



**Ngunjiri & 4 others v Wainaina (Environment & Land Case  
312 of 2017) [2023] KEELC 785 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 785 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 312 OF 2017**

**A NYUKURI, J**

**FEBRUARY 8, 2023**

**BETWEEN**

**KENNEDY WAINAINA NGUNJIRI ..... 1<sup>ST</sup> PLAINTIFF  
FRANCIS KINYANJUI NGUNJIRI ..... 2<sup>ND</sup> PLAINTIFF  
MARGARET WANJIRU NGUNJIRI ..... 3<sup>RD</sup> PLAINTIFF  
EMILY WAMBUI NGUNJIRI ..... 4<sup>TH</sup> PLAINTIFF  
CATHERINE WANJIKU NGUNJIRI ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**GEOFFERY NGUNJIRI WAINAINA ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint dated July 14, 2017, the plaintiff who are biological children of the defendant averred that LR No 14812/3 IR No 91442 (suit property) was registered in the name of the defendant as a trustee of the plaintiffs as the same was family/matrimonial property having been obtained as matrimonial property by the late RWN their mother.
2. They further stated that the defendant was too old to sell the suit property and he had already received 10% of the purchase price thereof, when the sale had not been sanctioned by the family. Therefore, the plaintiffs sought for a permanent injunction to restrain the defendant from selling, disposing, transferring or alienating the suit property. They also sought for costs of the suit.
3. By an amended defence and counterclaim dated December 10, 2021 and filed on December 16, 2021, the defendant denied the plaintiffs' claim and stated that the plaintiffs were all adults, married and independent children of the defendant who lived on their own in their respective homes. He further



stated that he purchased the suit property from his own income and obtained title after his wife's death. He denied holding the suit property in trust for the plaintiffs. His position was that the plaintiffs were mistaken in their claim as claims for matrimonial property can only be raised by the spouses after divorce and not by children of the marriage. He maintained that he does not need authorization from the plaintiffs to deal with his property.

4. The defendant further averred that the plaintiffs' claim was contrary to section 6 of the Matrimonial Property Act. He emphasized that he was the sole breadwinner as his wife was a housewife and never contributed to the purchase of the suit property. His position was that the plaintiffs had no legal claim to claim the suit property on their own behalf and or on behalf of a deceased person.
5. He confirmed that on July 26, 2018, he entered into a sale of land agreement with joint commercial limited in respect of the suit property but that he could not complete the sale due to a caution lodged on the property by the plaintiffs which caused him loss of Ksh 50,000/- which he sought to be paid by the plaintiffs.
6. Therefore, the defendant sought for dismissal of the plaintiffs' suit and counterclaimed for the following orders;
  - a. An order do issue declaring that the defendant's parcel of land known as LR no 14812/3 has never been the parties herein matrimonial property and the plaintiffs be ordered to pay damages for breach of contract and interest on damages at court rates from time of filing suit.
  - b. The plaintiffs be barred by way of permanent injunction from lodging any caution on the defendant's parcel of land known as LR No 14812/3 and lodging any objections to the defendant's application for the issuance of any land board consents in support of any intended sale of all that parcel of land known as LR No 14812/3 and that this honourable court deems fit to grant any other relief it deems fit together with costs.
7. In a reply to amended defence and defence to counterclaim filed on December 17, 2021, the plaintiffs joined issue with the defendants amended defence and reiterated their averments in the plaint. They further stated that the suit property was a family joint venture as the same was purchased from contributions of all the family members including the plaintiffs and their deceased mother.
8. They denied the claim in the counter claim and stated that the same was frivolous, bad in law and did not disclose a reasonable cause of action against them. They insisted that the defendant is not justified to sell the suit property without the consent of family members and sought for the dismissal of the counterclaim.
9. On October 13, 2022, the plaintiffs filed a preliminary objection against their own plaint and the counterclaim. They argued that the plaint ought to be struck out as they had raised an issue of matrimonial property which is the preserve of the High Court and that they sought to enforce the rights of their late mother RWN without first obtaining grant of letters of administration to represent her estate. They also objected on the jurisdiction of the court to hear one of the prayers in the counterclaim. While the court upheld their objections to the plaint and struck out the plaint, their objection against the counterclaim was dismissed. Therefore, the suit proceeded for hearing only in regard to the defendants counterclaim.

