



REPUBLIC OF KENYA



Gathaithe Farmers Cooperative Society Limited v Ndungu & another (Environment & Land Case 250 of 2017) [2022] KEELC 2973 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2973 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 250 OF 2017**

JG KEMEI, J

JULY 28, 2022

BETWEEN

GATHAITHE FARMERS COOPERATIVE SOCIETY LIMITED PLAINTIFF

AND

NICHOLAS KIGO NDUNGU 1ST DEFENDANT

GIDEON KAMAU KARANJA 2ND DEFENDANT

JUDGMENT

1. This suit was originally filed as Nyeri ELC Case No. 106 of 2016 before the establishment of Murang'a ELC necessitating its transfer on 9/2/2017 for the current renumbering. The Plaintiff sought Judgment against the Defendants for;
 - a. An order directing the Defendants to produce and execute all the relevant transfer documents in favour of the Plaintiff society and in default the Land Registrar Murang'a be authorized to cancel the Title deed LR. No. Makuyu/Makuyu Block11/1092 that is being held by the Defendants and re-issue another one in favour of the Plaintiff society without any conditions and a declaration that the Title Deed for the suit property number Makuyu/Makuyu Block11/1092 was fraudulently obtained and an order for its cancellation and reversion to the names of the Plaintiff.
 - b. A permanent injunction to restrain the Defendants either by themselves, their agents, servants, employees or anyone else claiming through him from selling, disposing, alienating, transferring or in any way interfering with the ownership, use and or possession by the Plaintiff of the suit property.
 - c. Costs of this suit and any interest thereon.
 - d. Any other further relief that this Court may deem fit and just to grant.



2. The Plaintiff's case is that it is the absolute registered owner of LR. No. Makuyu/Makuyu Block 11/1092 Gathaite measuring about 3.908 Ha (the suit land). That on or about the 9/5/2021 the Defendants conspired and deceived the Land Registrar Murang'a and fraudulently caused the registration of the suit land into their joint names without the knowledge or consent of the Plaintiff. Particulars of fraud against the Defendants are particularized at para. 4 of the plaint and the Plaintiff is apprehensive that the Defendants may dispose the suit land to unsuspecting members of the public hence the suit.
3. On 23/5/2017, the Defendants entered appearance through the firm of Waithira Mwangi & Co. Advocates. Despite appointing Counsel to act for them herein, the Defendant did not file any defence in opposition to the plaint. The matter was set down for hearing and despite electronic service of the hearing notice as shown in the Affidavit of service dated 22/2/2021 the Plaintiff's case was heard ex parte.
4. The Plaintiff called 3 witnesses. PW1, Absalom Mwangi testified and informed the Court that the Plaintiff's Company has 114 members and three officials namely; Arcadius Chege Njeru, Joseph Mburu and Peter Chege Ndungu. That the society owns four parcels of land at Makuyu Block 2/1092, 1098, 1086 and 1088. The suit land in dispute is Makuyu/Makuyu Block 1092. He testified that the Defendants are not members of the Company. He took the Court through the process followed by the Company to transfer land and maintained that the society had not sold the suit land and there were no record to that effect. He produced a bundle of documents filed on 23/5/2019 as Pex. 1- 6. PW1 confirmed that Arcadius Njeru was appointed an official in a Special General Meeting held on 27/8/1999.
5. PW2- Arcadius Njora Chege testified as the second witness. He informed the Court that he is the Chairman of the Society/Chairman whose membership stands at 114.
6. That the suit land belongs to the Plaintiff and he proceeded to produce the original title of the suit land as an exhibit in Court.
7. That in 2012 the Defendants deceived the Land Registrar to register them as owners of the suit land while the Plaintiff is still in possession of the original title which title has never been sold and or transferred. That the Defendants obtained title through fraud and without the consent and or knowledge of the Company or its members and that immediately he discovered through a search the actions of the Defendants he lodged a caution against the title to protect it from further transfers.
8. That he was elected by the members in 1999 in a special general meeting vide minute No 5/4/8/1999 in which the Cooperative Officer, Murang'a among other Government officials were in attendance. That in the year 2000 the members resolved to subdivide all the Company's land and distribute to the members. This was necessitated by the constant wrangles amongst the leadership of the Society.
9. He informed the Court that the property is not occupied. He adopted his witness statement dated 24/5/2016 as his evidence in chief. He produced the original title deed, green card and official search of the suit land as Pex.7-9 respectively.
10. Muthoni Mbuthia, Land Registrar Muranga testified as PW3. She stated that according to the green card in her possession, the suit land was registered on the 5/12/1988 and transferred to the Plaintiff on 4/12/98 before it was transferred again to the Defendants on 9/5/2012. Thereafter a caution was registered in favour of the Plaintiff's on account of a licensee's interest. Certified copies of the original transfers, the green card together with the original were produced as Pex. 9-15.



