



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamau v Chege & another (Environment & Land Case 173 of 2004)
[2022] KEELC 15135 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 173 OF 2004**

JA MOGENI, J

DECEMBER 5, 2022

BETWEEN

STEPHEN MBUGUA KAMAU PLAINTIFF

AND

WATIRI CHEGE 1ST DEFENDANT

GIDEON KAUMBUTHU MEENYE 2ND DEFENDANT

JUDGMENT

1. By a plaint and an amended plaint dated September 17, 2003 and February 15, 2021 respectively, the plaintiff sued the defendant and sought for the following orders;
 - i. A permanent injunction restraining the defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing occupation of the property known as Dagoretti/Riruta/3519.
 - ii. Eviction of the defendants their agents and or servants from the property known as Dagorretti/Riruta/3519.
 - iii. General damages for breach of contract
 - iv. Mense profits at Kshs 50,000 per annum from the year 1997 and delivery of vacant possession.
 - v. Costs of this suit and interest thereon at court rates.
2. The suit is opposed, the 1st defendant entered appearance on March 1, 1996, and filed a statement of defence dated March 25, 2004. The 1st defendant upon being served with the plaint and amended plaint in her response through the filed a statement of defence though she admits the plaintiff to have



been registered owner of suit property Dagoretti/Riruta/3519 but contends that the transfer to the plaintiff was unlawful on account of fraud perpetrated by the 2nd defendant

3. The suit proceeded by *viva voce* evidence. The plaintiff called one witness and the defendant called two witnesses. Both parties testified on May 18, 2022 and July 6, 2022 respectively.

The Plaintiff's Case

4. The plaintiff contends that, on November 25, 1993 the defendant's deceased husband transferred all that property known as Dagoretti/Riruta/3519(hereinafter referred to as the suit premises) to Gideon Kaumbuthu Meenye (hereinafter referred to as the vendor) who was subsequently registered as the owner of the suit premises and issued with a title deed dated December 3, 1993 under the Registered Land Act.
5. The plaintiff avers that, by a sale agreement dated December 4, 1995, the vendor agreed to dispose of all his right to title and interest in the suit premises for a consideration of Kshs 700,000. By a transfer dated October 15, 1996 the vendor did in fact transfer his rights and interest in the suit premises to the vendor.
6. The plaintiff postulates that, subsequent to the said transfer the plaintiff was legally registered as the owner of the suit premises and issued with a title deed dated July 30, 1997 under the Registered Land Act.
7. It is the plaintiff case that, she is entitled to possession of the suit premises but has been denied entry by the defendant who is in illegal and unlawful possession of the suit premises from whom she has been collecting rent.

Evidence by the Plaintiff

8. PW 1 Stephen Mbugua Kamau relied on his witness statement dated December 31, 2018. He adopted his list of documents dated February 14, 2019 as his evidence in chief which he produced as Exh 1-13.
9. During cross examination, he testified having bought the suit property around 1995 or thereabout from Mr Gideon Kahunyu Menye. After conducting a search, he deduced that the name in the green card was Gideon Kaumbuthu Menye.
10. It was his testimony that, after the search, he entered into a sale agreement dated December 4, 1995 between him and Menye the 2nd defendant. He was however uncertain whether the document was registered but he still paid stamp duty amounting to Kshs 48,000. The assessed value of the property was Kshs 700,000. The transfer document is dated November 7, 1996.
11. The plaintiff contends that, upon inspection of the suit property, he found that there was a three roomed house as well as houses made of timber with occupants in them. He stated that the said occupants claimed to be tenants and he issued them with a notice to vacate. However, the occupants never left and the defendant's wife sold the land to the 2nd defendant.
12. The plaintiff asserted that, there was an advertisement by an agent for sale of the suit property in the newspaper, by one Mr Menye who the plaintiff contended that he never knew. However, Mr Menye informed the plaintiff of a pending case on the suit property with Mr Simeon Chege. Again, the case was decided in favour of Mr Meenye.
13. The plaintiff averred that, when bought the suit property there were no record of cases on the suit property, and he sued Watiri Chege as she had occupied the property.



14. During re-examination, he clarified that on the charge placed by KCB bank, the title was discharged to allow him to buy the suit property. Also, condition 3 indicated that he was buying the property as it was, and there was no charge at the time on the suit property.
15. With that the plaintiff closed its case.

