



**Mburu v Kanja & 2 others (Environment & Land Case
40B of 2021) [2024] KEELC 5113 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 40B OF 2021**

**JG KEMEI, J
JULY 4, 2024**

BETWEEN

VERONICA WAIRIMU MBURU PLAINTIFF

AND

ALICE WANGUI KANJA 1ST DEFENDANT

THE LAND REGISTRAR, THIKA 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. This suit was initially filed by James Edward Mburu Njoroge (Njoroge) deceased vide a Plaint dated the 16/6/2015.
2. With the establishment of the Environment and Land Court at Thika in 2017, the suit was transferred to this Court on 11/3/2021 and renamed as ELC 40B of 2021.
3. Upon the demise of the original Plaintiff, James Edward Mburu Njoroge on 8/5/17, Veronica Wairimu Mburu (widow and legal representative of the estate of Njoroge) was substituted in his place with the leave of the Court. With leave of the Court, the Plaint was amended on the 23/1/2019.
4. In the amended Plaint the Plaintiff sought the following orders;
 - a. A permanent injunction be issued against the 1st Defendant restraining the 1st Defendant from interfering, trespassing, alienating or in any other way interfering with land parcel number RUIRU EAST/JUJA EAST BLOCK 2/1090.
 - b. That the 2nd Defendant who is the District Land Registrar, Thika be compelled to cancel the title deed for land parcel number RUIRU EAST/JUJA EAST BLOCK 2/1090 issued to the 1st Defendant and once cancelled the same be registered in the name of the Plaintiff.



- c. Any other relief that this Honourable Court may deem fit to grant.
 - d. Costs of this suit and interest thereon.
5. It was the Plaintiffs case that at all material times Njoroge was the registered owner of the suit land having acquired it by virtue of his membership in Juja Farm Limited 1972 and issued with a title on the 11/5/89. That her husband never sold or transferred the land to the 1st Defendant who acquired a title through fraud and illegality. Particulars of fraud are pleaded and itemized under para 12 and 13 of the Plaint to wit; acquiring title of the suit land without the authority and consent of the Plaintiff; the 2nd Defendant acted fraudulently in registering the suit land in the name of the 1st Defendant in the absence of any documents in support.
 6. According to the record before the Court, the 1st Defendant filed two statements of defence dated March 2015 and 19/3/2019 through two different law firms. In both she denied the claim of the Plaintiff and contended that she is the registered proprietor of the suit land having obtained title on 20/9/2012. She informed the Court that on 20/1/2010 she and a third party were charged in Court on allegations of forgery and fraud but were later acquitted and in denying the particulars of fraud retorted that she has never been convicted of any fraud at all. That following her acquittal, she moved the Court in Misc App No. 125 of 2010 to have the title registered in her name, orders which were granted in her favour.
 7. She stated that this could be a case of double allocation of plots by Juja Farms Limited and opined that the Plaintiff ought to sue the company instead. In addition, she stated that she purchased shares lawfully from Juja Farm Limited through her late father leading to the allocation of the suit land.
 8. The Plaintiff led evidence and stated that she is the wife and legal administrator of Njoroge and his estate of Njoroge respectively. She adopted her witness statement dated 8/4/2019 as her evidence in chief. Alongside her statement, she produced documents being the original title issued on 11/5/89, letter dated the 26/1/2012 authored by the Land Register, Thika and the grant of letters of administration ad litem marked as PEX No 1-3 in support of her case.
 9. The witness stated that the Land Registrar informed her that the green card was not available at the Land Registry. She informed the Court that she has the original title in the name of Njoroge and wondered how the land could have been registered in the name of the 1st Defendant without the original title having been presented and surrendered to the Land Registrar for cancelation as provided for in law. That she has been in possession of the land since the 1980's and that Njoroge never sold the land to anyone, the 1st Defendant included. That though the 1st Defendant became registered in 2012, at no time did she lay claim to the suit land measuring 3.15 acres
 10. Despite service, the 1st Defendant did not defend the suit. The suit of the Plaintiff was therefore heard exparte.
 11. The 2nd and 3rd Defendant's evidence was led by the Land Registrar – Ruiru Land Registry namely Robert Mbuba who stated that the original green card was produced in Court to wit; (Misc. App. No 125 of 2011- Thika) an exhibit and the same has not been returned. He produced the members register for Juja Farm Limited and informed the Court that according to the said members register plot No 1090 was allotted to Njoroge vide share certificate No 1265. He confirmed that he had not received any adverse claim on the suit land.
 12. Upon the close of the hearing the parties elected to file written submissions which I have read and considered.



13. Having considered the pleadings the evidence tendered during the trial and the rival submissions, the key issue for determination is who is the bonafide owner of the suit land and further who meets the costs.

14. It is not in dispute that there are two competing titles over the same parcel of land. In such a case the Court is called upon to carry out an inquiry into the root of the title to determine who between the Plaintiff and the 1st Defendant holds the genuine title. I rely on the decision of the Court in the case of *Hubert L Matin & 2 Others v Margaret J Kamar & 5 Others* [2016] eKLR where the Court stated ;

“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.”

