



REPUBLIC OF KENYA



**Warithi v Kamande (Environment and Land Case Civil Suit 953 of 2013)  
[2022] KEELC 15495 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15495 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 953 OF 2013  
LC KOMINGOI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**WALTER GAKOBO WARITHI ..... PLAINTIFF**

**AND**

**LEAH NGOIRI KAMANDE ..... DEFENDANT**

**JUDGMENT**

1. By the plaint dated August 2, 2013, the Plaintiff prays for judgement against the Defendant for orders:-
  - a. That a permanent and perpetual injunction restraining the Defendant, her servants or agents from trespassing, letting, alienating and or in any other way interfering with the Plaintiff's quiet possession of his property Nairobi /Block 105/1570.
  - b. That the Honourable court do issue eviction orders to the Defendant or her agents and or employees from the Plaintiff's property known as Nairobi /Block 105/1570.
  - c. That the Defendant be ordered to compensate the Plaintiff for damages and for the loss of use of his land since the year 2000.
  - d. Costs of the suit.
  - e. Any other orders the Honourable court may deem fit to issue.
2. It is the Plaintiff's case that he is the registered beneficial owner of all that parcel of land known as Nairobi/Block 105 situated in Nairobi County by virtue of him being a shareholder of Embakasi Ranching Company Limited and subsequent allotment by the said company. He further contended that about the year 2000, the Defendant trespassed on the suit land and erected semi-permanent structures.



3. It is also the Plaintiff's case that the Defendant refused to vacate when the Plaintiff demanded so and instead produced ownership documents being share certificate cards and transfer documents allegedly issued to her by Embakasi Ranching Company Limited.
4. The Plaintiff averred that in the same year, he reported the trespass to his allottee, Embakasi Ranching Company Limited which summoned the Defendant and upon hearing the parties, it made a finding that the Plaintiff was the rightful owner and concluded that the ownership documents issued to the Defendant were fake. The Plaintiff further averred that Embakasi Ranching Company subsequently issued the Defendant with a 3 months' Notice to vacate the suit land prompting the Defendant to file Civil suit No 1875 of 2000 to contend the notice but the suit was dismissed.

### **The Defendant's case**

5. The Defendant opposed the Plaintiff's claim. She filed the statement of defence and counterclaim dated August 23, 2013. She denied the allegations contained in the plaint. It is her case that she was allocated Plot No P 5457 in 1992 by Embakasi Ranching Company and she took possession the same year. She contended that the said plot is now known as Nairobi /Block 105/1570 and admitted that the Plaintiff is the beneficial registered owner thereof albeit fraudulently. She contended that in Nairobi High Court Civil Suit No 2667 of 1995 where she was the 6<sup>th</sup> Plaintiff and which was consolidated with Nairobi High Court Civil Suit No 3226 of 1994, the court decreed on November 21, 2001 that Embakasi Ranching Limited was to transfer Plot No P5457 now known as Nairobi/Block 105/1570 at Ruai to her unconditionally.
6. She accused the Plaintiff of fraudulently colluding with Embakasi Ranching Company Limited to deprive her of the suit land. She particularised the fraud allegations against them and counterclaimed for orders that the registration of the lease in favour of the Plaintiff herein in the register be cancelled and substituted with her name. She also sought costs of the counterclaim.
7. In her counterclaim, she prays for orders against the Plaintiff (1<sup>st</sup> Defendant) and Embakasi Ranching Company Limited as follows:-
  1. That the registration of the lease in favour of the Plaintiff (1<sup>st</sup> Defendant in counter claim) in the Register be cancelled and the name of the Plaintiff in the counterclaim be substituted in place of the Defendant in the counterclaim.
  2. That the costs of the suit and counterclaim be awarded to the Defendant.
  3. Such further or other reliefs as the court may deem fit to grant

### **Evidence of the Plaintiff**

8. PW1, Walter Gakobo Waruthi, was the Plaintiff testified on March 11, 2021. He told the court that he became a member of Embakasi Ranching Company Limited in 1984 and that was issued with an allotment and share certificate. That after paying requisite fees for registration of a lease, he was issued with a lease to the suit land in 2006 and has been paying rates for it. It was his testimony that he learnt that the Defendant had trespassed and occupied his land in the year 2000 prompting him to report the matter to Embakasi Ranching Company. He told the court that the Company called him and the Defendant to a meeting which was attended by himself and the Defendant's husband. He further testified that at that meeting, the Company confirmed him as the owner of the suit land and gave the Defendant three (3) months' notice to vacate but she has never vacated the suit land as there are still some permanent structures on the suit plot.



