



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Diaken Investment Company Limited v Muikia & another (Environment & Land Case 467 of 2015) [2022] KEELC 3325 (KLR) (9 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3325 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 467 OF 2015
LC KOMINGOI, J
JUNE 9, 2022**

BETWEEN

DIAKEN INVESTMENT COMPANY LIMITED PLAINTIFF

AND

FRANCIS NDIKIRU MUIKIA 1ST DEFENDANT

CHEGE MUIKIA 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 28th May 2015, the Plaintiff seeks for judgement against the Defendants jointly and severally for:-
 - a. A permanent injunction to be issued restraining the Defendants/Respondents from entering or trespassing, erecting structures, destroying the chain link fence, uprooting blue gum poles and all crops planted, dumping building materials and or interfering with the Plaintiff's quiet possession, occupation, absolute proprietorship and legal ownership of Title No. Karai/Gikambura/3636.
 - b. Declaration that the Plaintiff is the absolute proprietor and registered owner of all that parcel of land known as Title No. Karai/Gikambura/3636 with effect from 28th May 2012.
 - c. An eviction order be issued to the Defendants to remove all semi-permanent or permanent structures from all that parcel of land known as Title No. Karai/Gikambura/3636 after 14 days from date of decree.
 - d. An order that Kiambu District Land Registrar do remove the caution(s) and all letters of restriction lodged against Title No. Karai/Gikambura/3636 within 14 days.
 - e. That the OCS Kikuyu Police station be ordered to supervise the enforcement of these orders granted herein.



- f. Special damages of kshs.79,650/=.
 - g. General damages for trespass to property and malicious damage to property.
 - h. Costs of the suit and interest on special damages of kshs.79, 650/= and General damages for trespass to property and malicious damage to property.
2. It is the Plaintiff's case that it is the registered owner of the parcel of land known as Title No. Karai/ Gikambura/3636 having purchased from the previous registered owner one Peter Kihiko Njung'e who in turn had obtained his title after subdivision of his family shamba vide Nairobi High Court Succession Cause No.1909 of 2009; In the Matter of the Estate of Mary Njoki Njunge. It is the Plaintiff's case that that the Defendants have repeatedly trespassed on the suit land and interfered with its quiet possession by maliciously destroying the perimeter chain link, uprooting blue gum posts, slashing planted banana crops and bringing labour gangs on the suit land. It particularized special damages incurred to a sum of kshs.79, 650/=.
 3. The Plaintiff also stated that in the succession cause relating to the suit land; the 1st Defendant's deceased wife Elizabeth Wairimu Muikia filed an objection in the succession proceedings which vide the ruling of 10th October 2013 was found to have no valid claim over the suit land as she had purportedly purchased it from a third party who had also allegedly purchased from Peter Kihiko Njunge who in turn did not have any title deed to the land at the time as it was still registered under his deceased mother; Mary Njoki Njunge.

The Defendants' case

4. The Defendants filed the statement of defence dated 18th May 2019.They denied the allegations contained in the plaint. They admitted that Peter Kihiko Njunge was the registered owner of the suit land but contended that he held it under a constructive trust in favour of Elizabeth Muikia whom he had sold to and thus had no capacity to sell to others. They added that the Plaintiff and one David Mukirae Njunge conspired and through a corrupt and fraudulent scheme purported to sell and buy the suit land.

