



**Gikonyo v Attorney General & another (Environment & Land Case
29 of 2021) [2022] KEELC 14879 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 14879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 29 OF 2021
AK BOR, J
SEPTEMBER 29, 2022**

BETWEEN

JOSEPH THEURI GIKONYO PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

NICODEMUS WAKABA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff claims that he was one of the original shareholders of the land buying company known as Othaya Mahiga Chinga Exfacco Limited ('the Company') and that based on his contribution he was allocated plot number 658 measuring 2 acres which number was later changed to Mutara Mutara Block 11/708 (Uruku) ('the Suit Property'). That he paid all the necessary fees and was given a clearance certificate which he took to the Laikipia lands office and was issued a title deed in 1997. He claimed that he took possession of the land but learned in 2014 when he conducted a search that the Suit Property was registered in the 2nd Defendants' name in 2013.
2. He averred in the plaint which he filed in court on September 29, 2014 that the dealings by the Land Registrar, Laikipia and the 2nd Defendant in the Suit Property were fraudulent because he held a valid title over the land which was issued by the Land Registrar, Laikipia in 1997. He claimed that the registration of the 2nd Defendant as proprietor of the Suit Property was done fraudulently and gave particulars of fraud against both Defendants.
3. The Plaintiff sought a declaration that the Suit Property belongs to him and that all the transactions done by the Land Registrar, Laikipia County were fraudulent and illegal. Further, he sought the cancellation of the registration the 2nd Defendant as proprietor of the land and issuance of the title to him, and reinstatement of his name on the register of the Suit Property.



4. The 2nd Defendant denied the Plaintiff's claim and averred that he was a shareholder of the Company and was allotted shares. He claimed that he was the current registered proprietor of the Suit Property after being confirmed as the bona fide owner of the land. The 2nd Defendant averred that the Plaintiff colluded with some land officials in 1997 and they fraudulently cancelled his name and put that of the Plaintiff in their records relating to the Suit Property. He gave particulars of fraud against the Plaintiff while maintaining that he was the rightful proprietor of the Suit Property.
5. The hearing of the suit commenced before Lady Justice Waithaka in Nyeri on December 20, 2018 when the Plaintiff tendered his evidence and closed his case. He stated in his evidence that he was one of the original shareholders of the Company which would buy land and distribute it a month to its shareholders. He stated that the shareholders would ballot and be allotted land. That after balloting, he was given the ballot paper for plot No 653. The entire land was subdivided by the Company and his new plot number became 708. On being issued the new number, he paid the necessary fees and was given a clearance certificate which he took with other documents to the lands office in Laikipia and was issued a title deed over the Suit Property.
6. He averred that after being issued a title deed over the Suit Property, he took possession of the land. His neighbours informed him that they had seen people on his land who were purporting to survey the land. He was surprised because he had never sold the land to any one and had a valid title. He was shocked to learn that the 2nd Defendant had been registered as the owner of the land. He placed a caution against the land to preserve it. He was emphatic that he had never had any dealings with the 2nd Defendant and maintained that the registration of the 2nd Defendant as the proprietor of the Suit Property was illegal and fraudulent and his title should be cancelled. He faulted the District Land Registrar, Laikipia for issuing another title over the same land to the 2nd Defendant in 2013. He argued that he obtained his title through a legal process and urged the court to restore his name on the register.
7. He produced copies of receipts issued by the Company dated August 3, 1971 for payment of Kshs. 20 and other receipts dated May 13, 1985 and March 5, 1997. He also produced receipts dated May 15, 1995 issued by Othaya Mahiga Chinga Exfacco Limited for payment of Kshs 750 which indicate the plot number as 653 – 708. He produced another document on note paper of the Company written in Kikuyu dated June 29, 1975 which gives the plot number as 653. He produced a copy of the share certificate number 1224 showing that he had 20 shares. He produced other receipts issued by the Company June 15, 1997 and May 30, 1983 in respect of title deed for plot No 708 and survey fees for plot No 653 respectively. He produced a copy of the title deed issued to him on April 2, 1997.
8. On cross examination, he stated that he did not know the 2nd Defendant and only learned of him when he conducted a search on the Suit Property. He confirmed that he lodged a caution against the land but did not give the reasons for applying for the caution to the court. He informed the police about the matter and investigations were conducted. He stated that he did not sue the Company because it was the 2nd Defendant who had a title to his land and not the Company. He did not produce the clearance certificate issued by the Company. He maintained that if indeed the Company recommended that the Land Registrar cancel his title, he should have been informed. He was summoned by the Chief and the Land Registrar over the two title deeds. That on seeing that the Suit Property had two title deeds, the Land Registrar advised them to move to court for the authentic title to be ascertained by the court. He denied that the Land Registrar issued a gazette notice to the effect that his title would be cancelled if he did not return it.
9. Elijah Kibicho Mathenge, the Plaintiffs neighbour gave evidence. He stated that they come from the same village. He was a member of the Company and was given land number 551. His land was adjacent to the Plaintiff's land. They collected their title deeds together in 1997. Before they were given land,



