



REPUBLIC OF KENYA



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**Gichiri v Waruguru (Environment & Land Case 117 of 2018)
[2022] KEELC 2222 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 117 OF 2018**

**LN MBUGUA, J
JUNE 23, 2022**

BETWEEN

JOHN KINGARU GICHIRI PLAINTIFF

AND

**ERNEST KARIGI NGOTHO SUED AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF THE LATE FERESIA WARUGURU DEFENDANT**

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 19.3.2018 claiming that he is the registered owner of land parcel No. LR. Nairobi/ Block/ 119/ 2590 within Githurai Ting'ang'a Company Limited vide a certificate of lease issued on 4.4. 2011. However defendant trespassed on the land and has refused to give vacant possession. The plaintiff therefore prays for the following orders:
 - a. "A declaration that the Plaintiff is the lawful registered owner of L.R Nairobi/Block 119/2590
 - b. An eviction order be issued against the defendant his agents or servants from L.R. No. Nairobi/ Block 119/2590 and removal of the defendants illegal structures in the property.
 - c. Costs of the suit"
2. The defendant refuted plaintiff's claim through his defence filed on 26.2.2019 where he contends that plaintiff's land is a product of plot No. 785 of L.R. No 5964/2, which is a distinct plot from the one occupied by defendant. On the other hand, defendant's land is plot No. 789 also evolving from L.R. 5964/2 which land he has developed and occupied for the last 17 years. He prays for the dismissal of plaintiff's claim.
3. During the trial, the plaintiff testified as pw1. He adopted his witness statement dated 12.3.2018 as his evidence. He also produced the 5 documents in his bundle dated 12.3.2018 as his exhibits. The said document are: lease dated 1.12.1994 in the name of Jean Wangui and Simon Wanyoike Njau and



a Certificate of lease dated 4.4.2011 in the name of John Kingaru Gichiri, receipt for plot No. 789 in the name of Feresia Waruguru, Demand letter, letter from plaintiff's lawyer dated 20.7.2017 and Reply thereof from defendant's lawyer and the grant of letters of administration issued to defendant in respect of the estate of Feresia Waruguru.

4. In his witness statement, pw1 avers that he bought the land L.R. No Nairobi/ Block 119/ 2590 from one David Ikonya who transferred the land to him. He was then registered as the owner of that land on 4.4. 2011.
5. That with the help of a surveyor engaged by Githurai Ting'ang'a Company Limited, who are the original owners of the mother title No 5964/2 which was subdivided into several sub-plots, including the disputed plot, he was shown his land. However, the defendant trespassed on the aforementioned land and has declined to vacate.
6. In cross examination, pw1 stated that initially, the land belonged to one Jane Wangui Wanyoike who had a certificate, but the property was acquired from Ting'ang'a trading company. He bought the land from David Ikonya, but the land was not in David's name and there was no certificate of lease by then. There was only a certificate with a number 785. The documents he got from Ting'ang'a Company is what he presented to the land registry with the deed in order to get a title, but he does not have that deed plan in his certificate of lease. Apart from the certificate of lease, the plaintiff avered that he has other documents showing how he got the land, However, the same are not in the bundle. He contends that he knows where his property is located.
7. Plaintiff is aware that defendant has put up a house on the land he is claiming.
8. The Plaintiff disowned the document on page 7 of his bundle which is a lease issued on 1.12.1994 to Jean Wangui Wanyoike and Simon Wanyoike Njau. He does not know the relevance of the document on page 17 of his bundle which is a grant issued to the defendant in respect of the estate of Feresia Waruguru.
9. In Re-exam, pw1 clarified that he identified the lease on page 7 of his document and that he got it from Ikonya and Jane, then he stated that he got it from land Registry after Jane and Ikonya gave him transfer documents which they had signed. That when he got the documents from Jane and Ikonya, he handed the same to Ting'ang'a Company who in turn gave him documents to take to land registry. That is when he realized that the land was occupied. So he got the title but the land was partly built and partly not built. That by the time he bought the map, defendant was on the land.
10. Pw1 went on to state that after he got the title, there was a dispute between him and another man. That when he got the title, he was shown the correct land, but someone came to claim it and he is a neighbour at the end and he said that the land was his. That is when they got a surveyor as that was not the right land for Ikonya. The surveyor then came and showed pw1 a different land where a neighbour has already built and there is a house of defendant and this gave rise to a dispute of 3 properties. He contends that defendant's land is bigger, so the land he (pw1) is supposed to get is not enough.
11. The defence case was advanced by Dw1 (defendant) who adopted his statement dated 25.2.2019 as his evidence. He also produced the 11 documents in his list dated 25.2.2019 as exhibits 1-11. The said documents are:
 1. Grant of Letters of Administration dated 21st March 2007;
 2. Certificate of Confirmation of Grant dated 21st March, 2017;
 3. Death Certificate of Feresia Waruguru;



