



REPUBLIC OF KENYA



**Wainaina v Kiguru & another (Environment & Land Case
E023 of 2021) [2022] KEELC 3261 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3261 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E023 OF 2021**

LN GACHERU, J

JULY 28, 2022

BETWEEN

PETER GICHUHI WAINAINA PLAINTIFF

AND

JANE WAITHERA KIGURU 1ST DEFENDANT

**METHI & SWAMI CO-OPERATIVE SOCIETY LIMITED (UNDER
RECEIVERSHIP) 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff moved this Court *vide* a Complaint dated 6th July 2021, and filed in Court on 19th July 2021, for orders that; -
 - a. A declaration be made that the former Plot No. 2xx, and later changed to title Number LR Mitubiri/Wempa/Block 2/26xx, validly belonged to the Plaintiff.
 - b. A declaration that the subsequent registration and title deed issued in respect to title No. LR Mitubiri/ Wempa/ Block 2/ 26xx, by the 2nd Defendant to the 1st Defendant, his agents, servant was illegally done and the same should be declared null and void and cancelled.
 - c. General Damages.
 - d. Costs of this suit and interest at Court rate.
 - e. Any other or further relief that this Honourable Court may deem fit and just to grant.
2. It is the Plaintiff's case that he was a registered member of the 2nd Defendant vide a Share Certificate No. 26xx. That the 2nd Defendant was the registered proprietor of the parcel of land L.R. No. 107xx/1 Thika, which land the 2nd Defendant was holding for and on behalf of its members. The Plaintiff further avers that he was a successful allottee of Plot No.2xx, having participated in the balloting and



sub-division process in 1988, whereupon he paid all the requisite charges for survey and registration. He contends that he took immediate possession and occupation of the suit land, wherein he cultivated thereon.

3. That in the month of March 2010, he discovered that his name had been illegally removed from the 2nd Defendant's Register, and his plot transferred to the 1st Defendant. It is his case that as a result of the discovery, he filed a suit at the Co-operative Tribunal, and while the matter was pending there, it came to his realization that a new title deed for his Plot No. 2xx, had been issued to the 1st Defendant as LR Mitubiri/ Wempa/ Block 2/26xx. It is the Plaintiff's contestation that the 2nd Defendant's act of transferring his parcel of land to the 1st Defendant was illegal and unlawful and devoid of the laid down procedure.
4. Contemporaneously, the Plaintiff filed a Witness Statement wherein he reiterated his averments save to add that he had previously filed a suit at Makuyu Land Disputes Tribunal, being Case No. 43 of 2010, but which judgment was quashed. Additionally, that the Cooperative Tribunal determined the matter in his favour to the extent that the Plaintiff was a Member of the 2nd Defendant.
5. The Defendants never entered appearance and the matter proceeded in the absence.
6. On 23rd May, 2022, the matter proceeded for hearing, via viva voce evidence.

Plaintiff's Case

7. PW1 Peter Gichuhi Wainaina, adopted his witness statement dated 6th October 2021, and produced the documents contained in the list of documents as his exhibits. He told this Court that the 1st Defendant was not a Member of the 2nd Defendant, despite being the registered owner of the suit land, which title she obtained during the pendency of the Cooperative Tribunal case. He further testified that he is not in occupation of the suit land, as the 1st Defendant is utilizing the same. In the end, he urged this Court to find in his favour and declare him the owner of the suit land and cancel the 1st Defendant's title.
8. The Plaintiff filed his written submissions dated 15th June 2022, and submitted that he is the owner of the suit land. He further submitted that despite the evidence been uncontroverted, he had proved his case on the required standard of balance of probability. Reliance was placed on the cases of *Shaneebal Limited v County Government of Machakos*{2018}, where the Court cited the case of *Karuru Munyororo v Joseph Ndumia Murage & Another*, Nyeri HCC No. 95 of 1988, where the Court found that the Plaintiff therein had discharged her burden of proof and there being no Defendant to cross examine her, the Plaintiff's evidence was uncontroverted.
9. It was his further submissions that he has discharged his burden of proof and demonstrated that he is entitled to the suit property. He invited this Court to the provisions of Section 26(1) of the *Land Registration Act*, and urged the court to find that the 1st Defendant's title cannot stand as it was obtained fraudulently. He relied on the case of *Alice Chemutai Too v Nickoson Kipkurui Korir & 2 Others*(2015) eKLR, where the Court opined that title can be impeached where it is established that the same was obtained fraudulently. The Plaintiff urged this Court to be guided by the provisions of Section 80(1) of the *Land Registration Act*, and order for cancellation of title issued to the 1st Defendant.

