



REPUBLIC OF KENYA



KENYA LAW
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**Kirubi v Mwangi & another (Environment & Land Case 25 of 2012)
[2022] KEELC 14924 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 25 OF 2012**

**JM MUTUNGI, J
NOVEMBER 17, 2022**

BETWEEN

LYDIA WANJIRU KIRUBI PLAINTIFF

AND

CHARLES MWAI MWANGI 1ST DEFENDANT

ACENACTIUS MOGAKA MANYARA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted the instant suit by way of a Plaint dated February 6, 2012 filed in Court on February 8, 2012 and amended on June 8, 2013. The plaintiff in the plaint averred that she was the lawful owner of land parcel Kiambogo/Kiambogo Block 2/14607 'the suit land' but the defendants allegedly fraudulently and unlawfully caused the land to be transferred to their names without her authority and/or consent. The plaintiff vide the amended plaint prayed for the following orders:-
 - a. A perpetual injunction restraining the 2nd defendant by himself, his servants and or agents from selling, alienating, further developing, transferring and or interfering with the suit premises.
 - (aa) An order of eviction to issue against the 2nd defendant.
 - b. A declaration that the suit land is the property of the plaintiff and the subsequent transfers of the title to the suit land as being illegal and or null and void.
 - c. Nullification and or cancellation of title deed for and rectification of the register by the Land Registrar, Nakuru.
 - d. Costs of suit.
2. The 2nd Defendant entered appearance and filed a statement of defence dated February 20, 2012 filed in Court on February 21, 2012. He denied the plaintiff's averments in the plaint and stated he was the



duly registered owner of the suit property. He stated the suit land was properly and lawfully transferred to him and due process was followed. He denied the land was fraudulently transferred to him and asserted that he had been in possession of the land where he had fully developed a residential house and was residing thereon with his family.

3. The 1st defendant equally filed a statement of defence dated May 4, 2012 on May 8, 2012. He denied the averments by the plaintiff in the plaint. He asserted that he had lawfully purchased the suit land before he transferred the same to the 2nd defendant. He stated that the transfer to the 2nd defendant was lawfully done and due process was followed. He averred the 2nd defendant had taken possession of the land and had constructed a residential house where he resides with his family. He denied the plaintiff had any valid interest in the suit property.

The Plaintiff's Case

4. The plaintiff testified and called two witnesses in support of her case. In her evidence, the plaintiff testified that she was in 2005 introduced to the 1st defendant who was acting as a selling agent for one Ephraim Gatiba in respect of some plots at Kiambogo in Nakuru. She gave evidence that the 1st defendant showed her two plots namely Kiambogo Block 2/14606 and 14607 which she liked and agreed to buy. She testified that she paid the Vendor, Ephraim Gatiba the full purchase price of Ksh 230,000/= for parcel 14606 and paid a deposit of Ksh 70,000/= for parcel 14607 at the agent's office. She further testified that she signed a sale agreement dated September 27, 2005 for payment of the balance of Ksh 160,000/= for parcel 14607. As per the sale agreement, the balance was to be paid to the Vendor on or before December 30, 2005.
5. The plaintiff did not pay the balance of the purchase price of Ksh 160,000/= as agreed. She stated she paid a deposit of Ksh 30,000/= in 2007 to the agent but had misplaced the receipt during the post-election skirmishes of 2007/2008. She stated she paid the balance of Ksh 130,000/= to the Vendor's son John Njuguna Gatiba vide a cheque dated April 15, 2011 since Ephraim Gatiba with whom she had entered into the agreement had died. The plaintiff explained that the deceased son had allowed her time to pay for the plot.
6. The plaintiff testified that she carried out an official search on the suit property on November 29, 2010 which revealed that the 2nd defendant was registered as the owner of the property on April 16, 2010. She stated that she lodged a caution against the title of land parcel Kiambogo/Kiambogo Block 2/14607 to safeguard her interest as a purchaser. The plaintiff stated that in 2012 when she visited the parcel of land, she found that someone had deposited building materials on the site. She testified that the fundis who were on site called the 2nd defendant who came to the site with his wife and he affirmed he was the owner of the land. She said the 2nd defendant continued with the construction of the house although he knew the land had a dispute. She explained that as far as she knew, the land belonged to Ephraim Gatiba's estate since even the Certificate of confirmation of Grant dated March 31, 2011 tendered in evidence showed the suit property formed part of the assets of the estate of Ephraim Gatiba Njuguna (deceased). The plaintiff further stated the Administrator of the estate of Ephraim Gatiba wrote to the Land Registrar a letter dated May 3, 2011 confirming the land belonged to her.
7. The plaintiff on cross-examination by Ms Moenga, counsel for the defendants, stated that Ephraim Gatiba died in 2009 and that he had not before his death, given her a written instrument extending the period for the payment of the balance of the purchase price. She further affirmed as per the abstract of title of the suit property, the 1st defendant was registered as owner on October 12, 2007 while one Muchai Mbugua was registered as owner on July 18, 2008. She affirmed that by the time she made the payment of Ksh 130,000/= on April 15, 2011, the 2nd defendant had been registered as the owner of



