



Gathogo Kuria ((Suing As The Administrator of The Estate Of Kariuki Kuria)) v Mugo & another (Environment and Land Case Civil Suit 248 of 2016) [2022] KEELC 3697 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 248 OF 2016**

LA OMOLLO, J

JUNE 30, 2022

BETWEEN

**GATHOGO KURIA PLAINTIFF
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF KARIUKI KURIA)**

AND

**PETER KARIUKI MUGO 1ST DEFENDANT
JOHN NDUNGU MUGO 2ND DEFENDANT**

JUDGMENT

1. This suit was instituted *vide* a plaint dated July 11, 2016. The plaint was later amended on March 4, 2020 and further amended on October 22, 2021.
2. The plaintiff is suing as the administrator of the estate of Kariuki Kuria. He avers that the deceased was the legal proprietor of land parcel No Bahati/Kabatini Block 1/1677 which was subdivided into land parcel No's 17270 and 17271.
3. He avers that after subdivision, the 1st defendant transferred land parcel No 17271 to the 2nd defendant John Ndungu Mugo and retained ownership of parcel 17270.
4. He further avers that on April 25, 1985, Kariuki Kuria who was then a minor had acquired absolute proprietorship of the suit land.
5. It is his averment that the deceased remained in occupation of the suit land until the year 2000 which was a period of over fifteen years without interruption.
6. The plaintiff avers that the 1st defendant fraudulently and illegally transferred the title deed to his name while being aware that the rightful owner of the parcel of land was the deceased.



7. He avers that as a result of the illegal registration, the 1st defendant subdivided and sold a portion of the suit property to the 2nd defendant thereby allowing him to trespass onto the parcel of land and erect illegal structures.
8. The plaintiff prays for judgement jointly and severally against the defendants for the following orders:
 - a) A declaration that parcel of land Title No Bahati/Kabatini Block 1/1677 now known as Bahati/Kabatini Block 1 (Ndeffo) No. 17270 and Bahati/Kabatini Block 1(Ndeffo) No 17271 belong to the estate of the deceased.
 - b) Cancellation of the fraudulently obtained title to the suit land Bahati/Kabatini Block 1(Ndeffo) No 17270 and Bahati/Kabatini Block 1(Ndeffo) No 17271 registered in the name of the 1st defendant and 2nd defendant respectively and the property to revert to the estate of Kariuki Kuria.
 - c) That the Land Registrar be ordered to facilitate the execution of the necessary and relevant conveyance documents to effect registration of the suit land in favour of the deceased's estate.
 - d) Eviction order against the 1st defendant and 2nd defendant
 - e) Costs of the suit
 - f) Interests on (e) at court rates.
9. The defendants neither entered appearance nor filed a written statement of defence. The affidavit of service in respect of service of summons upon them is dated February 14, 2022.

Plaintiff's Evidence.

10. At the hearing, Gathogo Kuria testified as PW1. He adopted his witness statement filed on July 12, 2016 as part of his evidence.
11. It is his statement that he is the Administrator of the Estate of Kariuki Kuria (deceased). He explains that Kariuki Kuria was his younger brother and that he died in the year 2000 adding that he had no wife or children.
12. He stated that the deceased was the legal owner of land parcel No Bahati/ Kabatini Block 1/1677 having acquired absolute proprietorship on the April 25, 1985.
13. In his written statement, he states that the deceased retained proprietorship of the property without any interruption until his death in the year 2000.
14. He also states that upon the deceased's death, Peter Kariuki Mugo colluded with land officials and illegally transferred the land to his name while knowing that the suit property belonged to the deceased.
15. PW1 testified that he last did a search on the suit property in 2013 and presently the suit property is in the name of John Ndungu Mugo and Peter Kariuki Mugo.
16. It was his testimony that before John Ndungu Mugo, the suit land was in the name of Peter Kariuki Mugo. He stated that he was not aware that his deceased brother transferred the parcel.
17. He also testified that after transferring the property to his name, Peter Kariuki erected illegal structures on the land.
18. It was his further evidence that he was not aware of the transfer from his deceased brother to the 1st defendant.



