



Kagagi & another v Ng'ang'a & 4 others (Environment & Land Case 1 of 2010) [2022] KEELC 15188 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1 OF 2010
MD MWANGI, J
NOVEMBER 24, 2022**

BETWEEN

PETER MWAI KAGAGI 1ST PLAINTIFF

EUNICE WANJIRU MWAI 2ND PLAINTIFF

AND

DAVID KUNG'U NG'ANG'A 1ST DEFENDANT

ANDREW KYENGO 2ND DEFENDANT

MESHACK AMBUKA 3RD DEFENDANT

BERNARD MAINA 4TH DEFENDANT

ARTHUR MWAURA MBURU 5TH DEFENDANT

JUDGMENT

Background

1. In their amended Plaint filed July 28, 2010, the Plaintiffs pray for Judgement against the Defendants jointly and severally for;
 - a. A declaration that the Plaintiffs are the legal owners of Plot Number 50 located in Komarock Phase III developed by Embakasi/ Njiru United Self Group in which the 2nd, 3rd and 4th Defendants are the Chairman, Secretary and Treasurer respectively.
 - b. An injunction restraining the 1st and 5th Defendants whether by themselves, their employees, servants or agents or otherwise howsoever from trespassing into or interfering with the occupation and ownership of parcel of land known as Plot Number 50 comprised in a Certificate Number 1495 issued by the 2nd, 3rd and 4th Defendants to the Plaintiffs and located in the Komorock Phase III scheme developed by Embakasi/ Njiru United Self Help Group.



- c. An injunction compelling the 1st and 5th Defendants to remove forthwith any structures illegally erected on parcel of land known as Plot Number 50 comprised in a Certificate Number 1495 issued by the 2nd, 3rd and 4th Defendants to the Plaintiffs and located in Komorock Phase III Scheme developed by Embakasi/Njiru United Self Help Group or in default thereof, the Plaintiffs do proceed and remove such structures at the cost of the 1st and 5th Defendants.
 - d. Costs of this suit.
2. The Plaintiffs claim that they are the owners of land parcel known as Plot Number 50 comprised in a Certificate Number 1495 issued by the 2nd, 3rd and 4th Defendants. The Plot is located in Komorock Phase III Scheme developed by Embakasi/ Njiru United Self Help Group. The Plaintiffs allege that they purchased the suit property from one John Mwaura Wanaina for a sum of Kshs 550,000/=-, which sale was subsequently recognized and registered by the 2nd, 3rd and 4th Defendants who issuing them with a Beacon Certificate Number 958 and an ownership Certificate Number 1495 on behalf of Embakasi/ Njiru Self Help Group. The Title Deed was to be processed thereafter by the Registrar of Titles.
 3. The Plaintiffs further assert that they took possession of the suit property after the purchase. However, on or about December 16, 2009, the 1st and 5th Defendants trespassed into the suit property with the authority of the 2nd, 3rd and 4th Defendants and commenced construction thereon without any colour of right. The Plaintiffs aver that the construction were intended to defeat their interests on the suit property.
 4. The Plaintiffs' case is that the Defendants have persisted with their trespass and unless the court intervenes, they stand to suffer irreparably harm.
 5. The 1st and 5th Defendants responded to the Plaintiffs' claim by filing their respective Statements of Defence. The 5th Defendant's Statement of Defence is dated June 25, 2010. The 1st defendant's statement of Defence on the other hand is dated the November 29, 2021.
 6. The 2nd, 3rd and 4th Defendants did not enter appearance in the matter.

