



REPUBLIC OF KENYA



Waigwe v Attorney General & 3 others (Environment & Land Case 203 of 2018) [2024] KEELC 6952 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 203 OF 2018
JG KEMEI, J
OCTOBER 17, 2024
(FORMERLY ELC 779 OF 2017)**

BETWEEN

NANCY WAMBUI WAIGWE PLAINTIFF

AND

HON ATTORNEY GENERAL 1ST DEFENDANT

MOSES NYOITA KARIUKI 2ND DEFENDANT

SUSAN NYAMBURA KARIUKI 3RD DEFENDANT

PENINAH MUGURE KIHKA 4TH DEFENDANT

RULING

1. Vide a Complaint dated the 22/12/2017 and amended on the 20/11/2021 the Plaintiff filed suit against the Defendants seeking the following orders;
 - a. A declaration that the registration of the property Ruiru/Ruiru East Block 3/1685 (suit land) by the District Land Registrar Thika to the 2nd and 3rd Defendants and subsequently to the 4th and 5th Defendants was illegally unlawful and tainted with illegalities
 - b. An order for cancellation of the suit land in favour of the Defendants and registration of the property in the Plaintiff's name
 - c. General damages for trespass
 - d. In the alternative, special damages for compensation for the loss of the property at the current market value of Kshs 6,000,000/-
 - e. Any other or further relief that this Hon Court may deem fit to grant.



2. It is averred that the Plaintiff acquired the suit land from Mwalimu Investment Co. Limited where she was a member. That on allotment she paid for the land, received a ballot and took possession and fenced the same as she awaited issuance of title. That she learned in 2015 that the suit land was fraudulently and illegally registered in the names of third parties which position was confirmed in 2017 through the official searches from the Land office. Particulars of fraud and illegality have been cited under para 19 of the Plaint.
3. The Hon. Attorney General filed its defence on the 13/8/2018 denying the Plaintiffs claim in toto and in particular the claim of fraud and asserted that the registration of the suit land was carried out within the confines of the legal and statutory provisions of the law. Further that the suit offends the mandatory provisions of Section 13A of the Government Proceedings Act and undertook to raise a preliminary objection thereto.
4. The 2nd and 3rd Defendants in their defence dated the 25/1/2021 denied the claim of the Plaintiff and in particular denied any fraud and illegality on their part and put the Plaintiff to strict proof. They contended that they purchased the suit land from one Peter Murigi Njoroge (Njoroge), the allottee of the suit land from Mwalimu Investments Limited (Mwalimu) and obtained title in 2006. That in 2008 they sold the suit land to the 4th and 5th Defendants vide a sale agreement dated 20/1/2009. They urged the Court to dismiss the Plaintiffs suit with costs.
5. The 4th and 5th Defendants filed their Statement of Defence dated the 25/1/2021 in which they denied the claim of the Plaintiff and further contended that they are strangers to the allegations of illegality and fraud in the acquisition of the title. That in their opinion they acquired a good title as bonafide purchasers for value without notice of any defect.
6. At the hearing the Plaintiff testified as PW1 and stated that she is a Lecturer at Technical University of Kenya. She relied on her witness statements dated the 22/12/2017 and 15/6/2021 in chief. Additionally, she produced documents in support of her case marked as PEX No 1-11.
7. She led evidence that she was a member of the Mwalimu Investments Limited. On application, the company allocated her 4 acres vide a provisional offer letter dated 31/12/1982. She paid the requisite fees by way of crossed cheques to the company and was issued with a ballot for plot No 900. Following subdivision of the mother title, plot No 900 became Ruiru/Ruiru East Block 3 /1685 measuring 1.616 ha or thereabouts. She was shown the land whereupon she took possession and fenced it while awaiting the issuance of the title. Thereafter she executed the transfer in her favour in 1982. That in the preceding years the company was wound up making it difficult to obtain information on the progress of title processing. However, in 2015 she learnt from third parties that the property had irregularly and fraudulently been transferred to unknown persons and it was only upto 2017 that she laid her hand on the official searches from the lands office showing transfers to the 2nd -5th Defendants on varied dates.
8. Further she stated that she faulted the allotment to Peter Murigi Njoroge on the grounds that the payment of the plot was made in cash contrary to the terms of the letter of allotment; the documents in the name of Peter Murigi Njoroge were backdated to defeat her interests and that the 2nd -3rd Defendants did not acquire a good title from the said Njoroge.
9. In cross, she stated that she did not produce the members register in Court as the company had been wound up but based on the letter authored by the law firm of Muhoro & Company Advocates who were the company lawyers and who handled the transaction including the processing of titles for its members, it was confirmed that she was the rightful allottee of the land. With respect to the transfer document in her favour, the witness stated that though the same is neither dated, attested and not registered, the same had been executed by the parties for presentation at the Lands office to facilitate



