Njaria & 15 others v Gatheca & another (Environment and Land Appeal 35 of 2021) [2022] KEELC 14468 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14468 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 35 OF 2021

JG KEMEI, J

OCTOBER 31, 2022

BETWEEN

ESTHER WAMBAIRE NJARIA .... 1ST APPELLANT

GEORGE MWANGI MWATHE .... 2ND APPELLANT

MILKA WAMBUI KIARIE .... 3RD APPELLANT

PETER GIATHAIGA WANDIGA .... 4TH APPELLANT

KINAMU SELF HELP GROUP .... 5TH APPELLANT

CHRISTOPHER WANGOMBE .... 6TH APPELLANT

SALOME WANJIKU WAWERU .... 7TH APPELLANT

ALEXANDER NDUNGU MUNDATI .... 8TH APPELLANT

PETER MWANTHI MBUGUA .... 9TH APPELLANT

VERONICA NJOKI KINYUA .... 10TH APPELLANT

JOSEPH GITHAKA MWANGI .... 11TH APPELLANT

SALOME NJENGA WAINAINA .... 12TH APPELLANT

LYDIA WANJIKU MWANGI .... 13TH APPELLANT

FLORENCE WANJA MWANGI .... 14TH APPELLANT

PATRICK MAINA MURIITHI .... 15TH APPELLANT

PATRICK GITAU .... 16TH APPELLANT

AND

LUCY NDUTA GATHECA .... 1ST RESPONDENT

MARY MUMBI GATHECA .... 2ND RESPONDENT

(Being an appeal from the judgement of Hon C A OTIENO OMONDI, Senior Principal Magistrate delivered on the 26/3/2021 in MCLE No 162 of 2019, Thika)

JUDGMENT

1. Vide the record of Appeal filed on the May 11, 2021 the Appellants filed an appeal premised on 10 grounds of appeal as follows;

    a. The learned Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence adduced during the hearing and arriving at a decision which is not supported by or is against the weight of the evidence.

    b. The trial Court erred in disregarding its overriding objective and need to dispense substantive and not technical justice.

    c. The learned Magistrate failed to appreciate the need for substantive justice as far as the case before her was concerned given the evidence presented before the said Court by the 1st and 2nd Defendant witness.

    d. The trial Court erred in failing to appreciate the 2nd to 15th Defendant's equitable interest in the suit property.

    e. The learned Magistrate erred in law and in fact by failing to appreciate that the evidence adduced by the 1st Plaintiff outlined the facts of the case exposing all the circumstances that caused the 2nd to 15th Defendants to settle on Ruiru/ruiru East Block 2/1249, which evidence was collaborated by the defence witnesses 1 and 2.

    f. The learned Magistrate erred in law and in fact when failed to consider the Notice of Indemnity to Co-defendant issued to the 16th Defendant by the 1st – 15th Defendants.

    g. The trial Court erred in disregarding the notice to co Defendant thereby allowing the 16th Defendant to benefit from his own wrong doing in furtherance to his unjust enrichment scheme.

    h. The learned Magistrate erred in fact and in law in failing to appreciate that the 16th Defendant admitted to have received money from the 1st Defendant which is the nexus between the Defendants and the land in issue as here was an intention to sell land on the part of the 16th Defendant which caused the 1st Defendant to sub divide and sell Ruiru/ruiru East Block 2/1248 to the 2nd – 15th Defendant.

    i. The learned Magistrate erred in fact and in law when it failed to appreciate that the 16th Defendant was not a truthful witness as he admitted having led to Court in Ruiru MCL & E Case No 94 of 2019, where he obtained a Judgment in his favour essentially affects all the parties in this suit.

    j. The learned Magistrate failed to appreciate the admission and willingness of the 16th Defendant to refund the 1st Defendant's money paid in 2008 at the current market value, which current market value was filed in Court vide a Valuation Report which was admitted as evidence for the 1st to 15th Defendant.

2. The Appellants sought the following orders;

a. That the appeal against the judgement delivered on the March 26, 2021 be allowed.

b. That notice of indemnity to co-Defendant issued on the 16th Defendant be allowed as prayed.

c. Costs of this appeal and trial Court be awarded to the Appellant.