## Evidence

10. DW1 GNW, the defendant herein adopted his witness statement dated December 10, 2021 as his testimony in chief. He testified that the plaintiffs were his children who are all adults, married and living in their own respective homes with their respective families. He stated that he ensured all his children



were well educated and that none of them has any claim over his property. He stated further that none of the plaintiffs has any right to stop him from dealing with his property as he wished. He maintained that he is old and retired and had no income and that although the plaintiffs were earning, none of them provided for him hence he needed to sell his property to take care of his needs. He insisted that he acquired the suit property after the demise of his wife and that the same was not matrimonial property as alleged by the plaintiffs.

11. According to DW1, he does not hold the suit property in trust for the plaintiffs and that his wife was housewife and never contributed to the purchase of his property. That his intentions to sell the suit property were frustrated by the plaintiffs who placed cautions thereon leaving him with no source of income. He sought for the orders sought in the counterclaim. He produced documents attached in the list of documents dated August 15, 2022 and the list dated May 17, 2022 being whatsapp screenshot messages from his daughter, the 3<sup>rd</sup> defendant as D-Exhibit 1, sale agreement between the defendant and Joint Commercial Supplies as D-Exhibit 2, social media conversation as D-Exhibit 3, land clearance certificate of November 23, 2018 as D-Exhibit 4, hearing notice in Civil Suit No 5649 of 1992 as D-Exhibit 5, court order dated July 31, 2003 in Civil Suit No 5649 of 1992 as D-Exhibit 6, court order dated July 26, 2002 as D-Exhibit 7, certificate of title of LR No 14812/3 as D-Exhibit 8, defendant's medical receipts and records as D-Exhibit 9, withdrawal of caveat dated January 21, 2021 as D-Exhibit 10 and death certificate of RWN as D-Exhibit 11.
12. In cross examination, he stated that he purchased the suit land in 2003 while his wife died in 2001. He denied being aware of suit No 5649 of 1992. He stated that the plaintiffs should not have sued him as they have their own properties where they are free to deal and he had never interfered with them and that they never assisted him in obtaining the suit property. That marked the close of the defendant's case.
13. No evidence was tendered by the plaintiffs in defence against the counter claim, hence their case was marked as closed. Parties were directed to file written submissions. On record are the defendant's submissions dated November 16, 2022 and the plaintiffs' submissions dated December 13, 2022.

#### **Defendant's Submissions**

14. Counsel for the defendant submitted that the suit property was not held by the defendant in trust for the plaintiffs, who were also adults. Counsel further argued that the defendant obtained registration of the suit property in 2003 which was two years after the demise of his wife hence the same was not matrimonial property. Counsel relied on section 6 of the *Matrimonial Property Act*, to argue that the suit property does not fit the definition of matrimonial property given under section 6 of the *Matrimonial Property Act*. Counsel argued further that the plaintiffs did not even have grant of letters of administration to make any claim for the benefit of the estate of their late mother.
15. Counsel concluded that the defendant had demonstrated that the suit property solely belonged to him and that therefore he was entitled to the orders sought in the counter claim.

#### **Plaintiffs' Submissions**

16. Counsel for the plaintiffs submitted that the defendant having denied being aware of suit number 5649 of 1992 means that he was not honest. Reliance was placed on sections 162 and 163 (1) (c) of the *Evidence Act* to urge the court to find that the defendant was untruthful as the defendants had filed documents in respect of civil suit no 5649 of 1992.
17. The court was referred to the case of *Charter House Bank Limited (Under Statutory Management) vs Frank N Kamau*, Nairobi CA No 87 of 2014 (2016) eKLR, for the proposition that where the