19. PW1 also gave evidence that attempts have been made to settle the matter amicably but parties have failed to reach a resolution.
20. He testified that he did not have the original title to the suit parcel as it was lost in a fire in his late brother's house where his brother also lost his life.
21. He testified further that they reported the loss of title to the area Chief in the year 2000.
22. It was his testimony that the 2nd defendant has been in occupation of the suit property since the year 2016.
23. He also testified that the suit property was subdivided into land parcel No's 17270 & 17271 but they are yet to distribute the estate and that the succession cause is ongoing.
24. He produced the following documents in support of his case:
 - a. Certificate of official search dated October 14, 2013- Exhibit P1
 - b. Assistant Chief's letter reference No 02/29/12/15- Exhibit P2
 - c. Assistant Chief's letter on the loss of title deed- Exhibit P3
 - d. Land certificate dated 25/3/85- Exhibit P4
 - e. Chief's letter dated March 16, 2016 Exhibit P5
 - f. Department of Land Fee receipt No 3361168- Exhibit P6
 - g. Limited grant- Exhibit P7
 - h. Bundle of legal correspondences - Exhibit P8
 - i. Green card for land parcel No Bahati/Kabatini Block 1/1677- Exhibit P9
 - j. Green card for land parcel No Bahati/Kabatini Block 1 (Ndeffo) No 17270- Exhibit P10
 - k. Green card for Bahati/Kabatini Block 1 (Ndeffo) No. 17271- Exhibit P11
25. This marked the close of the plaintiff's case.

The Plaintiff's Submissions.

26. The plaintiff in his submissions filed on February 22, 2022 gave an outline of the facts of the case and a summary of the evidence presented.
27. The plaintiff in his submissions has identified the following issue for determination.
 - a. Who is the rightful owner of land parcel No Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1(Ndeffo) No 17271?
28. The plaintiff referred to section 26(1) of the *Land Registration Act* of 2012 and submitted that the 1st and 2nd defendants fraudulently registered themselves as owners of the suit property while a succession cause was pending in court.
29. It his submission that the deceased remained the registered owner of the suit property until it was suddenly registered in the names of the defendants. They submit that this transfer could not have been effected by a person who was already dead or by his family who had not obtained letters of



- administration. This, he states, is akin to intermeddling with the estate of a deceased person and goes against the provisions of section 45 of the *law of succession Act*, cap 160. He refers to the decision in *Alice chemutai Too Vs Nickson Kipkurui Korir, the Attorney General and Consolidated Bank of Kenya*.
30. He further submits that section 26 of the *Land Registration Act* allows for the revocation of an illegally issued title and is applicable to the circumstances of this case.
 31. The plaintiff submits that the defendants failed to file a statement of defence or attend court to explain their ownership of the suit land. He refers to the decision in *Shaneebal Limited Vs County Government of Machakos* [2018] eKLR, *Daudi Kiptugen Vs Commissioner of Lands & 4 Others* [2015] eKLR in support of this point. The plaintiff reiterates that the defendants obtained the title to the suit property without following due process.
 32. In conclusion, the plaintiff submitted that he has proved his case on a balance of probabilities and therefore prayed that the orders sought in the plaint be granted.

Analysis And Determination.

33. I have perused the pleadings in this matter, heard the plaintiff testify, read submissions and judicial decisions cited. I have also perused all the documents produced as evidence in this suit and have taken them into consideration in making my determination.
34. It is my considered view that the issues for determination are:
 - a. Whether Land Parcel No. Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1(Ndeffo) No 17271 was illegally and fraudulently transferred to the 1st and 2nd defendant.
 - b. Whether a declaration should issue that Land parcel No Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1 (Ndeffo) No 17271 belong to the estate of the deceased.
 - c. Whether the register of Land parcel No Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1 (Ndeffo) No 17271 should be rectified by deleting the 1st and 2nd defendant's names and restoring the names of Kariuki Kuria (deceased).
 - d. Who should bear the cost of the suit and interest thereon ?

A. Whether Land Parcel No Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1(Ndeffo) No 17270 and Bahati/Kabatini Block 1 (Ndeffo) No 17271 Was Illegally And Fraudulently Transferred To The 1st And 2nd Defendant.

35. The plaintiff evidence and documents point to the fact that the deceased- Kariuki Kuria died on March 3, 2000. The green card for land parcel No. Bahati/Kabatini Block 1/1677 shows, at entry No 7, that a title deed was issued on October 5, 2015. It also shows, at entry No 10 that a title deed was issued on March 8, 2016 to Peter Kariuki Mugo of Id No 11046274. Taking into consideration the date of death of the owner and the dealings on his land 15-16 years after his demise an inference of fraud or illegality is not farfetched.
36. The plaintiff has particularized the 1st defendant's fraud as follows
 - a. Colluding with the officials at the lands office to be registered as the proprietor of the suit property



- b. Failing to disclose the said authorities that he had no proprietary right capable of being registered. (sic)
37. Section 26 of the *Land Registration Act* provides as follows:
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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, unprocedurally or through a corrupt scheme. (Emphasis is mine)
38. On the basis of this single evidence, there is no doubt that the suit land formed part of the undistributed estate of the deceased and that the 1st defendant had dealing with the property of a deceased person.
39. The *Law of succession Act* at section 45 provides that:
- (1)) Except so far as expressly authorized by this *Act*, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
40. Section 45 of the *Law of Succession Act* speaks to the illegality of the acts of the defendants and it further supports the proposition that the title to the suit land was illegally acquired by the defendants who had no authority to deal with the property of the deceased.
41. In *Daudi Kiptugen vs Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, the learned Judge held as follows;
- “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 be the rightful proprietor of the land indicated therein...”



