



**Mathews v Waithera & another (Environment and Land Case Civil Suit 888 of 2017) [2022] KEELC 13616 (KLR) (17 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13616 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND CASE CIVIL SUIT 888 OF 2017  
MN GICHERU, J  
OCTOBER 17, 2022**

**BETWEEN**

**FRANK MWANGI MATHEWS ..... PLAINTIFF**

**AND**

**ELIZABETH HANNA WAITHERA ..... 1<sup>ST</sup> DEFENDANT**

**SOIL MERCHANTS (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Frank Mwangi Mathews, the plaintiff seeks the following reliefs against the defendant.
  - a. A permanent injunction restraining the defendants, their servants, agents from encroaching, trespassing and /or interfering with the plaintiff's possession, ownership and/or quiet enjoyment of the land known as Ngong/Ngong/15506 and Ngong/Ngong/15507 now subdivided into Ngong/Ngong/4531-44538 and 44539 – 44554 and any parcel of land excised from Ngong/Ngong/15506 and 15507.
  - b. An order declaring the fraudulently obtained title deeds void, cancellation of the fraudulently obtained titles and the Land Registrar Kajiado, to issue new title deeds to the plaintiff.
  - c. Damages and mesne profits.
  - d. Costs of the suit and interest.
  - e. Any other or further orders and relief the court may deem fit to grant.

This is as per the further amended plaint dated November 24, 2017.

2. The plaintiff's case is as follows. He used to be a boyfriend to the first defendant Elizabeth Hanna Waithera. The two cohabited as husband and wife until 1996 when their relationship irreparably broke down. Earlier in 1993, the plaintiff entered into an agreement with one Lolomaita Sidi Moiko for



the purchase of LR Ngong/Ngong/15506 and 15507. The plaintiff was to pay the purchase price in installments. By 1996, there was a balance of Kshs 18,000/=.

The first defendant took the plaintiff's identity card secretly. She went to Lolomaita and lied to him that she had been sent by the plaintiff with instructions to pay the balance of Kshs 18,000/=, and have the suit parcels transferred to her.

Lolomaita then transferred the land to the first defendant. Subsequently, the first defendant transferred the land to the second defendant which in turn transferred it to other parties including the other co-defendants. All this happened even though the plaintiff had cautioned the land parcels so that that they could not be partitioned or transferred until the caution had been lifted.

In the course of time, and during the pendency of the suit which has been in court for over 13 ½ years, the plaintiff has filed the following evidence in support of his case.

- i. Copy of order of injunction dated December 8, 2005 restraining the first defendant from dealing with the suit parcels and ordering for maintenance of status quo issued in Kajiado Senior Resident Magistrate's Court Case No 117 of 2005.
  - ii. Copy of certificate of official search dated February 2, 2009 for LR 15507 showing the second defendant as the registered proprietor thereof.
  - iii. Copy of register (green card) showing how each of the two parcels was transferred from Lolomeitaa Sidi Moiko to the first defendant and then to the second defendant.
  - iv. Copy of ruling in Kajiado Senior Resident Magistrate's Court Case No 117 of 2005 dated December 7, 2005.
  - v. Copy of affidavit by Lolomeitaa Sidi Moiko dated February 16, 2009 to the effect that the two parcels were sold to the second Defendant.
  - vi. Copy of sale agreement between the first defendant and Lolomeitaa which says that the first defendant is wife to the plaintiff.
  - vii. Copies of transfer instrument for the suit parcels between the first defendant and Lolomeitaa.
  - viii. Copies of title deeds for the suit parcels in the name of the first defendant together with the Land Control Board consents and applications for consent.
  - ix. Copy of caution dated September 23, 1996 registered by the plaintiff against LR 15507.
3. The first defendant through counsel on record filed a written statement of defence dated October 15, 2019. In the defence, she denies the plaintiff's claim. Her defence is that it is not the plaintiff who bought the suit parcels from Lolomeitaa. Instead, she is the one who bought the land with the financial assistance of her late mother who gave her Kshs 195,000/-. The plaintiff did not offer her any assistance.
  4. The second defendant Soil Merchant (K) Limited, filed a written statement of defence dated November 9, 2018, whose main thrust is that they purchased the suit property from the first defendant in good faith, for value and they did not participate any fraud. They pray for the dismissal of the suit with costs.

Further to the above, Samuel Njenga Kanyoro, the director of the second defendant, filed the following to support the defence.

- i. Undated witness statement.