5th Defendant's Defence

7. In his Defence, the 5th Defendant denied the Plaintiffs' claim. He averred that Plot No 50 Komarock Phase III scheme is part of a larger parcel owned by the then City Council of Nairobi and the 2nd, 3rd and 4th Defendants did not have any proprietary interests capable of registration and could therefore not pass any title either to the Plaintiffs or any other person.
8. The 5th Defendant asserted that after he purchased the said Plot from the 1st Defendant, he proceeded to the City Council of Nairobi Offices and was registered in the Council's records as the Proprietor as Lessee after payment of the Stand Premium, Land Rent and Rates totaling to a sum of Kshs 11,800/-. The Plot was then re-named Plot No.33- Extension Spine Road Estate.
9. He further avers that before purchase of the said Plot from the 1st Defendant, he conducted a Search at the offices of Embakasi/Njiru United Self Help Group and confirmed that the 1st Defendant, David Kungu Nganga was indeed the registered owner of the suit property. The 1st Defendant was already in possession and he had been issued with the Share Certificate and Beacon Certificate.
10. He further asserts that he has extensively developed the Plot by putting up a commercial storey building now occupied by tenants after he was issued with the Grant of the Lease by the City Council of Nairobi. He argues that the 2nd, 3rd and 4th Defendants do not have any valid legal interest and/



or title to the suit property which belongs to the City Council of Nairobi. The Plaintiffs' Certificate of Ownership and the Beacon Certificate are equally not valid. That even if the 2nd, 3rd and 4th Defendant's and the organization had any valid Title to the suit property, the 1st Defendant was registered in the records of City Council as the bona fide owner and he legally transferred his rights to the 5th Defendant for valuable consideration.

11. The 5th Defendant further states that at the time of purchasing the plot, the said plot was vacant and he took possession without any objection from any quarter. He prays for the dismissal of the Plaintiffs' suit with costs.

1st Defendant's Statement of Defence

12. The 1st Defendant denies the Plaintiff's claim. He pleads in his Statement of Defence dated November 29, 2021 that he was the owner of Plot known as Plot No 50 Komorock Phase III having purchased it in the year 2000. He however, sold it to the 5th Defendant sometime in the year 2001 due to financial challenges.
13. He particularly denies that the 2nd, 3rd and 4th Defendants are legally recognized as the owners of the suit property. He denies that he together with the 5th Defendant trespassed to the suit property with the authority of the 2nd, 3rd and 4th Defendants. He therefore prays that the Plaintiffs' suit be dismissed with costs to the Defendant.

Evidence Adduced on Behalf of the Plaintiffs

14. The 1st Plaintiff testified on the March 22, 2022. He adopted his Witness Statement as his evidence in-chief. He also produced as exhibits the documents on the Plaintiff's lists of documents dated October 11, 2010, October 21, 2021 and July 4, 2019. The Plaintiff's Exhibits are marked as PE 1-15 respectively.
15. The 1st Plaintiff's testimony was that he is the owner of the Suit Property, plot No 50 located at Komarock Phase III Scheme developed by Embakasi/Njiru United Self Help Group having bought it from a Mr John Wainaina on December 29, 2005.
16. The said Mr. John Wainaina was a businessman at Nyamakima. PW1 alleged that he went with him to the company called Embakasi/Njiru Development Scheme to confirm ownership of the plot. It was after the confirmation that they commenced the process and entered into an agreement for the purchase of the plot at Kshs 550,000/-. He however paid a sum of Kshs 560,00/= using the account of the 2nd Plaintiff who was his wife - now deceased. He was thereafter allegedly issued with an ownership certificate and a beacon certificate (PE 1& 2). He sought and paid for approvals from Nairobi City County as he intended to develop the property.
17. Sometime in December 2009, the PW1 said that he received a report that somebody had encroached into his plot and started constructing therein. He learnt that the 1st defendant had laid a claim over the suit property. He reported the matter to the area Chief but the issue was not sorted out. He was therefore left with no other option but to institute this case. He prays that the court grants him the orders sought in his Amended Plaintiff.
18. In cross-examination, the 1st Plaintiff confirmed that he bought the suit property from John Wainaina, who was his casual friend. Before buying the plot, he had visited the offices of the Company. John Wainaina had a Beacon Certificate and a Certificate of Ownership. He however states that he did not get copies of the Seller's documents as they were torn by the Company's Clerk after he was issued with his own documents.



19. It further emerged that the heading of the Ownership Certificate issued to PW1, was Embakasi/Njiru United Self Help Group. The certificate was issued on December 28, 2005 (written as 20005). Though it was signed by 5 officials he only sued 3 officials. He did not even sue the ‘company’ itself (the Self Help Group).
20. From the extract of the register produced, PW1 confirmed that the slot for Plot No 50 on page 18 was blank, whereas Plot No 30 is indicated as owned by the 5th Defendant. He stated that at City Hall, he only paid for building approvals. He was issued with a receipt but he did not produce it in court.

