



REPUBLIC OF KENYA



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

**Karara v Gitau & 17 others (Environment & Land Case 244 of 2018)
[2022] KEELC 15204 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 244 OF 2018**

JG KEMEI, J

DECEMBER 5, 2022

BETWEEN

PETER WAINAINA KARARA PLAINTIFF

AND

JOHN THENDU GITAU 1ST DEFENDANT

**GITHUNGURI CONSTITUENCY RANCHING CO LIMITED 2ND
DEFENDANT**

LAND REGSITRAR THIKA 3RD DEFENDANT

SAMUEL WAMWERE MBUGUA 4TH DEFENDANT

GEORGE MBUGUA MBERAI 5TH DEFENDANT

GABRIEL NJENGA MBERAI 6TH DEFENDANT

VERONICA ALUOCH OWUOR 7TH DEFENDANT

ANGELINE AKELLO AWUOR 8TH DEFENDANT

FAITH MWENDWA 9TH DEFENDANT

MARY GORETTI KARURU 10TH DEFENDANT

ALICE WANGUIN MUTHONI 11TH DEFENDANT

CAROLINE WAIRIMU MUNIU 12TH DEFENDANT

DAVID MWANGI GICHURE 13TH DEFENDANT

HELLEN MWIHAKI MIGWI 14TH DEFENDANT

CHARLES NJENGA 15TH DEFENDANT

GABRIEL NJENGA MERIA 16TH DEFENDANT



MARTIN MURUIKI KINYENJE 17TH DEFENDANT

GABRIEL GACHUKIA MBUGUA 18TH DEFENDANT

JUDGMENT

The Pleadings

1. By a plaint dated the October 8, 2018 the plaintiff filed this suit on the October 9, 2018 and sought the following orders;
 - a. A declaration that the register to parcel Ruirukiu Block 2(Githunguri)/1687 (suit land) opened on the March 2, 2012 was invalid.
 - b. A declaration that the mutation of the suit land registered on the March August, 2013 was and is illegal.
 - c. An order cancelling the registrar relating to land parcels of parcel Nos 11909- 11920 inclusive.
 - d. An order the 3rd defendant to reopen the register the suit land with the particulars obtaining in the title deed thereof issued in Kiambu on March 8, 1993.
 - e. An order of permanent injunction restraining the 1st, 4th - 19th defendants from trespassing alienating working on or in any other manner interfering with the suit land
 - f. Costs of the suit.
2. It is the plaintiff's case that he is the registered owner of the suit land having acquired the same through membership in the 2nd defendant Company. That while doing a routine search of the title in the Registry in April 2018, it turned out that the title had been fraudulently registered in the name of the 1st defendant who upon illegally subdividing into 12 parcels unlawfully transferred the same to the 4th - 9th defendants in collusion with the 2nd and 3rd defendants thus depriving him of his right to title.
3. The plaintiff averred that the title held by the 1st defendant having been acquired illegally is incapable of conferring title to the 4th -19th defendants as the said titles are null and void.
4. On application by the plaintiff the Court granted him orders to effect service upon the 1st, 4th - 19th defendants on the October 11, 2018. The 1st defendant was served on the October 8, 2018 and entered appearance on the October 20, 2018 through the law firm of Milimo Muthomi & Co Advocates.
5. On application by the plaintiff the Court issued orders of inhibition prohibiting any dealings by way of disposal of all the subdivisions being parcel Nos Ruiru/Kiu/Block2/Githunguri/11909 & 11920.
6. The 1st defendant denied the plaintiffs claim through his statement of defence filed on the Novmber 20, 2018 where he stated that he is a bonafide purchaser for value without any notice of any taint. That he lawfully subdivided the land into parcels Nos Ruiru /Kiu/(Githunguri)/11909 - 11920 and transferred to the 4th – 19th defendants.
7. The 2nd defendant entered appearance through the law firm of Kanyi Kiruchi & Co on the November 5, 2018 and filed defence on the June 24, 2018 and denied issuing the clearance certificate dated the January 22, 1992 on the grounds that the suit land does not belong to the plaintiff. It denied fraud levelled against it and contended that the plaintiff acquired the land through fraud illegality and was



emphatic that the suit land belongs to the 1st defendant having acquired it from the previous allottee of the 2nd defendant.

