



**Nganga v Ali (Sued as the legal administrator ad-litem of the
Estate of Fatuma Hersi Ali (Deceased) (Environment & Land Case
145 of 2019) [2023] KEELC 20664 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 145 OF 2019
A OMBWAYO, J
OCTOBER 5, 2023**

BETWEEN

JOSEPH KIMANI NGANGA PLAINTIFF

AND

**ZAINAB UMAR ALI (SUED AS THE LEGAL ADMINISTRATOR AD-LITEM OF
THE ESTATE OF FATUMA HERSI ALI (DECEASED) DEFENDANT**

JUDGMENT

1. Joseph Kimani Nganga, (hereinafter referred to as the Plaintiff) commenced this suit vide a plaint dated 22nd August, 2012. He stated that he bought the suit property DUNDORI/MUGWATHI BLOCK 2/168(hereinafter referred to as the suit property) and took possession. That sometime in 1997 he learnt that Zainab Umar Ali (hereinafter referred to as the Defendant) had fraudulently obtained a title deed to his land. The Plaintiff sought for judgment to be entered against the Defendant as follows:

A declaration that the plaintiff is the legal owner of that parcel of land known as PLOT NUMBER 1255R KOILEL FARM (originally) now known as DUNDORI/ MUGWATHI BLOCK 2/168

A cancellation of the title deed illegally obtained by the Defendant for DUNDORI/ MUGWATHI BLOCK 2/168

An order of injunction restraining the defendant by herself, her agents, servants and or employees from in any way interfering with the plaintiff's land known as PLOT NUMBER 1255R KOILEL FARM (originally) now known as DUNDORI MUGWATHI BLOCK 2/168.

Costs and interest of the suit.
2. The Defendant herein entered appearance filed her Amended Defence and Counter claim dated 19th April, 2023 and prayed for the following orders:



An order of eviction of the Plaintiff by himself, his servants, employees, agents and all persons therein under him from L.R No. Dundori/Mugwathi Block 2/168 (Koilel)

Costs and interest at court rates.

Any other and or further relief as the Honourable court may deem fit and just to grant.

Plaintiff's Case

3. Joseph Kimani Nganga the Plaintiff herein testified as PW1 that he is the owner of parcel of the suit property herein. He further testified that in the year 1982 one Kipsoi sold him the land which had no title then. He added that Kipsoi sold his shares in Kalenjin Enterprises Co Ltd. and they signed an agreement as listed in his bundle of documents dated 12/8/2012. The bundle of documents listed 1 to 12 was admitted as "PEX1-12. He explained that the shares he bought were what constituted the suit land. He testified that the seller was residing on the land which was about 3 acres. He added that he had inspected the land before purchasing and that they signed the agreement (PEX2) at the chief's office.
4. He further testified that the seller requested for some time to vacate after which he took possession in 1983 and started cultivating and constructed a permanent house in 1984. He testified that the chief gave them a letter confirming that he had purchased the suit land "PEX3" and then went to the company's office for transfer. He added that the company authorized the transfer to be effected to him vide the D.O's letter of 26/9/1984. He testified that the local administration became involved when disputes arose involving members. He testified that he had been in occupation of the plot since 1984 and no one had complained. It was his testimony that the company sometime in 1997 confirmed that the titles were ready and members could collect.
5. He explained that he went to the Lands Office where the Land Registrar inspected the register and informed him that his title had been issued in the name of the Defendant. He testified that he registered a caution on 4/9/1997 (PEX10) and reported to the DC's office Nakuru who wrote a letter to the Land Registrar and the DO (PEX6). The District Officer was instructed to investigate the matter and the Land Registrar recalled the title to the suit land until the matter was determined.
6. The Land Registrar summoned them to his office vide letter dated 1/10/1997 and informed them that the Defendant had acquired the land irregularly and advised the parties to seek redress from the court.
7. PW1 was referred to PEX11 a decree in land case No.35/2009 where he testified that there were two decrees on the same land matter and that he never knew there was any case against him until 2012 when the 2 decrees were brought to his house in August 2012 in his absence. That he then consulted his lawyer who filed the present case.
8. He was also referred to Plaintiff EX10 (share certificate) and testified that the reverse side of the share certificate had been stamped by the company when verification was publicly done. He added that there were 2 stamps at the back, one by the company (hand written) and the other by the surveyor which signified verification. He testified that during the verification the SC, DO and directors of the company were present.
9. He was also referred to PEX2 and testified that the agreement referred to plot No. 1255R which was the plot number before survey and after survey the same was numbered 168.
10. He testified that he never saw the Defendant at the time of verification and added that he could not recall the date of verification. He was referred to PEX12 (members Register/Allottees) and confirmed that Cheptiony Kipsoi sold him the land.
11. He urged the court to grant him the orders as per the Plaintiff and dismiss the Defendant's counterclaim.