- they were supposed to have all the necessary receipts for entry, survey, shares and issued share certificate. Initially they had to ballot to get the land. He stated that the original allottees were residents of Mahiga, Chinga and Othaya. He was surprised to learn in 2013 that the 2nd Defendant had been given the land yet he knew that the original owners were given their land 15 years before.
10. On cross examination, he considered that it was true that the directors of the Company had the tendency of allocating the same land twice. He confirmed that the Land Registrar issued title deeds to shareholders of the Company according to the list presented by the land buying company. He did not know who cancelled the 2nd Defendant's name on the Company's register and replaced it with the Plaintiff's name.
 11. This court heard the evidence of the 2nd Defendant. He stated that his late grandmother registered him as a shareholder of Othaya Mahinga Chinga Exfacco Limited in 1970 when he was 12 years. His father paid Kshs 400 for 20 shares and a share certificate was issued to him in 1971 under the name Mwangi Wakaba. He stated that his father, Moses Gitonga Wakaba went for balloting on June 29, 1975 and took ballot number 695 with the name Mwangi Wakaba. On becoming an adult, he was issued identity card number 3458775/66 under the name Nicodemus Wakaba Gitonga. He produced a copy of the letter dated September 5, 1983 by the Chief explaining his names. He swore an affidavit for the name Mwangi Wakaba to be deleted from the register and replaced with his name. The share certificate and Company register were changed to read Nicodemus Wakaba Gitonga.
 12. He stated that the Company later issued new ballots and ballot no 655 changed to ballot no 708. He paid the registration fee of Kshs 50 to the Company and on the receipt the old plot no 655 and new plot 708 were reflected. He paid the survey fees for plot no 708 and receipts were issued for the payment. After that he visited the land as did his parents to view it as they waited for the formalities of getting the title deed.
 13. He explained that in 1992 he was forced to relocate from Baringo District where he was teaching to Ol Kalau due to tribal clashes. He went to the Company on August 24, 2012 with his brother to seek information on how to obtain the title deed. They were directed to Mischeck Theuri Mwai who told them that he was one of the Company's directors. Mr Mwai issued him a clearance note addressed to the Registrar Laikipia stating that he was the owner of parcel no 708 and that he should be issued a title deed. He paid Kshs 2500/= for the clearance form.
 14. He presented his documents and the clearance note to the Laikipia lands registry but was informed that the land was registered under somebody else's name. He was advised to keep the documents safely. He was taken to the Land Registrar who informed him that the director who had issued the clearance note to him was replaced. He was directed to another director known as Michael Macharia. He went to Othaya and met Michael Macharia who issued another clearance note to him upon payment of Kshs 2,000/=. He went back to the Laikipia lands registry where he met a different Land Registrar who informed him that Michael Macharia had also been replaced. He was directed to one of the Board of Directors who advised him to meet the Board of Directors.
 15. He met the Board of Directors on September 24, 2012 who told him that his documents were genuine and that he was the rightful owner of the land known as Mutara/Mutara/Block II/708 Uruku. The Board issued a clearance certificate to him and he paid the fees. They gave him a letter addressed to the Assistant Chief, Kiamariga Sub- Location which he delivered. The Assistant Chief promised to inform the Chief about the land dispute and if possible arrange a meeting of the parties to the dispute. The board advised him to take the clearance to the lands office. His name had been deleted from the register and the land was registered in the Plaintiff's name.