- the issuance of the title and that explains why the Company's Lawyers Messrs Muhoro wrote to the Land Registrar raising the issue of delay in registering the title in her name. That she paid for the title processing fees but could not find the receipt. That she is claiming Kshs 6 million in the alternative for the loss of her title.
10. Moses Nyota Kariuki testified as DW1 and relied on his witness statement dated the 25/1/2021 in chief and produced the documents marked as DEX 1-13 in support of his defence.
 11. The witness stated that he purchased the suit land in 2005 from on Peter Murigi Njoroge (Njoroge). That he carried out due diligence at the offices of Mwalimu where it was confirmed from the records held in their offices that the said Njoroge was the allottee of the land. That Njoroge handed over the documents to him to wit; copies of plot allocation letter, ballot, receipts and letters from Mwalimu. That on completion of the purchase, Njoroge wrote to Mwalimu directing them to issue the title in favour of the 2nd and 3rd Defendants. That the records of the land in Mwalimu were also changed to reflect his name. In 2006 he picked the title from Mwalimu upon payment of Kshs 10,000/- being fees for title processing.
 12. That in 2009 he and the 3rd Defendant sold the land to the 4th and 5th Defendant at the consideration of Kshs 800,000/- . He admitted that Njoroge held no title for the suit land, only a letter of allotment, ballot and receipts. The witness conceded that Njoroge paid the allotment fees in cash contrary to the directions in the letter of allotment and in his view the payment in cash was still lawful for purposes of the allotment.
 13. DW2 – Josphat Njenga Mwangi testified on his own behalf and that of the 5th Defendant and relied on his witness statement dated the 25/1/2021 and produced documents in support of his defence marked as DEX No 14-15.
 14. He stated that in 2005 he was approached by one Kenyan Macharia who informed him that he knew someone who was selling land within Mwalimu Farm. Later he introduced him to Moses Nyota Kariuki who confirmed his intention of selling the land and struck a deal. That he carried out due diligence of the title at the Lands Office and confirmed that Moses Nyota Kariuki held an unencumbered title leading to execution of a sale agreement on 20/1/2009 at the sum of Kshs 800,000/-. The requisite land control board consents having been obtained the land was transferred to the 4th and 5th Defendants on 4/3/2009 conferring them an absolute and indefeasible title.
 15. That since the land was titled already he did not concern himself with how the land was acquired by the alleged allottee Mr Njoroge. That said he stated that he saw the allotment letter, ballot and the receipts. That to the best of knowledge he was not aware that Mwalimu had disputed the allotment of the land to Njoroge.
 16. Learned Counsel Ms Chilaka informed the Court that she did not wish to present any witness on behalf of the 1st Defendant and at that point proceeded to close the 1st Defendant's case.

Written submissions

17. On fraud and illegalities, the Plaintiff submitted and answered the question in the positive. The Plaintiff submitted that she was allotted the land and made payments within the stipulated time and also executed the transfer of the land in her name in 1992 but never received a title despite the efforts of Mwalimu's lawyer Mr Muhoro. That the 1st Defendant failed to consider the primacy of the Plaintiff's interest, having been allotted the land earlier going by the transfer in 1992. It was submitted that the Defendant's title falls short of the provisions of section 26 of the LRA and ought to be cancelled as it was acquired illegally unprocedurally and through a corrupt scheme.



18. It was submitted that the 2nd and 3rd Defendants failed to lay any evidence before the Court to show that Njoroge acquired any legitimate interest in the suit land in 1982 or any to her time. DW2 was faulted for failing to produce a copy of transfer of the land to Njoroge, proof of payment of Kshs 5040/- to Mwalimu within 14 days and if the payment was made in form of a banker's cheque in accordance with the letter of allotment.
19. Relying on the decision in *Munyua Maina Vs Hiram Gathihi Maina*, the Plaintiff submitted that the 2nd and 3rd Defendants failed to establish the root of their title. That they conveyed a defective title to the 4th and 5th Defendants. That clearly the payments by Njoroge were made after the expiry of the time provided in the allotment letter.
20. Further it was submitted that the 4th and 5th Defendants failed to meet the threshold of bonafide purchasers of the suit land as the title in question was obtained irregularly and illegally.
21. On behalf of the 2nd – 5th Defendants, it was submitted that the plot was allocated to Njoroge on 6/12/1982 and therefore the Plaintiffs allotment on the 31/12/1982 was untenable as the land had been allocated to Njoroge and therefore unavailable for allocation to the Plaintiff. That Njoroge's allocation was neither cancelled nor the land repossessed. That the land having been allocated to Njoroge, Mwalimu had no capacity to allot the same land to the Plaintiff. The allocation of Njoroge was first in time and therefore should take precedence over the allotment of the Plaintiff.
22. On the issue of fraud, the 2nd -5th Defendants submitted that they were not parties to any illegality or fraud in the acquisition of the land by Njoroge nor before the land was transferred. That the 2nd and 3rd Defendants acquired the land for valuable consideration and subsequently transferred to the 4th - 5th Defendants who now hold a valid title. No single evidence was laid by the Plaintiffs to prove that the 2nd -5th Defendants acted fraudulently in the acquisition of the title. That the Plaintiff levelled fraud against the Land Registrar and in the absence of any averment that the 2nd – 5th Defendants had any knowledge or were parties to any irregularity in the acquisition of the suit land, no blame can be attributed to the 2nd – 5th Defendants. It was further submitted that generalised and vague allegations of fraud fell short of the threshold of standard of proof required.
23. It was further submitted that a letter of allotment cannot dislodge a title of a registered proprietor of land. The decision in *Dr Joseph Arap Ngok Vs Justice Mojo Ole Keiwua Nairobi CA N 60 of 1997* was relied where the Court held that in cases of double allocation, a party who has been issued with a good title takes precedence over other equitable rights to title.
24. In conclusion it was submitted that the 2nd -5th Defendant's acquisition of the suit land was regular legal and formal and without any taint. That the root of title held by the 4th and 5th Defendants has been sufficiently explained. That they are the legitimate owners of the land and absent any taint on their title, the prayer for cancellation of title or payment of Kshs 6 M is not available to the Plaintiff.