4. Agreement dated 18th January, 2002;
 5. Certificate of Ownership of Plot No. 789 of L.R. No. 5964/2;
 6. Pictures of the Developments on Plot No. 789 of L.R. No. 5964/2;
 7. Receipts and correspondence from Githurai Ting'ang'a Limited;
 8. Complaint Letter dated 21st February, 2017;
 9. Letter from the DCI dated 8th November, 2018;
 10. Letter from the DPP dated 9th January, 2019;
 11. Letter dated 30/01/2019.
12. The case of defendant as set out in his recorded statement is that he is the legal representative of the estate of Feresia Waruguru, his mother who died on 17.2.2003. That the deceased bought the land plot No. 789 from Julius Gikonyo Mwaniki via his agent situated within L.R 5964/2 owned by Githurai Ting'ang'a. That Julius Gikonyo went to Ting'ang'a Company and had the land transferred to defendant's mother and she was issued with a certificate of ownership which Dw1 kept after the death of his mother. By then, there were only temporary structures but Dw1 went ahead and built a permanent house.
 13. In year 2012 after being on the plot for a period of 10 years, plaintiff came with a certificate of lease claiming that the land is his. Dw1 avers that records at Ting'ang'a Company showed that plot 789 had initially belonged to Julius Gikonyo.
 14. Dw1 also reported the matter to the Criminal Investigation Department at Kasarani Police Station where it was found that plaintiffs' plot was 785 and not 789. That the CID also unearthed more confusions in plot numbers via a vis the titles and they proposed resolution of the disputes via Alternative Dispute Resolution Mechanisms.
 15. Dw1 denies residing on plot 119/2590 which was formerly 785 within L.R 59 64/2. He further stated that the plaintiff did not come to the ground at the time he was apparently buying his plot, and when he eventually went to the ground where he had been allocated land, he found another member who had already developed his Plot No. 785 and that is when plaintiff was shown the plot of Dw1 by the person who trespassed on plaintiff's plot. Thus the plaintiff has opted to come and harass the defendant because the latter is not a person of adequate means to fight court battles.
 16. Dw1 contends that he has been residing on plot 789 for the last 17 years.
 17. In cross examination Dw1 stated that he met pw1 for the 1st time in 2010 and the latter was claiming the land. They first went to chief and then to Ting'ang'a. Ting'ang'a Company who came to the ground and said the land was for DW1.
 18. Dw1 also reported matter to DCIO at DCI and they were told to continue staying where each one was staying. To date, he has not processed his title because of the dispute. He added that Ting'ang'a company did not resolve the dispute and instead, they told people to go to court.
 19. Dw1 again emphasized that he has built on his land.
 20. In Re examination, Dw1 reiterated that plaintiff's title was derived from plot 785. Hence plot 785 and 789 are two different plots. That him and his neighbors bought their land from one person, whose plot was split into 4 parcels as follows:



- i. 787 belongs to Julius Amukure
 - ii. 788, Julius Waithaka
 - iii. 789 (Defendant's mother's plot)
 - iv. 790 James Nguyo Kagoi
1. Dw1 contends that plaintiff has never come to stay there.

Submissions

22. It was submitted for the plaintiff that under section 26 (1) of the *Land Registration Act*, a title issued by the Registrar shall be taken to be prima facie evidence that the person so registered is the absolute and indefeasible owner and this can only be challenged as provided by the statute. That the defendant has no title thus the land buying company has not issued him with a clearance certificate and a surveyor has not pointed out his rightful site. To this end, the court has been urged to find that plaintiff has proved his case on a balance of probability.
23. For the defendant, it was submitted that the plaintiff should have gone beyond the register to prove that he owned the plot on the ground. That plaintiff did not provide evidence of the location of his plot by way of a deed plan and survey map. It was pointed out that plaintiff's lease is endorsed with a Number 785 hence his title was produced via plot no 785 and not 789. It was submitted that defendant has not in any way trespassed on plaintiff's land since defendant stays on plot 789.
24. In support of his case, the defendant relied on the following cases:
 1. "*David Peterson Kiengo & 2 Others V Kariuki Thuo* [2012] eKLR.
 2. *Koinange & 13 others v Charles Karuga Koinange* [1986] eKLR
 3. *Paul Audi Ochuodho v Joshia Ombura Orwa* [2014] eKLR.
 4. *M'Ikiara M'Mukanya & another vs Gilbert Kabere M'Mbijiwe* [1983] eKLR"

