



Gitata (Suing as the Legal Representative of the Estate of the Late Hellen Gitata) v Kaino & 4 others (Environment & Land Case 160 of 2013) [2024] KEELC 3539 (KLR) (3 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 160 OF 2013**

A OMBWAYO, J

MAY 3, 2024

BETWEEN

WILLIAM MUIRURI GITATA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE HELLEN GITATA) PLAINTIFF

AND

DAVID KIPLAGAT KAINO 1ST DEFENDANT
COMMISSIONER OF LANDS 2ND DEFENDANT
DISTRICT LANDS REGISTRAR 3RD DEFENDANT
TOWN CLERK, NAKURU MUNICIPALITY 4TH DEFENDANT
ETON HOLDINGS LIMITED 5TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide the Complaint dated 17th February 2011 that was later amended where he sought the following orders;
 - a. A declaration that Nakuru Municipality Block 13/87 belongs to the estate of the late Hellen Gitata and that the Plaintiff herein is the absolute proprietor of Nakuru Municipality Block 13/87 as a beneficiary under the said estate.
 - b. A permanent injunction restraining the Defendants by themselves, their agents, servants or anyone claiming under them from interfering with the Plaintiff's peaceful possession of Nakuru Municipality Block 13/87.



- c. An order directing the 2nd, 3rd and 4th Defendant to rectify the register at the Lands Registry and all other relevant entries to revert the title to Nakuru Municipality Block 13/87 to the estate of the late Hellen Gitata.
 - d. An order directing the 2nd, 3rd and 4th Defendants to cancel any entries entered into the said land register and other relevant registers purporting to vest title in the 1st Defendant and 5th Defendant or any of them.
 - e. Costs of this suit.
 - f. Any other costs that this court may deem just and fit to grant.
2. The 5th defendant filed its statement of Defence on 23rd August, 2012 where it denied the averments in the amended plaint.
 3. The 2nd and 3rd Defendants filed their Statements of Defence on 19th February, 2016 where they denied the averments in the amended Plaint and sought that the Plaintiff's suit be dismissed with costs.

Evidence

4. Margaret Omulo Anita testified as PW1. It was her evidence that she was the District Land Registrar and that she had in court a white card for land parcel No. Nakuru/Municipality Block 13/87.
5. She testified that entry No. 1 was made on 7th February, 1991 when Hellen Gitata was registered as the owner of the suit property. Entry number 2 was made on 27th February, 1991 when a Certificate of lease was issued. The white card showed that Hellen was deceased and PW1 testified that she had in court a copy of the original lease issued to Hellen Gitata.
6. She also testified that she had the old green card of the suit property which showed that the suit property had been leased to the Nakuru Municipality Board for a term of 99 years. The second entry on the old green card was dated 7th February, 1991 when a lease to Hellen Gitata was registered for a term of 99 years from 1st January, 1990. When she was shown the white card in possession of the 5th defendant, she testified that she was familiar with the signature on the white card as it belonged to Erick Munene Nyamu but she denied being aware of Eton Holdings Limited as she had not seen any documents with respect to its ownership. It was her evidence that the suit property belonged to Hellen Gitata and she produced the white card as 3rd Defendant's DEX 1, the green card as 3rd Defendant's DEX 2 and the original green card as 3rd Defendant's DEX 3. The entire parcel file for the suit property was produced as 3rd Defendant's DEX 4.
7. When she was referred to the green card showing David Kiplagat Kairo as the owner, she testified that it was not certified and it did not therefore originate from the Land Registrar's office. She also testified that it was not a genuine card as Hellen Gitata's name was not indicated on it.
8. Upon cross examination by Mr. Murimi, PW1 confirmed that the government was the lessor. She admitted that she had not seen any letter of allotment or receipt. She acknowledged that the lease was issued on 1st January, 1990 and registered on 7th February, 1991 and it was done by the Municipal Council of Nakuru to Hellen Gitata. She stated that at that time, the Municipal council used to lease land on behalf of the government of Kenya. She confirmed that the Government of Kenya issued the Certificate of Lease while the Municipal Council of Nakuru issued the Lease. PW1 admitted that she had not come across any allotment letter to the Municipal Council of Nakuru and that currently, the Municipal Councils are no longer lessors.