the suit property, having been so registered on April 16, 2010. The plaintiff maintained that, she knew the land belonged to Ephraim Gatiba who had sold the land to her. She stated she honoured the terms of her agreement with the seller and at no time did the seller complain that she was in breach of the agreement. She explained that the delay in completion of the transaction was occasioned by events that followed after the 2007/2008 post-election violence.

8. PW2, John Njuguna Gatiba testified that he was the son of Ephraim Gatiba (deceased) who died on January 15, 2009. He testified that his late father subdivided his land parcel Kiambogo/Kiambogo Block 2/247 (Mwariki) measuring 4.57 Hectares into plots of 100 ft by 50 ft which he sold to members of the public. He stated that the plaintiff was one of those who had bought land from his late father. He stated the plaintiff in late 2009 informed him that she had bought land from her father but that she had not fully paid for one of the two plots that she had purchased. He explained that his father, before he died, had informed him the plaintiff had purchased two plots but had not fully paid for one of them and had requested that he allows the plaintiff to complete the transaction.
9. PW2 affirmed that his late father had appointed the 1st defendant as an agent for purposes of selling the plots shown in the subdivisions schedule exhibited as 'P EX10'. PW2 explained that he and his stepmother were appointed as the administrators of his late father's estate in Nairobi HC Succession Cause No 399 of 2009. He stated in the succession, the suit property was included as an asset of the deceased since the plot had not been transferred out to the plaintiff. In responding to the entries in the abstract of title of the suit property, PW2 stated the transfer to the 1st defendant was never notified to him as well as the transfers to Michael Mbugua and the 2nd defendant.
10. PW2 stated that before the plaintiff paid to him the balance of Ksh 130,000/=, he and the plaintiff visited the site and they found some people and building materials deposited there. He stated that he later wrote to the Land Registrar notifying him that the plaintiff was the rightful owner of the disputed plot but stated the Land Registrar declined to deal with the matter. The witness testified that he did not know how the 1st defendant got to be registered as owner of the property in dispute as he never showed how he had acquired title to the property.
11. In cross-examination, PW2 stated that he had not visited the suit property during his late father's life time. He stated he gave the plaintiff a letter dated April 6, 2011 extending the period within which to pay the balance which she later paid. He affirmed as per title abstract the property was transferred to the 2nd defendant in April, 2010 while the 1st defendant had been registered as owner in 2007. The witness stated they had included the suit property as part of the deceased property in the succession cause as they did not know of the transactions that had taken place at the Lands office affecting the title to the land. He affirmed that as at the time of hearing, there was a completed residential house on the plot constructed by the 2nd defendant.
12. PW3 Eric Nyamu a Land Registrar at the Nakuru Lands office highlighted the entries made on the abstract of title (green card) and affirmed as per the green card the current registered owner was Manyara, the 2nd defendant who was registered on April 16, 2010. The Land Registrar testified that the parcel file for the suit property did not contain the documents to support the entries that had been made on the green card in respect of the transactions of the 1st and 2nd defendants. He produced copies of the Presentation Book for the period which did not indicate any documents were presented for registration in regard to the 1st and 2nd defendants transactions. He explained that the Presentation Book is updated every time a transaction is booked for registration and captured all the particulars and nature of the transaction including any duty charged. In regard to the entries appearing on the green card, the witness stated the same were not reflected in the Presentation Book though he indicated



omissions usually can occur in the Presentation Book. He was however emphatic that the green card gives the current status and ownership of the property in question.

