



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Ngera & another (Environment & Land Case 314 of 2017)
[2025] KEELC 198 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 314 OF 2017
JG KEMEI, J
JANUARY 24, 2025
(FORMERLY ELC 311 OF 2014 -NAIROBI)**

BETWEEN

EDWARD KARORI WAWERU PLAINTIFF

AND

MUTHOGA NGERA 1ST DEFENDANT

MWALIMU SUKARI COMPANY LIMITED 2ND DEFENDANT

JUDGMENT

1. This suit was first filed in Nairobi on the 17/3/2014 and registered as ELC No 311 of 2014 and was transferred to this court in 2017 on account of territorial jurisdiction. That said it is noted from the record that the suit has tarried in the corridors of justice for almost a decade.
2. Vide an amended plaint dated the 1/4/2019 the Plaintiff sought the following orders against the defendants;
 - a. A declaration that RUIRU/RUIRU EAST BLOCK3/904 (suit land) lawfully belong to the Plaintiff.
 - b. A declaration that the entry made in regard to the suit land on 31/5/2005 and the issue of a title thereof was illegal fraudulent void and the same be cancelled.
 - c. Costs of the suit be provided for
3. The Plaintiff averred that at all material times he was the lawful owner of the suit land having purchased shares from Mwalimu Investment Co Limited a land buying company and was allocated the suit land and issued with a title on the 27/9/1996. Thereafter he averred that he took possession of the suit land to date and without any interruption from any person. That during a routine check on his property,



- he carried out a land search at the registry and to his shock he discovered that the suit land had been fraudulently registered in the name of the 1st Defendant in 2005. He impleaded particulars of fraud on the part of the defendants in para 9 of Plaintiff and urged the court to cancel the entries in the register.
4. The 1st Defendant denied the Plaintiff's claim in toto vide his statement of defence dated the 27/5/2014 and contended that he holds a legitimate interest in the suit land having acquired the suit land from Mwalimu Investment Co Limited for valuable consideration. He added that he is an innocent purchaser for value without notice devoid of any fraud or taint whatsoever. Further, that his due diligence established that the 2nd Defendant held and conveyed a valid and good title to him and put the Plaintiff to the strictest proof. He further averred that he is a bonafide registered proprietor of the suit land has legitimate possession and the Plaintiff's claim for trespass and loss of user is misconceived and untenable in the circumstances. He urged the court to so dismiss the suit with costs.
 5. According to the record the hearing of this case was delayed inter alia from 2021 to 2023 as the parties were negotiating with a view to settling the matter out of court. The negotiations collapsed despite the various accommodations by the court to allow the parties exercise their right to resolve their dispute through alternative dispute resolution mechanisms.
 6. PW1 – Edward Karori Waweru led evidence and relied on his witness statement dated the 1/4/2019 in evidence in chief and produced documents marked as PEX No 1-6 in support of his claim.
 7. He stated that in 1982 he purchased shares in Mwalimu Investment Co Limited (the company) and paid the necessary fees. That the shares entitled him to 8 acres of land owned by the company in form of 4 acres each being plot Nos 904 and 905. He was issued with the title deeds in 1996 and immediately took possession of the lands to date and commenced developments and farming of goats and sheep and also fenced the lands. A search in the land's office established that the suit land had been registered fraudulently in the name of the 1st Defendant and upon carrying out further inquiries with the Land registrar who upon perusal of the title documents in his custody advised him to file a complaint of fraud at the police station who upon preliminary investigation lodged a restriction on the land register to preserve the integrity of the register.
 8. The witness further stated that he was not given a copy of the green card in his name at the lands office on the grounds that the same was unavailable. That upon allocation of the land he duly paid up all the charges and costs required and produced receipts in support thereof. That he paid Kshs 10,080/- for 8 acres of land and paid accordingly.
 9. In further cross examination, he stated that he met the 1st Defendant in court for the first time. That he never sold the land to the 1st Defendant neither did he have an inkling that the same had been transferred to the 1st Defendant.
 10. With that the Plaintiff closed his case.
 11. DW1 – Muthoga Ngera testified and relied on his witness statement dated the 12/5/2016 in evidence in chief. He stated that in 2004 he purchased the suit land for the sum of Kshs 1.8 Million from the 2nd Defendant and a title was issued to him in 2005. He stated that when he was sued in this case he sought an explanation from the 2nd Defendant's officials who informed him that there could have been a mistake where the suit land could have been erroneously and inadvertently listed among the list of parcels whose original allottees had forfeited back the lands to the 2nd Defendant due to defaults in payment of the purchase price. That he had no knowledge that the suit land had been allotted to the Plaintiff and that if it is found that the Plaintiff was the first allottee he was prepared to surrender the title to the Plaintiff.



