



**Karuga v Njoki (Environment & Land Case 354 of 2014)  
[2023] KEELC 21460 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21460 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 354 OF 2014  
LA OMOLLO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**JAMES NJOROGE KARUGA ..... PLAINTIFF**

**AND**

**HANNAH NJOKI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this this suit vide a Plaint dated 20<sup>th</sup> March, 1996.
2. In the Plaint, he avers that he is the registered proprietor of all that parcel of land known as Nyandarua/ South Kinangop/599 situated in Nyandarua District.
3. He further avers that sometime in early February 1996, the Defendant trespassed onto half an acre of the Plaintiff's said plot No. Nyandarua/Kinangop/599, constructed a wooden house over the same and started cultivating the said piece of land on the ground, alleged, that the Defendant had bought the same from one Peter Karanja Kabura while the said Peter Karanja has or had no proprietary rights over the said property.
4. It is his averment that as a consequence of the Defendant's said trespass, the Plaintiff has been dispossessed of half an acre of his parcel of land and has suffered loss and damage and will continue to suffer loss and damage unless the Honourable Court orders the Defendant to vacate the Plaintiff's parcel of land.
5. He further avers that the parcel occupied by the Defendant yields potatoes worth an average of thirty thousand Kenya shillings per year, which the Plaintiff continues to loss as long as the Defendant continues to trespass on the said land.
6. The Plaintiff prays for judgment against the Defendants for:



- a. A mandatory injunction requiring the Defendant to forthwith vacate the Plaintiff's parcel of land known as Nyandarua/South Kinangop/599.
  - b. General damages for trespass
  - c. Mesne profits together with interest thereon from February 1996 until the time the Defendant vacates the Plaintiff's land.
  - d. Costs together with interest thereon.
  - e. Such other or further grounds this Honourable court may deem fit and just to grant.
7. The Defendants filed their Amended Defence and Counterclaim on 14<sup>th</sup> March, 2022.
  8. The Defendant denies that she trespassed onto the Plaintiff's land and avers that the portion she has occupied is what she bought as a bonafide purchaser and is not the Plaintiff's land.
  9. The Defendant denies the Notice to vacate and puts the Plaintiff to strict proof.
  10. In the counterclaim, the Defendant avers that she is the rightful, equitable and beneficial owner of the land currently in her occupation and possession being one acre in area.
  11. The Defendant further avers that her occupation and possession of the said property is lawful and proper as a purchaser for value without notice.
  12. The Defendant prays that the Plaintiff's suit be dismissed and judgment be entered in the following term;
    - a. A declaration that the Defendant is the legal and equitable owner of the portion of 1 acre in her possession and occupation.
    - b. An order that the Plaintiff do execute the necessary documents transferring title to the portion of 1 acre to the Defendant and in default the Registrar of this Court do execute such documents on the Plaintiff's behalf.
    - c. Costs of the suit to be paid to the Defendant.
    - d. Any other or such further orders as this court may deem fit and just to grant.

### **Plaintiff's Evidence.**

13. During the hearing of the Plaintiff's case, James Njoroge Karuga testified as PW1. He informed the court that he has a written statement dated 31<sup>st</sup> October, 2013 which he wished to have adopted as part of his evidence and it was adopted as such.
14. He further informed the court that he had also filed a list of documents dated 20<sup>th</sup> April, 2021. The documents on the said list were marked and produced as follows:
  - a. Copy of Title Deed for Nyandarua/ South Kinangop/ 599 as Exhibit P1.
  - b. Demand letter dated 11<sup>th</sup> February 1997 as Exhibit P2
  - c. Map for South Kinangop Settlement Scheme as Exhibit P3
  - d. Letter of Consent from the Land Control Board as Exhibit P4
  - e. Receipts dated 27<sup>th</sup> November, 1995 as Exhibit P5



