



**Thiongo & another v Gathuru (Environment & Land Case 133 of 2017)
[2022] KEELC 14902 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 133 OF 2017**

JG KEMEI, J

NOVEMBER 17, 2022

BETWEEN

JOHNSON KIHATU THIONGO 1ST PLAINTIFF

MAHIIRA HOUSING COMPANY LTD 2ND PLAINTIFF

AND

JOSEPH GATHURU DEFENDANT

JUDGMENT

1. On the 08/03/20216 the Plaintiffs sued the Defendant seeking the following orders:-
 - a. A permanent injunction to issue restraining the Defendant, his servants and/or agents from trespassing and/or continuing to trespass, from alienating, from entering, from constructing, from transferring, from leasing, excavating, from fencing, charging and/or erecting any structures or building thereon, committing acts of waste on land Ruiru Kiu Block 10 (mahiira)/675 and/or from interfering with the 1st Plaintiff's title and interest to the said property and/or from dealing with the said property in any way whatsoever.
 - b. A declaration that the 1st Plaintiff is the true and legal owner of all that property known as Ruiru Kiu Block 10(mahiira)/675 and as the owner thereof is entitled to exercise and enjoy all the incidents that ownership confers including protection of party under Article 40 of the [Constitution of Kenya](#) and consequently appropriate declaration and protection do issue in his favour.
 - c. General damages for trespass together with interest thereon.
 - d. Costs of the suit at plus interest.
 - e. Such further or other relief as this Hon Court may deem fit.



2. It is the 1st Plaintiff's case that he is the registered proprietor of the suit land having acquired it through purchase from one Martin Njuguna Kahura in 2008. The said Kahura was a member of the 2nd Plaintiff. That the defendant has without his consent and knowledge trespassed onto the land and deposited building materials with the intention of erecting a building to his detriment as the proprietor of the suit land.
3. On the May 12, 2016 the Defendant entered appearance through the firm of Mwenda Njagi & Co Advocates but failed to file Defence.
4. This suit was initially filed in Nairobi as ELC No 225 of 2016 but at the inception of the Thika ELC Court it was transferred to Thika and registered as ELC 133 of 2017.
5. The Plaintiffs' case was led by PW1 – John Kihara Thiongo who testified on November 24, 2021. He relied on his witness statement dated March 4, 2016 in his evidence in chief and produced the documents contained in the List of Documents filed on March 8, 2016 in support of his case. The documents were marked as Pex No 1 – 8.
6. In addition he informed the Court that he purchased the land in 2008 from Martin Njuguna at the cost of Kshs 155,000/- which he paid in full. Njuguna was a member of the 2nd Plaintiff and had acquired the land pursuant to his membership.
7. That he paid Kshs 10,000/- and was issued with plot Certificate No 520 by the 2nd Plaintiff dated January 22, 2009.
8. He added that the Vendor transferred the plot to him vide a transfer form dated January 22, 2009.
9. He then visited the plot which was not occupied then, took possession and constructed a small house and later fenced the land and put up a toilet. He processed title and obtained it in 2013.
10. That the Defendant entered the land by force and demolished the fence and built a small house measuring 10 X 10ft.
11. On the February 14, 2022 PW1 was cross examined by Mr Njagi Counsel for the Defendant. The witness informed the Court that he carried out a Search of the suit land which Search revealed that Njuguna was the owner of the land.
12. That in 2009 he found a small house that housed Njuguna and that the 1st Defendant occupies the land. That Mr Njuguna did not show him his Membership Certificate. That he paid Njuguna in cash however there is no receipt acknowledging the cash.
13. Asked about the title the Plaintiff confirmed that though the agreement showed the subject plot as No 520 his title issued on November 11, 2013 shows the land is described as Parcel 675.
14. The witness further stated that he did not obtain Land Control Board Consent.
15. PW2 – Raphael Waweru Kungu took the stand and stated that he is the Chairman of Mahiira Housing Co Ltd. He relied on his witness statement dated December 10, 2020. He stated that the suit land belongs to the 1st Plaintiff the same having been allocated to Martin Njuguna Kahura, who sold it to the 1st Plaintiff at Kshs 155,000/-. That the 2nd Plaintiff was advised by Njuguna that he had sold the land to the 1st Plaintiff and that the title should come out in his name.
16. In cross the witness stated that he was an official of the 2nd Plaintiff since 1986 and currently he is the Chairman of the 2nd Plaintiff Company since 2014. In 1986 he was the Company Secretary of the 2nd Plaintiff. Further he informed the Court that he signed the Plot Certificate No 520 on 22/1/2009.



