



Mbote (Suing through his Attorney Faith Wanjiru Mbote) v Barugu (Environment & Land Case E026 of 2023) [2025] KEELC 438 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELC 438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E026 OF 2023
A OMBWAYO, J
FEBRUARY 6, 2025**

BETWEEN

**JOHN GATHU MBOTE APPELLANT
SUING THROUGH HIS ATTORNEY FAITH WANJIRU MBOTE**

AND

DANIEL BARUGU RESPONDENT

JUDGMENT

Introduction

- 1 The Plaintiff commenced this suit vide a Plaint dated 3rd April, 2023 against the Defendant seeking the following orders:
 - a. An order of permanent injunction restraining the Defendant, his employees, servants, and or agents from further dealing, subdividing, leasing, selling, charging, entering, and transferring the Plaintiffs' / Applicants' land known Dundori/lanet Block 5/303 (kiamunyeki) measuring approximately 0.9850 Ha.
 - b. An order declaring the Plaintiffs as the legal, bona fide, and rightful proprietors of all that parcel of land known as Dundori/lanet Block 5/303 Kiamunyeki) measuring approximately 0.9850 Ha.
 - c. An order declaring that the Defendant's certificate of title for Dundori/lanet Block 5/303(kiamunyeki) was issued illegally and fraudulently. An order directing the land Registrar to cancel the certificate of title issued to the Defendant for all that parcel of land known as Dundori/lanet Block 5/303 (kiamunyeki) measuring approximately 0.9850 Ha. d) Costs of the suit.
 - e. Interest on (c) above.



- f. Any other orders that this Honorable court may deem fit and necessary.
- 2 The Defendant entered appearance and filed his Statement of Defence dated 16th November, 2021 where he denied the allegations in the plaint.

Plaintiffs' Case

- 3 Faith Wanjiru Mbote testified as PW1. She produced her witness statement dated 3rd April, 2023 as evidence in chief. She also produced her list of documents as PEX1- PEX 16. It was her testimony that the Plaintiff is her brother based in America. She testified that he gave her the power of Attorney. She testified that the suit land was registered in the name of Pauline and that of her brother. She further testified that the same was inherited and that their father's title was cancelled.
- 4 It was her testimony that the registered owner of the land should be her brother.
- 5 Upon cross examination by Waiganjo, she stated that Stephen Mbote was her late father. She denied knowing Devason Gichuki and stated that Nakuru Kiamunyeki was a land buying company. She stated that they have never lived on the suit land. She went on to state that there was a school on the suit land built by Gichuru but that it was not operative. She added that the school was known as St Georges Academy. She stated that Gichuru built the school to buy the land from her father. She confirmed that she did not have any documents. PW1 stated that he was leasing land from her father. She admitted that she did not have any evidence of the same. She stated that her father had the title issued on 1997. PW1 stated that the case number HCC No. 33 of 1998 touched on many titles where all title deeds were cancelled. She admitted that there was no order that rectified the decree issued on 18th December, 2002. She admitted that she did not know her father's shares nor seen any share certificate for the suit property. She stated that the share certificate at page 14 was that of Susan Wairimu Ndiangui. She further stated that the plot number was 303 in 1977. PW1 stated that she did not have her father's certificate. She confirmed that Susan Wairimu Ndiangui was the Defendant's mother. She stated that she has never visited the suit land. She further stated that her father was a Director and that he was number 105 against plot number 105. She went on to state that entry number 303 was for the Defendant. PW1 stated that Danson Karuno Gichuki was a director on 22nd February, 2002. She stated that all the siblings were to share the suit property. She admitted that the records did not show that it was given to her brother.
- 6 Upon re-examination, she stated that the grant was rectified in the succession cause filed in 2003. She added that the said rectification was done in November 2021. She stated that the title had been transferred to the Plaintiff and the same was presented in court on 14th November, 2002. The witness was referred to document no. 6 where she stated that the judgment bound the Plaintiff and 1st Defendant. She stated that her father was not a party in the case and that he had 2 parcels of land. She further stated that plot no 301 was owned by Susan Wairimu Ndiangui. PW1 stated that the register was verified on 6th February, 2012 and added that the Defendant was a party in the old matter. She stated that Gichuru wanted to build a school but her father protested. She went on to state that the school was not operational due to the ongoing case. In conclusion, she stated the Plaintiff was the owner of the land. This marked the close of the Plaintiff's case.