15. It is his testimony that he is the first registered owner of the suit parcel and has been in occupation since purchase in 1992 until September 1995 when the Defendant took occupation half an acre of his parcel without his permission.
16. He went on to testify that he questioned her on her occupation and she stated that she bought it from the chief whose name he gave as Karenga.
17. He further testified that he does not know Peter Karanja Kabura that the Defendant alleges to have bought the suit parcel from adding that he never sold the parcel to Peter Karanja Kabura.
18. It is the Plaintiff's testimony that had he been using the half acre in occupation by the Defendant, he would be making thirty thousand Kenya shillings. He explained that the area where the suit parcel is located is known for growing potatoes, cabbages and carrots and that these crops are grown and harvested twice a year.
19. He testified that he has he has not used the portion of the suit parcel since 1995 and prayed for compensation for its non-use, he also prayed for eviction against the Defendant and costs of the suit.
20. On the counterclaim, PW1 explained that the Defendant is not owner of the half acre portion as he is the one who has the title.
21. PW1 further testified that the Defendant alleges that she is a beneficial owner of the suit parcel and yet she does not know that person she is claiming from and has also not joined the said person to the suit. PW1 prays that the counterclaim be dismissed.
22. Upon cross examination, PW1 confirmed that he is the Plaintiff. He stated that the title deed was issued to him in 1992 and that the person who sold the land to him had it allocated to him by the settlement scheme. He added that he was the one who had it registered in his name.
23. He stated that he paid the loan due on the suit parcel and confirmed that he had no loan documents. He stated that he only has the title.
24. He stated that Ruth Watiri sold the entire parcel to him and explained that the suit parcel is approximately 7 acres. He further stated that he does not have the agreement between himself and Ruth Watiri and confirmed that there are stages that a purchaser has to go through before he/she is issued with a title.
25. He stated that he does not know Ruth Watiri's children but confirmed that she was married. He stated that her husband's name is Kapanga.
26. He stated that the consent says the transfer is for 7 acres and he does not have the other papers or documents preceding the consents.
27. He stated that he did not keep any documents once the title was issued. He further stated that he attended the Land Control Board alone and was given a consent. He stated that was neither with Peter Karanja Kabura nor with Ruth Watiri. He stated that he only needed her documents.
28. He stated that he could not remember all the people who sat at the Land Control Board but remembers the Chief. he further stated that after attending several board meetings, they finally they gave him the consent.
29. He stated that the receipt from Nyandarua County Council is for six hundred and sixty Kenya shillings and added that the amount was paid by him. He confirmed that the receipt has a signature but did



- not know whose signature it is. He confirmed that the receipt does not have a revenue stamp but was signed by the person who received the money.
30. PW1 stated that he did not know Ruth Watiri's children but only knew her brothers and husband who have since passed on. He denied that the suit parcel is larger than 7 acres but confirmed that he has never surveyed the parcel.
  31. PW1 confirmed that there is a grave on the suit parcel and stated that it belongs to the late Mr. Mundia Chobu. He stated that it is on the half acre portion occupied by the Defendant and added that Mundia Chobu was buried on it before he purchased the parcel.
  32. He confirmed that there is a barbed wire on the suit parcel and stated that it was put by the area Chief and District Officer. He denied that the suit parcel is larger than 7 acres and also denied that the one acre belonged to the Defendant.
  33. PW1 was shown a sale agreement and he stated that Dominic Karinga whose name appears on the agreement is the chief. He stated that he does not know the other people whose names appear on the agreement. He stated that he does not know about the agreement between Peter Karanja Kabura and the Defendant. He also stated that he does not know that Peter Karanja Kabura is the son of Ruth Watiri.
  34. He further stated that he does not know that they sold the portion with the grave to the Defendant. He confirmed that he did not take a surveyor to the suit parcel because he bought the whole of it and denied that he was supposed to give off one acre to the Defendant.
  35. He reiterated that Chief Karinga sat in the Board and he does not know about the agreement he witnessed between Peter Karanja Kabura and the Defendant.
  36. Upon re-examination, PW1 stated that Peter Karanja Kabura has not been joined to this suit and that the Defendant started living on the parcel in 1995 and that he filed this suit in 1996.
  37. He confirmed that Mundia Chobu was buried on the suit parcel and further confirmed that he was buried there before he bought the suit parcel.
  38. He explained that he has not found it necessary to have his parcel surveyed and added that the chief and District Officer cannot subdivide his parcel.
  39. He reiterated that he went to the land control board with Ruth Watiri and one of the people who sat at the Land Control Board is the Chief Dominic.
  40. In his witness statement dated 31<sup>st</sup> October 2013, PW1 states that he reported the Defendant to the Provincial Administration with the hope that they would assist him to evict the Defendant from his land but the Provincial Administration advised that he gets a court order.
  41. This marked the close of the Plaintiff's case.