Determination

25. There is no controversy that the suit lands (s) emanated from the larger parcel L.R No. 5964/2 owned by Githurai Ting'ang'a Company which appears to be a land buying company. It is also clear that plaintiff has a certificate of lease for parcel Nairobi Block 119/2590 issued on 4.4.2011. It is also not in dispute that the parcel of land being claimed by the plaintiff is occupied by defendant on the ground.
26. The issues falling for determination are: Whether the Plaintiff's Plot LR. No. Nairobi/Block 119/2590 is the same Plot as the Defendant's Plot No. 789 of LR. No. 5964/2, Whether the Defendant has trespassed onto the Plaintiff's Plot LR. No. Nairobi/Block 119/2590 and Whether an order of eviction should be issued against the Defendant.
27. On whether the plot in question is one and the same, (Nairobi/ Block 119/2590 and plot 789), the point of call is the provisions of Section 107 of the *Evidence Act* which stipulate as follows:
 - (1) (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".



28. The age long principle of law is that he who alleges must prove, see - *Susan Kanini Mwangani & another v. Patrick Mbithi Kavita* [2019] eKLR, and *Jennifer Nyambura Mamau. v Humphrey Lusaka Nandi* [2013] Eklr.
29. The plaintiff is the one who filed this suit and it behoves him to prove of his allegation that the land he is claiming is the one occupied by the defendant. The plaintiff contends that being the registered owner of the title, then the said title is not subject to challenge unless on ground of fraud or misrepresentation as set out in section 26 of the *Land Registration Act*. However, it is not enough for a registered proprietor of land to flash out a title without proof of its roots once that title is under challenge.
30. In the case of *Munyu Maina v. Hiram Gathiba Maina*, Civil Appeal No. 239 of 2009, the court of Appeal stated that:
- “When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
31. There being no dispute that the suit land emanated from the larger parcel LR 5964/2 owned by Ting’ang’a Company, then it was important for the plaintiff to adduce evidence giving a nexus of his title and the aforementioned company. The first document availed by plaintiff is a lease issued on 1.12.1994 to Jean Wangui Wanyoike and Simon Wanyoike Njau. The same indicates that the lease was issued by the Government of Kenya for 99 years effective from 1.12.1994. The plaintiff’s certificate of lease which is part of exhibit I again shows that lessor is the Government of Kenya and lessee is Jean Wangui Wanyoike and Simon Wanyoike Wanjau for 99 years from 1.12. 1994 and the plaintiff was registered as the proprietor of the said lease on 4.4.2011. None of those documents mention parcel 5964/2 or its owner being Githurai – Ting’ang’a Company.
32. In Plaintiff’s list of documents dated 12.3.2018 at the index part, he identifies the 2nd document as a receipt of subdivision plan. However, the said document on page 13 of the same bundle was issued to defendant’s mother Feresia Waruguru for plot 789 in L.R. No 5964/2. The rest of the documents are 2 letters from advocates and a grant and therefore do not form documents of ownership of the land. This far, I find that plaintiff has not availed any documents to show that he acquired land which has roots in Githurai Ting’ang’a Company.
33. The other point of consideration relates to how the plaintiff bought the land. In his recorded statement, he avers that he bought the land from David Ikonya who transferred it to him. However, during cross examination pw1 stated that:
- “Initially, the land was belonging to Jane Wangui Wanyoike. She was the initial owner of this land as per the certificate I have. It is not part of my bundle. I even informed Mr. Gatumuta. The property was acquired form a company called Ting’ang’a Trading Company. Paragraph 3 of my statement reads” I bought the property from David Ikonya and is the one who did everything. I know David. The land was not in David’s name. When I bought the land, there was no certificate of lease. It was only a certificate with a number as 785. I don’t agree that defendant has developed on 789 plot.”
34. The foregoing evidence is jumbled up. If pw1 bought the land from David Ikonya but the land was not in his name, then the land we in whose name? If indeed by the time plaintiff was buying the land there was no certificate of lease save the certificate No. 785, then the latter document was in whose name.



And if Ting'ang'a Company is the one which was allocating plots 785 -789 on the ground as plaintiff alleged during cross examination, then the allocation of plot 785 was to whom as at the time of sale? And in what capacity did David Ikonya transfer the land to the plaintiff when Jane was around and about?. The plaintiff has not given any plausible explanations for these glaring questions.