8. The 3rd defendant failed to enter appearance nor file a statement of defence.

The evidence

9. The plaintiff led evidence in support of his case and relied on his witness statement dated the October 28, 2018 and produced documents in the List of Documents marked as PEX No 1-11.
10. In summary the witness stated that he is a shareholder of the 2nd defendant through a direct subscription for shares. That his share certificate was issued on the June 17, 1986. That he balloted for the suit land, paid the requisite payments for survey etc; was issued with a clearance certificate letter dated the January 12, 1992 and subsequently a title was registered in his name on the January 7, 1993 and later was shown the land by the 2nd defendants officials; In a routine inspection of the register he discovered that the same had been registered in the name of the 1st defendant who had subsequently subdivided the same and sold to the 4th -9th defendants and yet he still retains the old title having not transferred or disposed it to anyone least of all the 1st ,4th -19th defendants. That the actions of the defendants are fraudulent, illegal and unlawful and urged the court to hold that the resultant titles are null and void.
11. In cross the witness stated that he acquired the land from the 2nd defendant through purchase of 1000 shares as shown in the share certificate dated the June 17, 1985. That the ballot numbers disclosed on the share certificate are 1957 (cancelled), 1357 and 1538. He did not know the reasons for the cancellation of the numbers on the certificate. He stated that though he does not have a ballot card his ballot is No 2865.
12. With respect to the status of his membership registration, he stated that his name is not in the members register maintained by the 2nd defendant.
13. With regards to the number of plots he was allocated he stated that he only got one and was not aware that members were entitled to three plots in total. He was categorical that he did not get any ¼ and/or 1/8 acre plots.
14. The witness stated that the results of the search on the title showed that the title was registered in the name of the 1st defendant and that he never procured any in his name. That in 2018 his advocate unsuccessfully requested for a clearance certificate from the 2nd defendant to show that he owned the land. None was given.
15. Further the witness stated that he was born in 1950 and was 17 years when the 2nd defendant company was founded. That he was one of the founder members of the 2nd defendant. That his identity card as stated in the share certificate is different because the same was changed during issuance of the 2nd generation identity cards.
16. The 1st, 4th – 19th defendants evidence was led by James Thendu Gitau who took the stand as DW1. He relied on his witness statement dated the May 6, 2019 and produced the documents enumerated in the list of documents dated the February 19, 2019 and supplementary list of March 10, 2022 and marked as DEX 1-6.
17. The witness informed the court that he purchased the suit land from an original member of the 2nd defendant namely Virginia Wanjiru Ndimu (Virginia) after conducting a search from the offices of the 2nd defendant. That he paid for the transfer and clearance fees to the 2nd defendant and was issued with