Defendant's case

- 7 Daniel Baragu testified as DW1 where his witness statement dated 9th November, 2023 was adopted as his evidence in chief. He also produced his documents as DEX1 – DEX 21. He testified that he owned the suit land as it was given to him by his mother, Susan Wairimu Ndiangui. He testified that his mother bought the land from Nakuru Kiamunyeki Co. Ltd where she was allocated plot No.3. He



further testified that the share certificate was given on 1st February, 1977. It was his testimony that he has lived on the parcel from 1978 and has even constructed a house. He testified that he was one of the owners of the school, St Georges Academy that was demolished by George Gichuru. He further testified that the Plaintiff never occupied the suit property. He added that he was aware of their father's case No.33 of 1998 filed In the High Court of Kenya where he was the 3rd Defendant suing for his plot no 303.

- 8 He testified that their prayers were for cancellation of title deed. He prayed for cancellation where the court granted the orders and the plots were reinstated to the Plaintiffs. He testified that the 2nd Defendant was Stephen Mbote who had taken his plot. He added that from the application dated 7th February, 2003 that sought for stay of execution, Stephen Mbote was not a party. He testified that the same did not succeed. It was his testimony that the Land Registrar cancelled the title.
- 9 Upon cross examination by Karanja, he stated that they had filed the case in 1998 when Mbote had already taken title. He added that the decree was by consent vide the letter dated 14th November, 2002. He stated that the 1st Defendant was Nakuru Kiamunyeki Co. Ltd. and that Mr Mbote was not part of consent. DW1 confirmed that he was not aware that Mbote died on 13th May, 2002. He admitted that there were wrangles in the leadership. He stated that the Plaintiffs in that case were the directors of the company. He further stated that he was a director of Kiamunyeki and that the decree was used to cancel Mbote's title.
- 10 He further stated that he was not aware that the order was set aside. That the Directors of the land took the order to lands. He went on to state that he entered into consent without Mbote. He stated that the case was determined in Gichuru's favour. He added that he did not know the fate of his appeal and that his mother never filed any case
- 11 Upon re-examination, DW1 stated that it had been ordered that all title deeds issued be cancelled and that Mbote never challenged the decree. He further stated that the Plaintiffs were directors of the company and that the consent was between themselves and Nakuru Kiamunyeki. He went on to state that he was given the title because they bought the land from the company. He added that he was not aware how the Mbote got the title.
- 12 Davason Karomo Gichuki testified as DW2 where his witness statement dated 9th November, 2023 was adopted as his evidence in chief. He testified that Nakuru Kiamunyeki Co Ltd. was registered in 1973 where he is the director of the land buying company. He further testified that it had shareholders and that parcel number 303 belonged to Susan Wairimu Ndiangu. He added that the suit parcel is registered in the Defendant's name.
- 14 It was his testimony that Stephen Mbote was a shareholder and that he was listed in the register under plot number 105. He testified that Stephen Mbote was the father to the Plaintiffs. He further testified 303 was occupied by the Defendant. He added that he was cultivating 105 that was occupied by the Plaintiff. He testified that the Defendant together with Gichumo and Kariuki constructed a school which was later demolished.
- 15 Upon cross examination by Karanja, he stated that he joined Kiamunyeki in 1982 and bought shares. He stated that he became a director in 2002 and that the register was done by the committee in 1987 in the settlement office. He stated that he signed the register on 2nd March, 2010 and verified by DLASO on 16th February, 2012. He added that the register was done in 1988 by D.C committee. He stated that when people wanted titles, the D.C was to avail the register. He further stated that the register was prepared in 1988. He stated that in 2010 the settlement office gave people land. He stated that in 1988, Mbote had title from 303 and that they had recorded and registered a consent on 19th November, 2002. He confirmed that Mbote never signed the consent. He stated that they took the order to the



