



Kirugumi v Langata Development Company Ltd & another (Environment and Land Case Civil Suit 106 of 2007) [2022] KEELC 2845 (KLR) (13 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 106 OF 2007**

**JA MOGENI, J
JUNE 13, 2022**

BETWEEN

GLADYS NJERI KIRUGUMI PLAINTIFF

AND

LANGATA DEVELOPMENT COMPANY LTD 1ST DEFENDANT

MOSES WAITHANJE MWIHURI 2ND DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 1/02/2007 the Plaintiff herein sought for Judgment against the Defendants for the following orders: -
 - a) A declaration that the Plaintiff is the rightful owner of Title No. Ruiru/Kiu Block 5/845 Githurai Kimbo Estate, Thika.
 - b) A permanent Injunction restraining the Defendants from disturbing the Plaintiff in the quiet enjoyment of the said property.
 - c) Damages for defamation, stress and anxiety.
 - d) Spent.
 - e) Costs of the suit and interest.
 - f) Any further relief that this Honourable Court deems just, necessary and expedient.
2. The suit is opposed. The 1st Defendant entered appearance on 14/03/2007 filed a defence dated 22/03/2007. The 2nd Defendant entered appearance on 20/04/2007 and filed a defence dated 17/04/2007. The suit proceeded by way of *viva voce* evidence. The Plaintiff called one witness and the



1st Defendant called one witness. The parties testified on 22/03/2022. The 2nd Defendant did not call any witnesses as the advocate walked out of court as the hearing was ongoing.

Plaintiff's Case

3. It is the plaintiff's case that sometime in or prior to 1983, she entered into a contract with the 1st Defendant whereby she purchased and paid for a number of shares in the 1st Defendant company in terms whereof she was entitled to a parcel of land commensurate in size with the number of shares purchased and paid for as aforesaid. It was an implied term of the contract that the 1st Defendant would not allocate to the Plaintiff a Parcel that belonged to or had been allotted/allocated to any other person.
4. In 1983 and pursuant to the said contract, the 1st Defendant allocated and allotted to the Plaintiff who accepted a stand or plot of land in Githurai Kimbo Estate. Following subsequent survey/adjudication the parcel of land was numbered Title Ruiru/Kiu Block 5/845 at Githurai Kimbo Estate, Thika. The 1st Defendant then represented to the Plaintiff who accepted that she was at liberty to take possession of the same and to enjoy and develop it accordingly as the rightful owner.
5. It is her claim that she took up possession of, and residence at the alleged parcel of land and moved her family thereon, commenced constructing residential structures upon and otherwise developing the same in 1983.
6. The Plaintiff avers that she has been in continuous unchallenged possession of and in residence at the said parcel of land as the rightful owner since 1983 as aforesaid.
7. The Plaintiff further states that sometime in December of 2005, she was informed by a firm of lawyers, Messrs. Mbichi Mboroki and Co. Advocates, that the said parcel of land had been allotted/allocated to, and registered in the name of the 2nd Defendant sometime in 1998.
8. It is the Plaintiff's contention that such purported allocation/allotment to and registration of the title in the name of the 2nd Defendant was unlawful and in breach of the contract between the Plaintiff and 1st Defendant.
9. Further, it is the Plaintiff's contention that the registration of the land was procured by fraud and bad faith, and was in breach of the duty of trust, fiduciary duty and duty of care on the part of the 1st Defendant and owed towards the Plaintiff.
10. The Plaintiff contends that the particulars of fraud on the part of the 1st and the 2nd Defendant include consenting to the registration of the land well knowing that the same belonged to the Plaintiff as the lawful owner/purchaser for consideration, arranging to register the land in the name of the 2nd Defendant well knowing that the land belonged to the Plaintiff as the rightful owner by virtue of adverse possession in terms of section 7 of the *Limitations of Actions Act* (Chapter 22 of the Laws of Kenya); refusing to make any or any reasonable efforts to correct or reverse the misregistration alleged herein above, that the 2nd Defendant has sought to extort unlawfully various sums of money from the Plaintiff and selling of land shares by the 1st Defendant to the Plaintiff and accepted money from her as the purchase price without any intention of allocating a parcel of land to her,
11. It is her allegation the 2nd Defendant has threatened to evict the Plaintiff and is otherwise harassing her and interfering with the quiet enjoyment of the parcel of land.
12. That by reason of the matters aforesaid the Plaintiff has suffered great humiliation, stress and anxiety and has been put to expense.



