



**Karanja v Kabuchia & 3 others (Environment & Land Case
356 of 2017) [2022] KEELC 3820 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 356 OF 2017**

YM ANGIMA, J

JUNE 16, 2022

BETWEEN

JOSEPH GICHERU KARANJA PLAINTIFF

AND

MBURU KARANJA KABUCHIA 1ST DEFENDANT

KAMAU KARIUKI 2ND DEFENDANT

PETER KAMANDE 3RD DEFENDANT

DAVID KANGETHE KIMANI 4TH DEFENDANT

JUDGMENT

A. The Plaintiff's Claim

1. By a plaint dated April 5, 2017 the plaintiff sought the following reliefs against the defendants:
 - (a) The rectification of the register to have title Nos Nyandarua/Njabini/4081 to 4089 cancelled and reverted to Nyandarua/Njabini/288 as earlier decreed by the court.
 - (b) The excision of 10 acres out of Nyandarua/Njabini/288 and registration of the same in the names of the plaintiff as the legal representative of the estate of the original plaintiff namely, Francis Karanja Gicheru.
 - (c) Costs of this suit and interest thereon at court's rates.
 - (d) Any other further reliefs that the honourable court may deem fit and just to grant.
2. The plaintiff pleaded that he was the son and legal representative of the late Francis Karanja Gicheru (the deceased) who had bought a portion of 10 acres out of title No Nyandrua/Njabini/288 (parcel 288) from the late Mburu Karanja (late Karanja). It was further pleaded that the said land was the



subject matter in Nyahururu PMCC No 307 of 1997 (the first suit) which was determined in favour of the deceased.

3. The plaintiff further pleaded that although the judgment in the first suit was set aside at some point and the suit ordered to be heard de novo the same was ultimately determined in favour of the deceased in 2005 but the decree could not be executed because the green card for parcel 288 had gone missing for a long time. It was further pleaded that it was discovered later on that parcel 288 had been sub-divided into title Nos Nyandarua/Njambini/4081 – 4089 some of which had been transferred to the defendants.
4. It was the plaintiff's contention that sometime in August 2005 an application was filed for rectification of the land register in the first suit but the trial court held that it had no jurisdiction and directed that the matter be presented before this court for determination hence the suit.
5. The plaintiff pleaded that the 1st defendant had fraudulently caused 3 out of the 9 sub-divisions of parcel 288 to be transferred to the 2nd, 3rd & 4th defendants and that the same parcels were part and parcel of the land decreed to belong to the estate of the deceased in the first suit. The plaintiff consequently listed 4 particulars of fraud against the 1st defendant in paragraph 16 of the plaint.

B. The Defendants' Response

6. Although there is no indication on record of the 1st defendant having filed a defence to the action, the 2 – 4 defendants filed a joint statement of defence dated December 18, 2018 denying liability for the plaintiff's claim. The 2nd defendant pleaded that he was a purchaser for value without notice of any defect in title of parcel No 4081 from the late Karanja.
7. The 3rd defendant pleaded that he was a son of the late Karanja but he was never involved in the alleged sale transaction between him and the deceased and neither was he aware of it. He further pleaded that it was the late Karanja who sub-divided parcel 288 during his lifetime and he transferred portions thereof to his sons and various purchasers who were not aware of the said sale transaction or the first suit.
8. The 2 – 4 defendants denied knowledge of the fraud and particulars of fraud pleaded by the plaintiff and pleaded that they were strangers thereto. They further pleaded that they acquired their portions of land lawfully as there were no cautions, inhibitions or restrictions registered against the suit properties at the material time and that, in any event, there was no judgment or decree in existence at the time parcel 288 was subdivided.

C. The Plaintiff's Rejoinder

9. The plaintiff filed a reply to defence dated October 27, 2021 which mainly reiterated the contents of the plaint and joined issue upon the defendants' defence. He pleaded that although the defendants were not parties to the first suit they were, nevertheless, aware of the proceedings and occupation of the suit properties by the family of the deceased.
10. The plaintiff reiterated that the sub-division of parcel 288 and transfer of some of its sub-divisions was fraudulent and in contempt of the decree passed in the first suit. The plaintiff consequently urged the court to dismiss the defence and enter judgment in his favour as prayed in the plaint.

D. Summary of Evidence at the Trial

11. At the trial hereof, the plaintiff called two witnesses and closed his case. The plaintiff was the first one to testify. He adopted his witness statement dated April 5, 2017 as his evidence in-chief and produced the documents in his list of documents as exhibits. The second witness was the plaintiff's brother John



Karanja who testified as PW2. He similarly adopted his witness statement dated April 5, 2017 as his evidence in-chief. Both witnesses maintained that they were still resident on the suit property which the deceased had acquired from the late Karanja for valuable consideration.