3. Vide an amended Plaint dated the February 28, 2020 the Plaintiffs (now Respondents) filed suit against the Defendants seeking orders of eviction from the suit land (Ruiru/Ruiru/East Block 2/1249), in the alternative the Plaintiffs sought compensation of the suit land from the Defendants as well as the costs of the suit.

4. It was the Plaintiffs case that the suit land belonged to them having been registered in the name of the 1st Plaintiff in 1988. That the suit land was purchased by the 2nd Plaintiff from Nyakinyua Investments Limited and caused it to be registered in the name of the 1st Plaintiff, who is her daughter. They averred that due to an honest mistake at the time of settlement between the 2nd Plaintiff and Wangare Njoroge, the registered owner of parcel Ruiru/Ruiru/East Block 2/1302 and the deceased mother of the 16th Defendant, the two owners mutually agreed to switch the parcels of land between themselves as a way of settling the issue. That by then Wangare was old and sickly and it fell on the 16th Defendant (Gitau) to facilitate the exchange of the titles. It is their case that Wangare died in 2015 before the exchange took place. They accuse Gitau of craftily taking advantage of the situation by selling parcel 1249 to the 1st Defendant, which land was occupied by Wangare, his mother but still registered in the name of the 1st Plaintiff. In turn the 1st Defendant entered the suit land without any colour of right, informally subdivided the land and sold it to the 2nd -15th Defendants.

5. In denying the Plaintiffs suit, the 1st Defendant admitted that she does not know 1st Plaintiff as she dealt with Gitau whom she met in 2007 when Gitau offered to sell to her parcel 1302 registered in the name of his mother, Wangare. A price of Kshs 400,000/- was agreed out of which she paid Kshs 230,000/- leaving a balance of Kshs 170,000/- which was agreed to be paid upon transfer of the land to her. On taking possession, she avers that Gitau informed her that the parcel was being occupied by the 2nd Plaintiff who had constructed her family home thereon. She was assured that the 2nd Plaintiff and Wangare had agreed to exchange the parcels, a position that the 2nd Plaintiff is said to have confirmed to her after which she continued to make the payments as set out above. Having been given the necessary assurances by Gitau and the 2nd Plaintiff, she then took possession of parcel 1249 awaiting the process of exchange of the title in the name of Gitau after which she would complete the payment of the purchase price on transfer of parcel 1249. As fate would have it, she pleaded that Gitau fell sick and had to travel overseas for treatment. That notwithstanding in 2008 with the knowledge of Gitau she subdivided the land and sold to the 2nd -15 Defendants, some of whom are in occupation of the land. That she later came to learn that the title was registered in the name of the 1st Plaintiff.

6. In her counterclaim she sought orders interalia; a permanent injunction restraining the Plaintiffs and Gitau from interfering with parcel 1249; title by way of adverse possession; in the alternative, specific performance of the exchange between the Plaintiffs and the 3rd Defendant and the registration of the property in the name of Gitau.

7. Vide their amended statement of defence dated the September 16, 2020 the 2nd -15th Defendants denied the Plaintiffs claims and admitted that they purchased the plots from the 1st Defendant and took vacant possession and therefore allege to be innocent purchasers for value with no notice and interalia contend that they are entitled to title by way of adverse possession on account of continuous and constructive possession for a period of over 12 years

8. The 16th Defendant denied the claim of the Plaintiffs and the 1st Defendants counterclaim and contended that the 2nd Plaintiff trespassed onto parcel 1302 in 2008 and begun constructing a house in 2010 and therefore it is untrue that she has been in occupation of the land for 34 years. He disclosed a suit MCLE No 94 of 2019 in which he had sued the Plaintiffs for trespass. He refuted any honest mistake in the occupation of the parcels and averred that title deeds were issued in 1988 and all the Nyakinyua members were shown their respective parcels of land upon balloting and survey including the Plaintiffs. That the 2nd Plaintiff denied having met him or his mother in MCLE 94 of 2019. Interalia, he averred that he is a stranger to the 2nd -15th Defendants. In addition, he stated that no sale agreement was adduced by the Plaintiffs to support a sale pursuant to section 3 (3) of the *Law of Contract* and termed the Plaint scandalous, vexatious and frivolous.