- plaintiffs' evidence is discredited, the defendant need not adduce evidence to rebut the same. Counsel further submitted that the defendant committed perjury and should be held in contempt of court.
18. It was also submitted for the plaintiffs that there was no breach of contract as alleged by the defendant. Counsel argued that before there can be breach of contract, the contract itself must be valid, meaning that the vendor must possess good title, the agreement must be legal and that the purchaser must be an innocent purchase without notice for valuable consideration. Counsel urged that this court must first decide whether the suit property is matrimonial property before determining whether the defendant could enter into a contract over the same before he could sue for breach of contract. Counsel cited the case of *Cornelius Kato vs Peter John Mwanthi* (2022) eKLR, for the proposition that a person can only pass a title to property that he lawfully owns.
  19. Counsel referred to section 93 for the *Land Registration Act* and sections 6(i) (c), 7 and 14a for the *Matrimonial Property Act* to contend that any property shown to be matrimonial property ought to be dealt with under the *Matrimonial Property Act*. Counsel contended that even if the defendant's wife was a house wife her contribution was non-monetary as spelt out on section 2 of the *Matrimonial Property Act*. Counsel referred to article 10 of the *Constitution* and the case of *PNN vs ZWN* (2017) eKLR which the court has considered. Counsel argued that the defendant failed to inform the Registrar at the point of registration of the suit property that he was a married man. Counsel relied on the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* [2015] eKLR, for the proposition that a subsequent sale by a person who has no good title to property cannot be upheld by the law.
  20. On the validity of the sale agreement, counsel contended that the same was not valid for want of attestation. Counsel argued that the purchaser in the agreement was not an innocent purchaser for value without notice as at the time of purchase there was a caution on the land. In that respect, counsel relied on the case of *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 Others* (2017) eKLR.

### **Analysis and Determination**

21. Having considered the defendant's counterclaim, the evidence by the defendant and the submissions filed by the parties, the issues that arise for determination are;
  - a. Whether the defendant is the lawful owner of the suit property.
  - b. Whether the prayers sought in the counterclaim are merited.
22. It is not in dispute that the suit property is registered in the defendant's name. While the plaintiffs submitted at length that the suit property was matrimonial property and went to great lengths in giving the history of the suit property and the matters in Civil Suit No 5649 of 1992, no evidence was adduced by the plaintiffs to support this trajectory that they wished the court to take. I am clear in my mind that the defendant being the owner of the claim, is under legal duty to prove his claim, whether or not any evidence is tendered by the plaintiffs who are the defendants in the counterclaim. However, the plaintiffs who chose not to give any evidence in defence cannot now use submissions to try and show that the suit property was matrimonial property. Submissions are neither pleadings nor evidence. They are merely persuasions and at best a marketing tool.
23. For the defendant to purport to exercise or enjoy any rights over the suit property, all he needs to show is that the property is his. The plaintiffs claim that the suit property was matrimonial property was struck out by the court on their own preliminary objection filed against their own claim. That being the case, the issue as to whether the suit property was matrimonial property was no longer an issue in dispute



- herein. In any event, this court has no jurisdiction to determine proceedings under the [Matrimonial Property Act](#) by dint of Rule 6 of the [Matrimonial Property Rules](#) 2022 which places such jurisdiction in the Magistrates Court, Kadhis Court where parties are Muslims and the High Court, where the pecuniary jurisdiction exceeds the Magistrates Court.
24. To prove ownership, the defendant produced the certificate of title in respect of LR No 14812/3 showing that he was registered as proprietor thereof on February 21, 2003. He also produced rates clearance certificate for the year 2018. While the plaintiffs in their defence to counterclaim described that the suit property as “a family joint venture” on the premise that the same was purchased from the contribution of the plaintiffs and their mother, no evidence was given to support those allegations. In my view therefore, there was no evidence to support the allegations in the defence that the suit property was family property.
  25. Section 24 of the [Land Registration Act](#) No 3 of 2012 provides as follows;
    - a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
    - b. The registration of a person as the proprietor of a lease shall vest on that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
  26. Section 25 of the said [Act](#) provides that the rights of a proprietor acquired on registration shall not be defeated except as provided for in the Act and shall be held by the proprietor free from other interests and claims but subject to the interests shown in the register or interest under section 28 of the Act. Section 26 of the [Act](#) provides that a certificate of title shall be *prima facie* evidence that the proprietor is the absolute and indefeasible owner thereof subject to the interests endorsed in the certificate and the title shall not be subject to challenge except on grounds of fraud, or misrepresentation to which the title holder is a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
  27. Essentially therefore, where a person holds title to property and the title is not challenged, then that person is the indefeasible and absolute owner of the property and entitled to exercise all the rights that the title confers on him, subject to the interests noted in the title or the overriding interests under section 28 of the [Land Registration Act](#).
  28. In the instant suit, there is no suit challenging the defendant’s acquisition of LR No 14812/3. The plaintiffs’ allegations in the defence that the suit property was family land and in the submission that the suit property was matrimonial property was not supported by any iota of evidence as the plaintiffs did not tender any evidence at trial. Considering that the defendant being the registered proprietor of the suit property and there being no challenge of his registration on ground of fraud, misrepresentation, illegalities, lack of procedure or through corruption, I find and hold that the defendant has shown that he is the owner of the suit property and therefore his proprietary interests are protected under article 40 of the [Constitution](#) and section 26 of the [Land Registration Act](#).
  29. The defendant pleaded that because of the plaintiffs’ caution on the suit property, the defendant was frustrated and was unable to complete a sale agreement he entered into on the July 26, 2018. He stated that he suffered loss of Kshs 50,000/- which he sought to be compensated by the plaintiffs.
  30. The plaintiffs did not deny lodging a caution on the defendant’s property. According to them, the defendant cannot sell the suit property without their consent as the same was purchased through