Analysis and determination

25. Having considered the pleadings of the parties, their rival evidence and submissions and all the material placed before the Court, the following issues are for determination;
 - a. Whether the Plaintiff has proved fraud and illegalities against the Defendants
 - b. Whether the 4th and 5th Defendants are bonafide purchasers of title
 - c. What orders should the Court grant



26. It is not in dispute that the suit land emanates from Mwalimu investment Company Limited. It is also not in dispute that the title of the suit land is now registered in the name of the 4th and 5th Defendants
27. It is the case of the Plaintiff that she was allocated the suit land by Mwalimu on 31/12/1982 vide letter referenced MCL/02/2160, paid for the land vide receipts dated 21/1/83, 10/12/1983 and 30/3/1983 being charges for the initial costs of the plot, legal fees, stamp duty, survey fees leading to the issuance of an allotment letter dated 23/1/1984 for plot No 900 - allocation No MCL/02/2160. The allotment letter is signed by P J Kibumbu, chairman of Mwalimu. On the ballot is a signature which appears similar to the one on the letter of allotment.
28. The case against the 1st Defendant was uncontroverted despite its Senior Learned State Counsel Ms Chilaka being present and cross examining the witnesses of the Plaintiff and the 2nd – 5th Defendants.
29. The case of the 2nd and 3rd Defendants is that they purchased the suit from one Njoroge who was the original allottee of the land from Mwalimu. It is instructive to note that the said Njoroge was not called as a witness to explain to the Court how he acquired the suit land. Suffice to state that DW1 produced documents that were handed over to him by Njoroge to wit; the letter of allotment dated the 6/12/1982, ref No MCL/02/1150; ballot for plot No 900; payment receipts dated the 10/11/1983, 20/1/1983 being payment for initial costs of the plot , legal fees and stamp duty and survey fees.
30. Upto now, the documents presented by both parties do not appear dissimilar however there are glaring inconsistencies which I shall bring out shortly.
31. The allotment letter in favour of Njoroge indicated that acceptance of the offer together with the payments were to be made within 14 days from the date of the allotment. That means by the 20/12/1982 in default of which the offer would be deemed cancelled and the land reallocated to another applicant. According to the evidence of DW1 the payments were partially made on 20/1/1983 and the balance on 10/11/1983 which is 34 days and 214 days later. Going by the strict timelines of the letter of allotment, in the absence of any acceptance and payment of the land the offer was paid for way past its expiry. None of the receipts bear the details of the land being paid for nor the land reference number MICL/2/1150 denoted in Njoroge's allotment letter.
32. In the case of the Plaintiff the letter of offer gave 30 days for acceptance and the payment in default the land would be reallocated to another applicant. The Plaintiff lead evidence that she made payments on 21/1/1983 which was well within the 30 days timeline. All the receipts bear the reference No MICL/O2/2160
33. The allotment letter in favour of the Plaintiff dated 28/2/1984 shows the plot Number is 900; allocation No is MCL/02/2160 for 4 acres. It is to be noted that the allocation No 2160 appears in all the receipts in favour of the Plaintiff.
34. The Plaintiff led evidence that upon balloting she was allotted plot No 900 which plot was later surveyed as Ruiru/Ruiru East Block3/1685. The communication from the company conveying these details is captured in the letter addressed to the Plaintiff date stamped 4/9/1990. In the said letter one BM Macharia informed the Plaintiff that the processing of the title deed was in the final stages and that the title reference for plot 900 is RUIRU Ruiru/Ruiru East Block3/1685 as per the survey of Kenya index map (RIM). The letter called for a further amount of Kshs 1170/- being the title processing fees.
35. Similarly, DW1 led evidence that vide letter date stamped the 2/5/1990 Njoroge was informed that the title to his plot was being processed. The Court notes that in this letter unlike that of the Plaintiff, the plot Number is missing and the reference number for the land is stated as Ruiru/Ruiru East Block 5/1685. It has not been explained why the plot number is not stated. DW1 failed to offer any nexus