Analysis and Determination

10. This Court finds and appreciates that at all times material to this suit, the land was initially registered in the name of the 2nd Defendant, who acquired ownership on 1st March 1974, as is evident by entry number 8 in the Certificate of title attached to the Plaintiff's bundles of documents. The Plaintiff



alleges that he was a member of the 2nd Defendant, and that he acquired the suit land through a ballot process conducted by the 2nd Defendant. His membership in the 2nd Defendant's Cooperative Society was confirmed by the Cooperative Tribunal vide its decisions issued on 26th February 2020, in Tribunal Case No. 452 of 2011.

11. It is the Plaintiff's contention that after acquiring the suit land, he took possession and occupation of the said suit land, but in 2010, he discovered that the suit land had been fraudulently registered in the name of the 1st Defendant.
12. The Defendants neither entered appearance nor filed a Defence in response to the Plaintiff's allegations and the Plaintiff's case remained uncontroverted. However, it is trite that uncontroverted evidence is subject to the rules of evidence, and therefore the Plaintiff had a duty to prove his case to this Court on the required standard of balance of probability.
13. This was well discussed in the case of *Samson S. Maitai & Ano v African Safari Club Ltd & Ano.* (2010) eKLR , where the Court held that: -

.....I have not seen judicial definition of the phrase 'formal proof'. 'Formal' in its ordinary dictionary meaning refers to being 'methodical' according to rules of evidence. On the other hand, according to Halsburys Laws of England, Vol. 17 Paragraph 260 , proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption".

14. Further, in the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the Court held as follows;

"The hearing referred to above is the one commonly known as "Formal proof". The Civil Procedure Rules do not define "Formal Proof". Black's Law Dictionary defines "Formal" as including "rules established by an institution according to certain processes". This particular hearing is for the claimant to proof his claim. It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest."

15. This Court has perused the pleadings, the witness statement and the evidence adduced in Court and the exhibits therein, the written submissions and the authorities cited therein and finds the issues of determination arising therefrom are;
 - i. Who is the legal owner of the suit property?
 - ii. Whether title issued in the name of the 1st Defendant should be cancelled?
 - iii. Who should bear costs of the suit?

i. Who is the legal owner of the suit property?

16. It is evident that the rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the *Land Registration Act* 2012, which provide as follows; -

24. "Subject to this Act



- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

17. Further Section 25(1) provides that for such a registered owner, his/her rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act.
18. However, ownership of such title is not absolute as the said Certificate of title can be impeached under certain circumstances as contemplated in Section 26 of the [Land Registration Act](#).

Section 26 (1) which provides;

“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.
19. The Plaintiff contends that he is a member of the 2nd Defendant and that he acquired the suit land from the 2nd Defendant through a ballot process. He maintains that he was issued with Ballot Number 2xx, which this Court has perused. This Court has also perused a bundle of receipts showing that the Plaintiff made the requisite payments as is evident from the bundles of receipts to pave way for the said property being demarcated and registered in his name. What is not clear however is why a title deed was never issued in the name of the Plaintiff.
20. The Plaintiff contends that sometime in 2010, he discovered that his property had been registered in the name of the 1st Defendant. This Court has perused a Certificate of Official Search dated 16th March 2022, which confirms that indeed the suit land is registered in the name of the 1st Defendant. The Court too has perused the Plaintiff’s bundle of Documents dated 10th May, 2022, and had noted that on page 78, there is an alleged extract of the 2nd Defendant’s Register of Members which shows that Ballot No. 2xx, was issued to the 1st Defendant herein. Additionally, at page 133 of the Plaintiff’s bundle attached to the Notice of Motion dated 6th July 2021, the Court has perused a receipt showing that the 1st Defendant paid Membership fees to the 2nd Defendant.
21. It is trite that when a person’s title is called into question, the said proprietor has to show the root of his ownership. In the case of [Hebert L Martin & 2 Others v Margaret J Kamar & 5 Others](#) {2016} the Court held:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they



need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

22. Further In the case of *Munyu Maina v Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, the Court of Appeal held that:-

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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."