#### **Defendant's Evidence.**

42. Hannah Njoki Kamuya testified as DW1 in her introduction she stated that she lives in Magumu in Nyandarua and is a farmer.
43. She stated that she knows the Plaintiff and knows where he lives. She also stated that she had come to court to testify as to how she acquired the suit parcel.



44. It is her testimony that she bought the land in 1995 from Peter Karanja Kabura and that it measured one acre. She testified that the purchase price was one hundred and forty-five thousand Kenya Shillings (Ksh 145,000) and she paid one hundred and twenty thousand Kenya Shillings (Ksh 120,000).
45. She testified that she had a balance of twenty-five thousand Kenya Shillings (Ksh 25,000) but did not pay it because the seller died after two months.
46. It is her testimony that the seller is one Peter Karanja Kabura and the land belonged to Ruth Watiri, Karanja's mother. He explained that Ruth Watiri didn't have a title. It is her testimony that the entire parcel was 8 acres and the one she is claiming is one acre.
47. She further testified that they entered into an agreement in 1995 and she took occupation in 1995. It is her testimony that she was shown the land which was fenced and it had rental houses and had beacons.
48. She testified that he (Peter Karanja Kabura) had also farmed potatoes and peas on the said parcel. She went on to narrate that Peter Karanja Kabura had been given an acre by his mother Ruth Watiri. He testified that they didn't go to the Land Board because after two months and he fell ill and died.
49. She testified that there were witnesses to the agreement and gave their names as: chief Karega, Njenga Murenga, Paul Mukundi, John Nganga, Karanja's father and Mburu. She testified that apart from the witnesses signing the agreement, they knew where the land was. It is her testimony that nobody came to evict her from the land.
50. DW1 stated that she had the said agreement and that it is dated 9<sup>th</sup> October, 1995. It was marked and produced as Exhibit D1.
51. She further testified that she did not see the title because Peter Karanja Kabura died and that she did not follow up because this suit was instituted against her.
52. She testified that there was some money that Karanja's mother ( Ruth Watiri) owed the government and she was therefore not able to get the title deed. It is her testimony that even after Peter Karanja Kabura died the money had not been paid. She testified that she does not know where the Plaintiff got his title and further that she does not know when he changed the title.
53. It is her testimony that she knew about the title when they went to the High Court in Nairobi and learnt that it was in the Plaintiff's name.
54. She testified that after she learnt that the title was in the Plaintiff's name, she did not ask the Plaintiff to surrender her one acre because the court wanted to see the original title.
55. It is her testimony that the suit was transferred to Nakuru and the Plaintiff went silent. She testified that she is not aware of the subdivision if any. She also testified that she does not know where the original title is and added that the suit in Nairobi was not concluded.
56. It is her testimony that the Plaintiff never threatened to evict her from the suit parcel and that after they came from Nairobi, the Plaintiff fenced off his land and a part of hers.
57. It is her further testimony that she never participated in the survey that led to the sub-division of the land and that she only reported to the chief who advised her to continue farming and she has been doing.
58. She testified that the Plaintiff took occupation of the suit parcel before her and she does not know how many acres he bought and added that when she took occupation of her one acre, he was already in occupation of part of the suit land and he knew that she had bought it.