13. The Plaintiff contends that the 2nd Defendant has falsely and maliciously represented to various persons, full details of whom are known to Defendants, that the Plaintiff is a criminal trespasser who ought to be arrested and imprisoned. As a result of such false and malicious publications, the Plaintiff's name and reputation have been lowered in the eyes of right-thinking members of society and she has been exposed to contempt and ridicule, and has sustained loss.
14. The Plaintiff avers that despite demand made and notice given of intention to sue, the Defendants have refused/failed to admit that the alleged parcel of land belongs to the Plaintiff as the rightful owner, and the 2nd Defendant persists in harassing the Plaintiff as aforesaid.

Evidence by the Plaintiff

15. PW1 – Gladys Njeri Kirugumi adopted her witness statement dated 9/11/2012 and supplementary witness statement date 18/09/2018. She relied on her bundle of documents dated 1/09/2009 which she produced as PfExh. 1.
16. During cross examination, she testified that she knew the 1st Defendant's witness from when he was employed by the 1st Defendant. That they have discussed, negotiated and arbitrated this matter between PW1 and the 2nd defendant many times. They have gone to the office whereby the 2nd Defendant was offered land and he refuses.
17. It is the Plaintiff's evidence that the 1st Defendant has done all they were required to do in order to reconcile the two but it has not worked.
18. The plaintiff informed the Court that she was shown by a surveyor when she had already built. The 2nd defendant showed up after 23 years after she had been staying on the land. It is her claim that they have been trying to resolve the matter but when the 2nd defendant is shown another piece of land he refuses. She reiterates that they have gone to the land buying company to resolve the matter but the 2nd defendant maintains that he wants his plot.
19. During re-examination, it was the Plaintiff's evidence the 2nd defendant never approached her before the 23 years expired.
20. PW2 – Joshua Waithaka Kagiri adopted his witness statement dated 6/06/2014 as his evidence before this court. He testified that PW1 is his mother in law and that she was among the very first person to build a temporary timber house in that area. That he heard about the conflict after PW1 had stayed on the land.
21. With that evidence, the Plaintiff closed her case.

Defendants' Case

1st Defendant

22. The 1st Defendant entered appearance on 14/03/2007 and filed a defence dated 22/03/2007 wherein he admits that the plaintiff entered into a contract with them sometime in or prior to 1983 where the plaintiff purchased and paid for shares in the 1st defendant company. They also admit that they were to allocate the plaintiff land.
23. That Sometime in 1983 it prepared a proposed subdivision of parcel number LR 8788/5 Kasarani in Kiambu District (commonly known as Githurai Kimbo) and allocated the plaintiff plot number C191.



24. It is the 1st Defendant's contention that the 2nd defendant was allocated plot number C199 which after final survey sometimes in 1989 became parcel number Ruiru/Kiu block 5/845, which is the subject matter of this suit.
25. The 1st defendant avers that the allocation of the plots after the proposed subdivision was subject to final survey.
26. The 1st defendant avers that after the final survey plot number C 191 was combined with C 192 and the 1st defendant purposed to allocate another plot in the same scheme to the plaintiff.
27. The 1st defendant however categorically avers that plot number C 191 and C 199 were distinct and the suit property was allocated to the 2nd defendant. They deny that the plaintiff took up possession of the suit property. They also deny the allegations of misregistration or clerical error.
28. The 1st defendant denies perpetrating any fraud or breaching any duty owed to the plaintiff as alleged and further denies the particulars of fraud and bad faith attributed to it at paragraph 10(i) to 10(v).
29. The 1st defendant prays that the plaintiff's suit be either struck out or the same be dismissed with costs.