9. He further stated that his plot was initially plot No H397 which was later registered as Nairobi Block 105/1570 and which he was shown by the surveyor while the Defendant is claiming Plot No 5457 which is not the same as his. He stated that his ownership documents and receipts indicate that Plot No H397 refers to Nairobi Block 105/1570 while the documents presented by the Defendant do not show nexus between Plot No 5457 and Nairobi Block 105/1570. He produced receipts for payment towards Plot No H397, letter of allotment for Plot No H397 dated June 6, 1984, transfer of lease in his favour registered on July 18, 2000, letter dated November 21, 2000 addressed to Njora Waweru & Co Advocates by Embakasi Ranching Company Limited stating that he is the rightful owner of plot H 397, letter dated January 9, 2002 from Embakasi Ranching Company Limited advising the Commissioner of Lands to facilitate registration of the suit land to him as well as a certificate of lease issued to him on October 19, 2006.
10. When referred to the decree issued in HCCC 3226/94, he stated that while the Defendant herein was the 6<sup>th</sup> Plaintiff in that suit, he was not party to that suit and the suit plot was not subject of the dispute in that suit. He also stated that he was not aware of any restriction placed on his plot and if there was any, it was placed illegally. He prayed to be declared owner of the suit plot and to be awarded damages.
11. When he was cross-examined, he stated that he bought shares in Embakasi Ranching Company Limited and then he was allocated the suit plot in 1984 and made all requisite payments. PW1 also told the court that he filed this suit on August 2, 2013, which is thirteen (13) years after the year 2000 when he learnt that the Defendant had trespassed on the suit plot. He added that he took time to file the suit against the Defendant since he was awaiting the outcome of HCCC 1875/2000, a case filed against him and Embakasi Ranching company Limited by the Defendant.
12. He stated that as at 2002, the suit plot was registered in the name of Embakasi Ranching Company Limited before it was transferred to him. When referred to the dates in the lease for the suit plot which is dated September 6, 2002 and the transfer of lease which is dated January 9, 2002, he stated that he received the transfer of lease on October 19, 2002 and that he is not the one who filed in the dates in those documents thus he would not comment on the dates. When referred to the approval for subdivision document which is dated January 10, 2002 he stated that someone in the ministry of lands could have made a mistake in the dates but his title was genuine and he followed due process in its acquisition.
13. When put to task as to why his letter of allocation is dated November 28, 1982 while his share certificate is dated May 7, 1984, he stated that he became a member of Embakasi Ranching Company Limited before June 1982. He added that he bought a share from somebody who had been given a share already.
14. PW1 also stated that P 5457 and H.397 are two different plots and that he is only claiming H 397. He also stated that on October 6, 2000, the board of directors of the Company called him and the Defendant for a meeting when he reported the trespass and that the Defendant's husband attended the meeting. When referred to the Defendant's non-member certificate of plot ownership for plot P 5457 dated June 9, 2000, he stated that the endorsement; ' double allocation LR No 105/1570' is an addition that was not part of the document.
15. When he was re-examined, he reiterated that the dates on the transfer and the lease were entered by someone else and stated that there is no evidence that he forged his documents and that if there was a problem with the dates, the land registrar who is not a party in these proceedings would have rejected the documents.
16. PW2, Jack Kamau Wachira, a land surveyor with Embakasi Ranching Company Limited, testified on July 28, 2021. His witness statement dated March 10, 2020 was adopted as his evidence in chief. He



stated that the Plaintiff was allocated plot No H 397 after completing payment of Ksh 3500/= civil engineering fees and took possession of the land thereafter. He further stated that in 2000, the Plaintiff was issued with a parcel number known as Nairobi Block 105/1570 for his plot by the then company surveyor and he was then issued with a certificate of lease.

17. He also stated that from their records, the Defendant was irregularly allocated plot No P5457 in 1992 and was issued with a forged share certificate No 14070 but since she had paid some money to the Company, it regularized her documents by issuing her with a non-member certificate No 002434 in the year 1998 and maintained the plot number earlier allocated.
18. PW2 also stated that in a meeting of directors in the presence of the Defendant represented by her husband and the Plaintiff, it was agreed and resolved that Plot No H 397 belongs to the Plaintiff and the Defendant's plot was P 5457 and the Defendant was asked to vacate the Plaintiff's plot and be allocated an alternative plot but she has never followed up her alternative plot.
19. When he was cross-examined, he stated that the Plaintiff was allocated plot H397 on August 10, 1984 and that there are maps held by the company which confirm that position. He also stated that H397 and P5457 are not the same and that there was no double allocation. He further stated that the suit plot was not subject of the litigation in HCCC3226/94 and HCCC2667/95.