- registrar to cancel the titles. He added that he was not aware that it was cancelled or set aside. He further stated that the register did not show transfer. He stated that he countersigned against Plot No 115 on 25th February, 1993. He confirmed that the register was availed to him on 1993 and that the register was prepared on 2nd March, 2010. He added that it was prepared and certified by the DLASO on 2nd March, 2010 and 16th February, 2022 respectively. He admitted that he signed all entries on 2nd March, 2010. He stated that one could have more than 2 plots. He further stated that Susan had other plots being 301 and 304. He stated that from 1987-1988, all the signatures in the register were done on 2nd March, 2010. He confirmed that the suit land belonged to Gichumo and that the Defendant had a title. He stated that Mbote and Pauline had titles that were illegally issued.
- 16 Upon re-examination, DW2 stated that the cancellation order was taken by Nakuru Kiamunyeki Co Ltd. He added that before cancellation, the land was in the name of Stephen Mbote. He stated that the cancellation order provided for 30 days for objection but the Plaintiffs did not file any objection. He went on to state that there was a consent and the 1987 register but he did not provide the same. He admitted that he only had a register verifying the occupation of land. DW2 stated that regarding the settlement in 1987-1988, the D.C appointed the D.O to do verification. He went on to state that he found the registration of Kiamunyeki A and Kiamunyeki B at the settlement office on 2nd March, 2010. He added that the signature was for 1977-1988. He also stated that the meeting did not prepare the register and that registration was done in 1988. He stated that the district commissioner was to verify the registration. He went on to state that the letter was copied to the chair and the remarks section was signed by himself as the secretary of the company. He confirmed that he became the secretary from 2002. He added that there were no remarks made before becoming secretary. He stated that he could not recall the date where the remarks for plot No 115 were placed.
- 17 He confirmed that the titles were cancelled. He also confirmed that a director could not prepare a register as the same was prepared by a panel of officers. He admitted that the register was prepared by the D.C Nakuru North between the year 1987-1988. He further admitted that he got the register from the settlement office and signed it in 2010. DW2 confirmed that there was no other register. He confirmed that the said register was used to issue titles. This marked the close of the Defendant's case.

Submissions

- 18 Counsel for the Defendant filed his submissions dated 5th December, 2024 where he gave a background of the case and identified two issues for determination. The first issue was who is the lawful owner of the suit land. He submits that both parties have titles to the suit property the Plaintiff having been issued with the same on 17th May, 2005 while the Defendant on 29th February, 2016. Counsel relied on the cases of *Munyu Maina V Hiram Gathiha Maina* [2013] eKLR and *M'Mugwika M'Rugongo V Settlement Fund Trustee & Another* [2022] eKLR. He submits that the Plaintiff failed to produce any evidence to prove how she acquired the suit land from Nakuru Kiamunyeki Co. Ltd. He further submits that there was no evidence that his late father Stephen Mukuru Mbote was a shareholder of the Company and that he was allocated the suit property. He submits that since Stephen Mbote was issued with a title deed, the court ought to declare him as the lawful owner of the suit land. He relied on Section 26 of the *Land Registration Act*.
- 19 It was counsel's submissions that by the consent, the Defendant got his plot No. 303 reinstated to him in a suit where the Plaintiff's father was a party and that he never challenged the said consent. He argues that the Plaintiff's claim was litigated by his father in the former suit and as such he is bound by the consent. Counsel submits that the Defendant fully explained the legality and root of his title. He adds that it was not the court order that gave the Defendant the suit land but the production of the relevant documents to support his claim over the suit land. He further submits that the Plaintiff's title was



cancelled by the Land Registrar vide the gazette notice No. 303 and that there was no objection to the same. It was counsel's submission that the Plaintiff's father had filed an application for review of the consent orders which application was dismissed. He argues that the same paved way for the issuance of title deeds to the members of Kiamunyeki Co. Ltd as per the consent order dated 19th November, 2002. He added that the appeal is still pending and therefore there are no orders in place setting aside the consent judgment. He urges the court to find that the Plaintiff failed to prove that she is the legal owner of the suit land.

- 20 The second issue was whether the Plaintiff is entitled to the orders sought. While submitting in the negative, counsel submits that from the evidence adduced, the Plaintiff holds a title deed for a suit land that was cancelled by the Land Registrar. He adds that the Plaintiff failed to produce evidence to explain the root of her title or that of her deceased's father. It was counsel's submission that there was no evidence to suggest that the Defendant's title had been issued illegally. He urges the court to dismiss the Plaintiff's prayers as she failed to prove her case on a balance of probabilities. Counsel urges the court to award the Defendant costs of the suit. The Plaintiff did not file any submissions.

Analysis and Determination

- 21 I have considered the pleadings, evidence on record and submissions and I am of the view that the following issues arise for determination:
- a. Who is the lawful owner of the suit property?
 - b. Whether the Plaintiff is entitled to the prayers sought
 - c. Who should bear the costs of the suit.

Who is the lawful owner of the suit property?