between this plot and the ballot which bore plot No 900. In any event the name of Njoroge was not disclosed in the said alleged ballot. This ballot is to say the least does not state the name and identity card number of the allottee, date of the allotment and reference number of the plot. It therefore becomes very difficult for the Court to hold that land registered as RUIRU/RUIRU plot No 900 (allotment No 2160) and parcel 1865 is the same as plot No 900 of allotment No 1150 EAST BLOCK 5/1685. Clearly Ruiru/Ruiru East Block 5/1685 and Ruiru/Ruiru East Block 3/1685 are two different parcels. The 2nd and 3rd Defendants did not help to clear the air by producing the transfer between Njoroge /Mwalimu to them; land control board consent; the title issued in the name of the 2nd and 3rd Defendants.

36. On the basis of the above evidence the Court is satisfied that the 2nd and 3rd Defendants land could not have been the suit land. This is further supported by the letter dated the 8/5/2015 authored by G M Muhoro to the District Land Registrar Thika as follows;

“Ref: GMM/495/80 8th May 2015

The District Land Registrar

Lands office

Thika

Dear Sir

RE: Ruiru/Ruiru East Block 3/1685

Nancy Wambui Waigwe

I act for Nancy Wambui Waigwe who has instructed me to write to you as follows:-

That she bought the above quoted parcel of land from Mwalimu Investment Co. Ltd sometimes in the year 1983 and was not issued with the Title Deed despite paying the purchase price in full.

The company has closed its offices but had given me all documents in regard to the scheme. I would be obliged if you can issue the title deed to her.

Attached is the transfer form duly executed by the said Nancy Wambui Waigwe also enclosed are her supporting documents.

Yours faithfully,

G. M. Muhoro

Enc.

c.c. Client.”

37. The presence of a transfer in favour of the Plaintiff is testament that the same confirms the Plaintiff's evidence that she was waiting for the title to be processed by Mwalimu. The question is what happened to the transfer that was submitted to the Lands office for registration? The Land Registrar chose to keep away from the hearing and the Court did not get the benefit of his testimony to shed light on the same. It suffices to note that stamp duty had been paid on the transfer as can be gleaned from the stamp duty stamps on the transfer. Sadly neither Njoroge nor DW1 placed before the Court any evidence to controvert this evidence.
38. It is trite that when the root of a proprietor's title is under challenge 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 defect or malady. See the decision of the Court of Appeal in *Munyu Maina Vs. 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.”

39. The Court finds that the 2nd and 3rd Defendants failed to establish the root of its title. As alluded earlier the 2nd and 3rd Defendants had the duty to call Njoroge to explain how he acquired the title but failed.
40. Having failed to acquire a good title the 2nd and 3rd Defendants conveyed no interest in the suit land to the 4th and 5th Defendants.
41. On the question of bonafides I rely on the decision of the Court of Appeal in *Samuel Kamere Vs. Land Registrar, Kajiado* [2015]eKLR where the Court stated as follows;

“Accordingly, having failed to conduct a proper due diligence on the ownership of the suit property, or prove how he acquired his title we find that the appellant has not demonstrated that he was a bonafide purchaser, and further having failed to prove that he paid any consideration for the suit property, we find that he was not a bona fide purchaser for value.”

42. Section 80 of the *Land Registration Act* which is a reflection of the provisions of Section 143 of the Registered *Land Act* states as follows;

“80. Rectification by order of Court:-

- (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.”

43. Having found that the 2nd and 3rd Defendants acquired no legal title, passed no legitimate title to the 4th and 5th Defendants, the title held by the 4th and 5th Defendants is devoid of any legality and the same is for cancellation under section 80 of the *Land Registration Act* aforesated.
44. Having taken possession of the suit land without any lawful cause the Court finds that the Defendants are liable for general damages for trespass in the sum of Kshs 200,000/-
45. In the end the Plaintiffs case succeeds in terms of prayer a, b and c of the Plaint.
46. Costs shall be in favour of the Plaintiff.
47. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 17TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Wanyonyi HB Ms. Macharia for Plaintiff

1st Defendant – Absent

Kingoo for 2nd, 3rd, 4th and 5th Defendants

Court Assistants – Phyllis