9. On the February 8, 2021 the 1st -15th Defendants took out a notice of indemnity against the 16th Defendant pursuant to Order 1 rule 24 of the *Civil Procedure Rules* with respect to the Plaintiffs orders sought against the 2nd - 15th Defendants in the Plaint which included interalia eviction of the 2nd -15th Defendants, in the alternative, orders of compensation of the suit land, costs of the suit and interest. They sought full indemnity in respect to any orders awardable to the Plaintiff in the suit. The notice of indemnity is grounded on the premises that Gitau sold parcel No 1249 to the 1st Defendant and relinquished possession after receipt of part payment of the purchase price with the balance being payable after the title deed of parcel 1249 was obtained in his name to facilitate completion of the sale. That this was done pursuant to the mutual exchange of the two parcels of land. That despite becoming the registered owner of parcel 1302 following the successful succession petition, Gitau failed to effect the exchange the parcel 1302 with 1249. The indemnity therefore is in favour of the 1st -15th Defendants at the current market rates as supported by a valuation report on record.

10. At the hearing of the suit the Plaintiffs called 3 witnesses. The 1st – 15th Defendants called 4 witnesses in support of their case while the 16th Defendant testified solely. I have read and considered the evidence of these witnesses which I shall revert to later in the judgement.

11. On the October 21, 2021 the parties took directions and elected to canvass the appeal by way of written submissions and the Court directed them to so file by December 21, 2021. As at the time of writing the judgement, only the Appellants have filed. None of the Respondents complied with the directions of the Court. I shall therefore determine the appeal based on the pleadings and material on record.

Analysis and Determination

12. I must address my mind to a pleading christened "Replying Affidavit" filed by the 2nd Respondent dated the November 9, 2021 and filed on the November 11, 2021 together with the accompanying documents. The record attests to no leave having been sought and granted by this Court to support the filing of the replying affidavit nor the annextures. Though it must be noted that the annextures are more or less comprise the record of appeal on record, the said pleading remain strange in law and the same is hereby struck out.

13. The duty of this Court is set out in Section 78 of the *Civil Procedure Act* which espouses the role of a first Appellate Court to include the re-evaluation, reassessment and re-analyzation of the record and draw its own conclusions. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own conclusions from the analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. Besides, that duty has been affirmed in

numerous decisions of the superior Courts. In the case of *Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123*, this principle was enunciated thus:

> "...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

14. The issues for determination are; whether there was evidence of exchange of parcel Nos 1249 and 1302; who is the lawful owner of parcel 1249? Whether the Defendants are bonafide purchasers of parcel 1249? What orders should the Court give in the circumstances; whether the appeal is merited; who meets the costs of the appeal?

15. Bearing the above principles in mind, I shall now examine the evidence on record to allow me reach my own conclusions in this suit.

16. I shall now deal with the 1st issue. It is not in dispute that parcel No 1249 belonged to the 2nd Plaintiff who caused it to be registered in the name of the 1st Plaintiff on the August 26, 1988 who is her daughter. It is also not in dispute that parcel No 1302 was registered in the name of Wangari Njoroge, the mother of the 16th Defendant on the August 26, 1988. See copies of titles on record. Evidence was led that both titles trace their roots to Nyakinyua Investments Limited, where both Mary Mumbi Gatheca and Wangari Njoroge were members and shareholders. PW1 led evidence that at the time of taking possession of the said lands, there was a honest mistake leading to the two owners settling on each other's lands in 1985 or thereabouts. That is to say Mary Mumbi unknowingly settled on parcel 1302 in or around 1985 or thereabouts and lived on the said land for over 34 years before the discovery was made. Likewise, Wangari whilst wielding title No 1302 settled on parcel No 1249, owned by Mary Mumbi. Evidence was led that unlike Wangari, Mary Mumbi constructed her family home on parcel 1302 where she lived and raised her children who are now adults, some of whom live on the land. Wangari on the other hand lived elsewhere and had not developed her parcel being 1249.

17. According to the evidence of PW1 she testified and informed the Court that she bought the land parcel 1249 in 1985 from Nyakinyua Investments limited and caused it to be registered in the name of the 1st Plaintiff and settled thereon. That her ballot was No 699. That the confusion may have arisen because the said ballot bore the number 669 on the reverse. That both numbers referred to the two parcels of land as 1302 and 1249. That she settled on parcel 1302 believing that it was her land i.e parcel 1249 for which she had a title through her daughter, the 1st Plaintiff.