12. On cross examination, he confirmed that he bought land from Cheptiony Kipsoi vide an agreement dated 7/12/1982. He further confirmed that the land was known as Koilelel farm plot number 1255 and Plot 168 Mugwathe was given by surveyor. He confirmed that he bought plot number 1255R and that he had documents for plot 168. He added that he did not have the title deed or a map for 1255R. He confirmed that he is currently in the plot and has not subdivided nor sold it. He further confirmed that the Defendant has the title and also admitted that he did not know when he came to know about the decision of the Trustee. He admitted that he did not have a clearance certificate but a share certificate. He added that Kipsoi Cheptony bought the land form Kalenjin Enterprise. He stated that he had not sued Kalenjin Enterprises because they gave Kipsoi (deceased) the certificate.
13. On re-examination, he stated that he was given a share certificate and that Kipsoi gave him a ballot and a shareholders card that showed plot number 1255R later converted to 168 during survey. He stated that the Defendant never claimed the land from him.
14. Daniel Maina Kerungui testified as PW2. His statement was adopted as his evidence in chief. He testified that he was the director and secretary to the Kalenjin Enterprise from 1997 to 2000. He further testified that he is a shareholder and therefore conversant with the proceedings of the company. He testified that the Plaintiff is his neighbor in plot 2 which is next to the suit property. He testified that the Plaintiff entered the land in 1982 and has constructed 2 permanent houses and trees.
15. The witness was shown the shareholders card and testified that it showed that property number 1255R and 168 are related. He was also shown a unit of shareholders and testified that they are allottees and that 168 belonged to Cheptiony Kipsoi. He further testified that registration was done using the allotment list. He added that the Defendant did not appear anywhere in the list and that his plot was 178 in the name of Rosemary Wangui Maina.
16. On cross examination, he confirmed that he has a plot in Ndunduri/Mugwathi 470 which he got through Kalenjin Enterprises. He also confirmed that he is a shareholder and he balloted then shown the plot by the surveyor. He admitted that he did not know whether the Plaintiff paid survey fees. He confirmed that Kipsoi moved out before titles were given and that he was not sure whether Kipsoi had paid the clearance certificate. He confirmed that Kipsoi freely gave the suit land to the Plaintiff and that he did not know anything about the tribunal.
17. On re examination he stated that survey fees had been paid by Kipsoi to which he had the receipt of Kshs 4,000 for the Plaintiff's plot number confirming that 1255R and 168 are the same.
That marked the close of the Plaintiff's case.
Defendant's case
18. Zainab Onar Abdi testified as DW1. Her statement filed on 9/6/2023 was adopted as evidence in chief. She testified that she has been sued on behalf of her mother Fatuma Abdi Hamisi who died on 16/8/2018. She produced the death certificate (DEX 1) and letters of administration ad litem (DEX 2). She testified that her mother had been sued by the Plaintiff. She added that her mother owned parcel number LR No. Ndudori/Mugwathi Block 2/168 Koilel measuring 1.2 Hectares valued at more than 10 million. She testified that she did not know Kipsoi.
19. She testified that her mother had filed a statement on 9/6/2017. The same was adopted as evidence in chief. It was her testimony that her mother bought 2 properties from Khadija Haji Ahmed. She produced documents number 1-14 marked as DEX3- DEX 17. She testified that Bahati Land Tribunal gave her mother the land. She also testified that she pays rates on the suit land. She added that Ng'anga'



did the approval. She testified that when her mother went to occupy the land she found the Plaintiff in occupation. She further testified that Kalenjin enterprises supported her mother.

20. On cross examination, she confirmed that the agreement was not dated and that her mother bought plot number 90. She stated that DEX 10,11,12 was not relevant. She further confirmed that her mother had bought 75 shares and that there was no connection between the agreement and share certificates. She admitted that since 1998 to date, they have never entered the land. She confirmed that the plot has been developed by the Plaintiff. She also confirmed that her mother bought the land from Khadija but her name is not on the list of allottees.
21. On re examination she stated that there was no consent to develop. She added that Plot number 311 had no dispute in the matter. She also stated that the Clearance certificate is on block1/168. She stated that they pay rates for Block 2/162.
22. Darasian Kaburu Gichuki testified as DW2. He testified that he was the chairman of the Bahati Land Disputes tribunal. He testified that they determined the dispute. He added that they had invited Joseph Kimani Ng'anga' and found that Fatuma H Ali was the owner of the land and that she had the clearance certificate.
23. On cross examination he confirmed that the dispute was in respect of registered land and that they were first determining ownership then the issue of trespass.

That marked the close of the Defendant's case.

Submissions

None of the parties filed their submissions.

