



**Thige v Kiguongo & another (Environment and Land Case Civil Suit
35 of 2012) [2022] KEELC 13539 (KLR) (11 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 35 OF 2012
MD MWANGI, J
OCTOBER 11, 2022**

BETWEEN

SIMON THIONG'O THIGE PLAINTIFF

AND

FRANCIS NJOROGE KIGUONGO 1ST DEFENDANT

JOAN WANGARI KARIUKI 2ND DEFENDANT

JUDGMENT

Background

1. The Plaintiff claims ownership of the parcel of Land known as LR No Nairobi/Block 126 /506 (hereinafter referred to as the suit property). The Suit property is however registered in the joint names of the 1st and 2nd Defendants. The Plaintiff alleges that the registration in favour of the Defendants was unlawful and or mistaken since he had already bought the shares of the original allottee thereby acquiring ownership of the plot number 685 which is what later became LR No Nairobi/Block 126/506.
2. The Plaintiff therefore prays for a declaration that he is the legal owner of the suit property and the cancellation of the entries No2 and 3, on the register of title of LR No Nairobi/Block 126/506 and that he instead be registered as the legal owner of the suit property.
3. The Defendants responded to the Plaintiff's claim by way of a joint statement of Defence and counterclaim filed in court on May 21, 2012. They denied the Plaintiff's claim in its entirety and put him to strict proof. The Defendants aver that they were bona fide members of Ngúndu Farmers Co-operative Society and therefore lawfully acquired the suit property. It is their assertion that the Plaintiff is a stranger to them and he has no cause of action against them, if at all.



4. The Defendants further plead that the Plaintiff's claim, if any, would have been against the now liquidated Ng'undu Farmers Co-operative Society. Such a claim, the Defendants allege would be time-barred in any event.
5. The Defendants counter-claim against the Plaintiff seeking the removal of the caution he placed on the title to the suit property and general damages for trespass. They accuse the Plaintiff of trespassing onto their land and committing acts of wastage and placing the caution on their title.

Evidence adduced

6. The case proceeded to hearing and the parties testified as witnesses in their respective cases. The Defendants on their part called an additional one witness.

Evidence adduced by the Plaintiff

7. The Plaintiff testified before the Court on May 10, 2022. The Plaintiff adopted as his evidence in –chief his witness statement dated January 16, 2012, the further witness statement and the Supplementary witness statement both dated 4th March, 2020. He further produced as exhibits the documents on his list of documents dated January 16, 2012 and July 24, 2019 respectively.
8. The Plaintiff's testimony was that he bought the suit property from one Gladys Wanjiru Ndungú in the year 1988. He allegedly took possession of the suit property immediately after buying the property.
9. The Plaintiff testified that in the year 2007, when he sought to register the property for purposes of obtaining a title, he discovered that the suit property had already been registered in the joint names of the Defendants herein. He termed the said registration fraudulent, illegal, wrongful and mistaken.
10. The Plaintiff insisted that he was the lawful owner of the suit property. He averred that the suit property was a subdivision of LR No 11593 which was owned by the defunct Ngúndu Farmers Co-operative Society Limited (hereinafter referred to as 'the co-operative society'. The Co-operative Society later subdivided the original parcel into several plots amongst which Gladys Wanjiru Ndungú was allocated plot No 685 through her ballot number 000685 on account of her 3 shares at the Co-operative Society which was evidenced by share certificate No 719.
11. The Plaintiff alleged that in 1988, he was introduced to Gladys Wanjiru Ndungú who was selling her plot No 685 measuring 7.5Acres. He together with the said Gladys visited the co-operative society, who, according to the Plaintiff confirmed that Gladys indeed owned the land and therefore had the capacity to sell and transfer it to him.
12. The Plaintiff further thereafter on 25th November, 1988 entered into an agreement with Gladys whereby, she sold him her 3 shares. She consequently transferred the share and ballot paper to him at the offices of the co-operative society and the co-operative society amended its records accordingly.
13. The Plaintiff alleged that the Original Land Reference Number 11593 (original Parcel owned by the Co-op Society) was subsequently brought under the provisions of the Registered Land Act, 300 (now repealed) and the suit property became Title No Nairobi/ Block 126/506.
14. The Plaintiff stated that he had been visiting the suit property from the time he bought it and had even sold portions of it to some friends though he had not transferred title to them.
15. It was in the year 2011, that he discovered that the title to the suit property had been registered to the Defendants. The Search he conducted indicated that the land had been registered in favour of the Defendants way back on August 15, 2007.



