



Mwangi v Mwangi (Suing through her Attorney Mary Njeri Kariuki) & another (Environment & Land Case 167 of 2018) [2022] KEELC 3502 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3502 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 167 OF 2018**

BM EBOSO, J

JULY 21, 2022

BETWEEN

HENRY KARIUKI MWANGI PLAINTIFF

AND

**JOYCE WAITHIRA MWANGI (SUING THROUGH HER ATTORNEY MARY
NJERI KARIUKI) 1ST DEFENDANT**

LAND REGISTRAR THIKA 2ND DEFENDANT

JUDGMENT

Introduction

1. Joyce Waithira Mwangi [the 1st defendant] is a daughter to Henry Kariuki Mwangi [the plaintiff]. The plaintiff initiated this suit against the two defendants on 29/5/2018 through a plaint dated 28/5/2018. He averred in paragraph 3 of the plaint that the 2nd defendant was “a nominal defendant sued only for the purpose of effecting the court’s order once granted”.
2. He sought the following reliefs against the defendants:
 - a. An order that the entry on the register of land parcel Thika Municipality Block 9/682 conferring the land solely on the 1st defendant be cancelled.
 - b. That land parcel Thika Municipality Block 9/682 does vest in the joint names of the plaintiff and the 1st defendant.
 - c. An injunction be issued restraining the 1st defendant from selling, disposing of, charging or in any other way interfering with the register to land parcel Thika Municipality Block 9/682.
 - d. Costs of the suit.



3. The dispute in the suit relates to entry number 5 made in the proprietorship section of the parcel register relating to land parcel number Thika Municipality Block 9/682 [the suit property]. The impugned entry was made on 16/10/2015. The import of the entry is that it changed the registration of the suit property from joint ownership by the plaintiff and the 1st defendant to the sole ownership of the suit property by the 1st defendant. It culminated in the issuance of a new certificate of lease in the name of the 1st defendant as the sole proprietor of the suit property on the same day, 16/10/2015. The plaintiff contends that the 1st defendant procured the said change of registration fraudulently and without his knowledge.
4. Subsequent to the initiation of the suit, Joyce Waithira Mwangi [the 1st defendant] appointed her mother, Mary Njeri Kariuki, as her attorney. Pursuant to a notice of motion dated 20/2/2020, Mary Njeri Kariuki was officially joined as an attorney of Joyce Waithira Mwangi. The plaintiff contended that the 1st defendant's attorney is his ex-wife with whom they divorced.

Plaintiff's Case

5. Through his plaint dated 28/5/2018, his witness statement dated 28/5/2018, and his oral evidence tendered during trial on 16/2/2022, the plaintiff contended that in the year 2004, he and the 1st defendant [Joyce Waithira Mwangi] jointly purchased the suit property and caused it to be registered in their joint names on 1/4/2004. A certificate of lease was issued to them bearing their joint names. The purchase price was raised substantially through financing by Housing Finance Company of Kenya. He repaid much of the loan, with the 1st defendant contributing minimally towards servicing of the loan. They finished repaying the loan in 2011.
6. The plaintiff further contended that their intention in purchasing the suit property was to have it as a family home. Upon acquisition of the suit property, he undertook "massive developments" on the suit property and moved into the suit property with his family in the year 2005. They lived there until 2015 when his ex-wife [the 1st defendant's attorney], together with her sons whom she got from a different relationship, chased him away. He contended that the transfer of the suit property into the 1st defendant's name as the sole proprietor of the suit property was fraudulent because:
 - (i) it was procured and effected without his consent;
 - (ii) it was procured without the necessary consent;
 - (iii) it was procured without him executing the requisite documents necessary for transfer; and
 - (v) that if any signature was appended to the transfer documents and expressed as his, it was a forgery.
7. The plaintiff added that he discovered about the fraudulent transfer in 2015 when he learnt that the suit property was on sale. He immediately caused a restriction to be registered against the parcel register on 30/10/2015. Unknown to him, the 1st defendant filed a miscellaneous application in this court against the Land Registrar and failed to join him as a party to the suit. Through the miscellaneous application, the 1st defendant fraudulently obtained an order vacating the restriction.
8. It was the case of the plaintiff that he did not initiate proceedings against the 1st defendant immediately he learnt about the fraudulent transfer because the 1st defendant is his only daughter whom he loved very much and he wanted the matter to be resolved amicably. When he realized that an amicable resolution was not forthcoming, he brought this suit.
9. He produced a total of 14 exhibits, namely:



- (i) Certificate of Lease issued on 1/10/2004;
- (ii) Copy of the land register issued on 2/11/2015;
- (iii) Letter dated 2/11/2015 by DCIO Thika to Land Registrar Thika;
- (iv) Letter dated 31/11/2015 by DCIO Thika to Land Registrar Thika;
- (v) Letter dated 30/10/2015 by Njoroge Kugwa & Co Advocates to the Land Registrar, Thika;
- (vi) Court Order dated 20/04/2018 issued in Thika ELC Misc App No 55 of 2017 - Joyce Waithira Mwangi v Thika Land Registrar;
- (vii) Statement of Mortgage Account from 2004 to 2011;
- (viii) Receipts of deposits by the plaintiff to the Mortgage Account;
- (ix) Statement by Mary Njeri Kariuki as copied to the plaintiff;
- (x) Joint Statement by Paul Ngángá Kariuki, David Kihui Mwangi, Danson Ndungu Kariuki, and John Kimani Kariuki;
- (xi) Some of the receipts showing payment of rates;
- (xii) Search dated 8/10/2015;
- (xiii) Search dated 29/10/2015; and
- (xiv) List of documents used by the 1st defendant to fraudulently transfer the land.

1st Defendant's Case

10. The defendant's case is contained in her statement of amended defence dated 31/8/2020; her attorney's witness statement dated 31/8/2020; and her attorney's oral evidence tendered in court on 16/2/2022. Her case was that she solely purchased the suit property through financing by Housing Finance Company of Kenya. Because she resided in the United Kingdom at the time, she sent the mortgage repayments through the plaintiff and that the plaintiff never contributed towards the repayment of the mortgage. She contended that the plaintiff was merely a medium through whom payments were made and had no interest in the suit property. She added that the plaintiff took advantage of the fact that she resided in the United Kingdom to cause the suit property to be registered in their joint names. It was her case that the suit property could not have been intended to be a family home because the plaintiff never purchased it, adding that the plaintiff never made developments to the suit property. It was her case that she allowed the plaintiff and her mother to live in the suit property after the plaintiff had been sacked in 2004. She added that the plaintiff abandoned her mother in the suit property in 2015 and married a second wife. She denied putting the suit property on sale.
11. The 1st defendant denied fraudulently transferring the suit property into her sole name, contending that the plaintiff was never an owner of the suit property but caused himself to be registered as an owner by taking advantage of the fact that she was in the United Kingdom. She added that the restriction placed on the parcel register was properly removed through a court order, contending that the plaintiff was aware of the suit but elected not to defend it.
12. In further answer to the plaintiff's claim, the 1st defendant contended that the plaintiff fraudulently procured his registration as co-owner of the suit property using the power of attorney donated to him by her.



13. The 1st defendant’s attorney produced the following ten documents:
- (i) Copy of Housing Finance Company of Kenya Mortgage Agreement [Loan Offer Letter];
 - (ii) Copy of letter dated 28/1/2004 from Avery Emerson Law;
 - (iii) Copy of power of attorney dated 28/1/2004;
 - (iv) Copy of revocation of power of attorney dated 12/8/2015;
 - (v) Copy of receipts showing money transfers;
 - (vi) Copy of certificate of lease dated the 1/10/2004;
 - (vii) Copy of letter dated 24/8/2015 from Mamicha Advocates;
 - (viii) Copy of application to withdraw restriction dated the 15/5/2017;
 - (ix) Copy of certificate of lease dated the 16/10/2015; and
 - (x) Copy of green card for LR No Thika Municipality Block 9/682.
14. During cross-examination, the 1st defendant’s attorney who testified as DW1 stated that the miscellaneous application in which an order vacating the restriction was issued was “filed against the plaintiff in this suit”. She did not know if the plaintiff was served with the suit papers. She did not know or have the details of the account number from where the initial deposit paid to Housing Finance Company of Kenya was remitted. Pressed further, she stated that the money [Kshs 1,000,000] was sent in cash through an agent and was collected by the plaintiff.
15. DW1 confirmed during cross-examination that the 1st defendant used to send money to the plaintiff to support the family. Taken through the six remittance slips produced by her as exhibits, she confirmed that four of the slips bore the purpose of the money that was being remitted by the 1st defendant as “family support.” She added that she did not have any demand letter from the 1st defendant asking the plaintiff to convey the suit property to the 1st defendant. She also confirmed that she did not have any summons requiring the plaintiff to attend before the Land Registrar in relation to a complaint by the 1st defendant. Lastly, she stated that she did not have evidence relating to fraud by the plaintiff.

