



Gakuya & another (Suing as the legal representative of the Estate of Jemimah Nyambura Gakuya (Deceased)) v Ngare & another (Environment & Land Case 1214 of 2014) [2023] KEELC 20542 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1214 OF 2014
LN MBUGUA, J
OCTOBER 5, 2023**

BETWEEN

WILFRED GAKUYA 1ST PLAINTIFF

JOYCE WAMBUI MBAI 2ND PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JEMIMAH
NYAMBURA GAKUYA (DECEASED)**

AND

DANIEL MBOCHA NGARE 1ST DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI COUNTY 2ND DEFENDANT

JUDGMENT

1. This suit was filed on 15.9.2014 where the plaintiffs contend that their late mother owned the suit parcel plot No. [particulars withheld] having acquired it from Thome I company limited. That in the year 2014, the plaintiffs and the beneficiaries of the estate of their mother discovered that the 1st defendant held a title deed to the suit land namely Nairobi Block [particulars withheld], triggering the filing of this suit.
2. The plaintiff therefore prays for the following orders:
 - a) An order for cancellation of the Title deed issued to Daniel Mbocha Ngare over Land Title Number Nairobi Block [particulars withheld].
 - b) A declaration that the estate of Jemimah Nyambura Gakuya (Deceased) is the owner of Title Nairobi Block [particulars withheld].



- c) A permanent injunction restraining the 1st Defendant, his servants, workmen and agents, from entering on the Plaintiffs' said Property, claiming ownership of it, or from in any way interfering with the Plaintiffs' use and enjoyment of the said Property.
 - d) Costs of this suit.
 - e) Interest thereon.
 - f) Any other relief the court deems fit to grant.
3. The 1st defendant filed a statement of defence on 29.10.2014 which contains a general denial of plaintiffs' claim.
 4. The 2nd defendant filed their statement of defence on 13.9.2016 and similarly they deny the claim of the plaintiffs, adding that they would seek indemnity from the 1st defendant in the event it is established that the 1st defendant mis-represented the facts during the registration of his title.
 5. PW1, one Dorcas Nanjero introduced herself as an advocate of the High Court of Kenya. She adopted her witness statement dated 22.9.2017 as her evidence. She avers that on 22.5.1990, she received written instructions from Thome Farmers No. 1 Company Ltd to prepare transfer for their property, and she holds the original register in respect of the plot owners of that company whereby plot No. [particulars withheld] corresponds with L.R. [particulars withheld] and that the said land belonged to Jemimah Nyambura Gakuya.
 6. She gave an account of how titles were being issued to the members of the company. A plot owner would come to their office with the share certificate for verification of which, PW1 would prepare transfer forms to take to land office for issuance of titles.
 7. She produced the letter of instruction as well as the extract of the register of the plot owners as exhibits.
 8. PW1 avers that Jemimah Nyambura never went to their office for the processing of the title, but again, she never processed a title for the 1st defendant.
 9. Upon cross examination by counsel for the 2nd defendant, PW1 stated that the scheme was big and the transfers could not all go together. She reiterated that she never processed a title for the 1st defendant.
 10. PW2 one James Kamwere introduced himself as a licensed Land Surveyor practicing under the name of Kamwere and Associates. He adopted his witness statement dated 22.9.2017 as his evidence. He avers that he was commissioned by Thome 1 Co. to carry out planning and cadastral survey of the original parcels of land L.R. No. [particulars withheld] and L.R No. [particulars withheld] He also had instructions to subdivide that land so as to facilitate the settlement of the company's shareholders. He went ahead and prepared a subdivision plan of 964 sub plots which was approved by both the local authority and Director of survey. The latter then allocated RTA numbers to the sub plots.
 11. The original parcels [particulars withheld] and [particulars withheld] were consolidated and allocated number LR [particulars withheld] under RTA, thus the suit parcel plot No. [particulars withheld] was allocated No. [particulars withheld]. That upon a request from the company, PW2 made a request to the Chief Land Registrar for the conversion of the R.T.A to R.L.R, of which the approval was given in year 1987.
 12. Consequently, the director of survey allocated the consolidated block as parcel Nairobi/[particulars withheld], thus all the subplots were given corresponding parcel numbers where the suit parcel under RTA number [particulars withheld] became Nairobi Block /[particulars withheld].