The 2nd Defendant's Case

13. The 2nd defendant testified as the sole witness in support of the defence case. The 2nd defendant testified that he purchased land parcel Kiambogo/Kiambogo Block 2/14607 from one John Muchai Mbugua on April 12, 2010 for the consideration of Ksh 610,000/=. The 2nd defendant stated that he paid for the land by way of Bankers Cheque for Ksh 610,000/= dated April 12, 2010. He testified that before he purchased the land, he carried out a search, at the Lands office and the suit land was clear with no encumbrances. He stated the Vendor surrendered to him the original title, copy of his Identity Card, KRA PIN Certificate, signed Transfer forms and signed application forms for the Land Board Consent. The 2nd defendant further stated that he later presented the documents for registration at the Lands office and that he was issued a title deed for the suit land on April 16, 2010 upon completion of the registration process.
14. The 2nd defendant further testified that soon after he got his title for the suit land, he commenced preparations to construct a residential house on the suit land. He obtained approval from the Municipal Council of Nakuru for the building plans on August 24, 2010 as per the letter exhibited as 'D EX7'. The 2nd defendant produced an abstract of title (green card) as 'D EX3' which indicated he was registered as owner on April 16, 2010. The 2nd defendant stated that when he purchased the land, it was vacant and was not fenced. He maintained he validly purchased the suit land after carrying out due diligence which revealed the land to be free of any encumbrances.
15. The 2nd defendant further testified that the plaintiff on December 6, 2010 lodged a caution against the title which he objected to and was removed after due process. The 2nd defendant explained that he was unaware of any succession proceedings involving the suit property and that he did not know the persons whose names appeared under entries 1 and 2 of the green card.
16. In cross-examination by Mrs Nancy Njoroge advocate for the plaintiff, the 2nd defendant stated that he was introduced to John Muchai, the seller, by a neighbour, one Nyagariga who knew Muchai had a plot he was selling. He explained that he entered into an agreement with the seller at the offices of Mongere & Co Advocates but had misplaced his copy of the agreement. He stated he gave the cheque for the purchase to the seller after entering into the sale agreement in exchange with the original title, land board application, copy of ID and photographs. He stated he presented all the documents to the Lands office for processing the title and when the title was ready he was informed and went and collected the same. He stated he saw no need to contact John Muchai, the seller, after he was sued since he had no issue with him as he had given him everything he required to be registered as owner. He stated he only met the 1st defendant in Court and had not known him before.
17. After the close of the trial, the parties filed their closing written submissions. The plaintiff's submissions were filed on September 14, 2022 and those of the defendants on September 29, 2022. Having reviewed the pleadings, the evidence adduced by the parties and having considered the submissions filed by the parties, the following issues emerge for determination:-
 - i. Whether the plaintiff was the lawful and/or beneficial owner of land parcel Kiambogo/Kiambogo/Block 2/14607?
 - ii. Whether the sale agreement dated September 27, 2005 between the plaintiff and Ephraim Gatiba Njuguna (deceased) respecting the suit property was valid after the completion date of December 30, 2005?



- iii. Whether at the time the Succession Cause No 399 of 2009 (Estate of Ephraim Gatiba Njuguna) was filed, land parcel Kiambogo/Kiambogo Block 2/14607 formed part of the assets of the estate?
 - iv. Whether the 2nd defendant acquired title to the suit property fraudulently?
 - v. Whether the 2nd defendant's title ought to be declared null and void and the register rectified?
 - vi. Who bears the costs of the suit?
18. The plaintiff's suit was anchored on the sale agreement entered into on September 27, 2005 between the plaintiff and Ephraim Gatiba Njuguna (deceased). As per the agreement, the plaintiff paid a deposit of Ksh 70,000/= to the Vendor and the balance of Ksh 160,000/= was to be paid on or before December 30, 2005. The plaintiff was to be granted possession against payment of the full purchase price. The plaintiff did not pay the balance of the purchase price by December 30, 2005 as provided in the agreement. The plaintiff stated she paid a deposit of Ksh 30,000/= in 2007 before paying the balance of Ksh 130,000/= on April 15, 2011 to PW2 who was a co-administrator of the estate of the late Ephraim Gatiba Njuguna. Although the plaintiff stated the deceased had agreed to extend time for her to pay the balance of the purchase price, no documentary evidence to that effect was tendered. PW2 purported to extend the completion period vide a letter dated April 6, 2011 after the plaintiff and PW2 had in fact become aware the 2nd defendant was the registered owner of the property.
19. The 1st defendant did not testify but in his filed defence, he pleaded that he had legally and lawfully purchased the suit property before he transferred the property to John Muchai Mbugua from whom the 2nd defendant purchased the property. The 1st defendant pleaded he was not the registered owner and neither did he have any beneficial interest in the suit property which currently was registered in the name of the 2nd defendant. The 1st defendant denied he was involved in any fraudulent dealing and asserted the plaintiff was a stranger to him and was not entitled to the orders she prays for.
20. PW3, the Land Registrar testified that the 2nd defendant as per their records (green card) was the current registered owner of the suit property having been registered on April 16, 2010. He however testified that he was not able to trace the documents to support the registration of the transfer, save for the original title in the name of John Muchai Mbugua surrendered to facilitate the registration of the transfer in favour of the 2nd defendant. The Land Registrar affirmed that the Green card contained the record of all the transactions affecting the property and was reliable. The Green Card produced in evidence showed Ephraim Gatiba Njuguna (deceased) was registered as owner of the suit property on September 17, 2004; the 1st defendant was registered on October 12, 2007; John Muchai Mbugua was registered on July 18, 2008 while the 2nd defendant was registered on April 16, 2010. The deceased with whom the plaintiff entered into the sale agreement died on January 15, 2009. As at the time of the deceased death, the suit property had changed hands twice as evidenced from the green card. The deceased son (PW2) in his evidence stated he had never been to the suit property during his father's lifetime.
21. The plaintiff as per the evidence became aware that the 2nd defendant had been registered as owner of the suit property at the very latest on December 3, 2010 when she carried out a search on the property that revealed the 2nd defendant was registered on April 16, 2010 and issued a title on the same date. That prompted her to register a caution on December 6, 2010 claiming a purchaser's interest. It is not clear why even after discovering the property had been registered in favour of the 2nd defendant, she went ahead to pay the balance of the purchase price of Ksh 130,000/= on April 15, 2011 to PW2. The