12. The witness stated that he was a high school teacher as early as 1983, That he acquired the land in 1995 from Mwalimu Investment Co Limited, a land buying company that owned 10,000 acres which was subdivided and sold to buyers. The witness denied fraud and stated that he collected the title from the 2nd Defendant which was issued to him in 2005 and that he has been in possession of the suit land since 2005. Without adducing any evidence, the witness stated that he was a member of the 2nd Defendant. Asked about the discrepancy in the witness statement and the oral evidence in court on when he purchased the land, DW1 stated that he begun purchasing the land in the 1990s. without adducing any evidence, he stated that he was issued with a allotment letter form the 2nd Defendant.
13. With that the 1st Defendant closed his case.
14. The 2nd Defendant failed to enter appearance and nor file a defence.
15. The Plaintiff filed written submissions that the Plaintiff was the first registered owner of the suit land on the 27/9/1996 and that the registration of the 1st Defendant in 2005 was illegal and unprocedural as the property was not available for allocation to the 1st Defendant, it having been allocated and title issued to the Plaintiff in 1996. Relying on the case of Munyu Maina Vs Hiram Gathiha Maina the Plaintiff added that it behooves the Defendant to proof that he acquired the title legally and free from any encumbrances. Further while quoting the case of Jacob Wekesa Balongo Vs Kincho Olokio Adeya & Anor (2020) EKLRL the Plaintiff submitted and urged the court to consider the historical background to the acquisition of the title which is as good as the title itself.
16. The 1st Defendant submitted and framed three issues for determination as thus; whether the plaintiff has proved fraud against the 1st Defendant; who is the legitimate owner of the suit land; whether the plaintiff is entitled to the order of cancellation of title over the suit land.
17. The 1st Defendant submitted that the Plaintiff failed to present evidence in support of the allegation that the 1st Defendant forged documents; colluded with the officials of the Land Registry; that the 1st Defendant was charged and convicted of forgery; that the allegation to the 1st Defendant was illegal and unprocedural; failed to adduce the transfer signed by the company, LCB consent to transfer receipt for stamp duty application of the registration of the transfer. That the burden of proof of the particulars of fraud lay squarely on the Plaintiff which burden the Plaintiff has failed to discharge. Further the Plaintiff was faulted for failing to produce a green card showing the Plaintiff was the registered owner of the suit land. It was further submitted that if the Plaintiff purchased 8 acres then he ought to have been allocated land in the block comprising of 8 acres and not 4 acres as alleged. The Plaintiff was faulted for failing to adduce evidence of the land registrar so as to offer an explanation regarding the missing green card for his title.
18. The issues for determination are;
 - a. Who between the Plaintiff and the 1st Defendant is the legitimate owner of the suit land.
 - b. Whether the Plaintiff has proven fraud and title for the suit land
 - c. Whether the plaintiff is entitled to the orders sought
 - d. Costs of the suit
19. It is not disputed that both parties are laying claim of ownership on the same suit land. The registration system in Kenya is such that it is illegal to issue title to two different persons on one parcel of land. If our registration system was functioning well (which it should be) cases of double titling for whatever reasons ought not be the case. Both parties claim to have purchased the suit land from the 2nd Defendant



but at different times. To determine who owns the suit land, this court is being called upon to inquire into the history and the root of each of the titles held by the Plaintiff and the 1st Defendant.