The 1st Defendants Case

16. The 1st defendant filed a statement of defence dated March 25, 2004.
17. It is the defendants case at all material times that, there was no proper and/or legal transfer of the suit premises by the defendant's deceased husband to one Gideon Kaumbuthu Meenye. Also, that the purported registration of Meenye as the proprietor of the suit premises was effected through fraud and misrepresentation.
18. The defendant states that, Meenye never acquired a right over the suit premises capable of forming the subject matter of any sale agreement and the purported sale agreement alluded to in paragraph 4 of the plaint is a sham.
19. The defendant asserted that, Meenye never acquired a right or interests over the suit premises capable of being transferred and had not acquired such rights by October 15, 1996 thereby making any alleged transfer totally illegal and incapable of enforcement by this honourable court.
20. The defendant averred that, the registration of the plaintiff as the owner of the suit premise was illegal as is the purported title deed dated July 30, 1997 and the said registration should be cancelled by the honourable court.
21. The defendant further stated that, before the sale and transfer alluded to in the plaint, the plaintiff had visited the suit premises and was aware of its physical condition and occupation. The plaintiff had prior notice of all the circumstances surrounding the suit premises up to and including Meenye's defective title as indeed the defendant's deceased husband had told him as much.
22. The defendant asserted that, she had not trespassed as she occupies the suit premises as of right as the same rightfully belongs to her deceased husband and her initial entry therein was legal and peaceful.
23. The defendant stated that, she has been in occupation of this suit premises for a period for over 12 years and has in any event acquired the suit premise by adverse possession thereby rendering this suit incompetent.
24. The defendant contended that, the suit was time barred by virtue of the statutes of limitation.

Evidence by the Defendant

25. DW 1 Alice Watiri Chege, relied on a witness statement dated December 15, 2021 she lives in Ngando, she is the 1st defendant. She adopted a list of documents dated July 29, 2009 as her evidence in chief which he produced as Exh 1-10.
26. During cross examination, she testified that she was in court because of her husband's property, they have not done succession. However, the plaintiff has not claimed her husband's property.
27. It was her testimony that, she was aware that the person left with the title was Mr Meenye and who fraudulently took the land. She testified that she did not gather any evidence of fraud but despite all these she is aware that Mr Meenye was her husband's advocate.



28. It was her testimony that, her husband never informed her that he sold the land to the plaintiff and that there was a neighbouring plot, which he said he had sold so that he can use the proceeds of the sale to develop the suit property. She stated that, her husband sued the plaintiff as there was no agreement. She was aware that her husband went to Land Registrar and sued Mr Meenye. She knew his claim was rejected and he filed an appeal against the Chief Land Registrar but she was unaware if it was dismissed at all.
29. The defendant asserted that she knew the land in Ruiru registered under Simeon Chege. Mr Meenye sold six acres of the land to Simon for Kshs 60,000 for six acres, to which she has the title.
30. During re- examination, she testified that, *vide* a letter dated July 18, 1995 at pg 35, it was clear that Mr Meenye was Mr Simeon's Advocate.
31. Again, he had occupied the suit property for 50 years and no one evicted him. She stated that, there was a plot next to the one she occupied, and was aware of it as the proceeds were utilized to develop it. Regarding the Ruiru property, she testified that her husband entrusted Mr Meenye as his legal advisor with the dealings in the property and that she was unaware of any sale agreement.
32. With that the 1st defendant closed its case.
33. DW2 Gideon Meenye adopted his witness statement dated March 14, 2019 as his evidence in chief.
34. He testified that, at the time the sale, the consideration was 700,000/= and this was financed by the Central Bank. He clarified that he did not hand over vacant possession as Mr Simeon Chege had refused to vacate.
35. During cross examination, the defendant asserted that, the original mother title was Dagoretti/Riruta 1611 in the name John Dwaro. He represented Mr Chege in respect of his brother's estate and after the grant was made the property was subdivided into two titles bearing the numbers 3518 and 3519. He offered to purchase one of the subdivisions so Mr Chege sold to me parcel number 3519. The Initial agreement was for 3518 but the lady who was buying completed the sale so now that Mr Chege had my money so he could not transfer 3518 so we agreed that he would sell to me parcel number 3519 at Kesh 450,000 and since I had paid him Kshs 180,000 we also agreed that I transfer Ruiru/Ruiru East Block 3149 comprising six acres to Mr Chege in addition to the Kshs 180,000 already paid.
36. The defendant asserted that, there was no formal agreement between him and Mr Chege for parcels 3518 and 3519. Also, the 3519 was transferred to when we went to Land Control Board and obtained a consent. The witness testified that he had signed a transfer form which has is produced and is in the court file and an affidavit dated and sworn on July 1, 2004 with the requisite annexures.
37. During re -examination, he stated that he knew Simon Chege and had acted for him as an advocate and in utmost good faith. The 2nd defendant testified that he did not sue him for eviction but had given notice. Equally, he produced a letter dated August 15, 1997 addressed to Simeon and all other tenants in the suit property. The 2nd document was the acknowledgement dated December 3, 1991, drawn by him and was referring to Dagorretti/Riruta a portion of 1617 in the name of Nduaru Chege.
38. The defendant clarified that he prepared the acknowledgement dated October 23, 1992, to which Simeon Chege appended his signature. By virtue of purposes of section 3A of the [Contract Act](#), the signed acknowledgement related to number parcel number 3518 of Dagorrrreti/Riruta. Subsequently, the application for consent was obtained on October 6, 1993.
39. The DW 2 reiterated that, the original title was Dagoretti/Riruta 1611 which he subdivided into two parcels numbers 3518 and 3519, where the latter was sold to him. He stated that, document No 2



