the above reasons, it is the finding of this court that the key questions raised in the claims by the 2nd and 3rd defendants cannot be effectually and completely adjudicated upon and settled in the absence of the estate of the late John Kareko Kariuki and the third parties who have purchased and developed the subdivisions surveyed out of the suit land and are in actual occupation of the said subdivisions.



35. The second and third issues constitute the key questions that fall for adjudication and settlement in the claims by the 2nd and 3rd defendants. I have made a finding to the effect that those questions cannot be effectually and completely adjudicated and settled without joinder of the estate of the late John Kareko Kariuki and the third parties who purchased and developed the subdivisions surveyed out of the suit land and are in occupation of the suit land. The court will, in the circumstances, refrain from making conclusive pronouncements on those questions. The court is alive to the fact that this is a judgment which is expected to dispose the two consolidated suits. The court will, in the circumstances, not dismiss the claims by the two defendants. The court will instead strike out the claims by the 2nd and 3rd defendants for non-joinder of the above key parties, without making any conclusive pronouncements on the above key questions. The 2nd and 3rd defendants will elect either to ventilate their claim in a proper suit where all the necessary parties are joined or let the matter rest at that.
36. The fourth issue is the question as to whether the plaintiff is entitled to the reliefs sought against the defendants. The plaintiff holds registered titles to the suit land. The 2nd and 3rd defendants' challenge against the titles has been struck out for non-joinder of necessary parties. If no proper suit is instituted to challenge the plaintiff's titles, the plaintiff would be entitled to all the rights that accrue to a registered proprietor of land under Sections 24 and 25 of the *Land Registration Act*. In the above circumstances, I will grant the plaintiff orders that are tailored to take into account the eventuality of the 2nd and 3rd defendants instituting or electing not to institute a proper suit to challenge the titles held in her name.
37. Given the circumstances under which these two suits are being disposed, I will not award costs to any of the parties.

Disposal orders

38. In the end, the claim by Asha Adam in Thika ELC Case No 756 of 2017; the counterclaim by Monica Wanjiru Chege in Thika ELC Case No. 756 of 2017; the claim by Monica Wanjiru Chege in Thika ELC Case No 765 of 2017; and the counterclaim by Lucia Waithera Baraza in Thika ELC Case No 765 of 2017 are disposed as follows:
 - a. The claims by Asha Adam and Lucia Waithera Baraza are hereby struck out for failure to join, as parties to the suits, the estate of the late John Kareko Kariuki and the third parties who purchased, have developed, and are in actual occupation of the suit land.
 - b. Should Asha Adam and Lucia Waithera Baraza fail to institute any subsequent suit against Monica Wanjiru Chege together with the above omitted parties within 120 days from today, the prayers sought by the plaintiff in the plaint in Thika ELC Case No 765 of 2017 shall be deemed granted to the plaintiff with no order as to costs.
 - c. In the event that a proper suit is instituted within 120 days from today, Monica Wanjiru Chege shall be at liberty to plead a counterclaim in terms of her claim in the present two suits.
 - d. Parties shall bear their respective costs of the two suits and the counterclaims therein.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Museve for the 2nd Defendant



Ms Bunei for the 3rd Defendant

Ms Wambui holding brief for Mr Muthomi for the Plaintiff

Court Assistant: Ms Lucy Muthoni