11. PW3 added that the consideration of the suit land from the Plaintiff to the Defendants was a gift despite the gazettelement of the Plaintiff's lost title having been recorded first before the impugned transfer to the Defendants. However, PW3 could not tell if there was any fraud in the manner the transfer was processed. She could not also confirm if the Defendants received the land as a gift from the Plaintiff Company.
12. The Plaintiff closed its case at that point and parties were directed to file their submissions.
13. The Plaintiff filed its submissions dated 7/7/2022 through the firm of Bwonwonga & Co. Advocates. It was submitted that the Defendants entered appearance on 29/5/2017 but failed to file their defence. That accordingly, the Plaintiff requested for judgment on 5/8/2016 before the matter was set down for formal proof hearing on 24/5/2016 and reiterated the evidence adduced in Court. That its case remains unchallenged and the evidence remains unrebutted. The Plaintiff rehashed the provisions of Section 25, 26 and 35 *LRA* and argued that the transfer of the suit land to the Defendants was fraudulent and the Court ought to impeach it forthwith.
14. The firm of Waithira Mwangi & Co. Advocates on behalf of the Defendants filed submissions dated 25/11/2021. They conceded not defending this suit on the basis that they were not served with summons or plaint herein. That they only learnt of the case when it appeared on the cause list. They reiterated that the burden of proof under section 107 of the *Evidence Act* must be discharged whether or not a suit is defended and impugned the PW2's capacity as the Plaintiff's official and termed him as a 'busy body'. To that end section 2 and 28(3) of the Cooperatives *Societies Act* were cited. That there was no evidence of the society's resolution to institute the suit making it defective and bad in law. The cases of *Josephat Kimani Mirara & 2 others v Romano K. Mikigu* [2013] eKLR and *Geoffrey Ndirangu & 5 Others v Chairman of Mariakani Jua Kali Association & 2 Others* [2005] eKLR were relied upon in support of that proposition. Further that the particulars of fraud pleaded were not proven to the required standard. They beseeched the Court to dismiss the suit.
15. Having read and considered the pleadings in the case, the evidence adduced by the parties and the written submissions, the main issues for determination are;
 - a. Whether the Defendants were served with the Summons in the main suit.
 - b. Whether the suit is defective on account that the management committee did not authorize its filing.
 - c. Whether the Plaintiff has proved its case against the Defendants.
16. Before I delve into determining the suit I will first of all entertain the two preliminary objections raised by the Defendants. The first one is whether the Defendants were served with the summons in the main suit.
17. The Defendants in their submissions have stated that they failed to file their defence because they were not served with the summons. Ordinarily such a claim if found to be factual would render the proceedings otiose on account of service and the Court must set aside the proceedings as of right to allow the party to be heard. This is in line with the principle of audi alteram partem which literally translates to hear the other side.
18. The Plaintiff did not address these issues in its written submissions. Be that as it may the Court will determine the objections on merit based on what is before it.
19. I have carefully perused the file and it is evident that the suit was filed on the 24/5/2016. Summons to enter appearance were issued on the 10/5/2016.