The Plaintiff's evidence

5. PW1, Dave Kamangu, was an Advocate of the High Court of Kenya testified on 28th April 2021. He told the court that he drafted the sale agreement dated 21st May 2012 between the Plaintiff and Peter Kihiko Njung'e for sale of the suit land. He produced the sale agreement. He stated that there were three directors representing the Plaintiff and that the purchase price was kshs.2,800,000/= .He stated that kshs.1.5 Million was paid by cash transfer to the vendor's account and the vendor was also given kshs.500,000/= in cash. He added that the balance of kshs.800, 000/= was to be paid within 90 days and that purchasers issued two postdated cheques of Kshs.400,000/= each to be held by him and be released to the vendor upon transfer of the property.
6. When cross-examined; he told the court that he acted for both parties in the transaction and while the Plaintiff had three directors; they did not show him anything to prove that they were directors of the Plaintiff. He stated that he did not know Peter Kihiko before but he knew his Brother David Mukirae Njunge who has been his client for a long time. He stated that Peter Kihiko Njunge was introduced to him by his Brother David Mukirae Njunge. He added that Peter had his Identity card and he verified that it was him, therefore he would be surprised if he claims that it was not him.
7. He also told the court that clause 2 of the sale agreement stated that kshs.1.5 Million would be paid by cash transfer to the vendor and that parties left his office and came back claiming that they had paid to



- the vendor's bank account. He stated that he did not accompany them to the bank. He added that the ksh.500,000/= paid in cash was counted in his office and handed over to Peter Kihiko Njunge and he executed the sale agreement acknowledging that he had received the amounts.
8. He stated that he was given the cheques of kshs.400,000/= and Peter Kihiko Njunge sent his brother to collect them from his office. He further stated that he did not draw the transfer but he drafted the application for consent from Land Control Board and Peter Kihiko signed in his presence.
 9. PW2, Michael Muigai Macharia, a director of the Plaintiff testified on 28th April 2021. His witness statement dated 28th May 2015 and the Plaintiff's list of documents dated 28th May 2015 were adopted as part of his evidence in this case.
 10. When cross-examined, he told the court that the Plaintiff has four directors and that they bought the suit land from Peter Kihiko whom he did not know before but his co-director knew him before and had arranged a meeting in Kikuyu where they transacted over the suit land. He further stated that they conducted due diligence and did a search at the lands registry and his co-director went to see the land. He stated that he was present when the sale agreement was executed. He added that he has not attached a beacon certificate, deed plan/map of the suit land. He stated that cheques were drawn in favour of Peter Kihiko Njunge and he was present when money was transferred to his account at Family Bank Kikuyu as he was the one who presented the cash to Peter Njunge's account and he was given a deposit slip which he has but it was not in the bundle of documents. He was put to task over the post-dated cheques and he stated that Peter Kihiko Njunge received the money but he has to check from the bank statement when the cheques were paid. He also stated that he is not aware that Peter Kihiko Njunge denies that he sold the land to the Plaintiff. When re-examined, he stated that if Peter Kihiko Njunge did not receive the purchase money, he ought to have sued them.
 11. PW3, James Githua adopted his witness statement dated 28th May 2015 as part of his evidence. He stated that he is a co-director of the Plaintiff which is the registered owner of the suit land vide a title deed issued at the Kiambu Lands Registry on 28th May 2012. He further stated that the purchase price was Kshs.2.8 million which was paid to the registered owner Peter Kihiko Njunge hence the Plaintiff is a bona fide purchaser for value.
 12. He stated that they proceeded to Kikuyu Land Control Board and obtained the consent to transfer and got requisite documents which they lodged at Kiambu Land Registry He also stated that the suit land; Karai/Giakambura/3636 did not lawfully exist as on 21st December 2009;the date of the alleged sale to a third party by a seller who did not have title. He was not cross-examined.

The Defendants' evidence

13. DW1, Francis Muikia Ndambo, was the 1st Defendant testified on 2nd November 2021. His witness statement dated 15th July 2019 and the list of documents dated 22nd July 2019 were adopted as part of his evidence. He stated that he resided in Germany and while there, he instructed his (now deceased) wife to buy the suit land while he provided the funds. He further stated that his late wife Elizabeth Wairimu Muikia purchased ½ an acre from Mugaa Mwioko in 2009 and another ½ an acre from his brother Peter Kihiko being their respective and specific shares as beneficiaries of the estate of their late mother Mary Nyakio Njunge who was the registered owner of L.R No.Karai/Gikambura/53.
14. He stated that beneficiaries of the estate of Mary Nyakio Njunge filed Succession Cause No.64 of 2006 and that in an application for confirmation for grant therein, his late wife's name was included as a beneficiary entitled to 1 acre from L.R No.Karai/Gikambura /53.He also stated that he is in possession of the original title to L.R No.Karai/Gikambura/53 which was deposited with the PCEA Kikuyu Hospital to secure hospital bills incurred by the late Mary Nyakio Njunge. He added that he sent