suit property having been transferred from the name of Ephraim Gatiba Njuguna (deceased) could not form part of his estate. From the evidence adduced, the property was transferred to the 1st defendant in 2007 and therefore by the time the succession proceedings for the deceased estate were commenced in 2009, the property had ceased to belong to the estate. There is no doubt that PW2 became aware that the property was no longer in the deceased name and thus he could not properly purport to transact respecting the property. The option PW2 had, if he considered the property to have been unlawfully transferred was to commence recovery proceedings of the land on behalf of the deceased estate.

22. The sale agreement relied upon by the plaintiff dated September 27, 2005 provided that the balance of the purchase price was to be paid on or before December 30, 2005. The agreement further provided that in the event of default, the party in default was to pay 10% of the purchase price as damages to the other party. There was no evidence tendered by the plaintiff to show that the agreement was extended before it lapsed on December 30, 2005 or at any date before the death of the deceased. In my considered view, there was no valid agreement after December 30, 2005. Besides, this was a transaction that required the consent of the Land Control Board in terms of Section 6(1) of the [Land Control Act](#), Cap 302 Laws of Kenya. No consent of the Land Board was sought and obtained within the requisite period of 6 months from the date of the sale agreement with the result that the sale agreement became void for all purposes and could therefore not confer a beneficial interest over the suit land on the plaintiff.

Section 6(1) (a) of the Act provides as follows:-

6(1) Each of the following transactions:-

- a. The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;
- b. -----
- c. -----

is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

23. Section 8 of the [Land Control Act](#) provides that an application for consent of the Land Control Board has to be made in the prescribed form within 6 months of the making of the agreement for sale by any party to the agreement. The High Court however has power to extend the period if there are sufficient reasons for doing so. No application for extension of time was made before the High Court by any party.
24. In the present case, the parties to the agreement made on September 27, 2005 never made any application for consent to the board and hence after the expiry of six months, the said Agreement became null and void. PW2 John Njuguna Gatiba who had been appointed a co-administrator of the deceased estate in April 2011 attempted to extend and revive the agreement with the plaintiff but as at that time, the property was not in the name of the deceased, and PW2 could not therefore extend the period for the purchase by the plaintiff of a property that did not belong to the deceased estate. The purported extension was of no legal consequence.
25. It is my determination in the premises that the plaintiff as at the time of filing the instant suit had no legal or beneficial interest in the suit property. The sale agreement dated September 27, 2005 entered between the plaintiff and the deceased lapsed on December 30, 2005 after the plaintiff failed to pay the balance of the purchase price and there was no extension of the period granted on or before the expiry



period of the Agreement. Further, the suit property could not form part of the assets of the estate of Ephraim Gatiba Njuguna (deceased) as the property had been transferred and registered in the name of the 1st defendant in 2007 and later in the name of John Muchai Mbugua in 2008 as evidenced by the abstract of title (green card). The Succession Case Nairobi HC Succ Cause No 399 of 2009 was filed in 2009 and the certificate of confirmation of grant was issued on March 31, 2011.