- ii. Copies of the title deeds for the suit land in the names of the first defendant, both dated September 29, 1996.
  - iii. Copies of register for the suit parcels (green card).
  - iv. Copies of the consent of the Land Control Board.
  - v. Copies of transfer forms duly executed by the transferor and the transferee.
  - vi. Copies of the certificate of official search all in the name of the first defendant.
5. Reuben Kariuki Nguruku, Mary Ngima Karanja, Margaret Nyambura Tipis, George Gichuru Nderitu, James Oura Osumo, Godwin Omondi Ojwang, Wilfred Mboya Osumo, John Kiniu Musau, and Evans Lusisi Mugeru referred to as the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup> and 23<sup>rd</sup> defendants through their counsel on record filed a written statement of defence dated 22/2/2018.
- Their defence is that they own land parcels numbers 44531 to 44538, which they bought from the second defendant or other third parties. At the time they bought the land, parcels numbers 15506 and 15507 did not exist and they have no privity of contract with the plaintiff.
- They pray for the dismissal of the plaintiff's suit against them with costs.
6. In support of their case, the nine defendants filed a witness statement by the 17<sup>th</sup> defendant dated February 22, 2018. They also filed the following documents.
- i. Copies of transfer documents for parcels 44531 to 44538
  - ii. Copies of sale agreements for all the relevant parcels.
  - iii. Copies of title deeds for all the relevant parcels.
  - iv. Copies of consents from the Land Control Board for all the relevant parcels.
7. The nineteenth defendant Esther Muringo Wang'ombe through counsel on record filed a written statement of defence dated February 28, 2018 in which she denied the plaintiff's claim.
- Her defence is that she owns LR Ngong/Ngong/44549, which she bought from Irene Mwangi Kabuya at an agreed consideration of Kshs 4 million. Before transacting with the registered owner of the parcel, she carried out a search and established that the land was in the name of the seller and was free from all encumbrances.
- She prays that the plaintiff's suit against her, be dismissed with costs.
- In support of her case, the nineteenth defendant filed a witness statement dated February 28, 2018.
8. At the trial on December 15, 2021, only the plaintiff, the first defendant, and the second defendant's representative testified. The plaintiff appeared in person. Each of the witnesses adopted their written statements and documents and they were then cross-examined by the adverse parties counsel.
9. Counsel for the parties filed written submissions as did the plaintiff. The issues raised in the submissions can be summarized as follows.
- i. Probative value of the affidavit evidence of Lolomaitaa Sidi Moiko?
  - ii. Whether the suit parcels are matrimonial property acquired by the plaintiff and the first defendant?



- iii. Whether the suit parcels were sold when there was in force an order dated March 3, 2009 forbidding their alienation?
- iv. Who has the burden of proof?
- v. Whether the second defendant is a bona fide purchase for value without notice of any defect in the first defendant's title?
- vi. Whether the second defendant is the legal and rightful proprietor of the parcels known as Ngong/Ngong/15506 and 15507?

10. I have carefully considered all the evidence adduced by the parties in this case. I have also considered the issues in the submissions. I find that the issues as identified by the parties and their counsel will resolve the dispute. I make the following findings on the six (6) issues as raised.

On the first issue, I do not find any probative value in the affidavit evidence of the witness called Lolomeitaa Sidi Moiko. We are told by the plaintiff that the witness was illiterate.

We have not been told how she came to record an affidavit in the English language. If there was any translation from her vernacular language, we have not been told who did.

More importantly, this witness was never called in court to be cross –examined on her evidence regarding who between the plaintiff and the first defendant purchased the suit premises from her.

On the second issue, I find that the plaintiff has not proved that the two parcels are matrimonial property. Even though the case lasted about thirteen years, the plaintiff did not file any witness statement or other evidence to prove that he contributed anything towards the purchase of the suit property.

When subjected to cross-examination he could not convince that he had a valid agreement with the seller of the land. He could not produce any evidence of money withdrawn from his account and paid to the seller. He has not given a detailed account of how much he bought the land for and who his witnesses were.

This was very important because his evidence is strongly disputed by the first defendant. Since the plaintiff is the one with the burden of proof, he needed to preponderate his case with convincing and credible evidence. He did not do so.

On the third issue, I find that there is no sufficient proof that the land parcels in question were sold by the first defendant to the second defendant when there was a court order in force.

In fact, even from the plaintiff's own copy of green card dated February 16, 2009, the title deeds were issued to Soil Merchants on January 28, 2009, while the court order in Civil Case No 31 of 2009 is dated March 3, 2009. When the court order was issued, the land had already been transferred to the second defendant.

Unfortunately, the plaintiff did not raise these issues at the trial. He did not file evidence to that effect. He is only raising them in submissions when there is no opportunity of hearing the parties respond to them.

On the fourth issue, I find that it is trite law, that the party who would fail if the case was not proved is the one with the burden of proof.

In this case, it is the plaintiff who has the burden of proof.

On the fifth and sixth issues, I find that the second defendant and indeed all the other defendants are innocent purchasers for value and that they acquired good title to the property that they bought.



As stated earlier in the judgment, the plaintiff never proved that he ever bought the suit parcels from Lolomeitaa Sidi Moiko.

This means that there is no defect in the first defendant's title to the property. She therefore passed a good title to all those that she sold the land to.

For the above reasons, I find no merit in the plaintiff's suit and I dismiss it with costs to the defendants.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17<sup>TH</sup> DAY OF OCTOBER, 2022.**

**M.N. GICHERU**

**JUDGE**