- a title by the 3rd defendant. That later he subdivided the land into parcels No 11909-11920 and sold to the 4th -19th defendants who took over possession of the said plots in 2015.
18. In cross he confirmed that Virginia held a ballot card, share certificate and receipts from the 2nd defendant. That he holds the original ballot card No. 2865 handed over to him by the said Virginia. That a shareholder in the 2nd defendant Company was entitled to three parcels of land namely $\frac{1}{4}$, $\frac{1}{8}$ and $1\frac{1}{4}$ acres. That the name of Virginia is contained in both registers presented by the plaintiff and the 2nd defendant and none exists for the plaintiff.
 19. DW2 – Robert Mugendi Mbuba stated that he is the Land Registrar -Ruiru Land Registry. That according to the green card he produced in Court and marked DEX 7-11, the register for the suit land was opened on the March 2, 2012 and the title issued on even date. On the March 8, 2012 the 1st defendant subdivided the suit land into 12 parcels namely 11909-11920 and sold to the 4th -19th defendants who hold titles to date.
 20. In addition, he stated that the land originated from the 2nd defendant who was the initial owner. That previously the sub parcels would be registered in the name of GOK and then the member in that order. He was categorical that there was no register opened in the name of the plaintiff according to the records held in the registry. With respect to the dispute at hand, the witness stated that where there is double allocation of land by the 2nd defendant, it behoves the 2nd defendant to give the correct position as to who is the rightful allottee of the land as they maintain the register of its members. That the clearance certificate from the 2nd defendant plays a key role in registering the title in the name of the member. That his office relies on it as it emanates from the Company which is expected to know its members and their entitlements. It also forms a guide on the identity of the allottee, parcel number, ballot number, acreage or size of the land.
 21. DW3- John Maina Mburu took the stand on behalf of the 2nd defendant. He introduced himself as the Chairman of the 2nd defendant and relied on his witness statement dated the November 26, 2021 and produced documents marked as DEX 12 -14 as contained in LOD dated the December 1, 2021.
 22. That according to the records of the 2nd defendant the original allottee of the suit land was Virginia Wanjiku Ndimu through ballot no 2865. She held a share certificate dated the October 9, 72. On the August 11, 2009 the land was transferred to the 1st defendant. That contrary to the evidence of the plaintiff, the plaintiff is not a member of the 2nd defendant. That their records show Virginia as a member and original allottee of the suit land.
 23. The witness took the court through the key steps in land acquisition from the company as thus; registration as a member; payment of shares; issuance of payment receipts & share certificate to the member; subdivision & surveying of the land; members are invited to ballot; identification of the parcel to the member post balloting; clearance certificates issued to the member for processing of the title at the Lands Registry. He stated that balloting is the last step in the process of land acquisition and emphasized the importance of the ballot card. A member holding fully paid up shares was entitled to 3 parcels of land; $\frac{1}{8}$ (residential), $\frac{1}{4}$ (bonus share) and 1.25 (farm) acres.
 24. The witness stated that the plaintiff is not a member of the 2nd defendant. When shown the share certificate No 5610 dated the June 17, 1985 the witness informed the Court that the plaintiff paid for the shares after the balloting had closed on the February 25, 1985. By the time he is being issued with a share certificate on the June 17, 1985 there were no plots available for allocation and that explains why his share certificate has 3 plot Nos namely 1957 (cancelled), 1357 and 1538. That the explanation is that since the plots had been balloted and allocated the plaintiff was seemingly asked to check on the ground whether there were any vacant plots available and found the plots occupied. That is



- why his share certificate contained an endorsement that the certificate was subject to authentication by the chairman and board of directors. That the endorsement was withdrawn hence the certificate was not validated. He stated that the certificate is not genuine for the reasons that it was issued after balloting was completed. It was his evidence that the residential plots measuring $\frac{1}{8}$ were allocated in 1973 followed by the $1\frac{1}{4}$ acres on the February 25, 1985 and finally the bonus of $\frac{1}{4}$ plots.
25. The witness stated that the receipt No 14558 of June 14, 1985 produced by the plaintiff is not authentic because by this date balloting had concluded 4 months before. Entry into the company post balloting means that the plaintiff was never a member of the 2nd defendant from the beginning. He stated that receipt No 14658 dated the June 14, 1985 refers to miscellaneous allocation of land which means that the plaintiff was paying to be shown if any parcels of land had remained unallocated and available. That members of the Company were showed their parcels by the company surveyor. He refuted the receipts dated the January 28, 1986 as inconsequential on the ground that the plaintiff had no ballot in the first place and added that he could not even confirm the authenticity of the same and or that the receipts emanated from the Company.
 26. The witness informed the court that a clearance certificate was of essence as it gave the plot and owner details on which the Land Registrar relied to open the register and pave way for the registration of the land in the name of the member. That the company issued the clearance certificate based on the details of the register of members that it maintained. He stated that the clearance certificate dated the January 22, 1992 is not genuine because the purported signature of the company secretary, a Mr Kamunge is a forgery. Further he assailed the title of the plaintiff on the grounds of the variation of the identity cards on the title and that in the clearance certificate. He refuted that the share certificate held by the plaintiff emanated from the 2nd defendant's office.
 27. Further the witness stated that the 2nd defendant was incorporated in 1968 as a Farmer's Cooperative Society and Virginia was one of the original members. Members purchased shares and contributed money for the purchase of the land; the land was subdivided in 1973 and allocation begun from Ruiru West Block 1 to settle the members hence the plots measuring $\frac{1}{8}$ were residential and settlement of the members; farming land being $1\frac{1}{4}$ acres was in Ruiru Kiu Block 2 and Ruiru East Block 1; That balloting for Ruiru Kiu Block 2 was done on the February 25, 1985; one could not have benefited from the 2nd plot unless he had been allocated the first one for residential save where the purchase is from an original member; That a portion of land remained and was allocated through ballot as a bonus – this one measured $\frac{1}{4}$ acres.
 28. The witness informed the court that he was appointed chairman of the 2nd defendant on the September 12, 2009. He informed the court that Ms Ndimu paid fully for 100 shares hence entitling her to 3 parcels of land. He confirmed that the 1st defendant was issued with a clearance upon payment of Kshs 9800/- which amount he stated was subject to variation by the directors. That the directors had the power to waive the fees for old members of the company. He confirmed that he submitted the members register for $1\frac{1}{4}$ acre plots as it was relevant to the dispute at hand.
 29. At the close of the hearing parties elected to file written submissions which I have carefully read and considered in the judgement.
 30. Having considered the pleadings, the evidence of the parties led at the hearing, the written submissions and all the material placed before me I consider the following issues pertinent for the determination of the dispute as follows; whether the plaintiff has proven fraud, illegality and unlawfulness on the part of the defendants; whether the plaintiff holds a valid title; what orders should the Court make; who meets the costs of the suit.