59. It is her testimony that she later went to the chief Karega to complain that her land had been sub divided and fenced and the chief told her to remove the fence and continue farming and that after that, they never went back to the Chief.
60. It is her testimony that there is a grave on the parcel and it belongs to Ruth Watiri's brother called Mundia Chobu adding that the late Mundia Chobu was buried on her land.
61. It is her testimony that before she bought the suit land. Mundia Chobu was living on the said parcel and the Plaintiff said that Mundia Chobu would not be buried there.
62. The Court sought clarification from DW1 on the relationship between Mundia Chobu, the Plaintiff and Ruth Watiri. DW1 stated that she did not know the relationship but she confirmed that there is a grave on her parcel and that it belongs to Mundia Chobu. She also responded that she has the photograph of herself standing next to the grave. She produced it as Exhibit D3.
63. It is her testimony that she wants the court to give her land which is one acre and she also seeks prayers as in the counterclaim and other reliefs that the court deems fit.
64. Upon cross examination, DW1 stated that she knows Peter Karanja Kabura as the one who sold the land to her. She stated that at the time of purchasing the land, she was not aware that the Plaintiff was in occupation of the land. She explained that the Plaintiff was in occupation of the suit land but not the portion she bought.
65. DW1 stated that Peter Karanja Kabura died and he did not show her any document of title and that she, also, did not do a search to confirm the owner of the land.
66. She stated that she did not know that the parcel was registered in the name of the Plaintiff.
67. She further stated that she is not aware that the Plaintiff had a title deed issued in 1992. She confirmed that Peter Karanja Kabura sold the land to her.
68. She stated further that Ruth Watiri did not have the title deed and added that Peter Kabura died. She confirmed that Peter Karanja Kabura had daughters whom he had not joined to the suit. She stated that she bought the one acre in 1995 and the whole land is 8 acres.
69. She further stated that the land was surveyed by one John Ngugi before she bought the land but she did not have any survey documents. She confirmed that she never went to the land control board.
70. She stated that the suit in Nairobi was filed in 1995 and it was not very long after she bought the land. She also stated that she went to court in Nairobi three times but did not give evidence and added that this is the first time she was speaking in court.
71. She reiterated that there was a barbed wire, rented houses and a grave and it is true that her statement does not mention rental premises and it only talks of a fence and a grave. It is her statement that the land was fenced by Peter Karanja Kabura and she was not there when it was fenced.
72. DW1 also stated that she was not there when Mundia Chobu died and added that the land was fenced and Peter Karanja Kabura was cultivating it. She also stated that Peter Karanja Kabura's mother and Ruth Watiri are sisters but she has no relation with them.
73. She also stated that she is not aware that the Plaintiff's land is 7 acres and it is inclusive of the parcel where she lives. She reiterated that the 7 acres and the 1 acre are separate.
74. Upon re-examination. DW1 stated that she first saw the title deed in Nairobi when it was shown to her by her lawyer.



75. She further stated that does not know the total acreage of the suit parcel and added that the title shows that that the land is 8 acres.
76. She testified that the court asked for the original and it was not produced but she heard that James Njoroge Karuga bought 8 acres and she reiterated that her parcel was not part of the one bought by the Plaintiff adding that it stood on its own.
77. Dominic Njuguna Karinga testified as DW2. It is his testimony that he lives in Magumu in Kinangop, Nyandarua county. He testified that he is a farmer and he is a retired senior chief of Magumu.
78. He testified that he does not know James Njoroge Karuga (the Plaintiff) but he knows Hannah Njoki Kamuya (the Defendant).
79. His testimony is that an old man by the name Mundia Chobu died and members of his family, one Ruth Watiri and her son informed him that they had been prevented from burying Mundia Chobu on the parcel by a person known as James Njoroge Karuga.
80. It is his testimony that Ruth Watiri had sold land to James Njoroge Karuga and the land sold to James Njoroge Karuga was larger than 7 acres. He went on to testify that the man who died is the one who was living on the suit parcel.
81. DW2 narrated that they were a little disturbed by these events and did not know what to do. He testified that he sought advice from his seniors on what to do because he had never encountered a problem like that.
82. He testified that he was advised to bring a surveyor and he invited a surveyor one John Ngugi who he explained is deceased. He further testified that John Ngugi measured 7 acres and put beacons on the portion that remained adding that it is the portion that Mundia Chobu was buried in. He went on to testify that after that, they lived peacefully. He explained that the survey was ordered by the area District Officer.
83. DW2 stated that the he has a letter which he wrote. He explained that the letter speaks to how Hannah Njoki Kamuya (the Defendant) bought part of the suit land. He testified that Peter Karanja Kabura sold the land to Hannah (the Defendant) and Peter Karanja Kabura is the son to Ruth Watiri. He testified that the letter is dated 28<sup>th</sup> August, 2003 and he prayed that the letter be produced as part of his evidence. It was marked and produced as Exhibit D2.
84. DW2 was referred to Exhibit D1 which is a sale agreement between Peter Karanja Kabura and Hannah Njoki Kamuya (the Defendant) and confirmed that there are witnesses and that he is one of the witnesses and added that he signed the agreement.
85. It is his further testimony that he had seen the parcel before Hannah Njoki Kamuya bought it and adding that it is his place of work therefore he knows the portion that was given to Peter Karanja Kabura and sold to Hannah Njoki Kamuya.
86. He testified that there was a balance of twenty-five thousand Kenya shillings (Ksh 25,000/=) to be paid at the Land Control Board (LCB) but they did not go to the LCB. He testified that he heard that the person who bought the 7 acres wanted the Defendant to vacate the parcel. He testified that Peter Karanja Kabura died and Ruth Watiri also died.
87. It is also his testimony that he heard that the Plaintiff got a title deed and he does not know how he acquired it. He testified that Hannah Njoki Kamuya has been on the parcel since 1995 and she lives there with her children.