20. Summons are issued by the Court after a party has filed suit. The summons bear the authority of the Court. Summons help to bring the existence of the suit to the notice of the Defendant. The other rationale of attaching the plaint to the summons is to inform the Defendant the nature of the claim facing him and to demand of him to respond to the grounds or claim within a certain time. See order 5 rule 1 of the *Civil procedure Rules*.
21. According to the record and the affidavit of service deposed on the 15/6/2016 the process server one Robinson Mukigi Muchoki avowed that he served the 1st Defendant and the 2nd Defendant separately in the Company of Arcadius Njora Chege on the 15/6/2016. That both accepted service and declined to append their signatures on the summons. They were each served in their various homes; the 1st Defendant at his home at Makuyu at 10.50 am while the 2nd Defendant was served at 1.20 pm at Kamwangi village.
22. Following service of summons the Defendants entered appearance through the firm of Waithira Mwangi & Co Advocates on the 23/5/2017. It is clear and evidence on the record show that the Defendants have never filed any defence despite service of summons. On the 13/7/2017 the Advocates of the Plaintiff Messrs Bwonwonga & Co Advocates invited the said firm to fix the case for hearing (formal proof) scheduled on the 19/7/2017. On the 25/9/2017 the Defendants filed a notice of motion seeking to have the instant suit struck out which motion was heard and determined by this Court on the 26/7/2018.
23. From the foregoing, it is the finding of this Court that the Defendants were served with the summons. It is in response of the summons that they entered appearance in the case. How else would they have known about the case other than through the summons?
24. This objection is unmerited and it is dismissed.
25. With regard to the second objection, the record bears witness that this issue was raised by the Defendants in their notice of motion dated the 25/7/2017 and the Court entertained and determined the application vide its ruling of the 26/7/2017. The issue is therefore resjudicata. There was no evidence led to show that the decision of the Court was set aside, vacated and or appealed. It is still in force.
26. The second objection is unmerited and it is dismissed.
27. The third and the core issue in the suit is whether Plaintiff has proved its case against the Defendants.
28. It is the Plaintiffs suit that it is the registered proprietor of the suit land. Evidence was led that the Plaintiff is still in possession of the original title. That the Defendants through fraud caused themselves to be registered as owners of the land without the consent and knowledge of the Plaintiff. PW2 stated that once he learned of the change of ownership through a search at the lands office he lodged a caution barring further transactions on the land.
29. As stated the Defendants failed to rebut the claim of the Plaintiff. The suit against the Defendants is therefore unchallenged. That said, the Plaintiff must discharge the burden of proof however much there has not been any rebuttal from the Defendants.



30. The threshold for proving fraud is above a balance of probabilities but below beyond reasonable doubt. The law is clear as buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) observed;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

31. PW1 led evidence that the society has a membership of 114 members and produced a register in support of the same. He stated that from the records that he has in his possession, the officials of the society are Archadius Njora Chege Joseph Mburu, Peter Chege Ndungu. He also stated that the society owns land parcel Nos. 1092, 1098 and 1088. He also confirmed that the Defendants are not members of the society. He explained that all the properties of the Society are disposed in accordance with the approval of the members in a meeting in which a cooperative officer is present. That in this case there are no minutes approving the disposal of the suit land.

32. PW2 led evidence that the suit land was sold without the consent and knowledge of the Plaintiff was in support of PW1 evidence.

33. Section 26 of the *Land Registration Act* states as follows:-

“(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.”

34. In this case I have carefully considered the documents presented by PW3 – the Land Registrar to wit; the green card certified on the 7/6/2021. According to the green card the register for parcel 1092 was opened on the 5/12/1988 and the Plaintiff became registered on the 4/12/1998 and a title issued on even date. On the same date, that is the 4/12/98 there is entry No 3 that states as follows;

“Title .. lost Gazette Notice No. 7700 of 24/7/2009 “

35. Entry No 4 dated the 27/10/2009 reads title issued vide Gazette Notice No. 7700 of 24/7/2009.

36. Entry No 5 dated the 9/5/2012 Nicholas Kigo Ndungu and Gideon Kamau Karanja became registered as owners of the suit land.