- money to Peter Kihiko Njunge to settle the bill and it was released to him on behalf of his family and he in turn handed it over to his late wife Elizabeth Muikia.
15. He stated that he learnt that David Mukirae Njunge, one of the beneficiaries; filed a parallel Succession cause in Nairobi being Succession Cause No.1909 /2009 where his late wife's beneficial interest in L.R No.Karai/Gikambura /53 Was not included and her objection in the said court was withdrawn on advise of the court which was of the view that her participation in the succession proceedings was preemptory and should have been handled in a separate forum.
 16. He stated that he learnt that the grant in respect to the suit land was confirmed and L.R No.Karai/Gikambura/53 was subdivided into 3 portions being Karai/Gikambura /3635,3635 and 3637 on 17th February 2011 and titles issued to the respective beneficiaries and Mugaa Mwioko was alleged to have sold his portion now L.R Karai/Gikambura /37 to Ann Gathoni Kairu while Peter Kihiko Njunge is said to have sold his portion now the suit land to the Plaintiff. He also stated that his family has been in occupation of the parcel of land rightfully and peacefully since 2008.
 17. He stated that his wife filed High Court Case No.1450 of 2014 Elizabeth Muikia v Mugaa Mwioko, Peter Kihiko Njunge, Diakenn Investments Company Limited and Ann Gathoni Kairu but passed on before summons could be effected on all Defendants. He however stated that Peter Kihiko Njunge filed his defence in that matter, admitting that he sold his share equivalent to ½ an acre to Elizabeth Muikia, denied involvement in subdivision of L.R No.Karai/Gikambura /53 and denied being issued with title and denied selling his portion to the 3rd Defendant who is the Plaintiff herein.
 18. When cross-examined, he told the court that he does not have letters of administration in respect of his wife's estate. He stated that he provided the funds for his wife to purchase the suit land which was registered in the name of Mary Nyakio Njunge. He further stated that Peter Kihiko Njunge did not have letters of administration in respect of his mother's estate. He added that his wife's application dated 12th September 2012 to revoke the grant was rejected and he was not in the country at the time and he was also not aware that his now deceased wife had made an application to revoke the grant.
 19. When referred to the Succession Cause No 1909 of 2009 and the confirmed grant therein, he stated that the suit land was shared between David, Peter and Mwioko Njunge. He stated that he does not have title to the suit land as his wife did not transfer to him. He denied destroying the Plaintiff's chain link and slashing his banana crops. He also stated that he is not aware that Peter Kihiko Njunge was issued with title to the suit land.
 20. When re-examined, he stated that the title to Karai /Gikambura/53 is attached to his documents and that he has the original mother title which he got from the hospital where Peter Kihiko's mother was admitted. He stated that his late wife did not have any property and he is the one who financed purchase of the suit land and he has been sued in his personal capacity. He stated that he has authority to plead on behalf of the 2nd Defendant who is his son living in United States of America. He also stated that his late wife was a beneficiary in respect of the succession cause filed in Limuru but the same was transferred to Nairobi. He stated that he has been on the land for fourteen (14) years.
 21. DW2, Peter Kihiko Njunge testified on 2nd November 2021. His witness statement dated 22nd July 2019 was adopted as part of his evidence. He told the court that he owns the suit land and he sold it to Elizabeth Wairimu Muikia about 14-15 years ago.
 22. When cross-examined, he stated that the suit land is in the Plaintiff's name, he does not have a title to the suit land and he has not sued the Plaintiff to get his title back. He admitted that he has never reported any fraud case to the Directorate of Criminal Investigations. He told the court that he reported the



matter at Kikuyu Police station. He also stated that he got a title deed in April 2012 and that the sale agreement with Elizabeth was in 2011.