16. The Land Registrar gazetted the fraudulent acquisition of his title and gave notice of the intention to cancel the title issued to the Plaintiff while requesting the Plaintiff to surrender the title which was irregularly issued to him. A title deed for Mutara/Mutara Block II/708 (Uruku) was issued to him on May 6, 2013. He faulted the Plaintiff for not seeking redress from the Assistant Chief or the Board of Directors or the lands office after he was informed of the dispute over the Suit Property.
17. He learnt on August 28, 2014 that the Plaintiff had placed a caution against his land. When he sought an explanation, the Land Registrar summoned both of them for a hearing. The Land Registrar advised them that only the Board of Directors of the company could rule on who was the rightful owner of the disputed land. He went to the Board of Directors of the Company and explained the situation and they wrote a letter to the Land Registrar of Laikipia County regarding the rightful ownership of the Suit Property. He took the letter to the lands office but the Plaintiff moved to court.
18. He produced copies of his title issued on May 6, 2013 and the letter dated September 24, 2012 from the Company to the Assistant Chief, Kiamariga Sub- Location which stated that the 2nd Defendant was the rightful owner of plot no 708. He also produced copies of the receipts issued by the Company on September 19, 1970, January 14, 1985 and the one dated May 31, 1992 showing plot no 708. The receipt dated August 31, 1992 is written old plot no 655 new plot 708 as does the receipt dated January 18, 1988. He produced the receipt dated September 24, 2012 for payment of the transfer fees.
19. The 2nd Defendant produced copies of the clearance certificate issued by the Company on September 24, 2012 for plot no 708; the share certificate issued on January 22, 1971 and the receipt issued in Kikuyu on June 29, 1975 from which one can decipher plot no 655. He also produced a copy of the affidavit clarifying his names and receipts issued on August 31, 1992 on account of registration fees and the receipt for survey fees which gives the plot no as 708. He also produced the ballot paper showing card no 708 issued by the Company and signed by the officials. The other receipts which he produced were issued on September 24, 2012 for transfer and office maintenance. He produced a copy of the Company's letter addressed to the Assistant Chief asking him to establish the truth of the problem.
20. He produced a copy of the gazette notice of November 9, 2012 inviting objections to the issuance of a new land title deed and a copy of the Land Registrar's letter of August 29, 2014 inviting the Plaintiff to object to the removal of the caution he had placed against the Suit Property. Another letter dated October 15, 2014 notifying the Plaintiff that the caution would be heard on October 29, 2014 and that a decision would be made if he failed to appear, was also tendered in evidence.
21. The 2nd Defendant produced a certified copy of the handwritten register of the Company dated September 24, 2012, which had his name cancelled against plot no 708 and that of the Plaintiff inserted. Mr Wakaba did not know why his name was cancelled in the register of the land buying company. When he discovered that his name had been cancelled, he went to see the directors of the Company and the board advised him that he had the right documents and issued a clearance certificate to him. He wrote to the Chief and later they sent him to the Land Registrar where after stating his case he was advised to gazette the land. When nobody opposed the issuance of title, a title was issued to him. He pointed out that the cancellation of his name from the register and replacement by the Plaintiff's name was not counter signed. He was emphatic that the Land Registrar followed the right procedure when he issued a title deed over the Suit Property to him.
22. Moses Gitonga Wakaba, the father of the 2nd Defendant gave evidence. He stated that he knew the history of the suit land. His later mother Nyaguthii Wakaba paid the entrance fee in 1970 for his son to enter Othaya Mahinga Chinga Exfacco Company Limited. When she was required to pay Kshs 400 for the shares, he paid it. During the time for balloting he went to represent his son and took ballot