indicated the change from 3518 to 3519. They had agreed that he buys the parcel for Kshs 450,000. The consent is dated October 6, 1993 and the consideration is Kshs 100,000 but had paid Kshs 100,000 and then Kshs 85,000 and the last was an exchange of the Ruiru parcel of land. Further he stated that at the time of applying the consent, the defendant had understated the consideration and had only declared Kshs 100,000.

40. He averred that, the transfer was signed by Simeon Chege in the presence of Mr Muthuuri, at his office. He asserted that, Simeon obtained the title legally in April 1992, while he obtained his in December 1993, and the eviction letter was dated 1997.
41. With that the 2nd defendant closed its case.

The Plaintiff's Reply to Defence

42. The plaintiff filed a reply to defence dated May 11, 2004.
43. The plaintiff avers that, title number Dagorreti/Riruta 3519 was sold and transferred to him by Gideon Kaumbuthu Meenye voluntarily and for valuable consideration after all formalities required were met. Further the above mentioned title was sold by Simon Chege to Gideon Kaumbuthu Meenye in strict compliance with the terms of law
44. The plaintiff further states that, the defendant was fully aware of the sale transactions in respect of the aforementioned title, engaged in by her deceased husband and elected not to object to the same if indeed she was aggrieved.

Written Submissions

45. The plaintiff filed written submissions dated September 20, 2022.
46. To determine whether the plaintiff has proved ownership of the suit property, counsel for the plaintiff submitted that, the totality of the evidence adduced and produced shows that the plaintiff has established ownership of the suit property to the required standard.
47. To establish whether the plaintiff's title is defeasible, counsel for the plaintiff relied on the decision in *Vijay Mojarla v Nansingh Madhusingh Darber and another* [2000]eKLR, *Kuria Kiarie & 2 others v Sammy Magera* [2018]eKLR, as well as *Emfil Limited v Registrar of Titles Mombasa & 2 others* Mombasa CA 312 of 2012, and submitted that, even if the plaintiff's title was to be adjudicated on the provision of section 26 of the *Land Registration Act* which re-enacted section 28 of the repealed *Registered Land Act*, there would be no evidence to prove that the plaintiff was party to any fraud.
48. To establish whether the 1st defendant is a trespasser on the suit property, counsel for the plaintiff relied on the decision in *Gitwany Investment v Tajmal Limited & 3 others* [2006]eKLR and submitted that, possession per se for a twelve year period does not entitle the 1st defendant to a claim for adverse possession which requires dispossession of the registered owner or discontinuance of his possession. Counsel further relied on the averments in *Teresia Kamene King'oo v Harun Edward Mwangi* Nrb CA 113 of 2015 [2019] eKLR, and submitted that, the plaintiff's claim for trespass is not against the deceased's estate but against the 1st defendant and or her servants or agents who are in actual occupation of the suit property.
49. To determine whether the plaintiff is entitled to the relief sought, the plaintiff relied on the decision in *Park Towers Ltd v John Mithamo Njika and 7 others* [2014] eKLR, as well as *Duncan Nderitu Ndegwa v KP&LC Limited & another* [2013]eKLR and submitted that, the suit property is situate in Dagorretti, within Nairobi County and thus ideal for various commercial ventures which would have earned the



plaintiff substantial revenue and/or income therefrom. Counsel submits that the court awards mesne profits of Kshs 50,000/= per annum from 1997 until delivery of vacant possession as pleaded.

50. The defendants did not file any submissions

Analysis and Determination

51. I have reviewed and considered the pleadings, the evidence tendered and the submissions made. The court identifies the following issues for determination:

- i. Whether the plaintiff has proved ownership of the suit properties.
- ii. Whether the plaintiff is entitled to the prayers sought.

52. The plaintiff has adduced evidence showing that it is the registered owner of the suit properties. The plaintiff produced certificate of titles and official searches in its name. Nothing has been produced by the defendant to show their nature of claim over the suit property. The documents produced by the plaintiff showing its interest as the proprietor of the suit property is conclusive evidence as to its ownership of the said parcels of land. Section 26 of the [Land Registration Act](#) provides that:

“The certificate of title issue 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 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 grounds 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.”