Evidence Adduced on Behalf of the Defense

21. The 1st and 5th Defendants testified as witnesses in the case. The 1st Defendant, David Ngángá Kungú testified as DW1. He relied on his Witness Statement dated November 29, 2021 which was adopted as his evidence in- chief. He further produced as exhibits, various documents including the Ownership Certificate No 095, Beacon Certificate No.165 and the Sale Agreement dated June 14, 2000 which were marked as DE 1, 2 and 3 respectively.
22. In his Witness Statement, the 1st Defendant stated that in the year 2000, he purchased 3 plots known as Plot No 50 Komarock Phase III Scheme which he later sold to the 5th Defendant at a sum of Kshs 500,000/= which was paid in 2 installments. He thereafter handed over the transfer documents to the 5th Defendant who took possession of the suit property.
23. In cross-examination, DW 1 stated that his Sale Agreement was dated June 14, 2000. He was the Seller of the suit property. He had nothing else to prove the sale or receipt of the purchase price.
24. The 5th Defendant, Arthur Mwaura Mburu testified as DW 2. He adopted his Witness Statement dated November 29, 2021 as his evidence in-chief. He also produced the documents listed on his List of Documents dated July 7, 2011 which were marked as DE 4-9.
25. It was his testimony that he purchased his Plot which was No 50 then from David Ngángá Kungú. The numbering of the Plots was later changed. He was informed that the numbering had changed from number 50 to number 33 at Dandora sub-county offices. That was the reason why his name appears against plot number 33 on the register produced by the Plaintiff.
26. That even the Rent Card Book, produced as DE 9, shows the Plot as No 33 –Spine Road. He asserted that he was summoned by the chief after the Plaintiff lodged a complaint. He went to the chief with his documents and the chief confirmed that he was the owner of the suit property. He authorized him to continue with the construction.
27. In cross-examination, the 5th Defendant confirmed that he paid the consideration by cash to the 1st Defendant. Other than the Sale Agreement, he had no other document to prove the purchase from the 1st Defendant. Both the Rent Card book and the register confirms that he owns Plot 33.

Court’s Directions

28. Upon the conclusion of the hearing, the court on June 8, 2022 directed parties to file written submissions. Both parties complied. The Plaintiff’s submissions are dated July 14, 2022 whereas the joint submission of the 1st and 5th Defendants are dated August 1, 2022. The court has had occasion to read the submissions of both parties.



Issues for Determination

29. 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 Plaintiffs are the lawful proprietors of all that land known as Plot No 50 Komorock Phase III and if so,
 - b. Whether the Defendant has trespassed onto the property?
 - c. Whether the Plaintiffs are entitled to the reliefs sought in the plaint?

Analysis and Determination

A. Whether the plaintiffs are the lawful proprietors of all that land known as plot No.50 Komorock Phase III

30. The dispute herein revolves around the ownership of Plot No No 50 Komorock Phase III developed by Embakasi/Njiru United Self Help Group (the suit property) which both the Plaintiffs on one hand and the 1st and 5th Defendants on the other hand lay claim to. The Plaintiffs claims to have purchased the suit property from John Mwaura Wanaina. They alleged that the sale was subsequently recognized by the 2nd, 3rd and 4th Defendants who issued them a Beacon Certificate Number 958 and ownership Certificate Number 1495 on behalf of Embakasi/Njiru Self Help Group.
31. The 1st and 5th Defendants equally claim ownership of the suit property. It is the 1st Defendant's case that he was the original allottee from Embakasi/Njiru Self Help Group of the suit property having been allotted the same sometime in the year 2000. He however, sold it to the 5th Defendant.
32. The 5th Defendant on his part avers that he purchased Plot No 50 as shown on the register produced by the Plaintiff from the 1st Defendant. That he conducted a search with the 'company' before purchasing. The suit property was subsequently transferred to him after the sale. He produced the Ownership Certificate and Beacon Certificate receipt issued to the 1st Defendant. He further produced the Agreement for sale between himself and the 1st Defendant, Ownership Certificate and a Beacon Certificate both in his name.
33. It was his evidence that after purchasing the plot, he learnt that the numbering of the Plots had changed. That when he went to seek development approval and he was referred to Dandora sub-county offices. He was informed that the numbering had changed from Number 50 to Number 33 by the officials. His name indeed appears against Plot Number 33 on the register produced by the Plaintiff.
34. He further stated that the Rent Card Book, which he produced as DE 9, shows the Plot as No. 33 –Spine Road. He also produced receipts issued to him by the City Council of Nairobi confirming payment of rent. He affirmed that when the Plaintiffs visited the suit property claiming ownership of the same, he went to the offices of the 'company', who confirmed that he was the registered owner. This explains why the Plaintiffs sued the officials of the self-help group ('company') alongside the 1st and 5th Defendants.
35. It is evident that none of the parties herein has a title to the suit plot. Justice Onguto (as he then was) in the case of *Danson Kimani Gacina & another v Embakasi Ranching Company Ltd* [2014] eKLR stated that