31. The plaintiff's case is that he was the original member of the 2nd defendant; paid for the shares, balloted and was issued with the suit land. Armed with the documents alongside the clearance certificate he was registered as owner of the land in 1992 and issued with a title which he holds to date. That in 2018 whilst carrying out a routine search of the land he discovered that the same is registered in the name of the 1st defendant and further that the same had been subdivided into 12 plots and sold to the 4th - 9th defendants. In summary he accuses the defendants of fraud and illegality and has urged the Court to declare the resultant titles held by the defendants null and void. He decries the actions of the defendants as depriving him of his right to own land contrary to his property rights espoused in art 40 of the Constitution.
32. The 1st, 4th - 9th defendants refuted the claim of the plaintiff and argued that the 1st defendant was a bonafide purchaser for value without any notice of taint whatsoever in the title that he acquired from Virginia Wambui Ndimu, the original allottee of the land. He denied any acts of fraud and or illegality and urged the court to dismiss the suit.
33. The 2nd defendant whilst denying the claim of the plaintiff gave a blow by blow details of how the suit land was allocated and confirmed that the 1st defendant purchased the land from the original allottee, Ms Ndimu who was their member. That the plaintiff was not their member and questioned how he obtained a share certificate, ballot and title and termed his claim unsubstantiated in all respects.
34. The 3rd defendant led evidence through the Land Registrar and dispelled the claim of the plaintiff by stating that the rightful registered owner of the land was the 1st defendant and that there is no evidence that a register was ever opened in the name of the plaintiff.
35. It is commonly accepted that the suit land emanates from the 2nd defendant incorporated in 1968 as a Farmer's Cooperative. It is also commonly accepted that there are two titles over the parcel of land, one held by the 1st defendant and later subdivided into 12 plots and the one held by the plaintiff. The court is being called upon to determine as to who between the plaintiff and the 1st defendant hold a valid title.
36. Ownership and registration of title are processes that are protected in law. Protection of rights to property do not extend to any property that has been found to have been unlawfully acquired. See article 40 (6) of the Constitution as read together with the provisions of section 26 of the Land Registration Act which provide the manner in which a title may be impeached.
37. In determining the dispute this court among other things must inquire into the root and the coming into existence of the two titles to determine which one has an unbroken chain and stands the test of a lawful and valid title protected by the law. It is trite that in title acquisition it is not the end that justifies the means. The process of acquiring title is as important, if not more important than the final title document. See the case of Munyua Maina v Hiram Gathiba Maina (2013) eKLR where the court held that when the instrument of title is under challenge the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title to show that the acquisition is legal, formal and free from any encumbrances.
38. Section 107, 108 and 109 of the Evidence Act state as follows;
 107. Burden of proof
 - (1) 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.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

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.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