9. When she was referred to DEX 4 she testified that the property was leased by the Nakuru Municipal Board for a term of 99 years from 10th January, 1991. When PW1 was referred to the white card issued by the Land Registrar known as Sunguti, she stated that it was not authentic and that the documents she brought were the ones in the parcel file.
10. William Muiruri Gitata testified as PW2. He adopted his witness statement dated 12th December, 2012 as part of his evidence and produced the documents on his list of documents dated 4th December, 2012 as PEX 1 to 19. He further produced the documents on his list of documents dated 4th November, 2019 as PEX 20 to PEX 32.
11. He testified that the lease issued to David Kiplagat Kairo on 4th November, 2011 was not genuine as the suit property has always been registered in the name of his late mother. He also testified that after his late mother Hellen Gitata died, he tried to transfer the suit property to his name but he was not able to. It was his evidence that Eton Holdings acquired the Certificate of Lease to the suit property fraudulently and testified that the Land Registrar had confirmed that the suit property belonged to his late mother and so he sought for judgement as per the prayers in the amended Plaintiff.
12. Upon cross examination by Ms. Nyambura, he admitted that he was present when the Land Registrar gave her evidence. He confirmed that the Land Registrar testified that the suit property was registered in his mother's name on 17th February, 1991 and that her evidence is supported by both the green card and the white card which he had also produced. He confirmed that he did a search on 29th October, 2019 and that other than a toilet and a car wash, there is no other structure on the land.
13. Upon further cross examination, he confirmed that his mother was a councilor for Bondeni Ward and was the original allottee of the suit property. He denied having any knowledge of Elizabeth Taprandich but admitted that his late mother Hellen Gitata had a long-standing dispute with the said Elizabeth Taprandich. He also denied having any knowledge that Elizabeth Taprandich was the mother of the 1st Defendant and confirmed that he has been in possession of the suit property since the year 2004.
14. He also confirmed that the car wash on the suit property occupies $\frac{3}{4}$ of an acre and it is fenced by a mabati fence. He stated that the suit property belonged to the Nakuru Municipal Council and that even though he registered several court orders and restrictions, the same was not reflected in the green card except for the caution registered in 2011. He admitted that the green card showed that David Kiplagat was registered as the owner on 4th January, 2011. He also admitted that he had filed Nakuru CMCC No.1380 of 2009 and sought for an order of injunction. The 1st Defendant was an interested party in the said suit and the court ordered that there be status quo.
15. He stated that even though the 1st defendant was not in occupation of the suit property, he came to learn that he had obtained a title to the property. He denied being aware of a report made to the provincial Criminal Investigation Department or any findings made thereof. He reiterated that his mother was allocated the suit property by the Municipal Council of Nakuru and that at that time Elizabeth was in occupation of a portion of the suit property. He stated that she lived in a small house on the suit property until she died.
16. Upon re-examination, he stated that the official search that he did on 29th October, 2019 showed that the owner of the suit property was Hellen Gitata. He also stated that as at 5th August, 2003 his mother was already dead. He denied having knowledge of any investigations and reiterated that there were other cases filed in court with regard to the dispute between his mother and Elizabeth. The said cases went up to the Court of Appeal and judgement was entered in their favour. He stated that there were several white cards one of which showed that Hellen Gitata was the registered owner while there no white



card that showed David Kiplagat Tanui as the owner. He reiterated that the 1st Defendant was given a certificate of title on 4th January, 2011 while the white card showed that it was opened on 7th February, 1991. He stated that the registrar explained how the title moved from the colonial government to the Nakuru County Council and stated that in the present matter, there was a clear case of fraud.

This marked the close of the Plaintiff's case.

The 2nd and 3rd Defendants case was also closed.

4th Defendant's Evidence

17. Charles Waihenya testified as DW2. He adopted his witness statement dated 11th August, 2012 as part of his evidence and produced documents appearing as No's 4 to 36 in his list of documents as the 5th Defendant's DEX 1 to 33. It was his evidence that the 5th Defendant purchased the suit property in 2011 after conducting a search on 6th January, 2011 which showed that David Kiplagat was the registered owner of the suit property.
18. It was also his evidence that the 5th Defendant paid the 1st Defendant Kshs. 2.8 million as purchase price, paid stamp duty and the suit property was transferred to its name. After the 5th Defendant obtained title, it paid rates between the years 2011 and 2012. He testified that he had documents in his possession that showed that the land was properly acquired. He denied having knowledge as to how the Plaintiff acquired the suit property and testified that he had seen a report which indicated that the suit property belonged to Elizabeth Taprandich. He testified that any other person who claimed ownership to the suit property was fraudulent.
20. It was his evidence that when he bought the suit property, there was no restriction and that the 1st Defendant was in occupation. It was also his evidence that there was another matter which was case No. 1380 of 2008 where an eviction order had been issued which required the 1st Defendant and two other people in occupation of the suit property to be evicted. The 1st Defendant was a party in the said case and proceedings stopping eviction were commenced and no other party was evicted. He admitted that the Plaintiff in the said suit was the real owner of the suit property. He testified that after the 1st Defendant was evicted from the suit property, he decided to keep away and that he was not aware of the current occupant of the land. He also testified that the green card had the name of David Kiplagat Kaino and he denied being aware of the title registered in 1991. He further testified that when he purchased the suit property there was no other claim on the land and the plaintiff's suit should be dismissed.
21. Upon cross examination by Mr. Waiganjo, he admitted that he met the 1st Defendant in the year 2011 after seeing him on the suit property from the year 2009. He confirmed that he was not aware of the case that had been filed in the year 2009 but he was joined to it in the year 2013 together with the 1st Defendant. The 1st Defendant herein was joined to the said suit on 30th December, 2009 and DW2 admitted that he was not aware if the said case was determined. He also admitted that an order of status quo was issued on 30th December 2009 over the suit property in the said matter.
22. He denied having any knowledge of the dispute between Hellen and Elizabeth and admitted that in the year 2013, he came across a judgement that the lease was fake and that the suit property belonged to the National Government. He reiterated that they went to the Lands office where they confirmed that the suit property was registered in the name of the 1st Defendant and he denied ever seeing the green card or the caution. He emphasized that he had the 5th defendant's documents and reiterated that he did not know Elizabeth Taprandich. He stated that he was issued with a title deed to the suit property