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root



of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.”

36. For this Court to determine who between the Plaintiffs and the 1st and 5th Defendants has a valid claim over the suit property, the court is required to examine who between the two has established the root of his claim to the suit property. As the court stated in the case of *Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others* [2015] eKLR;

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.....

It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

37. It is trite law that whoever asserts the existence of a legal right or liability has the burden of proving the existence of that right or liability.

38. Section 107 of the *Evidence Act* (Cap 80 Laws of Kenya) succinctly states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

39. Section 108 of *Evidence Act* (Cap 80 Laws of Kenya) further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

40. The Plaintiffs’ claim of ownership of the Suit Property is founded upon the alleged Sale Agreement with one Mr John Mwaura, Ownership Certificate and the Beacon Certificate from Embakasi/Njiru United Self Help Group. The Plaintiffs did not however, call the ‘mysterious’ John Mwaura, the alleged seller as a witness in their case to corroborate the evidence despite PW1 confirming that he was his casual friend and a businessman at Nyamakima in Nairobi. Moreover, PW1 did not produce the ownership documents of John Mwaura. That was the only way that he could have proved that the said John Mwaura was the owner of the plot that he subsequently sold to him.



41. The extract of the register that PW1 produced as evidence in court did not help his case either. The slot for Plot No 50 which the Plaintiffs claim to own was blank. How did that help the Plaintiffs prove their case? Again, although he alleged to have paid the City Council of Nairobi for building approvals, PW1 did not produce the said plans in court.
42. The Plaintiff had alleged that he had at one point been in possession of plot number 50. He did not provide an iota of evidence to prove that allegation. The burden of proof was squarely on the Plaintiffs to prove their case against the Defendants.
43. The 5th Defendant on the other hand had produced both Ownership Certificates and Beacon Certificates to prove his ownership claim. He also produced the Agreement for sale confirming purchase of the suit property from the 1st Defendant. The 5th Defendant testified that he had additionally been issued with a Lease from the City Council of Nairobi and had been paying rent. He produced a Rent Card Book and Receipts to that effect.
44. The 1st Defendant corroborated the 5th Defendant's evidence. He confirmed selling the suit property to the 5th Defendant. He further explained in his testimony how he acquired the suit property. Further, it is not in dispute that the 5th Defendant is in possession of the suit property and has even developed it with a 5 Storey building. He confirms that he got the building approvals from the City Council of Nairobi.
45. The court is satisfied that as between the Plaintiffs and the 5th Defendant, the 5th Defendant has been able to sufficiently establish the root of his title to the suit property.
46. The Plaintiffs did not prove that the alleged John Mwaura, whom they purportedly purchased the property from had title or a valid claim of ownership to the suit property.
47. Based on the foregoing, it is the finding of this court that the plaintiffs have not proved their case on a balance of probabilities.
48. Accordingly, their claim for damages for trespass against the Defendants crumbles like a house of cards. They are not entitled to the prayers sought having failed to prove ownership over the suit property.
49. Consequently, the Plaintiffs' case is dismissed with costs to the 1st and 5th Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Wambui Mwai for the Plaintiffs.

No appearance for the Defendants.

Court Assistant- Hilda/Yvette.

M.D. MWANGI

JUDGE