their contribution. Having found that there was no evidence that the plaintiffs contributed to the acquisition for the suit property and that the defendant is the absolute and indefeasible owner of the suit property, it was unlawful for the plaintiffs to lodge a caution against the defendant's title. As discussed above, section 25 of the *Land Registration Act* vests in the registered owner of a title rights that are free from other interests and claims. The plaintiffs do not have any rights noted on the defendant's title neither do they have overriding interests prescribed in section 28 of the *Act* and therefore they had no right whatsoever to limit the defendant's enjoyment of his property by placing a caution on his title. Their actions were therefore in breach of section 25 of the *Act*.

31. In the case of *David Bagire vs Martin Bund* (1997) eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ in *Bonham Carter vs Hyde Park Hotel Limited* [1948] 64 TLR 177 where he stated as follows;

"The plaintiffs must understand that if they bring actions for damages, it is for them to prove damage. It is not enough to note down the particulars and so to speak, throw them at the head of the court saying this is what I have lost, I ask you to give me these damages; they have to prove it."

32. The defendant has shown that on July 26, 2018, he entered into land sale agreement with Joint Commercial Supplies Limited for the sale of the suit property to enable him take care of his needs as he is aged and without any source of income. The plaintiffs' argument that the said sale agreement was not attested is immaterial as the defendant has the right to deal with his property as he wishes. I therefore find that having been limited in the manner he would exercise his rights over the suit property, by the caution placed on his title by the plaintiffs and the defendant having been unable to sell his property to meet his needs, he is entitled to damages. Damages need not only be pleaded but they ought to be proved.
33. The plaintiffs having cautioned the title of the suit property to the detriment of the defendant and denying him the opportunity to deal with it, have indeed frustrated the defendant who testified that he is old, with no income and no way to meet his needs. The defendant sought for damages for Kshs 50,000/-. I find that a sum of Kshs 50,000/- is reasonable compensation in the circumstances and I allow the same.
34. The defendant also sought for an order of permanent injunction to bar the plaintiffs from lodging a caution on his property or objections on applications for issuance of Land Control Board consents. Having found that the defendant has indefeasible and absolute ownership of the suit property to the exclusion of the whole world, the prayer to bar the plaintiffs as sought is justified and the said prayer is allowed.
35. In the end, I am satisfied that the defendant has proved his case against the plaintiffs on the required standard and I enter judgment for the defendant against the plaintiffs as follows;
- a. That a declaration be and is hereby made that the defendant is the absolute and indefeasible owner of LR No 14812/3.
  - b. That damages of Kshs 50,000/- be and are hereby awarded to the defendant.
  - c. That an order of permanent injunction be and is hereby issued restraining the plaintiffs from lodging cautions on LR No 14812/3 and lodging objections to the defendant's application for issuance of Land Board Consents in support of any intended sale of all that parcel of land known as LR No 14812/3.
  - d. As the suit is between a father and his biological children, I make no order as to costs.



36. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8<sup>TH</sup> DAY OF  
FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Mairura for the plaintiffs

Ms Karuga holding brief for Kariu for the Defendant

Josephine – Court Assistant