88. It was his testimony that Hannah has never complained of the grave and it is Mundia Chobu who is buried there. He testified that he does not know about the consent of the Land Control Board. He testified that he was employed in 1987 and he does not know about the meeting.
89. He testified that the Plaintiff bought 7 acres and anything over 7 acres to be given to the Defendant.
90. Upon cross examination, DW2 stated that when the surveyor came, the Plaintiff was present but he did not have the survey report. He also stated that Mundia Chobu died around 1992/1993 but he could not remember too well.
91. He also stated that as at 1992 the Plaintiff had purchased land but he did not know when he obtained the title deed.
92. He also stated that when they did the survey, it was not on account of a court order but it was because the body of Mundia Chobu needed to be buried. He further stated that he went with 4 policemen and the Plaintiff was also present.
93. It is also his statement that the whole parcel belonged to Ruth Watiri and that Ruth Watiri is the one who sold it to the Plaintiff. He also stated that he never heard any complaints from Ruth Watiri about her land being taken away.
94. He stated that Peter Karanja Kabura was the son of Ruth Watiri and at the time of sale, Ruth Watiri had died and Peter Karanja Kabura's father was alive.
95. He testified that the father did not sign the agreement and he was not living in his location and he did not know about him.
96. On 26<sup>th</sup> October, 2022, this court issued an order that:
  - a. The District Land Surveyor Engineer visits the suit parcel i.e. Nyandarua/ South Kinangop/599 and confirm the acreage of the said parcel and file his report in court.
  - b. The Land Registrar Nyahururu do confirm the current position of the title Nyandarua/ South Kinangop/ 599 issue a search certificate on it and have it filed in court.
97. On 9<sup>th</sup> March, 2023, Counsel for the Defendant informed the Court that the County Surveyor Nyandarua South had filed his report dated 2<sup>nd</sup> December, 2022 on 9<sup>th</sup> December, 2022.
98. Counsel for the Defendant also informed the court that parties had agreed to produce the report by consent. This was confirmed by counsel for the Plaintiff and the report by the County surveyor was produced as Exhibit D4.
99. The Defendant's case was closed.

#### **Issues For Determination.**

100. The Plaintiff filed his submissions on 31<sup>st</sup> March, 2023. He identifies the following issues for determination:
  - a. Whether the Plaintiff has proved that he is the registered owner of Land parcel number Nyandarua/ South Kinangop 1599?
  - b. Whether the Defendant is entitled to a portion of the Plaintiff's piece of land?