- That Plot No 520 is now registered as Parcel No 675. That the 2nd Plaintiff received Kshs 10,000/- being transfer fees for the transfer between the 1st Plaintiff and the said Kahura.
17. The Plaintiffs filed written submissions through the firm of Arusei & Co Advocates.
 18. The Defendant did not file any written submissions.
 19. The Plaintiffs submitted that the 1st Plaintiff was the 1st registered owner of the title and therefore there was no need to obtain Land Control Board consent.
 20. Relying on 24, 25 & 26 of the Land Registration Act the Plaintiffs argued that the 1st Plaintiff holds an indefeasible title and enjoys the protection of the law.
 21. Relying on case of Charles Kirathe Kiarie & 2 others -Vs- Administrators of the Estate of John Wallace Mathare – Deceased [2013] eKLR. The Plaintiff submitted that the 1st Plaintiff's title having been obtained through purchase as a *bonafide* purchaser for value without notice of fraud is incapable of being impeached. That there are no grounds of illegality, fraud and or misrepresentation that have been pleaded and proved to warrant the impeachment of title.
 22. It was submitted that the transfer of Plot 520 dated January 22, 2009 met the requirement of Section 3(3) of the Law of Contract because the document is in writing, signed by the parties and the same is witnessed.
 23. Having read and considered the pleadings the evidence adduced on record, the written submissions and all the material placed before me the issues for determination are:-
 - a. Whether the Plaintiff is the registered owner of the land?
 - b. Whether the Plaintiff has proved trespass?
 - c. Costs of the suit.
 24. It is not in dispute that the Defendant was duly served with the Summons in this case and despite entering appearance failed to file a Defence.
 25. The suit therefore proceeded to hearing undefended. The Defendant's Counsel cross examined the Plaintiff's witnesses. The Defendant therefore elected not to defend the suit.
 26. The 1st Plaintiff has adduced evidence that he purchased the Plot from one Martin Njuguna Kahura vide a transfer document addressed to the 2nd Plaintiff on January 22, 2009. The consideration disclosed is Kshs 155,000/-. The transfer is signed by both parties and witnessed by James Gateri Thiongo ID No xxxxx.
 27. Section 3(3) of the Law of Contract states as follows:-

“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 found-
 - (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.”



28. It is evident that the Agreement dated January 22, 2009 met the requirements of Section 3(3) of the *Law of Contract* as cited above.
29. PW2, the Chairman of the 2nd Plaintiff confirmed in evidence that he witnessed the sale and upon purchase issued the 1st Plaintiff with the Plot Certificate No 520 measuring 50X80ft on the January 22, 2009. That thereafter using the authority of transfer dated January 22, 2009, the title was processed in the name of the 1st Plaintiff.
30. Section 26 of *Land Registration Act* state as follows:-
- “(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.”
31. According to the evidence adduced on record, there was no evidence received by the Court capable of impeaching the above title either by way of fraud, misrepresentation, illegality, unprocedurally or a corrupt scheme.
32. Section 26 of *Land Registration Act* mandates the Court to take the 1st Plaintiff as the registered owner of the land in the absence of any evidence to construe otherwise.
33. The law provides certain privileges to a registered owner of land. This include the protection provided in Section 24 and 25 of *Land Registration Act* which include quiet and peaceful possession of land.
34. It is the 1st Plaintiff’s claim that the Defendant has encroached on to his land without his consent and permission. The Defendant failed to rebut the Plaintiffs’ claim.
35. In the *Trespass Act* trespass is defined as :-
- “Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
36. In the absence of evidence to the contrary the claim of the 1st Plaintiff is not rebutted.
37. In the end the 1st Plaintiff’s claim succeeds. I enter Judgment as follows:-
- a. A permanent injunction be and is hereby issued restraining the Defendant, his servants and/or agents from trespassing and/or continuing to trespass, from alienating, from entering, from constructing, from transferring, from leasing, excavating, from fencing, charging and/or erecting any structures or building thereon, committing acts of waste on land Ruiru Kiu Block 10 (mahiira)/675 and/or from interfering with the 1st Plaintiff’s title and interest to the said property and/or from dealing with the said property in any way whatsoever.



- b. A declaration be and is hereby issued that the 1st Plaintiff is the legal owner of all that property known as Ruiru Kiu Block 10(mahiira)/675.
- c. The prayer for general damages is declined.
- d. I make no orders as to costs of the suit.

38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Martin HB Arusei for 1st and 2nd Plaintiffs

Defendant – Absent

Court Assistant – Kevin