18. It was her evidence that all was well until early 2007 when Gitau visited her home and informed her that she had trespassed onto his land and that he should vacate at once. Startled by this news, she conducted a search on parcel 1249 and confirmed that it was still registered in the name of the 1st Respondent, which search he showed Gitau on his second return. That it is then that Gitau informed them that they were occupying parcel 1302 instead of parcel 1249 for which they had a title. Armed with the information she went to Nyakinyua offices to ascertain the allegations and confirmed the registered owners of the two parcels. Upon seeking the services of a surveyor to identify the parcels on the ground, it was confirmed that indeed she was occupying parcel 1302 which belonged to Wangari Njoroge. She told the Court that after several attempts to resolve the issue she and Wangari mutually agreed to exchange the parcels so that Mary Mumbi would occupy parcel 1302 which she had developed. That

she then awaited a call from Nyakinyua to complete the exchange as she continued with her peaceful occupation of the land.

19. It was her further testimony that Gitau returned again in 2015 and tried to forcefully evict her and she visited the offices of Nyakinyua to track down the progress of exchange and she was informed that Wangari had passed away. That by then parcel 1249 had been sold by Gitau and subdivided by the 1st Defendant and occupied by the Appellants.

20. The evidence of PW1 was corroborated by the evidence of PW2, PW3, DW1 and DW2. DWI, Muchina Mwangi Mukoke testified and stated that he is a village elder at Theta Ward and assists the chief of the area to resolve disputes in the said ward. That Mary Mumbi was shown the wrong plot by the surveyor of Nyakinyua after which she occupied and settled on it. That Gitau reported the matter to the chief namely Solomon Kiuna and when Mary Mumbi was summoned she attended the meeting. That Gitau and his mother, Wangari Njoroge were also present. That after deliberations it was agreed that Mary Mumbi and Wangari should exchange the parcels and Mary Mumbi to continue living on parcel 1302. That Gitau and his mother had no objection to the exchange.

21. According to the evidence of DW2, she stated that she was introduced to Gitau through a friend who was buying another parcel of land from Gitau. That Gitau offered her parcel 1302 belonging to his mother. That though the property was registered in the name of his mother the same was occupied by Mary Mumbi. That Gitau assured her that the matter had been resolved and agreed that the parties would exchange the parcels. That she also confirmed the issue of the exchange from the 2nd Plaintiff and with that embarked on the payment of the purchase price to Gitau.

22. Gitau in his statement and evidence has denied the exchange of the land and insists that the Plaintiffs are trespassers on his land. Likewise, he also denied ever selling the parcel 1249 to the 1st Defendant and accused the Plaintiffs of taking no action when their land was being disposed to the Defendants despite living in the neighbourhood. That he sued the Plaintiffs for trespass in MELC No 94 of 2019. He disputed that there was any wrongful occupation of the parcels as each owner was allocated their respective plots. That he held his mother's Power of Attorney and as such would have known about the exchange. That interalia his mother was bedridden from 2006 and there was no way she would have agreed to the exchange without his knowledge as he is the only child and caretaker of his mother's affairs. That in any event the 2nd Plaintiff denied ever meeting him or his mother in her pleadings in MCLE 94 of 2019. He also faulted the 1st Defendant for not carrying out due diligence nor obtaining Land Control Board consent for the alleged transaction involving parcel 1249.

23. At the hearing Gitau informed the Court that at the Chief's office in 2007, it was agreed that Mary Mumbi would move to her property parcel 1249 and he would settle on parcel 1302. That his mother was not present in the meeting. Similarly that this is the resolution that was arrived at the DCI, Ruiru. That he never agreed to the exchange of the land nor the sale of the parcel 1249 to the 1st Defendant. He denied that DW1 was present at the Chief's office.

24. I have analysed the evidence in this suit and my finding is that there was indeed -no agreement of exchange between the two land owners. It could as well have been discussions and recommendations to that effect but the bottom line is that no exchange was reduced into writing with respect to an exchange agreed between Wangari Njoroge and Mary Mumbi with respect to parcels 1302 and 1249. I find that answer in the negative.