- c. Whether the portion of land the Defendant is occupying is part of the land parcel number Nyandarua/South Kinangop 1599 and if so does she have any right to occupy or develop the same?
  - d. What remedies are available to the Plaintiff?
101. The Plaintiff submits that his claim is based on proprietorship of the suit land and entitlement to the rights in respect to ownership of land. He submits that he produced documentary evidence in the form of a title to the same parcel of land as an exhibit in his name as proof of the fact that he is the owner of the land that measures approximately 3 Hectares (7.42 acres App).
  102. The Plaintiff relies on Section 24 and 26 of the *Land Registration Act* 2012. The Plaintiff also relies on the judicial decision of Margaret Njeri Wachira vs Eliud Waweru Njenga (2018) eKLR.
  103. The Plaintiff submits that he presented evidence that shows that the Defendant has illegally taken possession of part of the suit land and developed it and utilizes a portion measuring approximately half acre to and that the Defendant and her witness confirmed this position.
  104. The Plaintiff submits that the Defendant's actions amount to trespass and a violation of the Plaintiff rights as guaranteed in *the constitution* and must be stopped.
  105. The Plaintiff also submits that the Defendant stated in both her evidence in chief and examination that she did not purchase or lease the portion of land in which she occupies from the plaintiff. He submits that she said that she purchased that portion from one Peter Karanja Kabura pursuant to the agreement of sale dated 9<sup>th</sup> October, 1995 and the question that begs is to what legal capacity the said Peter Karanja Kabura had to sell a portion of the Plaintiff's piece of land.
  106. The Plaintiff relies on the judicial decisions of Benson Mutums Muriungi vs CEO Kenya Police Sacco & another (2016) eKLR and Lawrence Mukiri vs A.G & 4 others (2013) eKLR.
  107. The Plaintiff submits that Peter Karanja Kabura did not have title to the suit property therefore the Defendant could have acquired a good title from him either and in any event Peter Karanja Kabura nor his estate were made a party to the proceedings before this court.
  108. The Defendant filed her submissions dated 3<sup>rd</sup> April, 2023 and she identified the following issues for determination:
    - a. Whether at all material times relevant to this suit and particularly on 9<sup>th</sup> October, 1995 the Defendant had purchased one (1) acre of land from Nyandarua/S. Kinangop/599?
    - b. Whether the Plaintiff's Title for the whole land was obtained illegally?
    - c. Whether the Plaintiff is entitled to trespass unto the Defendant's land?
    - d. Whether the Defendant's claim has merit?
    - e. Who should bear costs of this suit?
  109. The Defendant submits that pursuant to Section 107 of the *Evidence Act*, the burden of proof lies on he who asserts the existence of a fact. She submits that it is her case that on 9<sup>th</sup> October 1995, she bought a parcel of land from Peter Karanja Kabura (now deceased) at a consideration of Ksh 145,000/=
  110. It is the defendant's submission that the land which she purchased was to be excised from the original piece of land known as Nyandarua /S. Kinangop/599 and that she has been staying on the said parcel of land measuring one acre since 1995 to date and has developed the same.