- on 15th July, 2011 and denied coming across the search dated 5th August, 2011. He admitted that he did not have the search done before the transfer.
23. Upon further cross examination by Ms. Nyambura, he admitted that he had purchased the suit property from David Kiplagat in the year 2011 and clarified that he conducted a search on the suit property but he did not have it in court. He stated that he had never taken possession of the suit property because of this case and that David Kiplagat has a car wash business on the property.
 24. Upon re-examination he stated that as at 4th January, 2011 the registered owner of the suit property was David Kiplagat. He also stated that he applied for a green card extract which showed that the 1st Defendant was the registered owner of the suit property. He reiterated that he paid rates and stamp duty before the title deed was issued and only became aware of the disputes over the suit properties in the year 2013.

Submissions

25. The plaintiff filed his submissions on 22nd February 2024 while the 5th Defendant filed its submissions on 9th April, 2024.
26. The Plaintiff submitted on who is the rightful owner of land parcel No. Nakuru Municipality Block 13/87 and whether he is entitled to the orders sought. He relied on Sections 107 and 108 of the *Evidence Act*, the cases of *William Kabogo Gitau vs George Thuo & 2 Others* [2010] 1 KLR 526, *Palace Investment Ltd vs Geoffrey Kariuki Mwenda & another* [2015] eKLR and submitted that his late mother had filed HCC No. 702 of 1993 where the court in its judgement that was delivered on 13th April, 1994 held that the suit property belonged to Hellen Gitata his late mother.
27. The Plaintiff also submitted that his late mother Hellen Gitata was still the registered owner of the suit property when the 1st Defendant purported to acquire the land and was issued with a Certificate of lease on 4th January, 2011. It is the Plaintiff's submissions that when he became aware of the existence of the said title, he moved the court and sought that the Certificate of Lease be cancelled. As this matter was pending, the 1st Defendant sold the suit property to the 5th Defendant who was issued with a Certificate of Lease on 15th July, 2011. It was his submissions that the court was presented with two registers that were held by the District Land Registrar and the court has to determine which between the two is genuine.
28. The plaintiff submitted that the land registrar was the custodian of title records on behalf of the government and while relying on Section 7 of the *Land Registration Act*, further submitted that the Land Registrar who testified as PW1 disowned the white card that suggested that the suit property belonged to the 1st and 5th Defendants and confirmed that the suit property was acquired by Hellen Gitata on 7th February, 1991. The Plaintiff relied on Sections 25(1) and 26 (1) of the *Land Registration Act*, the cases of *Seko Limited vs Selina C. Kanda & 6 Others* [2017] eKLR, *M'Mugwika M'Rugongo vs Settlement Fund Trustee & another* [2022] eKLR among other judicial authorities and submitted that the 1st and 5th Defendants did not demonstrate how they obtained the title deeds to the suit property.
29. The Plaintiff relied on Section 80(1) of the *Land Registration Act*, the judicial authority of *Wambui vs Mwangi & 3 others (Civil Appeal 465 of 2019)* [2021] KECA 144 (KLR) (19th November 2021) (Judgement) and sought that his case be allowed as prayed.
30. The 5th Defendant in its submissions submitted on whether the Plaintiff acquired the suit property legally and whether the 5th Defendant is entitled to the orders it seeks.



