



Macharia v Gitau & another (Land Case 231 of 2017 & Environment & Land Case 221 of 2017 (Consolidated)) [2022] KEELC 3787 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 231 OF 2017 & ENVIRONMENT
& LAND CASE 221 OF 2017 (CONSOLIDATED)**

FM NJOROGE, J

JUNE 29, 2022

BETWEEN

JOSEPH MUTHAMA MACHARIA PLAINTIFF

AND

NANCY WANJIRU GITAU 1ST DEFENDANT

GRACE WANJIRU MWANGI 2ND DEFENDANT

JUDGMENT

1. The dispute over the land herein spawned three separate pieces of litigation, that Nakuru ELC 231 of 2017 and Nakuru ELC 221 of 2017 and Naivasha CMCC 830 of 2015. The first two suits are before this court and they were consolidated vide a consent order recorded by Hon. D.O. Ohungo J. on 7/2/2018, with ELC 231 of 2017 being the lead file. There are only three parties in this case and save for the paragraphs in which the prayers in each case are set out in this judgment, I am satisfied with referring to them under the descriptions in the lead file in the rest of this judgment.
2. The Plaint dated 22/5/2017 in ELC 221 of 2017 prays for judgment against the Defendant for:
 - a. Vacant possession of the property;
 - b. Removal of the restriction on the suit property at the Naivasha Lands Registry;
 - c. A permanent injunction restraining the defendant herein either by its agents, invitees and/or servants from constructing, fencing, entering, trespassing and/or in any other way interfering with the Plaintiff's possession of all the property known as Land Title No. Naivasha/ Municipality Block 8/5;
 - d. That the honourable court be pleased to issue a mandatory injunction compelling the defendant herein either by its agents, invitees and/or servants to demolish and/or remove all



structures erected on the property known as Land Title No. Naivasha/Municipality Block 8/5 pending hearing and determination of this suit;

- e. Costs of this suit and interest thereon;
 - f. Any other or further relief as this court may deem fit.
3. The plaint in ELC 231 Of 2017 seeks the following orders against the defendants:
- a. A declaration that the plaintiff herein is entitled to LR NO 1144/302 now referred to as Naivasha Municipality Block 8/5 and the title deed issued to the defendant herein be cancelled;
 - b. A permanent injunction restraining the defendants by themselves, their agents and/or servants from transferring, selling and or interfering in any way with the parcels of land known as LR NO 1144/1302 also referred to as Naivasha Municipality Block 8/5.
 - c. Costs of this suit.
4. Each party therefore claims in their respective suit prayers adverse to the others.
5. The plaintiff (and now I will henceforth be referring to the parties by their descriptions in the suit as consolidated) claims that he is the registered owner of the suit land, having purchased it from a company going by the name Ilkek Limited for valuable consideration in the year 2003. In the year 2015 the plaintiff became aware that the defendants had acquired title to the suit land in their names. Whereas the plaintiff's title had been issued under the Registration of Titles Act (RTA) (now repealed,) the defendant's title had been issued under the Registered Land Act (RLA) (now repealed.) It is common ground that both titles refer to the suit land on the ground. The plaintiff lodged a restriction against the RLA title issued in the defendant's names. The defendants then filed Naivasha CMCC No 830 of 2018 against the plaintiff seeking removal of the restriction and an order of injunction. The restriction was removed by order of court issued on 15/12/2015 but the plaintiff soon thereafter obtained an order staying the removal of the restriction. In the present suit the plaintiff avers that the issuance of the title in the defendants' names was occasioned by fraud on the part of the defendants.
6. There is evidence that the defendants were served in this suit, and they filed a sworn replying affidavit dated 28/1/2018 in respect of the motion for injunctive orders dated 2/6/2017 but failed to file any defence to the suit; however, the suits having been consolidated, the defendant's claim in ELC 221 of 2017 is effectively the defence to the plaintiff's claim.
7. It is clear from the court record that from as early as 13/7/2018 the parties in this litigation mulled over the recording of a consent and indeed there is a draft consent in the record handing ownership of the suit land to the plaintiff but which consent has never been adopted by the court. On 28/9/2018, the consent was rejected by the court for the reason that the defendants had not been in touch with their advocates.
8. On 25/1/2022, counsel for the two parties appeared before court but the suit never proceeded to hearing and it was adjourned to 10/5/2022. On the latter date the defendants and their counsel were absent and the hearing proceeded ex parte.
9. The plaintiff alone testified in his case and adopted his witness statement dated 2/6/2017 filed in the record. His evidence tallied with the contents of his plaint. He produced the documents in his filed bundle as P. Exh 1-6. These included his title document issued in the year 2004 under the RTA (now repealed.) The suit had to be adjourned to 12/5/2022 to enable the plaintiff attend to produce his original title. The same was compared with the copy in the bundle, and both having tallied, the copy was retained as P. Exh 1. No submissions were filed by any of the parties.



10. I have considered the pleadings and the evidence in this case. The defendants did not adduce any evidence and therefore their statements in the plaint in ELC 221 Of 2017, which I consider as the defence to the plaintiff's claim, are therefore unsupported. The instant suit is therefore deemed as undefended.
11. In this court's view, the evidence adduced by the plaintiff has established that his title was issued earlier than the defendant's title yet both titles refer to the suit land on the ground. The defendant's title ought not be allowed to stand as there was nothing to allocate to them after the land was allocated to the first owner by the name George Kiarie Nganga, who later transferred it to Ilkek Ltd who subsequently sold it to the plaintiff.
12. I therefore find that the plaintiff has established his claim on a balance of probabilities against the defendants and I enter judgment in his favour against them and I issue the following final orders:
 - a. A declaration is hereby issued declaring that the plaintiff herein is the registered proprietor of LR NO 1144/302;
 - b. The title deed issued to the defendants in respect of the suit land under the title Naivasha Municipality Block 8/5 and which purported to refer to the suit land was obtained fraudulently and it is hereby cancelled;
 - c. A permanent injunction is hereby issued restraining the defendants by themselves, their agents and/or servants from transferring, selling and or interfering in any way with the parcel of land known as LR NO 1144/1302;
 - d. For the avoidance of doubt, the defendant's claim in the plaint dated 22/5/2017 in ELC 221 of 2017 is hereby dismissed;
 - e. The defendants shall pay to the plaintiffs the costs of this consolidated suit.

It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 29TH DAY OF JUNE, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