26. In her submissions, the plaintiff submitted that the deceased never sold the suit property to the 1st defendant and to fortify her submission, the plaintiff asserted the 1st defendant did not tender a sale agreement in evidence and neither did he give evidence at the trial. The 1st defendant in his defence pleaded that the plaintiff was a stranger to him and that he had legally and lawfully purchased the property before he transferred the same. It is noteworthy that Ephraim Gatiba Njuguna (deceased) and or his estate was not a party in the suit. The deceased and/or his legal personal representatives would have been the appropriate party to lay claim to the land if indeed the same had been fraudulently or illegally transferred to the 1st defendant. The deceased was the registered owner of the property before it was transferred to the 1st defendant. The plaintiff could not step into the shoes of the deceased to challenge the transfer made to the 1st defendant. The 1st defendant apart from acting as agent for the deceased did not deal with the plaintiff in the matter of the sale of the property. The plaintiff paid the purchase price to the deceased and/or the deceased personal representative. PW2 who testified on behalf of the plaintiff only came to the scene after the death of his father. The briefings he claims to have had with the deceased before his death, respecting the sale of the suit property to the plaintiff, to the extent there was nothing in writing, was hearsay and I am of the considered opinion that it was intended to assist the plaintiff in the case and also as a means of collecting the balance of Ksh 130,000/- towards the purchase price. It is unclear why after discovering the property had been transferred to at least 3 persons and was not in the deceased name, he went ahead to receive the balance of Ksh 130,000/= on April 15, 2011. The plaintiff as at December 2010 had verified that the 2nd defendant was the registered owner as per the certificate of search the plaintiff obtained on December 3, 2010. Why then would she have gone ahead and paid the balance? That is the paradox and only the plaintiff can explain.
27. Be it as it may be, having come to the conclusion that the plaintiff had not demonstrated she had any legal interest and/or beneficial interest in the suit property, it follows that she had no locus standi to challenge the registration of the 1st defendant and/or indeed the 2nd defendant as the owner of the suit property. The plaintiff's claim that the defendants got the suit property transferred to their respective names fraudulently cannot be substantiated and I find and hold no evidence of any fraud has been adduced and the allegations of fraud remain unproven.
28. On the question as to whether the 2nd defendant acquired title to the suit property fraudulently, I find no basis to so hold. On the evidence, it is clear the 2nd defendant purchased the suit property from one John Muchai Mbugua who was the registered proprietor. A search carried out on the suit property on April 7, 2010 before the 2nd defendant purchase the property, indicated John Muchai Mbugua had been registered as owner on July 18, 2008 and the property had no encumbrances. The 2nd defendant paid John Muchai Mbugua the purchased price vide a Bankers cheque dated April 12, 2010 for Ksh 610,000/= and the Vendor executed the transfer and the Land Board application forms and surrendered the original title to facilitate the processing of the transfer. The 2nd defendant was eventually registered as owner of the suit property on April 16, 2010 as shown in the green card/ abstract of title and on the copy of Title deed issued to the 2nd defendant.
29. The plaintiff challenged the 2nd defendant's title arguing that there were no supporting documents for the registration of the transfer such as consent, Stamp Duty and payment receipts. The Land Registrar who testified as PW3 confirmed that a Registrar's duties, among others include registering documents



after verifying the same to be in order. The Land Registrar indicated that the Land Register (green card) was conclusive evidence of ownership of a parcel of land. In the present matter, the Land Registrar affirmed that as per their records, the 2nd defendant was the registered owner of the suit property. In the absence of any credible evidence, to the contrary, the registration of the 2nd defendant as owner must be taken to have been regularly obtained.

30. On the evidence available on record, the 2nd defendant was by all accounts a bona fide purchaser and could not have had any notice of any defect in the title. He purchased the property from the registered owner, paid consideration and the property had no encumbrance as at the time of the purchase. The 2nd defendant in the premises acquired an absolute title which in terms of Section 26(1) of the Land Registration Act, 2012 is absolute and indefeasible. As the registered owner, he is entitled to full enjoyment of the rights conferred by registration under Sections 24 and 25 of the Land Registration Act 2012. I am satisfied that the 2nd defendant acquired a good title to the suit property which deserves protection of the law.
31. The upshot is that I find and hold that the plaintiff has not proved her case on a balance of probabilities. The plaintiff's suit is dismissed with costs to the 2nd defendant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF NOVEMBER, 2022.

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HON. J.M. MUTUNGI
ELC JUDGE