- 22 It was the Plaintiff's case that her brother and Pauline inherited the suit land from her deceased father. Upon cross examination, she stated that their father bought the suit land from Kiamunyeki Co. Ltd but admitted that she did not know her father's shares or seen the share certificate for the suit property. PW1 confirmed that the share certificate produced was that of Susan Wairimu Ndiangu the Defendant's mother.
- 23 The Defendant on the other hand claimed that he owned the suit land by virtue of his mother, Susan Wairimu Ndiangu. It was his case that his mother bought the land from Nakuru Kiamunyeki Co. Ltd where she was allocated plot No.3. He claimed that the outcome in case No.33 of 1998 filed in the High Court of Kenya by the Plaintiff's deceased father resulted in cancellation of Stephen Mbote's title. Upon cross examination, he confirmed that the consent was between themselves and Nakuru Kiamunyeki and did not involve Stephen Mbote. He also claimed that the Plaintiff's father never objected to the cancellation of the title.
- 24 DW2 the director of Kiamunyeki Co. Ltd gave evidence that Stephen Mbota was a shareholder listed in the register under plot number 105. It was his case that plot number 303 was occupied by the Defendant who also cultivated plot number 105. It was his case that the register between 1987-1988 gave rise to the titles. Upon cross examination, he confirmed that the suit land belonged to Gichumo and that the Defendant had a title. He added that Mbote and Pauline had titles that were illegally issued.
- 25 I have keenly perused the court record and it is not in dispute that Susan Wairimu Ndiangu was issued with a share certificate number 301 of 150 shares from Nakuru Kiamunyeki Co. Ltd. for plot number 303. There is also evidence of transfer of ownership of the said plot to the Defendant vide the letter dated 11th March, 1988. I have also confirmed from Kiamunyeki Co. Ltd register for block 5 that the



Defendant was allocated plot number 303 being the suit property herein. I have also confirmed receipts from Susan Wairimu Ndiangui to Nakuru Kiamunyeki Co. Ltd. being entrance and demarcation fees for the suit property (DEX3).

26 It is not in contention that the Plaintiff admitted that she did not have her father's share certificate for the suit property. She also admitted that she did not have evidence to confirm that her brother was given the suit land. It is also not in dispute that PW1's certificate was cancelled. I have confirmed from the records that the procedure for cancellation was duly followed vide gazette notice No. 303 and the Plaintiffs had the liberty to object to the same but they didn't.

27 Section 26(1) of the [Land Registration Act](#) further provides that:

"...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
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

28 The Supreme Court in the case of Dina Management Limited V County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the case of Munyu Maina V Hiram Gathiha Maina [2013] KECA, where the court held 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."

29 It was the Plaintiff's allegation that the Defendant fraudulently acquired the suit property, she however failed to adduce sufficient evidence to prove the same. It is this court's view that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts, the Plaintiff ought to have strictly proved the alleged particulars of fraud as stated in the plaint.

30 Section 107, 108 and 109 of the [Evidence Act](#), provides as follows;

"107 (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. 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 said.

109. 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 be on any particular person."

31 It is this court's view that the Defendant successfully established the root of his title while the Plaintiff's evidence was marred with loopholes. The Plaintiff failed to explain how he obtained the title to the



suit property and therefore, it is my finding that the Plaintiff failed to discharge the burden of proof as set out in law. It is noteworthy that the outcome of the high court matter did not have any impact on the procedure of how the title to the suit property was acquired. It is my view that the Plaintiff failed to prove his case on a balance of probabilities

- 32 It is also this court's view that the Defendant was issued with the title deed on 29th February, 2016 which is thus sufficient evidence that he is the registered proprietor of the suit land. This court finds that the Defendant is the lawful owner of the suit property.

Whether the Plaintiff is entitled to the orders sought.

- 33 This court having established that the Defendant is the lawful owner of the suit property, the Plaintiff is therefore not entitled to the orders sought in his plaint dated 21st July, 2010. In the upshot, having found that the Defendant proved his claim to the required standard of probabilities, judgment is hereby entered in favour of the Defendant in the following terms:

- a. A declaration that the Defendant is the lawful proprietor of Dundori/lanet Block 5/303(kiamunyeki).
- b. An order of permanent injunction is issued restraining the Plaintiff by himself, his servants or lawful agents from trespassing upon, entering, remaining, dealing in or otherwise in any other manner whatsoever from interfering with Dundori/lanet Block 5/303 (kiamunyeki).
- c. An order is hereby issued directing the Nakuru Land Registrar to recall and cancel the title held by the Plaintiff in respect to Dundori/lanet Block 5/303 (kiamunyeki). d) The Plaintiff shall bear the costs of the suit. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

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