### **Evidence of the Defendant**

20. DW1, Leah Ngoiri Kamande, the Defendant testified on November 3, 2021. She told the court that in 1992, she bought shares from Embakasi Ranching Company Limited and was issued with share certificate No 14070 for a share in the mother title which was Land Parcel No 1094/2 and which was later subdivided. It was her testimony that after paying all dues, she was taken to plot No P 5457 on July 29, 1992 where after she signed an endorsement that she had been shown the plot. She testified that upon allocation, she took up, cleared the sisal plantation, fenced it and planted trees.
21. It was also her testimony that she constructed a brick house on the suit land, moved in and put up a chicken shed and a goat shed. She stated that she occupied the suit plot uninterrupted until she got information from Embakasi Ranching Company that she had not been genuinely allocated.
22. It was her testimony that together with other plot owners, they sued Embakasi Ranching Company Limited in HCCC 2667 of 1995 as the 6<sup>th</sup> Plaintiff and a decree issued thereof, Embakasi Ranching Limited was ordered to confirm the allocation she had been given together with a bonus share.
23. DW1 also told the court that in 2015, she was asked to top up with Kshs 2000/=. She further stated that Embakasi Ranching Company Limited contacted her to go to their offices with her original share certificate and advised her to leave it there which she did but when she went back for it, she was given a non-member certificate and that while she was not given receipts for the monies she paid the company, it has been indicated on the non-member certificate issued to her.
24. She also testified that she lost the original share certificates in the process of visiting the Ministry of lands to conduct a search but she reported the loss to the police who issued her with an abstract which was endorsed by Embakasi Ranching Company Limited.
25. She also stated that she was not present in the meeting called by Embakasi Ranching Limited and that she could not confirm that she was to be given an alternative plot. She stated that she had sued the Plaintiff herein and Embakasi Ranching Company Limited but the judge asked them to resolve the matter out of court.



26. When she was cross-examined, she stated that the Plaintiff is not party to the decree in HCCC 2667 of 1995 and that the said decree does not mention any plot number but it has not been complied with. She further stated that someone went to fence her plot and that is why she filed suit 1875 of 2000 and that the judge told them to settle the matter.
27. When referred to the letter dated November 21, 2010 addressed by Embakasi Ranching Company Limited to Njora Waweru & Company Advocates stating that the Plaintiff is the owner of the suit land and that Hesbon Kamande agreed before the board of directors during the meeting of October 6, 2000 that he would remove the structures on the suit plot within 3 months, she admitted that Hesbon Kamande is her husband but denied sending him to represent her in the aforementioned meeting. She also stated that P5457 has no LR Number.
28. When she was re-examined, she stated that there was no dispute between her and the Plaintiff in 1994 when she filed HCC No 2667 of 1995 and that by the time a decree was issued in the said matter, the suit plot had been issued and allocated to her and she had already taken possession in July 1992 and lived peacefully without interruption until 2000 when the Defendant fenced it off.
29. At the close of oral testimonies parties tendered final written submissions.

#### **The Plaintiff's submissions**

30. They are dated February 1, 2022. They raise the following issues:-
  - a. Is the suit time barred?
  - b. Whether the Plaintiff is the lawful and bona fide owner of the suit property.
  - c. Damages.
  - d. What remedy should the court grant?
31. It was the Plaintiff's submission that the suit is not time barred for reasons that it appeared to have been resolved by Embakasi Ranching Company Limited when the Plaintiff reported the dispute there and that the Defendant also filed HCCC 1875 OF 2000 against the Plaintiff and Embakasi Ranching Company Limited in the year 2000. It was also the Plaintiff's submission that since the Defendant did not raise the issue of statutory limitation in her defence, she is bound by her pleadings hence she cannot raise the issue at this later stage.
32. The Plaintiff also submitted that he is the registered owner of the suit property and is accorded protection under Section 26 of the Land Act, No 3 of 2012. He added that the Defendant failed to prove any fraud, misrepresentation or illegality on the part of the Plaintiff. He put forward the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another [2013]e KLR*.
33. Relying on the case of *Reuben K Arap Serem v Zippora Meli [2017]eKLR*, the Plaintiff also submitted that since he had established trespass against the Defendant, he is entitled to damages.