12. The defendants did not attend court to testify at the trial. Their advocates on record requested an advocate to hold brief and seek an adjournment on their behalf but the application was rejected. Consequently, the defendants' case was closed without any evidence being tendered on their behalf.

E. The Issues For Determination

13. The court has perused the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination herein:
 - (a) Whether the plaintiff has proved his case against the defendants to the required standard.
 - (b) Whether the 2nd defendant was an innocent purchaser for value without notice of any defect in title.
 - (c) Whether the plaintiff is entitled to the reliefs sought in the suit.
 - (d) Who shall bear costs of the suit.

F. Analysis and Determination

a. Whether The Plaintiff Has Proved His Case Against The Defendants To The Required Standard

14. The court has considered the material and evidence on record on this issue. The plaintiff's claim is essentially for recovery of 10 acres out of parcel No.288 from the defendants. The material on record shows that the 1st defendant died on February 2, 2018 and the 3rd defendant was granted a limited grant to his estate under section 54 of the *Law of Succession Act* (cap 160). The record further shows that the issue of whether or not the deceased was entitled to 10 acres out of parcel 288 was determined in favour of the deceased in the first suit.
15. The defendants did not raise the defence of limitation of actions or that the instant suit was res judicata. Accordingly, the court shall not delve into those issues but shall confine itself to the issues as pleaded by the parties. The court is satisfied on the basis of the uncontroverted evidence on record that the deceased bought a portion of 10 acres out of parcel 288 from the late Karanja in 1980 for which the consent of the Land Control Board was sought and obtained. It is also evident from the material on record that although the deceased took possession of the subject land, the late Karanja did not transfer the same to the deceased. He instead sub-divided parcel 288 into 9 parcels in 2002 out of which he transferred 3 to the 2 – 4 defendants.
16. The material on record indicates that the 3rd and 4th defendants were sons of the late Karanja whereas the 2nd defendant appears to have been a purchaser. The plaintiff pleaded in paragraph 2 of the plaint that the 3rd and 4th defendants were sons of the late Karanja which description was admitted by the defendants in their joint statement of defence. The 3rd and 4th defendants contended that they were given portions of the suit property by their late father whereas the 2nd defendant contended that he was an innocent purchaser without notice of any defect in title.
17. The court is satisfied that the plaintiff has proved his case on a balance of probabilities against the 3rd and 4th defendants and the estate of the late Karanja. The late Karanja knew all along that he had sold a portion of 10 acres out of parcel 288 to the deceased way back in 1980 yet he purported to sub-divide



and transfer portions thereof to his sons and a purchaser. His actions were evidently fraudulent in his bid to defraud the deceased who was already in possession of the land in question.

b. Whether The 2nd Defendant Was An Innocent Purchaser For Value Without Notice Of Any Defect In Title

18. The court has considered the material and evidence on record on this issue. Although the 2nd defendant pleaded in the statement of defence that he was an innocent purchaser for value without notice of defect in title, he did not tender any evidence at the trial to demonstrate his defence. There was no evidence on record to show that he paid any consideration or that he was not aware of the deceased family's possession of the property. In the absence of any evidence on the part of the 2nd defendant, the court is unable to find that he was a bona fide purchaser for value without notice of the deceased's claim to the same property.

c. Whether The Plaintiff Is Entitled To The Reliefs Sought In The Suit

19. The court has found that the plaintiff has proved his claim against the defendants on a balance of probabilities. The court has further found that there is no evidence on record to demonstrate that the 2nd defendant was an innocent purchaser for value without notice of the deceased's prior claim. In the premises, the court is satisfied that the plaintiff is entitled to the reliefs sought in the plaint.

d. Who shall bear costs of the suit.

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to 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. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court is, however, of the opinion that since the defendants did not attend the hearing to contest the suit each party shall bear his own costs.

G. Conclusion and Disposal

21. The upshot of the foregoing is that the court is satisfied that the plaintiff has proved his claim against the defendants to the required standard. Accordingly, judgment is hereby entered for the plaintiff against the 2nd – 4th defendants in the following terms:

- a. An order be and is hereby made for rectification of the land register by cancellation of title Nos Nyandarua/Njabini/4081 – 4089 and restoration of the original title No Nyandarua/Njabini/288.
- b. The County Land Surveyor and Land Registrar shall undertake an excision of 10 acres out of Title No Nyandarua/Njabini/288 and cause it to be registered in the name of plaintiff, Joseph Gicheru Karanja as the legal representative of the estate of the late Francis Karanja Gicheru.
- c. The Land Registrar Nyandarua County shall dispense with production of the original title deeds for parcel Nos 4081 – 4089 during rectification of the register.
- d. Each party shall bear his own costs.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 16TH DAY OF JUNE, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.



In the presence of:

Mr Mwangi for the plaintiff.

N/A for the defendants.

C/A - Carol

YM ANGIMA

JUDGE