42. Lord Denning in *Macfoy Vs United Africa Co Ltd* [1961] 3 All ER 1169 at page 1172 where he stated as follows: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there...”

43. It is evident that the defendants illegally and fraudulently transferred the title to the suit land to themselves. The resultant titles in the name of the defendants are therefore null and void, cannot be said to be indefeasible and should therefore be cancelled.

B. Whether A Declaration Should Issue That Land Parcel No Bahati/ Kabatini Block 1/1677 Now Known As Bahati/ Kabatini Block 1(ndeffer) No 17270 And Bahati/kabatini Block 1 (ndeffer) No 17271 Belongs To The Estate Of The Deceased.

44. The defendants were given an opportunity to defend the suit but they chose not to. In *Shaneebal Limited Vs County Government of Machakos* [2018] eKLR, the learned Judge cited with approval the decision in *Karuru Munyoro Vs Joseph Ndumia Murage & Another Nyeri HCCC No 95 of 1988*, wherein it was held that;

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

45. In view of my finding on question (A) above coupled with the fact that the plaintiff’s evidence in uncontroverted, nothing is easier than to declare that that the Land parcel No Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffer) No 17270 and Bahati/Kabatini Block 1 (Ndeffer) No 17271 belongs to the estate of the deceased. The 1st and 2nd defendant are illegally in occupation and should give vacant possession of it

C. Whether The Register Of Land Parcel No Bahati/ Kabatini Block 1/1677 Now Known As Bahati/ Kabatini Block 1(ndeffer) No 17270 And Bahati/kabatini Block 1(ndeffer) No 17271 Should Be Rectified By Deleting The 1st And 2nd Defendant’s Names And Restoring The Names Of Kariuki Kuria (Deceased).

46. The plaintiff did not expressly seek this prayer in the plaint but have made submissions on it.

47. Section 13(7) of the *Environment and Land Court Act* provides that this court has power to make any orders and grant any relief as the court deems fit and just. I will proceed to look up the law and determine whether the orders can be issued.

48. Section 80 of the *Land Registration Act* provides as follows:

80. Rectification by order of court.

(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.



(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

49. Section 80 of the Land Registration Act states that this honourable court has power to order rectification of the register if it is satisfied that the registration was obtained, made or omitted by fraud or mistake. This section further gives guidance on mode of rectification by the court ie by directing that any registration be cancelled or amended.
50. Consequently, I find that the register of Land parcel No Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1(Ndeffo) No 17271 should be rectified by deleting the 1st and 2nd defendants names and restoring the names of Kariuki Kuria (deceased).

D. Who Should Bear The Cost Of The Suit And Interest Thereon?

51. The general rule is that costs shall follow the event in accordance with the provisions of section 27 of the Civil Procedure Act (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

52. The upshot of the foregoing is that the plaintiff's suit succeeds.
53. Consequently, I enter judgment in the following terms:
- a. A declaration is hereby issued that land parcel No. Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1 (Ndeffo) No 17271 belongs to the estate of the deceased.
 - b. A declaration is hereby issued that Land parcel No. Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1 (Ndeffo) No 17271 was illegally and fraudulently transferred to the 1st and 2nd defendant.
 - c. The Land Registrar shall rectify the register of Land parcel No. Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1 (Ndeffo) No 17271 by deleting the 1st and 2nd defendant's names and restoring the names of Kariuki Kuria (deceased).
 - d. An eviction order is hereby issued against the 1st and 2nd defendant, their servants and/or agents in respect of Land parcel No Bahati/ Kabatini Block 1/1677 now known as Bahati/ Kabatini Block 1 (Ndeffo) No 17270 and Bahati/Kabatini Block 1 (Ndeffo) No 17271.
 - e. The eviction orders in (d) above, shall be effected after 90 days of service of this judgement and court order on the 1st and 2nd defendant, their servants and/or agents.
 - f. The plaintiff shall have costs of this suit and interest thereon from the date of judgment until payment in full.
54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF JUNE, 2022.



L. A. OMOLLO

JUDGE

In the presence of: -

Cherono for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

Court Assistant; Ms. Jeniffer Chepkorir