2nd Defendant

30. The 2nd Defendant entered appearance on 20/04/2007 and filed a defence dated 17/04/2007 wherein he denies the allegations made by the plaintiff in the plaint and avers that the plaintiff has been living in the 2nd defendant's land since July 1998 and is a criminal trespasser.
31. The 2nd Defendant avers that he is the registered owner of LR No. Ruiru/Kiu Block 5/845.
32. The 2nd Defendant avers that the Plaintiff has been allocated land by the 1st Defendant and has a title in her name and has only taken the 1st Defendant land since it's in a strategic place. He further avers that the Plaintiff had no authority or consent to enter my land or erect any structures therein.
33. The 2nd defendant prays that the plaintiff's suit be dismissed with costs and eviction order be issued against the plaintiff

Evidence by the Defendants

34. DW1 – Eliud Anthony Kariuki adopted his witness statement dated 9/02/2012 as his evidence in this matter. He produced and relied on documents in his list of documents and a copy of subdivision plan (DW1 exhibit – page 12 -13). However, the Court notes that the document on page 12 – 13 is a letter of allotment to the Plaintiff for Plot no. Block C – 191.
35. He testified that that was a subdivision scheme for a piece of land in Githurai and it was 200 acres in total. The plot in dispute is shown C199 and the other one is C191. He also mentions that he talked about C160 in his statement. He averred that his position on plot occupied by the plaintiff is that allocation was done by the 1st defendant and the plaintiff was allocated plot C191 but she put up her house at C199. There was a clerk on site and he is the one who showed the plaintiff where to build.
36. It is his evidence that as a board, they called the plaintiff and the 2nd defendant and had two meetings. They have minutes for the meeting but they did not produce the same in court. The plot measures the same. The final survey was done and C191 was renamed to C160 which was to be allocated to the 2nd defendant but he refused. Both the plaintiff and the 2nd defendant have a plot. They are not opposed to the claim of the plaintiff. DW1 averred that he would like the two parties settled in their properties. He added that the 1st defendant is neutral and they support them.



37. During cross examination, he testified that in 1983 the land was not allocated to the parties based on the final subdivision. They have an employee who shows people their plot. They show them physically. When the final survey was done, the plots remained the same only the numbers changed. He added that the plaintiff was allocated C191 which became C160 and C192 were combined to become C160. Plot C191 no longer exists. The plaintiff had already occupied C199 by the time the 1st Defendant became aware of the errors. The final survey was done in 1989, the error was discovered in 1989 as well but the plaintiff was occupying the plot. The mother title was issued in 1984 for the entire land.
38. During re-examination, the 1st Defendant averred he could not remember when the dispute was brought to them but it was before 2007.
39. With that evidence, the 1st Defendant closed its case.
40. The 2nd Defendant did not call any witnesses as the advocate walked out of court as the hearing was ongoing.

Written submissions

41. Parties failed to file their written submissions as it was ordered on 22/03/2022. The Court therefore directed that it will deliver its judgment from the evidence presented and the documents adduced in support.

Analysis and Determination

42. The Court has now carefully read and considered the pleadings and the evidence adduced and the exhibits thereto and renders itself as follows:
43. The Court finds the issues for determination are as follows.
 - a. Whether the Plaintiff is entitled to the reliefs sought
 - b. Who should bear the costs of this suit?

a. Whether the Plaintiff is entitled to the reliefs sought.

44. The Plaintiff has sought for a declaration that she is the rightful owner of the suit property, a permanent injunction and costs. For the Court to find in favour of the Plaintiff, it is not in doubt that the Plaintiff ought to prove that she is deserving of the orders sought.
45. The 2nd Defendant entered appearance, filed his defence but failed to defend the suit during the hearing. However, the Plaintiff is still required to prove their case against the 2nd defendant on the required standard of balance of probability. See the cases of *Shaneebal Limited v County Government of Machakos* (2018) eKLR and *Karuru Munyoro v Joseph Ndumia Murage & Another*, Nyeri HCCC No. 95 of 1988.
46. The bone of contention in this matter revolves around an error in the allocation of plots after the subdivision of parcel number LR 8788/5 Kasarani. Proof of ownership of land is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities, but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.