35. Another point of consideration relates to the ground identification of the plot in issue. In his recorded statement, plaintiff stated that he was shown the plot “with the help of a surveyor engaged by Ting'ang'a Company”. He doesn't state as to who showed him the plot or when this happened. During re examination plaintiff stated that it is when he went to land registry that he realized that the land was occupied. Still in the Re-examination, plaintiff had stated that:

“On the ground, I was shown the land by its owner. I sued Earnest because when I was shown the land, the right one, when I got the title, someone else came to claim the land and he is a neighbour at the end. I think he is at the end. He is different. That is when we got surveyor as the land for Ikonya, it was not the right one. The guy told me that the land was not mine”. Surveyor came and showed me a different land where a neighbour had already built. There is a house of Karigi.....”

36. What resonates from this evidence is that plaintiff saw the land he is claiming after the sale and after he had gotten the certificate of lease from Lands office. He has admitted that he found the plot in question occupied by defendant when he went to the ground. This is a pointer to the fact that when plaintiff was buying the land, he knew not of what he was buying. That explains why he embarked on a game of chance, going here and there trying to identify his land on the ground. He has also admitted that he doesn't have a deed plan for this title. With all these discrepancies, how then can the plaintiff claim that his land is the one occupied by defendant.
37. On the other hand, defendant has a given consistent and plausible evidence of his claim. The suit land belonged to his mother Feresia Waruguru who in turn bought the land from Julius Gikonyo Mwaniki and the land was plot 789 in 5964/2 owned by Githurai Ting'ang'a Company. Julius transferred the land to Feresia in the Ting'ang'a Company records resulting in Feresia Waruguru being issued with a certificate of ownership which is on page 14 of defendant's bundle.
38. These kind of documents may not mean much in terms of recognition of land ownership under the relevant statutes, but when it comes to ascertainment of rights and interests in land in land buying companies, whose large parcels of land are usually subdivided resulting into many plots, the certificates of ownership, share certificates, ballot cards and such other like documents becomes the hall mark of ownership. This is because the said documents are the focal points of reference which allows the owner to trace his claim of ownership. The documents also allow an owner to effect their interests in land to someone else through sale, gift, transmission etc. Most important, the documents also allows an owner of land in a land buying company to transition his rights and interests in that land to full registration of proprietorship via acquisition of a title deed.
39. The defendant has given minute details of who his neighbours are: plot 787 is for Julius Amukure, plot 788 is for Julius Waithaka, plot 790 is owned by Jane Nguyo and plot 789 is for defendant's mother. Defendant was even able to give such finer details relating to how the four plots (plot 787 – 790) were bought from one person, hence all the four mentioned persons are neighbours.



40. In the case of *Esther Ndegi Njiru & another v Leonard Gatei* [2014] eKLR, the court had observed as follows on the issue of Share certificate vis a vis a title in a land buying company;

“The clearance certificate used by the 2nd Defendant to process the title was fake and/or forged. The resultant title was of no consequence and therefore the plaintiffs title cannot supersede the share certificate of the true owner of the parcel of land. The Land Registrar could only properly process a title against a validly issued clearance certificate by Githunguri Constituency Ranching Company and once it is proved that no proper clearance was tendered for issue of a title, such a title in my view would have been unlawfully and unprocedurally procured and therefore voidable”.

41. In the case of *Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, the court while cancelling a lease certificate stated that;

“On this point, it does not have to be proved that the plaintiff was a party to the illegality, lack of proper procedure or corruption. The plaintiff certainly did not get title procedurally, for what he was supposed to obtain a lease over, was the property described as “unsurveyed plot B26”. It was not procedural for the Commissioner of Lands to issue the present lease to the plaintiff. Such action cannot be defended as being legal. I have no evidence that there was any corrupt dealings, but at the very least, there was a procedural impropriety that led to the Lease being issued to the plaintiff”.

42. It is not enough for the plaintiff to dangle his certificate of lease when he has failed to establish the root of acquisition of the same. In the final analysis, I find that plaintiff has not demonstrated that the title he holds, the same being Nairobi/Block 119/2590 has a relation with the land occupied by defendant. That being the case, then the defendant cannot be said to have trespassed on plaintiff’s land and the orders of eviction are not merited.

43. Thus plaintiff’s case has not been proved on as balance of probabilities and the same is hereby dismissed with costs to defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Gatumuta for the Plaintiff

Ambani for the Defendant

Court Assistant: Eddel