39. For the court to grant the declaratory orders sought in the plaint my reading of the above provisions of the law is that the plaintiff bears the burden of proof that he is the lawful owner of the suit land and that he acquired it lawfully and without any taint.
40. The case of the plaintiff is anchored on fraud. It is his case that his title was fraudulently registered in the name of the 1st defendant and illegally subdivided and transferred to the 4th -19th defendants. It is trite that fraud cannot be inferred from the facts of the case but must be pleaded and proved to a standard that is lower than beyond reasonable doubt obtainable in criminal cases and higher than the balance of probabilities in civil cases. See the case of *Vijay Marjoria v Nansignh Madhusingh Darbar & Anor* (2000) eKLR.
41. I have evaluated the evidence on record and I find that the plaintiff's claim in his pleadings is that he was one of the original members of the 2nd defendant and that he balloted for 3 plots under ballot Nos 1357, 1538 and 2836. This contradicts his evidence that he led in Court when he stated that he only acquired one plot being the suit land. That he held ballot No 2865. Whilst giving evidence the witness appeared unsure of the details of his ballot and even when he balloted. DW3 led evidence that the 2nd defendant company was incorporated in 1968 and members purchased shares and contributed to the purchase of the large parcel of land which was later subdivided for its members. He explained that the process of land acquisition entailed the purchase of shares; issuance of receipts; share certificate; payment of survey and other incidentals; survey and subdivision of the land and balloting.
42. DW3 explained that the balloting for 1¹/₄ acres was based on the initial allotment of 1/8 acres of land in 1973. That the balloting for the land was on February 25, 1985. For one to ballot one must have been a member of the 2nd defendant Company. The plaintiff failed to lead evidence that he was a member of the 2nd defendant. Both extracts of the membership Register only showed Virginia Wambui Ndimu as a shareholder and the name of the plaintiff is missing. This evidence is contrary to the evidence of the plaintiff that he was an original member of the 2nd defendant company. There is neither no evidence that the plaintiff purchased the suit land from an original member of the 2nd defendant. The share certificate held by the plaintiff has been challenged on the ground that it is not anchored on the register of members; that the plot Nos on the share certificate seemingly shows that the plaintiff's interest did not crystalize into a particular parcel least of all the suit land. The plaintiff did not dispel the evidence led by DW3 that the share certificate was never validated by the board of directors and that the same is not genuine. The plaintiff had the onus to proof otherwise to the court but he failed.
43. Going by the unchallenged evidence of DW3 that balloting was done on the February 25, 1985, the plaintiffs share certificate having been issued in the month of June 1985 after the conclusion of the balloting exercise creates doubt as to the genuineness of the said document.



44. I have perused the share certificate held by Ms Ndimu issued in 1972 which agrees with the ballot of 1985 and it is clear that by June 1985 there was no plot No 1687 available for allocation and balloting by the plaintiff it having been alienated to Virginia in February 1985. It also shows that the plaintiff did not ballot for the plot at all given that his payment receipt reads June 14, 1985. He could not have balloted for the plot before paying for the shares and being admitted into membership. In any event the land was not allocated to him. The evidence of DW3 is persuasive that the plaintiff was not a member of the 2nd defendant, did not ballot and that the suit land belonged to Virginia W. Ndimu, the original allottee.
45. The evidence of the Land Registrar was clear that there was no register for the title held by the plaintiff. He produced documents which showed that the plaintiff purchased the land from Virginia Ndimu, got clearance from the 2nd defendant and was registered as owner in 2012. The plaintiff failed to show that the suit land had ever been registered in his name. Where there are competing titles and the register is not helpful in unearthing the ownership of a parcel of land the Court turns to the Company for the records of its member that it maintains to answer the issue in controversy as to the ownership of the land. As discussed above I have found that the plaintiff was not a member of the 2nd defendant; share certificate is questionable; has no ballot card and therefore the root of his title cannot be traced to the 2nd defendant. To the contrary the title of the 1st defendant is clearly traceable to the 2nd defendant, membership of Ms Ndimu and finally the titling in favour of the 1st defendant.
46. Having carefully analysed the dispute I find that the plaintiff has not proved fraud and or illegality on the part of the defendants. That is to say that no evidence of fraud; no evidence of concealment or removal of the title register; cancellation of the register or conspiracy on the part of the defendants.
47. Having found that the plaintiff has not proved the root of his title I find that he has not proven that he holds a valid title. To avoid the said title being held out as a genuine title, I find that this is a title that this court can cancel under its mandate given in section 80 of the [Land Registration Act](#). For avoidance of any doubt the title held by the plaintiff is hereby declared null and void to the extent of its existence.
48. In the end the plaintiffs case has not been proved. It is dismissed with costs to the defendants.
49. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 5TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Irungu for plaintiff

Muthomi for 1st defendant

Wachira HB Kanyi for 2nd defendant

3rd defendant – Absent

Muthomi for 4th – 19th defendants

Court Assistant – Phyllis / Kevin