Plaintiff’s Submissions

16. The plaintiff filed written submissions dated 28/2/2022 and further submissions dated 21/3/2022, through M/s Waithira Mwangi & Co Advocates. Counsel identified the following as the four key issues that fell for determination in the suit property:
- (i) Whether the plaintiff and the 1st defendant were the joint owners of the suit property;
 - (ii) Whether the suit property was fraudulently registered in the name of the 1st defendant;
 - (iii) Whether the plaintiff was entitled to the reliefs sought; and
 - (iv) Who should bear costs of this suit.
17. On whether the plaintiff and 1st defendant were joint owners of the suit property, counsel for the plaintiff submitted that the plaintiff had led evidence demonstrating that the suit property was registered in their joint names in 2004. Counsel added that the plaintiff had further led evidence establishing that the mortgage repayment was made by him either as direct transfers from his bank account or as cash remittances. Counsel added that the 1st defendant’s allegation that she used to remit



Kshs 50,000 as mortgage repayment every month was not supported by evidence and remained an allegation. Counsel submitted that the plaintiff had demonstrated that he had serviced the mortgage account and that the inclusion of the 1st as a joint owner was a family arrangement.

18. On whether the suit property was fraudulently registered in the name of the 1st defendant, counsel submitted that the registration of the suit property in the name of the 1st defendant as the sole proprietor was fraudulent because it was done without the consent of the plaintiff and without the plaintiff executing the requisite conveyance documents. Counsel added that the 1st defendant's contention that the Land Registrar merely rectified the land register could not hold because the Land Registrar did not have powers to change ownership of the suit property. Counsel added that the 1st defendant went a step further in perpetuating the fraud by instituting and prosecuting Thika ELC Misc Application No 55 of 2017 without joining or serving the plaintiff.
19. On whether the plaintiff was entitled to the reliefs sought, counsel submitted that the plaintiff had proved his case on the balance of probabilities and was entitled to the reliefs.

Defendant's Submissions

20. The 1st defendant filed written submissions dated 12/2/2022, through M/s Etole & Company Advocates. Counsel for the 1st defendant identified the following as the three issues that fell for determination in the suit:
 - (i) Whether the suit property was purchased jointly by the plaintiff and the 1st defendant;
 - (ii) Whether the 1st defendant fraudulently transferred the suit property to herself; and
 - (iii) Whether the plaintiff was entitled to any of the orders sought.
21. On whether the suit property was purchased jointly by the plaintiff and the 1st defendant, counsel for the 1st defendant cited the letter from the 1st defendant's employer, Avery Emerson, dated 28/1/2004, and submitted that the letter was evidence that the 1st defendant was the sole purchaser of the suit property. Counsel added that the 1st defendant donated to the plaintiff a power of attorney because she was based in the United Kingdom. Counsel contended that inclusion of the plaintiff in the transaction was fraudulently done by the plaintiff using the power of attorney. Counsel for the 1st defendant faulted the plaintiff for not producing the executed sale agreement and contended that the agreement would have shown that the 1st defendant was the sole purchaser. Counsel urged the court not to give weight to the plaintiff's evidence, contending that he had withheld crucial evidence from the court and that he had lied to the court. Counsel urged the court to find that the suit property was purchased solely by the 1st defendant.
22. On whether the 1st defendant fraudulently transferred the suit property to herself, counsel submitted that the plaintiff having fraudulently caused the suit property to be registered in their joint names, the Land Registrar properly cancelled the joint registration under Section 79(2) of the [Land Registration Act](#). Counsel added that the plaintiff had failed to prove fraud on part of the 1st defendant. Counsel urged the court to dismiss the plaintiff's claim and award the 1st defendant costs of the suit.