23. When re-examined, he stated that he sold his ½ share of Karai /Gikambura/53 to Elizabeth Wairimu Muikia which was by then registered in his mother's name; Mary Nyakio Njunge. He stated that they deposited the title at Kikuyu Hospital so that his mother's body could be released. He also stated that when he reported the matter to Kikuyu Police station, his elder brother Mukirae was summoned but he refused to attend.
24. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's submissions

25. They are dated 28th January 2022. Counsel for the Plaintiff submitted that the Plaintiff having legally and lawfully followed the due process to obtain its title deed to the suit land, it follows that the Plaintiff is the owner and absolute proprietor protected under Section 26 of the [Land Registration Act](#). He put forward the case of [WW v Severin Kinyanjui Njoroge & Another](#)[2021]eKLR. He added that there is no evidence of fraud, misrepresentation or illegal acquisition of the suit land on the part of the Plaintiff.
26. He submitted that in contrast, the Defendants' claim on title to the suit land originates from 2 illegalities being that the title deed No.Karai/Gikambura /3636 did not exist as on 18th December 2009 which is the date of initial sale to a 3rd party; Margdalene Wangui Ilaki by DW2 and that the said Magdalene did not have a good title which she could pass to the 1st Defendant's wife Elizabeth Wairimu Muikia. He added that sale of the suit property to the 1st Defendant's wife was undertaken long before succession cause No.1909 of 2009 was determined hence it was illegal intermeddling with the deceased's property contrary to Section 45 ,Section 55 and Section 82(b) of the [Law of Succession Act](#). He relied on the case of [Re-Estate of Paul M'Maria \(Deceased\)](#)[2017] eKLR.

The Defendant's submissions

27. They are dated 1st March 2022. Counsel for the Defendants submitted that Section 45 (1) of the [Law of Succession Act](#) is not a complete bar to transactions involving properties of an estate as the provision qualifies and uses the words 'except' so far as 'expressly authorized' by this Act. He added that selling an interest prior to obtaining letters of administration is allowed under Rule 39 of the Probate and Administration Rules made under the [Law of Succession act](#). He further submitted that the [Law of Succession Act](#) contemplates that there may be instances where property has devolved to persons who are not direct heirs and a court is enjoined under Section 70 of the [Law of Succession Act](#) to call further evidence to determine rights of other persons claiming interest in the deceased's property.
28. It was his submission that the property in question was not free property of the deceased capable of being intermeddled in terms of Section 3(1) of the [Law of Succession Act](#), for reason that the deceased had a life interest in the property and under Section 37 of the Act, she could only dispose it with the consent of her children.
29. It was also counsel for the Defendant's submission that the Plaintiff's title cannot be availed the protection under Section 26(1) (a) and (b) of the [Land Registration Act](#) as it was obtained under opaque circumstances and is marred with fraud and misrepresentation. He pointed out that the vendor denied selling the suit land and PW1 denied drawing transfers and confirmed that he had no hand in obtaining title.
30. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-