20. In the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR the court when faced with the same facts had this to say:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

21. It is the Plaintiff case that he purchased the suit land in 1982 as can be seen by the letter of offer dated the 18/12/1982. In this letter the 2nd Defendant offered to sell 8 acres of a portion of land at the consideration of Kshs 7200/- and additional Kshs 2880/- being the legal fees, services and stamp duty making it the total sum of Kshs 10,080/- . This amount was due within 30 days from the date of the letter. The Plaintiff led unchallenged evidence and adduced receipts dated the 4/1/83 being payment for the full purchase price. The court notes that the payment was made within the stipulated period of 30 days stated in the letter of offer. The Plaintiff also adduced several receipts for additional; payments notable being the 21/11/83 as well as the 7/10/91 being the title fees for plot No 905. It was the Plaintiff's case that he was issued with two titles being parcel 904 and 905. the later being the subject of the suit. The Plaintiff adduced a copy of the title issued in his name on the 27/9/92. It was his case that despite holding title he discovered that the green card for the said title was issued in the name of the 1st Defendant and yet he held title to the land. He also led evidence that he took possession of the land from 1982 to date.
22. The 1st Defendant's case is that he purchased the suit land from the 2nd Defendant at the consideration of Kshs 1.8 Million. Save for a copy of the green card showing his name under entry No 2 , the 1st Defendant did not adduce any other evidence in form of a sale agreement, transfer form, payment receipts for the land, letter of offer, membership register, copy of title and or land control board consent to transfer the property.
23. It is trite when the root of a proprietor's title is under challenge the registered proprietor must travel beyond the instrument and proof the legality of how he acquired the title and show that the acquisition was legal formal and free from any defect or malady. See the decision of the court in *Munyu Maina Vs Hiram Hiram Gathiha Maina* (2013) eKLR where the court stated as follows;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and



free from any encumbrances including any and all interests which need not be noted on the register.”

24. The court notes that the 1st Defendant failed to show the root of his title. In his evidence he explained that after he was served with the summons in this case, he inquired from the 2nd Defendant what could have happened and the director of the company explained to him that it could have been a mistake that occurred whereby the suit land was sold to him erroneously and inadvertently listed as among the parcels that had been forfeited on account of payment defaults. So candid was the 1st Defendant that he avowed to surrender the title he holds if the Plaintiff was found to have been the first allottee of the land.
25. From the evidence on record the court finds that the Plaintiff was the first allottee of the land in 1982 and having paid for the land as supported by the receipts on record, he acquired a good title demonstrated by the title issued to him in 1996. If there was land that had been forfeited on account of defaults in payments, certainly it cannot be the suit land as evidence has been adduced that payment was done within the stipulated time given in the letter of offer. Indeed, by 2005 the suit land having been purchased allotted and titled in favour of the Plaintiff was not available for allocation to the 1st Defendant, the same having been allotted to the Plaintiff in 1982.
26. Section 26 of the *Land Registration Act* provides as follows;

“26.

- (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.

27. Weighing the evidence adduced by the plaintiff against that of the 1st Defendant I find that the Plaintiff has a better title than the Defendant for the reasons explained in the preceding paragraphs. I find the title of the 1st Defendant hollow and unsupported in evidence, the same having been obtained through illegality, fraud mistake and or both on the part of the Defendants. From the record it is not in dispute that mistake was admitted by the 2nd Defendant on record.
28. Be that as it may be from the above findings it is clear that the register containing the name of the 1st Defendant cannot be allowed to exist lest it is used to further more fraud on unsuspecting members of the public. It must be cancelled and the register in the name of the Plaintiff be restored.



Final Orders for Disposal

29. The plaintiff case succeeds and I enter judgement as follows;
- a. It is hereby declared that Ruiru/ruiru East Block3/904 (suit land) lawfully belongs to the Plaintiff.
 - b. It is further declared that the entry made in regard to the suit land on 31/5/2005 and the issue of a title thereof was illegal fraudulent void and the same hereby stand cancelled.
 - c. The Land Registrar, Ruiru be and is hereby ordered to cancel the entries made in the name of the 1st Defendant on 31/5/2005 and reinstate the register in the name of the Plaintiff forthwith.
 - d. Costs of the suit are in favour of the Plaintiff
30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Njoki holding brief for Gatumwa for Plaintiff

Ms. Wangare holding brief for Mutinda for 1st Defendant

Judith Adhiambo – Court Assistant