15. It is trite that just as the title to land is vital and important the process of acquisition of the title is equally important. In Kenya land is acquired through inter alia, purchase, allocation, inheritance, adverse possession to name a few.

16. Where there are two or more titles a party must demonstrate that the title was acquired through a lawful and regular process so as to gain legitimacy and legality. In the case of *Daudi Kiptugen v Commissioner of Lands and 4 Others* [2015]eKLR, the Court stated as follows;

“In order to determine the question whether the lease held by the Plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this Court to determine how the Plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the Plaintiff with a Lease over the suit land.”

17. It is not in dispute that the Plaintiffs case is not controverted. That said the Plaintiff retains the burden of proof which she must discharge to succeed. In the case of *William Kabogo Gitau v Gorge Thuo & 2 Others* [2010] eKLR, the Court stated;

“In ordinary civil cases, a case may be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took



place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

18. The case of the Plaintiff is based on fraud. That the 1st Defendant fraudulently and illegally acquired the suit land without her authority and consent. Fraud is defined as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.

19. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

20. Section 26 of the *Land Registration Act* provides two instances that a title may be impeached. It states as follows:-

“(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 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.”

21. I can do no better than to quote the case of case of *Munyu Maina v Hiram Gathiha Maina Nyeri Civil Appeal No. 239 of 2009* [2013] eKLR where the Learned Judges stated 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.”

22. The Plaintiff led uncontroverted evidence that Njoroge acquired the land through his membership with Juja Farm limited. This was corroborated by DW1 who produced the share register of Juja Farm Limited showing Njoroge as member No 1265 and an allottee of plot No 1090 leading to the issuance of a title on 11/5/1989. The Plaintiff informed the Court that Njoroge never sold the land and even



- produced the original title in Court. She stated that she has been in possession of the land since 1980s and no claim has been raised against it from any quarter, the 1st Defendant included.
23. The Plaintiff produced a letter dated the 26/1/2012 authored by P M Muthegi, the Land Registrar, Thika addressed to the Chief Executive Officer, Thika Law Courts in which he raised concern with the orders issued on 20/1/2012 requiring him to register the suit land in the name of the 1st Defendant. He informed the Court that the 1st Defendant had in her possession a green card which was not genuine as the correct one was with the Court having been produced as an exhibit. He went ahead to state that the Plaintiff has the original title deed issued in Kiambu before the Thika Land Registry was opened in 1996 as well as documents from Juja Farm Limited. This letter was corroborated by DW1 when he testified in Court and confirmed that the bonafide owner of the land was Njoroge and not the 1st Defendant.
24. The 1st Defendant in her statement of defence alluded to the land having been allocated to her through her late father. She pleaded that she was the sole registered owner of the land having acquired it lawfully. She failed to table before the Court any documents either from her late father being share certificate, ballot from Juja Farms and any transfer leading to the issuance of the title purportedly registered in her name and issued on 26/9/2002.
25. I have keenly perused the title of the 1st Defendant which is alleged to have been issued on the 26/9/2002 through a Court order issued on 16/12/2011 and the million-dollar question is how the 1st Defendant caused a title to be issued to her in 2002 in compliance of an order issued in 2011. The Court finds that on the face of it the title in the name of the 1st Defendant was issued fraudulently and without following due process. The root of the title held by the 1st Defendant has not been established and that might explain why the 1st Defendant kept away from the hearing. Moreso, when the Land Registrar has disowned the said title as having not emanated from their office. The purported green card which was a subject of a “Court order” was said to have been fake as per the evidence of the Land Registrar.
26. Weighing the evidence led by the Plaintiff, I find that the Plaintiff has a better title than the 1st Defendant. Having failed to impeach the title of the Plaintiff, the 1st Defendant is permanently enjoined from interfering with the Plaintiff’s peaceful enjoyment of the suit land. In the overall, I therefore find that the Plaintiff has proved fraud and I enter judgement in her favour.
27. The Plaintiff having proved fraud against the 1st Defendant, the green card and the title in the name of the 1st Defendant be deemed cancelled in accordance with the provisions of Section 80 of the [Land Registration Act](#) which state as follows;
- “(1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
28. The Plaintiff having succeeded in her case I find no reason to deny her costs.
29. Final orders for disposal;



- a. A permanent injunction be and is hereby issued against the 1st Defendant restraining the 1st Defendant from interfering, trespassing, alienating or in any way interfering with the land parcel No Ruiru East /Juja East Block2/1090.
- b. The 2nd Defendant be and is hereby ordered to cancel the title deed together with the green card in the name of the 1st Defendant and reinstate the register/ green card in the name of James Edward Mburu Njoroge as at 6/5/1989.
- c. The suit being undefended, I make no orders as to costs.

30. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 4TH DAY OF JULY 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Mugo HB Karanja Kang'iri for Plaintiff

1st Defendant – Absent

Ms. Ndundu for 2nd and 3rd Defendants