- no 655 which later was changed by the company to no 708. He gave the ballot to his son to follow up the matter.
23. On cross examination, he clarified that his son changed his name from Mwangi to Wakaba because Mwangi was the age mate of his father and his father was Wakaba. He named his son Nicodemus Wakaba Gitonga.
 24. Thiga Gachuhi, a committee member of Othaya Mahiga Chinga Exfacco Company Limited gave evidence. He confirmed that the 2nd Defendant went to his office on September 24, 2012 to check the status of his land, he had been sent from the lands office. The directors of the Company asked him to produce his ownership documents which he did. They zeroed in on the receipt for Kshs 50 for registration dated August 31, 1992 and the receipt for survey which were mandatory, the old ballot card for plot no 655 and the new ballot card no 708 because these four documents proved ownership and membership in the company.
 25. They checked the documents against the register which showed that the Defendant's name had been cancelled without being countersigned or disclosing who did that and the reason. He stated that the cancellation of the Defendant's name from the register and the insertion of the Plaintiff's name was fraudulent. They gave the Defendant a clearance certificate and wrote to the Assistant Chief to summon the parties and establish the rightful owner. The Chief summoned the Plaintiff and when he refused to go for the meeting, the Chief referred the matter to the Land Registrar. He stated that the Company records were similar to those in the lands office at Nanyuki. They left the Defendant to pursue the title at the lands office.
 26. Thereafter the Land Registrar sent the 2nd Defendant to them and the Company formally wrote to the Land Registrar to confirm that the 2nd Defendant was the legitimate owner of the Suit Property. He added that registration and survey fees could not be paid on separate days yet the Defendants' receipt show that he paid them on the same day August 31, 1992.
 27. On cross examination, he confirmed that he was a director of the Company. He confirmed that that was the Company register and that they wrote a letter to the lands office regarding the register clarifying the deletion of the 2nd Defendant's name. He had been a director for 10 years since 2012. He knew that the land was given to those who had registered and paid Kshs 50.
 28. Parties filed submissions which the court considered. The Plaintiff submitted that he was the proprietor of the Suit Property having been issued the title deed on April 7, 1997. He relied on the evidence which he gave on how the Company allocated him the land and thereafter he was issued the title. He relied on Section 26 of the *Land Registration Act* on the protection afforded to a registered proprietor as long as he can show that the title was acquired procedurally. He referred to the register and submitted that the 2nd Defendant's third witness acknowledged during the hearing that the register belonged to the Company but they did not know who cancelled the 2nd Defendant's name and inserted his own. He denied that he was part of conspiracy that led to this. He maintained that the title he had was issued procedurally and relied on the ballot card, receipts and share certificate.
 29. He submitted that the 2nd Defendant failed to prove that he was involved in any fraudulent transaction or cancellation of the register and that he was therefore the absolute proprietor of the Suit Property. He relied on *Pauline Nyambura Kariuki (Suing for and on behalf of the Estate of Samson Kariuki Mange) v Karura Umoja Company Limited [2021] eKLR* on the requirement to prove fraud in the acquisition of share certificates for plots.
 30. The Plaintiff relied on Section 143 (1) of the repealed Registered Land Act (RLA) on the power of the court to order rectification of the register. He urged that despite the fact that the RLA was repealed



following the enactment of the *Land Registration Act* (LRA), Section 107 provides that any right, interest, title or obligation acquired or which accrued under the repealed Act would continue to be governed by the law that was applicable before the commencement of the new statute. The Plaintiff submitted that his rights and interests over the Suit Property having been acquired before the LRA came into force then they ought to be construed under the provisions of the RLA.