31. The 5th defendant submitted that it purchased the suit property from the 1st Defendant who was its owner. The 5th defendant also submitted that the 2nd, 3rd and 4th defendants guaranteed the right of the 1st Defendant to the land that was subsequently transferred to the 5th Defendant. The 5th Defendant relied on the cases of *Fuzi Development Limited & others vs City Council of Kwale* [2014] eKLR, *Dina Management Ltd vs County Government of Mombasa, Chief Land Registrar & 4 Others* (citation not given), *James Njoroge Gitau vs Lucy Chepkurui Kimutai* [2018] eKLR among other cases and submitted that it had produced enough evidence that demonstrated the root of its title.
32. The 5th Defendant relied on the case of *Munyu Maina vs Hiram Gathiba Maina* Civil Appeal No. 239 of 2009 and submitted that the plaintiff fraudulently acquired title to the suit property and sought to defeat the 5th Defendant's constitutional right to property. The 5th Defendant also submitted that the Plaintiff colluded with the 2nd, 3rd and 4th Defendants with the intention to mislead this court and grab the land the 5th Defendant had acquired upon conducting due diligence.
33. On whether it is entitled to the orders sought, the 5th Defendant relied on among other cases, the cases of *Alberta Mae Gacci vs Attorney General & 4 Others* [2006]eKLR, *Chemei Investments Limited vs The Attorney General & Others* Nairobi Petition No. 94 of 2005, *Kenya National Highway Authority vs Shalien Masood Mughai & 5 Others* [2017]eKLR and sought that the court finds in its favour.

Analysis and determination _____

34. I have considered the pleadings and the evidence on record and the issues that arise for determination are who is the owner of land parcel No. Nakuru Municipality Block 13/87 and who should bear the costs of the suit.
35. It is not in dispute that both the plaintiff and the 5th defendant have title documents for land parcel No. Nakuru Municipality Block 13/87. The plaintiff alleged that the suit property was allocated to his late mother Hellen Gitata on 7th February, 1991 and has always been registered in her name while the 5th defendant alleged that it purchased the suit property from the 1st Defendant sometime in 2011 and was issued with a certificate of lease on 15th July, 2011.
36. This court has been presented with two documents of title and each party wants the court to hold that they are the rightful owner. This court has to therefore query both title documents and the process that culminated in their issuance.
37. The court in *Hubert L. Martin & 2 others v Margaret J. Kamar & 5 Others* [2016] eKLR held as follows;

31. 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.”

38. As aforementioned, the plaintiff alleged that the suit property belonged to the estate of his late mother Hellen Gitata while the 5th defendant claimed ownership and stated that it had purchased the property from the 1st defendant.
39. It is my view that since there are two competing titles, the evidence of the land registrar who is the custodian of the records relating to land is very vital. The land registrar testified as DW1. It was her evidence that as per the white card of land parcel No. Nakuru Municipality Block 13/87, the owner of the suit property was Hellen Gitata who was registered as the owner on 7th February, 1991 and was issued with a certificate of lease on the same day. When she was shown the white card that allegedly showed the 5th defendant as the owner of the suit property, she stated that the said white card did not originate from the Land Registrar’s office.
40. Even though the 5th defendants produced various documents that included a copy of an allotment letter alleged to have been issued to the 1st Defendant David Kiplagat, a copy of a lease allegedly issued to David Kiplagat on 1st March, 2010, a copy of a lease issued to the 5th defendant on 15th July, 2011, the land registrar denied having the said records and unequivocally stated that the suit property belonged to the late Hellen Gitata. It is therefore evident that the custodian of the land records could not speak to the authenticity of the 5th defendant’s documents.
41. In *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR, the court held as follows;

We state that when a registered proprietors 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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony. We find that a trust exists in relation to the suit property.”
42. Section 26 of the *Land Registration Act* 2012 provides that a certificate of title shall be held as conclusive evidence of proprietorship and that such title shall not be subject to challenge except on the grounds that it has been acquired through fraud, misrepresentation, illegally, un procedurally or through a corrupt scheme.
43. In the present matter, it is my finding that the plaintiff has discharged his burden of proof in explaining the root of his mother’s title while the 5th defendant had failed to do so. Therefore, the prayers sought in the plaint are granted thus:-
 - a. A declaration that Nakuru Municipality Block 13/87 belongs to the estate of the late Hellen Gitata and that the Plaintiff herein is the absolute proprietor of Nakuru Municipality Block 13/87 as a beneficiary under the said estate.
 - b. A permanent injunction restraining the Defendants by themselves, their agents, servants or anyone claiming under them from interfering with the Plaintiff’s peaceful possession of Nakuru Municipality Block 13/87.



- c. An order directing the 2nd, 3rd and 4th Defendant to rectify the register at the Lands Registry and all other relevant entries to revert the title to Nakuru Municipality Block 13/87 to the estate of the late Hellen Gitata.
- d. An order directing the 2nd, 3rd and 4th Defendants to cancel any entries entered into the said land register and other relevant registers purporting to vest title in the 1st Defendant and 5th Defendant or any of them.
- e. Costs of this suit to the plaintiff. Orders accordingly.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY ON 3RD DAY OF MAY 2024.

A.O. OMBWAYO

JUDGE