#### **The Defendant's submissions**

34. They are dated April 20, 2022. They raise the following issues.
  - a. Is the Plaintiff's suit herein barred by the *Limitation of Actions Act*?
  - b. Was the title to the suit property obtained by the Plaintiff fraudulently?
  - c. Has the Plaintiff proved his case to the required standard?



35. On the issue whether the suit herein is barred by the statute of limitation, it was the Defendant's submission, that the Plaintiff's suit is barred having been filed after the lapse of the statutory period as set out in Section 4 and 7 of the limitation of Actions Act. He relied on the case of Dickson Ngige Ngugi v Consolidated Bank Limited & Another [2020]eKLR and the case of Sobanlaldurgadass Rajput & Another v Divisional Integrated Development Programmes Co Limited[2021]e KLR.
36. Relying on the case of Zachariah Wambugu Gathimu & Another v John Ndungu Maina [2019]eKLR and the case of Alice Chemutai Too v Nickson Kipkurui Korir & 2 others[2015]e KLR, the Defendant urged the court to find that the certificate of lease issued to the Plaintiff was issued unprocedurally or through a corrupt scheme and to cancel it. She pointed out that the documents relied on by the Plaintiff point to procedural anomalies as they do not give the chronology of events as to how the Plaintiff obtained his title.
37. I have considered the pleadings and the evidence on record, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
- i. Is the suit time barred?
  - ii. Whether the Plaintiff fraudulently procured registration of the suit property.
  - iii. Who between the Plaintiff and the Defendant has established ownership of the suit property?
  - iv. Is the Plaintiff entitled to the reliefs sought?
  - v. Is the Defendant entitled to the reliefs sought in the counterclaim?
  - vi. Who should bear costs of this suit?
38. While the Defendant did not plead that the Plaintiff's suit was time barred, the issue of statutory limitation came up at the hearing of this suit. When he was cross-examined on the time the cause of action arose in this matter, the Plaintiff admitted that while the Defendant trespassed on his land in 2000, he filed this suit in 2013, thirteen (13) years after the cause of action arose. At the hearing of the Defendant's case, it also emerged that the Defendant sued the Plaintiff over the suit plot the same year vide HCCC 1875 of 2000 .
39. In *Odd Jobs v Mubia (1974) EA 476* cited by the Court of appeal in Mangrove Investments Limited v Attorney General & Another [2020] eKLR it was stated as follows: 'A court may base a decision on an unpleaded issue where, it appears from the course followed at the trial, that the issue has been left to the court to decide'. In my view, it cannot be said that this suit is time barred as there was active litigation over the subject matter being HCCC 1875 of 2000.
40. The Plaintiff herein is the registered proprietor of Nairobi Block 105/1570. However, the Defendant argues that the Plaintiff's registration was fraudulently procured by the Plaintiff in cahoots with Embakasi Ranching Company Limited, the 2<sup>nd</sup> Defendant, in the Defendant's counterclaim. The Defendant relies on a share certificate No 14070 and a non-member share certificate No 002434 from Embakasi Ranching Company Limited, receipts issued by the said company and a decree of the high court issued in Nairobi HCCC No 3226 of 1994 as consolidated with Nairobi HCCC No 2667 of 1995 issued on November 21, 2003.
41. It is not in doubt that the Plaintiff is the registered proprietor of Nairobi Block 105/1570 hereinafter referred to as 'the suit property'. It is the Plaintiff's case that he was allotted the suit property by Embakasi Ranching Company Limited where he held one share. The Plaintiff told the court that he



was allotted Plot H397 in 1984. That on January 9, 2002 the suit property was transferred to him by Embakasi Ranching Company Limited.