Analysis and Determination

23. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common statement of issues. Arising from the pleadings and evidence in this suit, the following are, in my view, the key issues that fall for determination in this suit:



- (i) Whether the registration of the plaintiff in 2004 as co-proprietor of land parcel number Thika Municipality Block 9/682 [the suit property] was procured fraudulently by the plaintiff;
 - (ii) Whether the plaintiff is a legitimate co-proprietor of the suit property;
 - (iii) Whether the registration of the 1st defendant in 2015 as the sole proprietor of the suit property was procured fraudulently by the 1st defendant;
 - (iv) Whether the plaintiff is entitled to the reliefs sought in the plaint; and
 - (v) What order should be made in relation to costs of this suit. I will make brief sequential pronouncements on the five issues in the above order.
24. The first and second issues are intertwined and will therefore be disposed together. The plaintiff's case is that, together with the 1st defendant, they purchased the suit property as a family home and caused it to be registered in their joint names. On her part, the 1st defendant contends that she purchased the suit property alone and that, as her attorney, the plaintiff fraudulently caused the suit property to be registered in their joint names instead of causing it to be registered in her name as the sole proprietor. Neither the plaintiff nor the 1st defendant produced the sale agreement [contract] relating to the purchase of the suit property. Neither of them produced the conveyance document that culminated in the registration of 2004. The two parties, however, agree that the suit property was substantially acquired using a loan of Kshs 2,000,000 from Housing Finance Company of Kenya Limited. The 1st defendant produced as exhibit number 1, a letter of offer [mortgage agreement] relating to the loan. It is clear from the letter of offer that the loan offer was made to Henry Kariuki Mwangi [the plaintiff] and Joyce Waithera Mwangi [the 1st defendant]. The plaintiff accepted the offer as an applicant and as an attorney of his co-applicant, Joyce Waithera Mwangi.
25. The plaintiff produced as an exhibit, a mortgage statement (ledger) extracted from the mortgage account. It covers the entire loan repayment period running from 2004 to 2011. It shows that the mortgage account was opened in the joint names of the plaintiff and the 1st defendant. It further shows that on several occasions, cash deposits were made into the mortgage account. It also shows that on several occasions, money was credited onto the mortgage account from Account No 200-0043719 belonging to Henry K. The plaintiff contended, without any controverting evidence from the 1st defendant, that the said account is his and that the money was from him. Further, the plaintiff testified that he repaid the loan using funds from his businesses between 2004 and 2011. He denied the 1st defendant's contention that she provided the initial deposit of Kshs 1,000,000. Apart from the mortgage account ledger, the plaintiff produced receipts showing some of the moneys he contended he remitted to the mortgage account.
26. On her part, the 1st defendant did not personally testify. She led evidence by her attorney, Mary Njeri Kariuki. The attorney is an ex-wife of the plaintiff. As evidence of the 1st defendant's remittance of money towards the loan repayment, she produced six money transfer slips. The first slip relates to a transfer of the equivalent of Kshs 52,400 made on 24/10/2006. The purpose of the money is given as "family support". The second slip relates to a transfer of the equivalent of Kshs 50,317. The purpose of the transfer is not clear from the slip. The third slip relates to a transfer of the equivalent of Kshs 300,160 on 10/12/2006. The purpose of the transfer is given as "family support". The fourth slip relates to a transfer of the equivalent of Kshs 200,067 made on 22/12/2004. The purpose of the transfer was not given. The fifth slip relates to a transfer of Kshs 52,000 made on 18/11/2006. The purpose of the transfer is given as "family support". The last remittance slip relates to a transfer of the equivalent of Kshs 50,220 made on 31/1/2006. The purpose of the transfer is not given. Both the plaintiff and DW1 confirmed that the 1st defendant used to occasionally send to them money for family support through



the plaintiff. Even if the court were to treat all the above moneys as mortgage repayment money as opposed to family support money, their aggregate is about Kshs 705,167. The principal loan from Housing Finance Company of Kenya was Kshs 2,000,000. When interest is reckoned, the figure is much higher.