16. In cross-examination by the advocate for the Defendants, the Plaintiff confirmed that he was not in actual occupation of the suit property. Further that he and Gladys Wanjiru who had allegedly sold the land to him did not enter into a formal agreement. He had not had any evidence of payment of the purchase price to Gladys. He further did not know the whereabouts of Gladys Wanjiru Ndung'u.
17. From the extract of the register of members of Ngu'ndu Farmers Co-operative Society Limited that was shown to him, the Plaintiff confirmed that his name was not in the said register. The name of Gladys Wanjiru Ndungú too was not in the register. The names of the Defendants on the other hand however, were in the register, confirming that they were allocated the suit property.
18. The Plaintiff further confirmed that he was not issued with any document howsoever after purchasing the land that confirmed him as the new owner of the land.

Evidence Adduced on behalf of the defendants

19. Both Defendants testified as witnesses in their case. They further called a third witness who testified as 'DW3'.
20. The 2nd Defendant Joan Wangari testified as 'DW 1'. She relied on her witness Statement dated May 17, 2012 which was adopted as her evidence in-chief. She further produced as exhibits the documents on the Defendants 'List of Documents' and the 'Supplementary list of documents' dated March 5, 2020.
21. 'DW1' testified that she was given her share of the land by her mother when she was still alive. The same was transferred to her and she thereby became a member of Ng'undu Farmers Co-operative Society. She remembered attending the meetings of the Co-operative Society as a member. 'DW1' agreed with the 1st Defendant to jointly register as owners of the suit property. They have not built on the Land though they have had possession of it.
22. 'DW2' was the chairman of Ngúndu Farmers Co-operative Society. He adopted his witness statement dated May 17, 2012 and his further statement dated March 3, 2020 as his evidence in chief.
23. 'DW2' was the chairman of Ngúndu Farmers Co-operative Society between the years 2002 and 2008. He confirmed the Member's Register produced in court as the authentic register of the society. He denied that Gladys Wanjiru Ndung'u was ever a member of the Co-operative Society. The register produced in court was made during his tenure as the chairman of the Co-operative Society after a through exercise of verification of the genuine members of the co-operative society.
24. Prior to the verification of members and subsequent compilation of the members' register, notices were published in the Kenya Gazette and the Print Media calling upon anyone who had any claim to come forward and verify their claim. The Plaintiff did not come forward at that time to validate his claim, if any at that material time. The notices were targeted at all members of the Co-op Society, former members, persons claiming through former members, and any other person with interests in the Co-operative Society. The Co-operative Society has since been wound up.
25. Finally, the 1st Defendant testified as 'DW3' by adopting his witness statement of May 17, 2012. He confirmed that he bought his shares from Ngúndu Farmers Co-operative Society. He had a share certificate and an allotment letter to support his claim.



Court's directions

26. Upon the conclusion of the hearing, the court on June 23, 2022 directed parties to file written submissions. Both parties complied and the court has had the occasion to read the submissions of both parties with the attached authorities in support of the parties' respective positions.

Issues for Determination

27. Considering the pleadings filed in this case, the evidence adduced and the respective submissions of the parties, the court is of the view that the issues for determination in this case are; -
- a. Whether the Plaintiff has established a valid claim of ownership of the suit property.
 - b. Whether the Plaintiff has proved fraud against the Defendants.
 - c. Whether the Defendants' title to the suit property should be cancelled.
 - d. Whether the caveat/caution lodged against the title to the suit property by the Plaintiff should be removed.
 - e. Whether the Defendants are entitled to damages for trespass.
 - f. Who shall bear the costs of this suit?

Analysis and determination

a. Whether the plaintiff has established a valid claim of ownership of the suit property

28. The Plaintiff claims that he is the lawful owner of the suit property. He alleges that he bought the suit property from Gladys Wanjiru Ndungú in 1988. He allegedly took possession immediately after buying the property.
29. He averred that the suit property was a subdivision of LR No 11593 which was owned by the defunct Ngúndu Farmers Co-operative Society Limited. The Co-operative Society later subdivided the original parcel into several plots amongst which Gladys Wanjiru Ndungú was allocated plot No 685 through her ballot number 000685 on account of her 3 shares of the Co-operative Society evidenced by share certificate No 719. He allegedly entered into an agreement with Gladys for the sale of her 3 shares of the co-operative society. She consequently transferred the share and ballot paper to him at the offices of the co-operative society and the co-operative society amended its records accordingly.
30. Although the Plaintiff alleges to have purchased the suit property from Gladys Wanjiru Ndung'u, he did not provide any form of proof howsoever to confirm the alleged purchase. In cross-examination by the advocate for the Defendants he again confirmed that he had no formal agreement to show nor proof of payment of the purchase price.
31. Section 3(3) of the *Law of Contract* provides that; -

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) The contract upon which the suit is founded:
 - i. is in writing;
 - (ii) is signed by all the parties thereto; and



- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

32. Section 3 (3) of the *Law of Contract Act* before the amendment of 1990, provided that:

- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it:

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

SUBPARA i.

has in part performance of the contract taken possession of the property or any part thereof; or

SUBPARA ii.

being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

33. The Plaintiff did not produce any evidence in the form of a written memorandum or a sale agreement to support his allegation that there was a transaction between him and the said Gladys. Further, the Plaintiff did not call any witness to confirm that in deed there was ever such an agreement made.
34. The Defendants have vehemently contested the Plaintiff’s alleged ownership of the suit property. The 2nd Defendant Joan Wangari averred that she was given her share of the land by her mother when she was still alive. The same was transferred to her and she became a member of Ng’undu Farmers Co-operative Society and even attended meetings of the Co-operative Society as a member.
35. ‘DW2’ who was the chairman of Ngúndu Farmers Co-operative Society validated the evidence by ‘DW1’. He confirmed that the Members’ Register produced in court was the authentic members’. He denied that Gladys Wanjiru was ever a member of the Co-operative Society.
36. From the foregoing the Court’s finding is that the Plaintiff has not established a valid claim of ownership of the suit property. The Defendants have on the other hand demonstrated how they acquired ownership of the suit property and eventually obtained their joint title.

b. Whether the plaintiff has proved fraud against the defendants

37. The Plaintiff claims that after purchasing the suit property, he sought to register the property for purposes of obtaining a title. He alleges that it was then that he discovered that the suit property had already been registered in the joint names of the Defendants. He termed the said registration fraudulent, illegal, wrongful and mistaken. He insisted that he was the lawful owner of the suit property.



38. In the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] EKLK the Court of Appeal stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.. “..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

39. The Plaintiff had not in his plaint specifically pleaded nor particularized the allegations of fraud as required. He mentioned it in passing as indicated above. He has not adduced any evidence to the required standard to prove how the alleged fraud was perpetuated by the Defendants. Consequently, the court finds that Plaintiff’s claim of fraud against the Defendants is not only unfounded but unsubstantiated as well.

c. Whether the defendants’ title to the suit property should be cancelled

40. Section 26 (1) of the *Land Registration Act* provides that:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

40. The Certificate of Title issued by the Registrar upon registration shall be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. By the above provision, the Defendants are the absolute indefeasible owners of the suit property. The only grounds upon which the Defendants’ title would be challenged are fraud or misrepresentation to which the Defendants are proved to be party to or where there is proof that the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.

41. The Plaintiff has not proved any of the above grounds. This court therefore has no basis for interfering with the registration of the Defendants as the rightful owners of the suit property.

d. Whether the caveat/caution lodged against the title to the suit property by the plaintiff should be removed.

42. As noted earlier, the Defendants filed a counterclaim against the Plaintiff seeking the removal of the caution placed on the title to the suit property. The court having found that the Plaintiff has not established any claim of right over the suit property, there is no basis for the maintenance of the caution placed by the Plaintiff over the title to the suit property.



43. In any event, and as stated by this court in the case of *Mary Njeri Kariuki & 7 Others v Mary Mugure Daniel Kariuki* [2022] eKLR, where this court agreed with the holding in the case of *Sammy Nganga Ngatiri S.S Vs. George Ngatiri & 2 Others* (2021) eKLR, a caveat/caution should only serve as a temporary measure and should not be used to limit or deprive the land owner of his right to property indefinitely.
44. Accordingly, the court's finding is that the caveat/caution lodged by the Plaintiff on the title to the suit property should be removed forthwith.

E. Whether the defendants are entitled to an award for general damages for trespass

45. The Defendants in their counter-claim sought general damages for trespass against the Plaintiff. They accused the Plaintiff of trespassing onto their land and committing acts of wastage on the land. From their evidence however, the Defendants have been in possession of the land. The Plaintiff has not carried out any activity on the suit property.
46. This is a claim that the Defendants have surely not proved against the Plaintiff. It is disallowed.

E. Who shall bear the costs of this suit?

47. Having found in favour of the Defendants, the Court has not reason to depart from the norm that costs follow the cause. Accordingly, the Court orders that the Plaintiff should bear the costs of the suit as well as the Counterclaim.

Conclusion

48. In conclusion the Court makes the following orders: -
- a) The Plaintiff's case is hereby dismissed.
 - b) That the caveat/caution lodged on the parcel of land number Nairobi Block 126/506 be removed forthwith.
 - c) That the Plaintiff shall bear the costs of the suit as well as the costs of the Counterclaim by the Defendants.

It is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mwawoh holding brief for Mr. Naragwi for the Plaintiff.

Ms. Maina holding brief for Mr. Mbigi for the Defendants.

Court Assistant Hilda.

M.D. MWANGI

JUDGE