25. Having held that there was no exchange of the parcels of land this Court will now determine who is the lawful owner of the suit land. Evidence was led by the Respondents that the land is registered in

the name of the 1st Respondent as shown by the copy of the title registered in her name on the August 26, 1988.

26. Section 26 of the *Land Registration Act* mandates the Court to take a certificate of title as primafacie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to permitted restrictions encumbrances in law. In the absence of any evidence to the contrary, the Court cannot hesitate to hold that the 1st Respondent is the lawful registered owner of the land. I find no ground to fault the trial Court in making the conclusion that this Court has arrived.

27. It is her case that the 16th Appellant illegally sold the suit land to 1st Defendant without any consent and authority of the Plaintiffs wherein the 2nd – 15 Defendants who have entered the suit land and constructed structures thereon.

28. The evidence of the 1st Appellant is that she bought the land from the 16th Appellant who informed her that though the land was registered in the name of the 1st Respondent he was going to see to it that an exchange was done. It would appear this was not done and curiously the 15th Appellant has denied the sale to the 1st Appellant and insists that he never sold any land; further that the 1st Appellant ought to have conducted due diligence before purchasing the land and further that the Respondents were negligent in not protecting their land noting that they have occupied 1302 for over 30 years and lived in the vicinity and cannot claim that they were not aware. With respect to monies in the sum of Kshs 230,000/- deposited in his account he stated that he did not know what the amounts are. This was in contrast to the evidence led by the 1st Appellant that he paid the 15th Appellant the sum in three tranches for the sale of the land leaving a sum of Kshs 170,000/- pending the transfer of the suit land. The evidence of the 15th Appellant is not believable and it is clear that the 15th Appellant indeed sold the suit land to the 1st Appellant and received consideration in the sum of Kshs 230,000/-.

29. The next question is whether the Appellants were bonafide purchasers for value without notice. It was the 1st Appellants case that she bought the land from the 16th Defendant and not the Respondents. She failed to lead evidence in support of the purchase. Such evidence would have been in form of a sale agreement. Her evidence was clear that though she was aware that the land did not belong to the 15th Defendant she went ahead to pay the 15th Appellant when she know or ought to have known that the 15th Defendant did not have any interest in the land. She went ahead to subdivide the same and sold to the rest of the Appellants. The Appellants have argued that they are persons in occupation and have acquired processionary rights over the suit land which rights they argue are equitable and bind the land. The case of Mwangi Maina v Mwangi is distinguishable in the in that case the owner of the land put the Defendants in possession of the land. In this case the 1st Appellant was categorical that she did not transact with the Respondents. She did not pay the Respondents any monies but instead claim to have paid Gitau, which monies are denied by the said Gitau. It is my finding that the possession of the Appellants is not one that has crystalized into prescriptive rights noting that the basis of the possession was not by the consent and authority of the registered owner.

30. In the case of *Lawrence Mukiri v Attorney General & 4 Others [2013] eKLR* where the Court stated what amounts to "bonafide purchaser for value" thus:

> " ... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:
>
> a. He holds a Certificate of Title.
>
> b. He purchased the Property in good faith;

c. He had no knowledge of the fraud;

d. The vendors had apparent valid title;

e. He purchased without notice of any fraud;

f. He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."

31. In this case it has been admitted by the 1st Appellant that she purchased the land from Gitau while knowing nor ought to have known that he held no title for the suit land. Though she did not lead evidence of any due diligence on the acquisition, she was aware that the land belonged to 1st Respondent. It could as well be that there were discussions on how to resolve the mistaken occupation by the registered owners of the land but as admitted by PW2, Wangari died before the exchange took place. It is evident that upon the land been devolved to the name of Gitau, Gitau proceeded to file suit and successfully obtained orders of eviction of the Respondents from the suit land. There was therefore no apparent title to warrant the protection of the Appellants. It is also clear that the vendor, Gitau had no apparent title to pass to the Appellants. The Appellants risked their money while in the knowledge of deficiency of title and they cannot be said to have acted bonafide.

32. In the end I find that the appeal is devoid of merit. I find no grounds to fault the trial Court's decision.

33. It is hereby dismissed with costs to the Respondents.

34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 31ST DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1st – 15th Appellants – Absent

Kahia for 16th Appellant

Ms. Mbugua HB Kamonjo for 1st and 2nd Respondents

Court Assistant – Dominic