- i. Whether the sale of the suit land to the Plaintiff was regular.
 - ii. Whether the sale of the suit land to Elizabeth Wairumu Muikia was regular.
 - iii. Is the Plaintiff entitled to the reliefs sought?
 - iv. Who should bear costs of the suit?
31. Mary Njoki Njunge (deceased) was the registered proprietor of L.R No.Karai/Gikambura /53.Vide the Certificate of confirmation of grant issued on 22nd November 2010 in Succession Cause No.1909 /2009; In the Matter of the Estate of Mary Nyakio Njung'e,the said parcel was distributed among her three sons being David Mukirae Njung'e, Peter Kihiko Njung'e and Mugaa Mwhoko Njung'e. The portion belonging to Peter Kihiko Njung'e measuring ½ an acre, being Title No.Karai/ Gikambura /3636 is the subject of this suit.
 32. On the 12th January 2010 Letters of Administration in respect of the Estate of Mary Nyakio Njunge were granted to David Mukirae Njunge by the High Court in Nairobi vide Succession Cause No 1909 of 2009. The Certificate of Confirmation of Grant was issued on 22nd October 2010. As per the schedule of properties Karai/Gikambura/53 was distributed to David Mukirae Njunge 0.6 acres, Peter Kihiko Njunge ½ acre and Mugaa Mwhoko Njunge ½ an acre.
 33. The sale agreement between the Plaintiff and Peter Kihiko Njunge is dated 21st May 2012. This was after the certificate of Confirmation of Grant had been issued. I find that the sale of the suit land to the Plaintiff was proper.
 34. It is stated that Elizabeth Wairimu Muikia bought the suit land in the year 2009. The sale could not have been proper as the Grant of Letters of Administration had not been issued by then.
 35. The said David Mukirae Njunge properly sought consent from the Land Control Board Kikuyu to subdivide the said land. The Letter of consent is dated 6th January 2011. The Land Parcel No. Karai/ Gikambura/53 was subdivided into three portions.
 36. There is a Certificate of Official Search dated 21st May 2012 showing that Peter Kihiko Njunge was the registered owner of Karai/Gikambura/3636. The title deed on his name was issued on 9th April 2012.
 37. As things stand the Plaintiff is now the registered proprietor of Karai/Gikambura/3636. Section 26 of the Land Registration Act, 2012 provides that:-
 - “(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.



- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

38. DW2 Peter Kihiko Njunge claims that he did not sell the suit land to the Plaintiff. When he was cross examined by the Plaintiff’s counsel he told the court that he has not instituted any suit against the Plaintiff to recover his suit land. He also stated that he has not reported any fraud to the Directorate of Criminal Investigations. He told the court that he got the title deed in April 2012 but that he sold the land to Elizabeth Wairimu in 2011.
39. I find that Peter Kihiko Njunge told this court lies. His evidence cannot be believed.
40. The Plaintiff herein seeks special damages of Kshs.79,650 being the costs of damages to the perimeter wall. Special damages must not only be pleaded but must also be specifically proved. In paragraph 13 and 14 of the Plaint the Plaintiff claims that it is the 1st and 2nd Defendants who destroyed the perimeter wall. No evidence was led to confirm that it was the 1st and 2nd Defendants who did the damage. I find that this claim must fail.
41. The Plaintiff being the registered proprietor of the suit land being Karai/Gikambura/3636 is entitled to quiet possession of the same.
42. There is evidence that the Peter Kihiko Njunge received payments in respect of the suit land. Consent to transfer the same was sought and was granted by Kikuyu Land Control Board. The documents were lodged at Kiambu Land Registry on 28th May 2012 and a title deed issued.
43. In conclusion, I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities.
44. Accordingly, judgment is entered in favour of the Plaintiff as against the Defendants jointly and severally for orders:-
- a. That a permanent injunction is hereby issued restraining the Defendants/Respondents from entering or trespassing, erecting structures, destroying the chain link fence, uprooting blue gum poles and all crops planted, dumping building materials and or interfering with the Plaintiff’s quiet possession, occupation, absolute proprietorship and legal ownership of Title No. Karai/Gikambura/3636.
 - b. That a declaration is hereby issued that the Plaintiff is the absolute proprietor and registered owner of all that parcel of land known as Title No. Karai/Gikambura/3636 with effect from 28th May 2012.
 - c. That an order is hereby issued directing the Defendants to remove all semi-permanent or permanent structures from all that parcel of land known as Title No. Karai/Gikambura/3636 within 90 days from the date of judgment failure to which the Plaintiff shall be at liberty to use lawful means to remove the same.
 - d. That an order is hereby issued that Kiambu District Land Registrar do remove the caution(s) and all letters of restriction lodged against Title No. Karai/Gikambura/3636 within 30 days from the date of this judgment.
 - e. That the OCS Kikuyu Police station is hereby ordered to supervise the enforcement of these orders granted herein.



f. Costs of this suit and interest.

45. It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 9TH DAY OF JUNE 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Njuguna for Mr. Gitau for the Plaintiff

Mr. Karanja for the Defendants

Steve - Court Assistant