31. The Plaintiff relied on *Republic v Kisumu Lands Officer & Another [2010] eKLR* where the court reiterated that it was only a court of law which could cancel a title.
32. The Plaintiff submitted that he was not given any notice of the cancellation of his title yet the Land Registrar should have given him an opportunity to state his case. He added that the Land Registrar had no power under Section 107 of the RLA to cancel the Plaintiff's title and issue another title deed to the 2nd Defendant. He maintained that the title issued to the 2nd Defendant on May 6, 2013 was procured illegally and fraudulently and should be cancelled. Further, that the 2nd Defendant did not produce any documentary evidence to support the allegation that Mwangi Wakaba was also his name. He submitted that the 2nd Defendant failed to prove that he procured his title fraudulently. He concluded that he had proved the root of his title and that he was the lawful owner of the Suit Property. He faulted the Land Registrar for using Section 35 of the RLA on loss of title to gazette the cancellation of his title.
33. The 2nd Defendant submitted that the Land Registrar had power to rectify the register under Sections 14 and 79 (2) of the LRA after summoning the Plaintiff who failed to comply following which a title was issued to him after the gazette. The 2nd Defendant maintained that the Land Registrar followed due process before he rectified the title.
34. The 2nd Defendant submitted that the document he produced showed that he was a bona fide member of the Company and that his documents showing shareholding in the Company were older than the Plaintiff's documents. He pointed out that the Company's register showed that he was the original member registered against entry no 708 but that entry was cancelled and the Plaintiff's name inserted. He submitted that that cancellation was neither owned by anyone nor was it countersigned yet it is the foundation of the Plaintiff's registration as the owner of the suit land. He went further to submit that when the illegality was discovered by the Company, it wrote to the Land Registrar and introduced him as the legitimate owner of the Suit Property. He added that the Land Registrar investigated the complaint and found the registration of the Plaintiff to be fraudulent and asked him to surrender the title which he failed to do. It was gazetted and upon the lapse of the notice, the Plaintiff was issued a new title deed.
35. Further, he argued that the Plaintiff failed to produce any ballot card or clearance certificate issued by the Company and faulted the Plaintiff for not suing the Company or calling any official from the Company to support his case. Further, that he had not called any witness from the lands registry to testify on how he was initially registered as the owner of the suit land and whether there was a clearance certificate from the Company for a title deed to have been issued to him. He maintained that the suit land was now registered in his name through due process which involved the Assistant Chief of the area where the land is situated, the Company which parties claimed they were members of and the land registry in Nanyuki. He emphasised that the Company's representative had denounced the cancellation of his name in its register as illegal.
36. He argued that the Plaintiff had not proved any conspiracy between him and the Land Registrar and also failed to prove fraud against him. He relied on the decision in *Dennis Noel Muhulo Ochwanda & Another v Elizabeth Murungari Njoroge & Another [2018] eKLR* on the requirement to strictly prove allegations of fraud.