37. Entry No 6 a caution by Arcadius Chege – Chairman of Gathaite Farmers claiming licensees interest was registered on the title.
38. Section 37 of the *Land Registration Act* states as follows;
- “(1) A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.
- (2) A transfer shall be completed by:-
- a) Filing the instrument; and
- b) Registration of the transferee as proprietor of the land, lease or charge.
39. PW3 produced a copy of the transfer of land dated the 26/4/2012 between Samuel Ndirangu Njoroge, Nicholas Kigo Ndungu, Joel Kiruku Njenga and Nicholas Kigo Ndungu in Court. This transfer was registered on the 9/5/2012. The consideration is a gift.
40. Looking at the transfer against the Green Card it is clear that the transferors being Samuel Ndirangu Njoroge , Nicholas Kigo Ndungu and Joel Kiruku Njenga were never the registered owners of the land so much so that they transferred land by way of gift to the Defendants which land they had zero interest. They gifted the Plaintiffs land to the Defendants.
41. There is no entry whatsoever in the green card/register of the suit land showing that the suit land was ever transferred conveyed and or deposed to the alleged transferors namely Samuel Ndirangu Njoroge , Nicholas Kigo Ndungu and Joel Kiruku Njenga.
42. The land control board consent dated the 26/4/2012 states that the transferor of the land is the Plaintiff. That the Plaintiff transferred the land to the Defendants as a gift. The application form for Land Control Board consent was not annexed to determine who executed the same. Even if it is taken that the Plaintiff actually intended to gift the Defendants the suit land, there is no evidence absolutely that it did.
43. Further there are no minutes by the Society approving the disposal of the suit land to the Defendants by way of gift or howsoever.
44. The Court has had the opportunity to peruse the Gazette Notice No. 7700 of 24/7/2009 and I shall produce it verbatim for purposes of emphasis as follows;

“Gazette Notice No. 7700

The Registered Land Act

(Cap. 300, section 35)

Issue of a New Land Title Deed

Whereas Gathaite Farmers Co-operative Society Limited in the Republic of Kenya, is registered as proprietor in absolute ownership interest of those pieces of land containing 3.908 and 2.2656 hectares or thereabout, situate in the district of Murang'a, registered under title Nos. Makuyu Makuyu Block 11/1092 and 1091, and whereas sufficient evidence has been adduced to show that the land title deeds issued thereof have been lost, notice is given



that after the expiration of sixty (60) days from the date hereof, I shall issue new land title deeds provided that no objection has been received within that period.

Dated the 24th July, 2009.

Nyamweya,

Land Registrar,

Murang'a District.”

45. The Plaintiff presented the original title in its custody to the Court to show that there was no time that it had gotten lost/missing. It is not clear why the above gazette notice was taken out if indeed the title of the Plaintiff is in its safe and secure possession. The question is who put up the gazette notice and what were the intentions. Was this a scheme to procure a title for purposes of dispossessing the Plaintiff its land? It would appear so. It is unfortunate that the Defendants stayed away from the case and denied the Court the opportunity to hear their side of the case. It can only be presumed that they had no explanation for the state of affairs as obtaining with respect to the title.
46. It is the finding of the Court that the transferors of the title to the Defendants were simply imposters for lack of a better definition. They are fraudsters who defrauded the Company of its land and purported to gift it to the Defendants. In the process the Defendants received nothing as the donors had no interest right and or equity in the suit land capable of being conveyed to the Defendants.
47. I find that the Plaintiff has proved fraud to the standard required.
48. Section 80 of the Land Registration Act provides as follows;
- “(1) 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.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
49. I find that the 1st Defendant was one of the chief architects of the fraud having executed a transfer of the suit land in favour of himself and his co-Defendant knowing too well that the land belonged to the Plaintiff and knowing too well that he had no interest or right in the suit land.
50. I find that the title is registered in the name of the Defendants is a product of fraud and in the eyes of the law is tainted and must be cancelled. I shall make the appropriate orders in the end.
51. On the issue of costs I am guided by the law as set out in Section 27 of the Civil Procedure Act which states as follows;
1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:



Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such”.
52. The Plaintiff has succeeded in its claim. I see no reason to deny it costs of the suit.
53. Final orders and disposal.
 - a. A declaration be and is hereby issued that the Plaintiff is the rightful owner of the suit land LR. No. Makuyu/Makuyu Block 11/1092.
 - b. The title in the name of the Defendants be and is hereby cancelled forthwith.
 - c. The Land Registrar Murang’a be and is hereby ordered to cancel the Title Deed L.R. No. Makuyu/Makuyu BlocK 11/1092 that is being held by the Defendants and rectify the register by cancelling entries Nos. 3, 4 and 5 and reinstating the title in the name of Gathaite Farmers Cooperative Society Limited.
 - d. A permanent injunction be and is hereby issued to restrain the Defendants either by themselves, their agents, servants, employees or anyone else claiming through the from selling, disposing, alienating, transferring or in any way interfering with the ownership, use and or possession by the Plaintiff of the suit property.
 - e. The Costs of this suit are in favour of the Plaintiff.
54. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JULY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent

Waithira Mwangi for 1st and 2nd Respondents

Court Assistant – Phyllis Mwangi