13. PW2 produced as exhibits, the subdivision scheme of 1976, the survey plan as well as the Registry Index Map (RIM) to show how the suit plot No [particulars withheld] became Nairobi Block [particulars withheld].
14. PW3 Wilfred Gakuya Waweru is a plaintiff. He adopted his witness statement dated 11.9.2014 as his evidence. He also produced as his exhibits the documents filed in three lists namely: the one dated 20.9.2017 (13 items), the supplementary list dated 10.2.2016 (4 items) and the further list dated 20.6.2016, (2 items).
15. PW3 contends that his mother was a member of Thome 1 Co. Ltd where she finished the purchase of her plot No. [particulars withheld] in 1986, but she never applied for the title by the time she passed on in year 2000.
16. In year 2014, the family of PW3 discovered that 1st defendant had a title issued on 17.10.1996 and re-issued on 21.3.2014. PW3 contended that his family has all along been in possession of the suit property.
17. The case of the 2nd defendant was advanced by one Vincencia Juma (DW1) who introduced herself as a Land Registrar. She adopted her witness statement dated 20.4.2023 as her evidence. She also produced the 17 documents in their list dated 20.4.2023 as their exhibits. Her evidence is that their registration records indicate that 1st defendant was the registered owner of the suit property but she knew not as to how he came to be so registered.
18. The 1st defendant did not tender any evidence despite the fact that he filed a defence and once in a while, his advocate would make an appearance in court. For instance, 1st defendant's advocate was present in court on 25.2.2019 when the hearing date of 25.9.2010 was given but neither the 1st defendant or his advocate turned up for hearing.
19. On 6.7.2020, the matter was scheduled for defence hearing, when the advocate for the 1st defendant addressed the court as follows:

“My client wishes to sit down with the plaintiff and resolve the dispute. We request for one month.”
20. Four months later on 12.11.2020, again counsel for the 1st defendant addressed the court as follows:

“We do not yet have a settlement. We are in the process of transferring the title to the plaintiff...”
21. The 1st defendant and his advocate never turned up in court after that and no settlement was ever recorded.
22. The submissions of the plaintiff are dated 15.5.2023 where they aver that all the evidence tendered by the plaintiff leave no doubts that the title held by the 1st defendant was fraudulently acquired hence liable to be impeached as per the provisions of Section 26 of the *Land Registration Act*. To buttress this claim, the plaintiff relied on the case of *Dira Management Limited vs County Government of Mombasa and 5 others* [2021] eKLR.
23. The submissions of the 2nd defendant are dated 16.6.2023 where they aver that no explanation was proffered as to why plaintiff never got a title to their land and that no fraud was established in the registration of the title to the 1st defendant. The 2nd defendant relied on the cases of *Kuria Kiarie & 2 others vs Sammy Magera* [2018] eKLR. They still went on to submit that though 1st defendant has a



title, the same was under challenge and he failed to come to court to explain how he obtained the said title. To this end, reference was made to the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR.

Determination

24. I have weighed all the evidence adduced herein. I find that the issues falling for determination are:
- 1) Whether plot No. [particulars withheld] being claimed by the plaintiff is the same plot as Nairobi Block [particulars withheld] registered in the name of the 1st defendant.
 - 2) Who owns the suit property parcel [particulars withheld] or Nairobi Block [particulars withheld].
25. On whether the two parcels are the same, I find that PW2 has given minute details of the history of the suit land. That initially, the large parcel was No's [particulars withheld] and [particulars withheld] which as per instructions of Thome 1 co Ltd, PW2 had the two parcels consolidated into parcel [particulars withheld] and a subdivision scheme was generated resulting into 964 plots. Plot No. [particulars withheld] became parcel [particulars withheld] under RTA. However, through conversion from the titling regime of RTA to RLA, the large parcel [particulars withheld] become Nairobi Block [particulars withheld] of which the parcel [particulars withheld] became Nairobi Block [particulars withheld].
26. That evidence of PW2 has been corroborated by PW1, the advocate who had taken charge of processing, transfers under Thome I Co. Ltd. To this end, I am inclined to believe that parcel [particulars withheld] is the same plot as Nairobi Block [particulars withheld].
27. Who owns the suit property? As rightly submitted by the plaintiff and the 2nd defendant, the title of the 1st defendant is under challenge. In the case of *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR. It was stated that;
- “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.”
28. The plaintiff has given a plausible account of his claim to the suit land. His testimony that their family is the one which for decades has been utilizing the suit land by planting nappier grass has not been challenged. It appears that the only shortcoming on the part of Jemimah and her family was their failure to process their title. But again, that was not a licence for some one else (read 1st defendant) to get a title for the same land.
29. It is quite telling that the 1st defendant has all along been aware about this suit but he opted to be “missing in action” when the actual hearing commenced.
30. The logical conclusion to make is that the title held by the 1st defendant was issued illegally, unprocedurally or through a corrupt scheme. In terms of the provisions of Section 26 (1) (b) of the *Land Registration Act*, the title of the 1st defendant now stands to be impeached. See *Elijah Makeri; Nyangweso vs Stephen Mungai Njuguna & Another* [2013] eKLR.
31. In the final analysis, I find that the suit parcel belongs to the estate of Jemimah Nyambura.



Final Orders

- 1) An order is hereby issued for cancellation of the title deed issued to Daniel Mbocha Ngare for parcel Nairobi [particulars withheld]
- 2) An order is hereby issued declaring the estate of Jemimah Nyambura as the owner of parcel Nairobi Block [particulars withheld].
- 3) A permanent injunction is hereby issued restraining the 1st defendant his servants and agents from interfering with plaintiffs land No. Nairobi Block [particulars withheld].
- 4) The 1st defendant is hereby condemned to pay costs of the suit to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Karuga for Plaintiff

Mr. Meenge for 2nd Defendant