47. It is not in dispute that the Plaintiff was allotted plot C191 and the 2nd Defendant was allotted plot C199 and will uphold the same. A title was also adduced in Court demonstrating that the suit property was issued in the 2nd Defendant's name on 27/06/1997. What is in dispute is the 2nd Defendant's contention that the Plaintiff is trespassing on his land.
48. The 2nd Defendant produced a title deed that proves his ownership over the suit property. The said title deed was issued on 27/06/1997 under Cap 300(now repealed). Under Section 27 of the above Cap 300, then the 2nd Defendant acquired all the rights and privileges appurtenant thereto. Further under Section 28 of the repealed Act, such rights could not be defeated except by operation of law. See Section 28 of the Registered Land Act, Cap 300(now repealed) which states: -
- “The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”
49. Therefore prima-faciely, the 2nd Defendant is the owner of the suit property.
50. From the pleadings adduced in court, both the plaintiff and the 2nd defendant bought 45 shares with the 1st defendant and were each allocated a plot. It is the 1st defendant's contention that the plaintiff was allocated C-191 and later C160 and the 2nd defendant was allocated C199 and he already has a title deed registered under his name. The 1st defendant also averred that they tried to mediate with the parties and come to a conclusion but the 2nd defendant did not accept to take up plot C160. He avers that the plaintiff has taken his parcel because of its strategic place. However, no evidence has been adduced to support this allegation. The 2nd defendant did not even appear in court to defend his case.
51. From the 1st Defendant's evidence, it is apparent that their clerk showed the Plaintiff the wrong plot wherein the Plaintiff went ahead and took possession of the same. This was a mistake and the same has to be determined.
52. I note that the mistake was admitted by the 1st Defendant. There was no proof that the Plaintiff had knowledge of the mistake or that she contributed to the mistake. She bought plot C191 but took possession of C199 which was registered to the 2nd Defendant and there was nothing on the ground that could have alerted her of the 2nd Defendant's interest in the title. The mistake was caused by the negligence of the 1st Defendant's clerk when he showed the plaintiff where to put up her structures. There was a “mismatch” regarding the issuance of the actual properties. The issuance of the suit property to the Plaintiff was a mistake seeing that the 1st Defendant's clerk showed her that that was her plot and that she could go ahead and begin to take possession. This mistake is rectifiable.
53. Section 143(1) Registered Land Act, Cap 300(now repealed) and which is repeated in Section 80(1) of the Land Registration Act comes into play. It provides: -
- “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.”
54. The Court already held and found that the 2nd Defendant is the legal owner of the suit property. Evidence adduced demonstrated that Plot C160 measures the same as the suit property and that it is vacant and available to be allocated and allotted to the 2nd Defendant. In that regard the Court is



therefore inclined to order for the cancellation and rectification of the certificate of title held by the 2nd Defendant as stipulated by the above proviso to section 80 of the [Land Registration Act](#).

55. I note that it emerged that Plot C160 is available and has been offered to the 2nd Defendant during meetings held between the parties herein. Furthermore, it is contended that the 2nd Defendant has refused to accept the offer on various occasions. I note that he did not come to court to adduce evidence demonstrating why he could not accept plot C160 and yet it is of the same size as the suit property. The 2nd defendant has not filed a counterclaim as well as file a suit against the plaintiff for trespass.
56. The plaintiff and the 2nd defendant were clearly allocated different plots. It is unfortunate that the Plaintiff has taken possession of plot C199 instead of C191. It appears that the error was not on her part but on the 1st Defendant's part. The 1st defendant denied being aware that the plaintiff has taken possession and developed the suit property but has admitted that they tried to give the 2nd defendant plot C160.
57. It is my considered view that this is really a straightforward matter and that the parties can both be furnished with the alternative letters of allotment so that they could rectify the titles to effect the changes.
58. The Plaintiff has also alleged that the 1st and 2nd Defendants fraudulently registered the suit land to the 2nd Defendant's name. The Court of Appeal in [Munyu Maina v Hiram Gathiba Maina](#), Civil Appeal number 239 of 2009, held as follows:

“We state 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’.

59. In [Black's Law Dictionary](#) 9th Edition at page 731 fraud is defined as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

60. In the case of [Railal Gordhanbhai Patel v Lalji Makanji](#) [1957] E.A 314, the court held that allegations of fraud must be strictly proved to a standard which is more than a balance of probabilities but not beyond any reasonable doubt. The court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

61. DW1 testified in Court and clarified how the 2nd Defendant came to be registered as the proprietor of the suit property. This Court has seen the official search that indicates that the 2nd Defendant is the owner of the suit property. It is trite that when Certificate of title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title.
62. In this instant case, the Plaintiff has not produced any evidence to demonstrate the alleged fraud and has also not relied on any documents adduced to prove the allegations of fraud. I am not satisfied that the Plaintiff has established that the 2nd Defendant acquired the suit property fraudulently. It is clear



that he who alleges must prove. It is trite law that allegations of fraud must be strictly proved, and a degree higher than a mere balance of probabilities is required. The Kenyan courts position is that allegations of fraud must be proved through cogent evidence whose degree of proof must be higher than the ordinary proof of balance of probabilities required ordinarily. In this case, I find that the allegations of fraud on the part of the 1st and 2nd Defendants alleged by the Plaintiff have not been proved to the required standard.