23. Having been so guided, this Court will move to ascertain which party has proved the root of its title.
24. The Plaintiff has led evidence that he acquired ownership of the suit property from the 2nd Defendant through a ballot process. Though it is not clear the date when the ballot card was issued, it is evident from the receipts attached that the Plaintiff became a member of the 2nd Defendant sometime in 1978, and paid for the survey of the plot on the 12th September, 1978. The Plaintiff has corroborated his evidence with a Status Report by the Liquidators of the 2nd Defendant contained in pages 203-210, of the Plaintiff's bundle of documents, attached to the Notice of Motion. In the said Status Report, the Liquidators confirmed that the Plaintiff was the rightful owner of land parcel No. being Mitubiri/Wempa/ Block 2/26xx, under ballot Card No.2xx.
25. This Court has no reason to doubt the evidence adduced by the Plaintiff and the contents of the aforementioned Status Report. The 1st Defendant on the other hand became a Member sometime in 1979, as is evident from a receipt for payment of Membership dated 30th March, 1979. This Court did not have the benefit of hearing the evidence of the 1st Defendant to determine how she acquired the certificate of title. Even so, it appears that the Plaintiff was the first allottee of the suit property, having been allotted the same sometime in 1978.
26. In the case of *M'ikiara M'rinkanya & Another v Gilbert Kabeere M'binjiwe* {1982-1988} I KAR 196, the Court held that where there was a double allocation of land, the first allotment would prevail. That after the first allotment, there was no power to allot the same property again. To this end, this Court is convinced that the Plaintiff has on a balance of probability proved the root of his title in compliance with Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya.
27. Having found as above, the Court finds and holds that the Plaintiff has proved the root of his title and is the legal owner of the suit property to the exclusion of all others including but not limited to the 1st Defendant.

ii. Whether title issued in the name of the 1st Defendant should be cancelled?

28. The 1st Defendant was issued with a title deed on 24th August, 2011. The Plaintiff has sought for the cancellation of the proprietorship of the 1st Defendant. The Court has already held and found that the Plaintiff is the lawful owner of the suit property, and that the registration of the 1st Defendant having been unprocedurally acquired.
29. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding



of such title is not absolute as the same may be impeached under certain circumstances. Section 26 (1)a and b of the [Land Registration Act](#), which provides;

- (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.

30. This Court having found that the Plaintiff has established on a balance of probability the root of his title and there being no cogent evidence to controvert his testimony, then the Court will proceed to exercise its discretion in his favor.

31. Section 80(1) of the [Land Registration Act](#) 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."

32. The above provision of Law is relevant in this case.

33. Further in the case of [Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others](#) [2015] eKLR, the Court held that: -

"It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists."

34. In addition, the Court of Appeal in the Case of [Munyu Maina v Hiram Gathiba Maina](#), *Supra*, stated that:

"when a registered proprietor's root of title is in the challenge, it is not sufficient to dangle the instrument of title as ownership. It is this instrument that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register"

35. Having considered the available evidence, this Court is satisfied that the Certificate of title held by the 1st Defendant was procured unprocedurally and as such it is impeachable and ought to be cancelled.

36. This Court has already held and found that the Plaintiff is the legal owner of the suit property, and it is only fair that the register be rectified in his favor.

(iii) Who should bear the Costs of the Suit

37. It is very clear that Section 27 of the [Civil Procedure Act](#) gives the Court discretion to grants costs. As the successful party is always entitled to costs, except in exceptional circumstances, and having noted that no exceptional circumstance exists in this suit, the Court finds and holds that the Plaintiff being the successful litigant is entitled to the costs of the suit.



38. Having carefully considered the available evidence, the Court finds that the Plaintiff herein has proved his case on the required standard of balance of probabilities against the Defendants herein.
39. Consequently, Judgement is entered for the Plaintiff against the Defendants herein Jointly and Severally in terms of prayers No. 1, 2 and 4 of the Plaint dated 6th July 2021.
40. On prayer No. 3 wherein the Plaintiff sought for General Damages, there was no evidence adduced to support the same and thus this Court will not award the sought General Damages.
41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF JULY, 2022.

L. GACHERU

JUDGE

In the presence of;

Joel Njonjo - Court Assistant

Mr Kibathi for the Plaintiff

1st and 2nd Defendants – Absent

L. GACHERU

JUDGE