37. The 2nd Defendant submitted that the Plaintiff testified that his original plot number was 653 and later became 708 which is shown in the receipt of May 15, 1995. He argued that the Company had as early as January 18, 1985 indicated that his old plot no 655 became plot no 708. According to the 2nd Defendant, the Company had earlier confirmed him as the true owner of the suit land and that parcel no 708 was therefore not available for allocation to the Plaintiff. He submitted that the Plaintiff had not produced any ballot card or clearance certificate from the Company and that in the absence of these documents from the Company, his title deed was fraudulently issued. The 2nd Defendant urged the court to dismiss the suit.
38. The issue for determination is whether the Plaintiff has proved his case on a balance of probabilities for the court to grant the orders he seeks in the plaint dated September 29, 2014. It is not in contention that the land originally belonged to the Company which issued shares to its shareholders and invited them to ballot for the plots after subdividing the land. It is also common ground that it was the Company which handled the allocation of the land to the shareholders and it therefore held the records regarding the allocation of plots to its members. The Land Registrar could only have processed and issued titles based on the records supplied by the Company and other relevant documents including clearance certificates issued by the Company to its members.
39. What is at the heart of this dispute is who between the Plaintiff and the 2nd Defendant has a superior claim to the Suit Property. They both claim to hold valid title deeds over the suit land. The Plaintiff's claim is that he has an indefeasible title over the Suit Property which the Land Registrar procedurally issued to him on April 2, 1997 and which he contends is protected by Section 26 of the [Land Registration Act](#). The 1st Defendant neither filed any documents nor did it participate in the hearing of the case.
40. The Plaintiff claims that he was a shareholder of Company and produced receipts issued by the Company including the one dated May 15, 1995 for payment of Kshs 750/= for plot number 653-708. The receipts dated July 2, 1975, May 30, 1983 and the one in Kikuyu all give the Plaintiff's plot number as 653. He produced the receipt dated March 5, 1997 which the Company issued to him on payment of title deed fees for plot number 708 together with the title deed issued on April 2, 1997.
41. The Plaintiff did not produce any evidence to show how his plot number 653 changed to 708. He failed to explain basis upon which the Land Register issued a title to him yet he did not tender a clearance certificate from the Company or the list prepared by the Company of its shareholders who were entitled to be given land and issued title deeds. The Plaintiff failed to call a witness from the Company to shed some light on how he acquired his title over the Suit Property. Assuming that the document in Kikuyu dated October 29, 1975 written number 653 is the ballot, then a second ballot ought to have been issued to the Plaintiff at the time when he claims that the plot number changed from 653 to 708. He failed to produce any evidence to corroborate this claim. On the other hand, the 2nd Defendant produced a copy of the ballot dated June 29, 1975 for plot 655 and a second ballot card from the Company giving the card number as 708.
42. It was the 2nd Defendant's case that the title the Plaintiff holds over the Suit Property was irregularly issued and that he is the rightful owner of the suit land. He produced receipts issued by the Company, the clearance certificate from the Company and the Company's register which had the 2nd Defendant's name deleted and replaced with the Plaintiff's name. The 2nd Defendant called an official of the Company to give evidence and explain the process followed in the issuance of the title to the 2nd Defendant.



43. The court does not agree with the Plaintiff's submission that Section 107 of the LRA provides a blanket protection for any right, interest or title which was acquired under the RLA regardless of the propriety of the process employed in the acquisition of the right, interest or title. An inquiry into the process used in the acquisition of the right can still be undertaken if the circumstances of the case so require. The LRA which came into force on May 2, 2012 is the applicable law to these proceedings.
44. Section 14 of LRA empowers a Land Registrar to require any person to produce any instrument, certificate or other document relating to a parcel of land and that person is expected to produce the document. Before the 2016 amendments, Section 79 (2) of LRA empowered the Registrar to rectify or direct the rectification of a register or document if the document was obtained by fraud.
45. The evidence tendered by the 2nd Defendant was that the Land Registrar caused a notice to be published in the Kenya gazette of December 9, 2012 informing the Plaintiff that his title was fraudulently obtained and that the Land Registrar intended to issue a new title to the 2nd Defendant but the Plaintiff failed to take steps to challenge the gazette notice within the time given in the notice. If the Plaintiff believed that the Land Registrar exceeded his powers when he issued a title deed over the Suit Property after issuing the gazette notice then in the court's view the Plaintiff ought to have sought orders of judicial review to quash the decision of the Land Registrar.
46. Weighing the evidence tendered by the Plaintiff against that of the 2nd Defendant, the court is inclined to find that the Plaintiff failed to prove that he holds a better title to the suit land than the 2nd Defendant.
47. The Plaintiff's claim is dismissed. Each party will bear its own costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 29TH DAY OF SEPTEMBER 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Kebuka Wachira for the Plaintiff

Ms. Mumbi Kiarie for the 1st Defendant

Mr. Waweru Macharia for the 2nd Defendant

Ms. Stella Gakii- Court Assistant

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