53. Section 107 of the [Evidence Act](#) cap 80 of the laws of Kenya 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”.

54. Therefore, the onus is on the plaintiff to tender evidence proving the facts he alleges on a balance of probability. The plaintiff herein has indeed produced evidence which stands unchallenged that he is the registered proprietor of land LR No Dagorreti/Riruta 3519 per the title deed issued on 30/07+/1997 and an official search confirming his ownership.

55. In view of the foregoing sections 24, 25 and 26 of the [Land Registration Act](#), the plaintiff title to the suit property would only be challenged successfully on allegations of fraud, where the plaintiff is a party to the fraud.

56. It is clear from the pleadings herein that there are no allegations tabled challenging the plaintiff title to the property on such allegations as fraud.

57. It is trite law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. Therefore, in the circumstances this court



is inclined to find that the plaintiff is the registered owner of the suit property as his title to the property has not been challenged by the 1st nor 2nd defendants and or any evidence to the contrary presented.

58. In fact the 1st defendant in her bundle of documents has attached a document showing that her late husband Simon Chege placed a caution on the suit property. She has also a copy of the decision made by the Land Registrar lifting the caution, an appeal by her late husband against the Land Registrar's decision and the final decision by the District Land Registrar upholding the Land Registrar's decision. The District Land Registrar stated that "...The transaction was therefore executed and completed lawfully. The cautioner knew that he was transferring Dagoretti/Riruta/3519 to Mr Meenye.." The 1st defendant did not appeal further against this decision. It therefore my finding that the plaintiff is the absolute proprietor of the suit property and therefore entitled to protection as provide under the law.
59. On his part the 2nd defendant supported fully the plaintiff's claim and placed blame on the 1st defendant who has refused to move out of the suit property even after being compensated with the parcel of land in Ruiru. She did not deny that she has the papers for the land in Ruiru which LR No Ruiru/Ruiru East Block 31449.
60. The only issue that now remains for determination is whether the plaintiff is entitled to the orders sought. Having considered the certificate of search and title deed tendered by the plaintiff before this court, I find that the plaintiff is the registered proprietor of the suit land. It is therefore my finding that the 1st defendant's occupation of the suit land is illegal. In the case of Nyangeri Obiye Thomas v Yunuke Sakagwa Nyoiza ELC Case No277 of 2018 Okong'o J observed as follows:

"Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines trespass as follows:

"Any unjustifiable intrusion by one person upon land in possession of another."....trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession"

61. The 1st defendant's actions of remaining on the suit land therefore amounts to trespass which entitles the plaintiff to nominal damages.
62. The plaintiff has also sought injunctive orders and I have considered the Court of Appeal decision in Nguruman Limited v Jan Bonde Nielsen & 2 others, [2014] eKLR, where the court reiterated the conditions to be met by a litigant who seeks injunctive relief:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a) establish his case only at a *prima facie* level,
- b) demonstrate irreparable injury if a temporary injunction is not granted, and
- c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially."



63. The plaintiff has demonstrated through evidence that he is the registered owner of the suit property and has thus established a prima facie case. The 1st defendant has wholly occupied the plaintiff's land thus if the injunctive orders are not granted the plaintiff would suffer irreparable injury.
64. The plaintiff has also sought for mesne profits and damages for breach of contract from the defendants. The plaintiff has proved on a balance of probabilities that the 1st defendant has trespassed on his parcel of land known as LR No Dagoretti/Riruta 3519. The court awards the plaintiff Kshs 50,000/= as the nominal award of general damages in this case taking into consideration the duration of the trespass. Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved, however where a party claims for both mesne profits and damages the court can only grant one. In this instant the plaintiff has not proved what the tenant received from the suit property, this prayer is therefore declined.
65. In the end, I find that the plaintiff has proved his case on a balance of probabilities and I therefore enter judgment in his favour and grant the following orders;
- a. A permanent injunction restraining the defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing occupation of the property known as Dagoretti/Riruta/3519.
 - b. General damages at a nominal award of Kshs 50,000
 - c. The 1st defendant is hereby ordered to vacate the suit property within 30 days from the date of service of the decree herein upon them failing which the plaintiff may apply for an eviction order from the property known as Dagoretti/Riruta/3519.
 - d. Costs of this suit to be borne by the 1st defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2022.

MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Ms Mwangi holding brief for Mr Nderitu Advocate for the Plaintiff

Mr Njugu for the 1st Defendant

No appearance for the 2nd Defendant

Ms. Caroline Sagina : Court Assistant.

MOGENI J

JUDGE