63. Regarding damages for defamation, stress and anxiety, was the Plaintiff defamed and if so, has she proved the alleged defamation as to qualify for damages?
64. To properly address this issue, it is important to remind ourselves of the essential elements of the tort of defamation. For a plaintiff to succeed in an action for defamation, he must prove on a balance of probabilities that the words complained of were published by the defendant in reference to him; that the words were false and malicious and lastly, that the words were injurious to his reputation. Publication means communication of the offending words or information to a third party or other persons other than the person claiming to have been defamed.
65. In this case, the Plaintiff is seeking damages for defamation, stress and anxiety. She alleged that she has suffered humiliation and has been put to expense. To begin with, the Plaintiff did not prove the alleged defamation. The Plaintiff in her claim and evidence stated that the 2nd Defendant has falsely and maliciously represented to various persons, full details of whom are known to the defendants that the plaintiff is a criminal trespasser who ought to be arrested and imprisoned. As a result of this, the plaintiff alleges that her reputation has been lowered in the eyes of the right-thinking members of the society and she has been exposed to contempt and ridicule and has sustained loss. She did not call any person from the “society” to give evidence about her character and how they viewed her after the said defamation.
66. In *Cosmas M Nzau & 2 others v the Attorney General* (2013) eKLR Justice Waweru had this to say: -
“..... The Plaintiffs also alleged that they suffered considerable pain and mental anguish, trouble, inconvenience, anxiety and unnecessary expense during the trial. It must be borne in mind that this is not a case based on defamation.... Defamation arises when false words of someone tending to injure his character or reputation are published. The publication may be oral (slander) or written (libel) . The actual words complained of must be pleaded...”.
67. As I have said hereinabove, the Plaintiff did not prove the alleged defamatory words in evidence. The mere fact that allegation that the defendant told people that she is a criminal trespasser does not amount to defamation. I therefore find that the Plaintiff was not defamed as to call for an award of damages for defamation, stress and anxiety.
68. Any eviction order has far reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession of for some time. Before such an order is given, the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make is entitled to be heard.
69. In the instant suit, the 1st Defendant admitted that their clerk on site is the one who showed the Plaintiff where to build. I find and hold that evicting the Plaintiff would be harsh seeing that she has been in possession of the suit property for 23 years or so and has developed structures thereon. In any case, it is imperative to note that the 2nd Defendant did not file a counterclaim to the suit seeking the eviction of the Plaintiff or mesne profits as prayed for in his witness statement.



70. The effect of Section 80 of the *Land Registration Act* is that even where the court is satisfied that there is a mistake in the register relating to a title to land, the person who is registered as proprietor as per the title is protected to the extent that the court can only order rectification of the register if it is satisfied, that the registered proprietor either had knowledge of the mistake, or caused the mistake, or substantially contributed to it through any act, neglect or default.
71. Consequently, the Court finds that the Plaintiff has proved its case on the required standard of balance of probability and that some of the prayers as sought in the Plaint are merited.

b. Who should bear the Costs of the Suit

72. Ordinarily, costs do follow the event. Section 27 of the *Civil Procedure Act* provides that ‘costs are granted at the discretion of the Court’. Therefore, the Plaintiff is entitled to the costs of the suit.
73. The upshot of the foregoing is that the Court finds and holds that the Plaintiff is deserving of the orders sought in the Plaint dated 1/02/2007 in part and allows the said Plaint in part in the following terms: -
- a. An order of permanent injunction be and is hereby issued restraining the Defendants from disturbing the Plaintiff in the quiet enjoyment of the said property.
 - b. I award the Plaintiff the costs of the suit.
 - c. An order of cancellation and rectification of the Register of Titles be and is hereby issued cancelling the 2nd Defendant’s name and amending the same to include that of the Plaintiff in the Register of Titles at Thika Land Registry as the proprietor of Land Title No. Ruiru/Kiu Block 5/845 Githurai Kimbo Estate and issue certificates of titles accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2022.

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MOGENI J

Judgement read in virtual court in the presence of:

for the Plaintiff

for the 1st Defendant

for the 2nd Defendant

Mr. Vincent Owour- Court Assistant.