27. From the above evidence by the 1st defendant and from the mortgage account ledger produced by the plaintiff, it is clear that the plaintiff contributed substantially towards repayment of the loan amount owed to Housing Finance Company of Kenya. It is also clear from the totality of the evidence before court that the suit property was acquired jointly by the plaintiff and the 1st defendant.
28. The 1st defendant pleaded in paragraph 13 of her amended defence that the plaintiff fraudulently caused the suit property to be registered in their joint names. The allegation was not corroborated through evidence. The 1st defendant was aware of the existence of the title and the mortgage account from 2004 to 2015. She never raised any objection. She only caused the property to be registered in her sole name in 2015 after the marriage between her parents got strained.
29. For the above reasons, it is the finding of this court that the registration of the plaintiff in 2004 as co-proprietors of the suit property was lawful and was not procured fraudulently. It is the further finding of this court that the plaintiff is a legitimate co-proprietor of the suit property, land parcel number Thika Municipality Block 9/682.
30. The third issue is whether the registration of the 1st defendant in 2015 as the sole proprietor of the suit property was procured fraudulently. The plaintiff pleaded in paragraph 9 of his plaint that the 1st defendant fraudulently caused the suit property to be transferred into her name as the sole proprietor in 2015. He outlined the particulars of fraud on part of the 1st defendant. The 1st defendant's response to the claim is contained in paragraph 9 of her amended defence and reads as follows:

“In reply to paragraph 9, the first defendant states that she never fraudulently transferred the suit land for reasons that the plaintiff was never an owner in the first instance but only caused himself to register by taking advantage of the fact that she was in the United Kingdom. The plaintiff is put to strict proof of the allegations of fraud.”

31. In addition, the plaintiff testified that he did not sign any transfer conveying the suit property from their joint names into the name of the 1st defendant. He was not privy to any conveyancing document that culminated in the registration of the plaintiff as sole proprietor of the suit property. The 1st defendant did not respond to the specific allegations of fraud as particularized. She did not tender evidence on how she procured the registration of the property into her name as a sole proprietor. No single document was tendered to support the transfer. The duty to justify the change of registration lay on the 1st defendant.
32. Counsel for the 1st defendant submitted that the Land Registrar rectified the parcel register in exercise of his power under Section 79(2) of the *Land Registration Act*. That submission cannot be accepted. First, entry number 5 which related to the impugned registration was not a rectification under Section 79(2). It was a registration relating to a transfer. Were it to be a rectification, it would be expressed as such and the section of the *Act* invoked to effect the rectification would be specified. Having procured the impugned registration, it was incumbent upon the 1st defendant to place before the court instruments that culminated in the impugned transfer. None was produced. The logical conclusion is that the registration was procured without lawful mandatory statutory documents such as a duly executed transfer. It was therefore fraudulent. That is the finding of this court on the third issue.
33. The fourth issue is whether the plaintiff is entitled to the reliefs sought in the plaint. The plaintiff has established that he co-purchased the suit property with his daughter [the 1st defendant]. He has further



established that he was a lawful registered co-proprietor of the suit property from 1/10/2004 until 16/10/2015 when the 1st defendant caused the suit property to be fraudulently transferred into her name as the sole proprietor. He has established fraud on part of the 1st defendant. In the circumstances, the court finds that he is entitled to the reliefs sought in the plaint.

34. On costs, the court is guided by the general principle in Section 27 of the *Civil Procedure Act*. The general principle is that costs follow the event. The 1st defendant, in the circumstances, shall bear costs of the suit.
35. The Land Registry was complicit in the fraud involved in this dispute. No law-abiding land registrar would have effected the impugned registration without the requisite documents. Because the plaintiff pleaded that he was suing the Land Registrar as a nominal defendant for the purpose of enforcing the reliefs, I will say no more.
36. In the end, the court finds that the plaintiff has proved his case against the 1st defendant on a balance of probabilities. The court accordingly enters Judgment against the defendants in terms of prayers (a), (b) and (c). The 1st defendant shall bear costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF JULY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Waithira Mwangi for the Plaintiff

Mr Sospeter Nyongesa for the 1st Defendant

Court Assistant: Ms Lucy Muthoni