42. The certificate of lease was registered in favour of the Plaintiff on October 19, 2006. What is interesting is that at the back of the receipts issued to the Plaintiff for sealing of lease, there are words endorsed 'Block 105/1570 =11397 13/8/2000 site confirmed, EW Mahinda'. There is a signature below it. It is not clear how the plots were renamed to give them new numbers or who authored the above words. I also note that the subdivision scheme approval is dated January 10, 2002 after the suit property had been transferred to the Plaintiff. I find this to be an anomaly.
43. PW2 Jack Kamau Wachira a surveyor with Embakasi Ranching Company Limited did not avail a register of the members of the company. Specifically he ought to have availed a register showing how the plots were given new numbers. PW2 also stated that after a meeting between the Plaintiff and Hesbon Kamande (the Defendant's representative) the company decided that the suit property belonged to the Plaintiff and that the Defendant would be given an alternative plot. According to PW1 and PW2 the said Hesbon Kamande agreed to remove the structure within three months. The meeting is said to have been held on October 6, 2000.
44. It is not lost to the court that after the alleged meeting, the Plaintiff and the company escalated the registration in favour of the Plaintiff. The question that begs to be answered is why did the Plaintiff and the company deal with Hesbon Kamande and not the Defendant? No evidence has been tendered to show that the Defendant was unable to attend the meeting.
45. The extract of minutes produced allegedly of the meeting do not show who was present at the meeting. It is not shown that the said Hesbon Kamande was present.
46. All these events show that the Plaintiff knowing that there was someone else claiming the suit property, proceeded to have it registered in his name. He could not have done this alone. He acted with the assistance of the officials of Embakasi Ranching Company Limited.
47. If indeed the officials of the company were genuine they ought to have processed a title for the Defendant as well. It is for the above reasons that I find that the title in favour of the Plaintiff was fraudulently acquired.
48. The Defendant in her part told the court that she was initially issued share certificate no 14070 for one share and allocated Plot No P5457 on July 29, 1992. She stated that she later was given a non member certificate No 002434 on September 27, 1999 for Plot No P5457. She told the court that she took possession of the plot in 1992.
49. It is her case that together with other shareholders they filed a suit against Embakasi Ranching Co Ltd vide HCCC 3226 of 1994 which was consolidated with HCCC 2667 of 1995. This was because the company had refused to allocate the members a bonus share. The decree emanating from the above suits is that the Plaintiff was entitled to her plot P5457 and a bonus share upon payment of Kshs 26,000/-. The company was aware of the decree of these two suits when it transferred the suit property to the Plaintiff.
50. The Defendant told the court that she fenced the plot and put up a semi permanent structure and is in possession to date. When she realized that the Plaintiff was claiming her plot she filed HCCC 1875 of 2000 whereby the court encouraged them to settle the matter out of court. During the negotiations, the company made her believe that the Plaintiff would be given an alternative plot only to be served with summons to enter appearance in this suit. It is her case that she has not trespassed on the Plaintiff's plot.



51. As stated earlier, the Plaintiff and PW2 could not confirm who endorsed the words Block 105/1570 as being Plot NO H397 on August 23, 2000 on the back of the share certificate. The transfer of lease is dated January 9, 2002 and registered on October 19, 2006.

52. The original lease to Embakasi Ranching Co Ltd was issued by the Land Registrar on September 6, 2002 and the company could not have signed a transfer of lease on January 9, 2002. PW2 also failed to produce the survey plans and/or maps to ascertain the plot allotted to the Plaintiff.

53. Section 26 of the *Land Registration Act*, 2012 provided that:-

' (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.'

54. In the case of *Zacharia Wambugu Gathimu & Another vs John Ndungu Maina* [2019] e KLR the court held:-

' 161. The provisions of Section 26 of the *Land Registration Act*, Act No 3 of 2012 provide as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

162. As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'



55. PW2 though not directly, alluded to the issue of double allocation of the suit property herein. I find that the Plaintiff fraudulently obtained registration of the suit property in his favour.
56. Having stated so, I find that he has not established ownership of the suit property. It was not clear how Plot No H397 became Nairobi/Block 105/1570. It is not in dispute that the Defendant is in possession of the suit property. It is the company to avail an alternative plot to the Plaintiff.
57. From the foregoing, I find that the Plaintiff is not entitled to the reliefs sought in the plaint. Consequently, I find that the Defendant has established that she is entitled to the suit property.
58. I find that the Plaintiff has failed to prove his case as against the Defendant on a balance of probabilities and the suit is dismissed.
59. The Defendant succeeds in her counterclaim and I grant the orders sought namely:-
  - a. That the Chief Land Registrar is hereby directed to cancel the registration of the Certificate of Lease in favour of the Plaintiff (1<sup>st</sup> Defendant in the counterclaim) in the Register and the name of the Plaintiff in the counterclaim be inserted as the owner of Nairobi/block 105/1570 within ninety (90) days from the date of this judgment.
  - b. That costs of this suit be borne by the Plaintiff (in the main suit)

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Kiamindo for Mr. Ayieko advocate for the Plaintiff

Ms Kamande advocate for the Defendant present

Mutisya – Court Assistant