Analysis and Determination

I have considered the pleadings and the evidence on record and I am of the view that the following issues ought to be determined:

24.
 - a. Who between the Plaintiff and Defendant is the rightful owner of the suit property?
25.
 - b. Whether the Defendant is entitled to the prayers as sought in her Counter-claim.
26.
 - c. Which party should bear the costs of the suit?
27. Both the Plaintiff and Defendant explained the root of their title to the suit property. The Plaintiff testified that in 1982 Cheptiony Kipsoi sold him the land and transferred to the Plaintiff 50 shares from Kalenjin Enterprises Co Ltd. The Plaintiff produced a sale agreement dated 7th December, 1982 as well as transfer of shares dated 18th September, 1984. He testified that the suit property at the time he bought it was plot number 1255R Koilele Farm which later changed to 168 after survey. PW2 testified and confirmed that his suit property was next to the Plaintiff's and that the Plaintiff was the owner of the suit property having bought the same from Cheptiony Kipsoi.
28. The Defendant on the other hand through her daughter testified that she was the owner of the suit land having purchased the same from one Khadija. DW1 testified that her mother had bought Plot No. 90 and admitted that the agreement was not dated. She however produced receipts for plot number 311



which she later confirmed that the said plot did not have any disputes. The share certificate produced with the name Khadija did not indicate the plot number to which she sold to the Defendant.

29. This court has carefully perused the pleadings and noted that from the certified copy of register of list of allottees by Kalenjin Enterprises (Koelel Farm), Khadija's name does not appear which DW1 also confirmed during cross-examination.
30. It is noteworthy that from the same list, Cheptiony Kipsoi being the one who sold the suit property to the Plaintiff features on the list confirming that he was indeed allotted the suit property. DW2 on re-examination stated that the Clearance certificate was for the suit property while adding that they pay rates for Block 2/162.
31. In light of the above, this court is of the view that the DW1 and DW2 have clearly not delivered any evidence to prove that the Khadija held any shares at Kalenjin Enterprises. She did not produce any share certificate, nor any receipt for payment for survey so as to be assigned the suit land. In addition the sale agreement between Fatuma Hersi Ali and Khadija Haji Ahmed is undated and refers to plot number 90. This court is of the view that the two properties are different and the onus was on the Plaintiff and Defendant to show how the said plot changed to the suit property being Dundori/ Mugwathi Block 2/168 (Koilel).
32. In the Court of Appeal case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the court held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

Section 26(1) of the *Land Registration Act* provides as follows; -

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

33. The Plaintiff in paragraph 6 enumerated particulars of fraud on the part of the Defendant. The Court of Appeal in Mombasa, in Civil Appeal No. 312 of 2012;- Emfil Limited Vs Registrar of Titles Mombasa & 2 others [2014] eKLR held as follows;-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.

34. This court finds that the same has not been proven to the required standard by the Plaintiff.



35. It is not in dispute that both parties claim that the suit property was issued by the Kalenjin Enterprise Limited. I have looked at the documents and from the certified copy of the allottee register from the said company confirms that Cheptiony Kipsoi was an allottee. DW1 confirmed that Khadija Haji Ahmed was not on the list and the same is not disputed. The evidence by DW1 does not clearly support her case to show that her mother Fatuma bought the suit property from Khadija. In the event she did, then it was not the suit property but another property. DW1 produced documents that are clearly not related to the suit property and furthermore her testimony did not advance her case.
36. The Plaintiff on the other hand was able to explain how he acquired the suit property and the evidence presented advanced his case. During cross examination the Plaintiff's testimony remained unshaken and was consistent all through.
37. This court is therefore not persuaded that one Khadija Haji Ahamed was ever allotted the suit by Kalenjin Enterprises and therefore the Defendant never purchased the suit property from her. I find that the title issued in the Defendant's name was unprocedurally issued. Given the above, this court finds that the Plaintiff is the rightful proprietor of the suit property have established that he bought the same from Cheptiony Kipsoi an allottee of the Kalenjin Enterprises Limited.
38. In the upshot, this court finds that the Plaintiff has proved his case to the required standard of balance of probabilities and is therefore entitled to the orders sought.
39. Consequently, the Defendant's Counter-claim is dismissed with costs and I now enter Judgment for the Plaintiff against the Defendant in the following terms:-
- a. The Plaintiff is the legal owner of the suit property Dundori/ Mugwathi Block 2/168.
 - b. An order cancelling the title illegally obtained by the Defendant for Dundori/ Mugwathi Block 2/168.
 - c. An order of injunction restraining the Defendant her agents, servants and or employees from in any way interfering with the Plaintiff's land.
 - d. The Plaintiff is awarded costs of the suit.
40. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 5TH OF OCTOBER 2023

A.O.OMBWAYO

JUDGE

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