111. The Defendant submits that in her witness statement dated 11<sup>th</sup> March, 2022 and she stated that the sale agreement dated 9<sup>th</sup> October, 1995 was attested by both the vendor and her in presence of four witnesses, namely: John Nga'ng'a, Paul Mukundi, Mwangi Karanja and John Mburu. She submits that the cost of the transfer was shared equally among the parties and the Seller agreed to take the buyer to the Land Control board in the month of October 1995.
112. The Defendant submits that the fourth witness was one Dominic Njuguna Karinga a former chief of Magumu Location (This, however, is factually incorrect, this was the second and final witness to testify for the defence) and that his written statement is dated 3<sup>rd</sup> August, 2022. She submits that his testimony was that he knows her as she resides in his location. He submits that he stated that on 28<sup>th</sup> August, 2003, he wrote a letter confirming that Hannah Njoki Kamuya (Defendant) had purchased a piece of land measuring one acre from Peter Karanja Kabura on 9<sup>th</sup> October, 1995.
113. The Defendant submits that the Black's Law Dictionary Ninth Edition at Page 731 also defines fraud as: "A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." She submits that there were deceitful acts of providing documentation that are not genuine or not explained that were used by the Plaintiff in obtaining Title Deed for the parcel of land known as Nyandarua/S.Kinangop/599 and that amounts to fraud.
114. The Defendant submits that the Plaintiff knew that the Defendant had purchased one acre of land from the suit land but he went ahead and obtained the Title Deed for the whole parcel of land without the Defendants knowledge.
115. The Defendant submits that the evidence on record was to the effect that when the Defendant purchased one acre of land from the suit land, it was duly fenced by a barbed wire and further the Defendant has never trespassed onto the Plaintiff's land at all.
116. The Defendant submits that her testimony has been corroborated by three witnesses, and further that the issue of land ownership of one acre of land from the suit land have been confirmed by all the witnesses.
117. The Defendant relies on the judicial decision of Munyu Maina vs Hiram Gathiha Maina [2013] eKLR.
118. The Defendant also relies on Section 80 (1) of the *Land Registration Act* and submits that it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. She submits that it is the duty of a court of law to unravel seemingly intractable problems in accordance with the law and substantial justice.
119. The Defendant relies on Section 26 of the *Land Registration Act* and submits that after the Plaintiff had obtained Title deed for the whole land, the Defendant went and informed the person who sold the land to her, one Peter Karanja Kabura and unfortunately, he died before solving the issue at hand.
120. The Defendant submits that Peter Karanja Kabura had inherited the said land from his late mother Ruth Watiri who had inherited it from the original owner Mundia Chobu (Deceased) who neither had a child nor wife and that prior to Peter Karanja Kabura's death and his late mother, Ruth Watiri, the Defendant tried to have the suit land transferred to her but all efforts were in vain.
121. The Defendant submits that just before James Njoroge Karuga (Plaintiff) collected the Title Deed for Nyandarua/S.Kinangop/599, Mundia Chobu died and he was buried in the portion of one-acre land which was earlier given to the late Peter Karanja Kabura that was sold to the Defendant.



122. The Defendant submits that thereafter, James Njoroge Karuga (Plaintiff) after receiving the Title Deed began demanding that the Defendant moves out of the suit parcel of land and that during that time Peter Karanja Kabura had bought two acres in Nyakio location.
123. She submits that the late Peter Karanja Kabura was informed on the intentions of James Njoroge Karuga against the Defendant and just before he took any action, he fell sick and died.
124. The Defendant submits that the Plaintiff knowingly trespassed and illegally encroached into the Defendants parcel of land knowing very well the correct position of the boundary. She submits that according to the Defendant's witnesses, the Defendant's land was duly fenced by a barbed wire during the purchase.
125. The Defendant submits that the Plaintiff without any colour of right processed the Title Deed for the whole parcel of land known as Nyandarua/S. Kinangop/ 599 knowing very well that the Plaintiff had purchased one acre of land from Peter Karanja Kabura. The Defendant submits that the Defendant avers that the Plaintiff's actions were well calculated with an intent of depriving her of her property.
126. The Defendant submits that she has been in possession of the one acre of land since the 9<sup>th</sup> October, 1995 and she has since constructed a wooden house and cultivated the land.
127. The Defendant submits that the Plaintiff fraudulently and by misrepresentation failed to acknowledge that the Defendant had bought one acre of the suit property vide the sale agreement dated 9<sup>th</sup> October, 1995 and as such the title did not represent the actual state of the suit property.
128. She submits that having furnished the court with evidence of the sale agreement, it follows that the Defendant is entitled to one acre of the suit property and she prays that this Honourable court orders that the Plaintiff ceases to trespass on the Defendants parcel of land measuring one acre.
129. The Defendant submits that what is in dispute herein is whether the Defendant purchased from Peter Karanja Kabura (Deceased) one acre out of the suit land. She submits that although the Defendant is not the registered owner of the suit land, it is clear from the pleadings and annexure that she has a legitimate claim of the one acre within the suit land.
130. The Defendant prays that this Honourable court finds that the certificate of title held by the Plaintiff was procured by fraud and as such it is impeachable and ought to be cancelled. She submits that the Plaintiff has not demonstrated how he purchased or earned the parcel of land known as Nyandarua/ S. Kinangop/599.
131. The Defendant relies on Section 143 (1) of the Registered *Land Act*. She also submits that based on Section 80 (1) of the *Land Registration Act*, the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
132. It is the Defendant's submission that the Plaintiff's actions were well calculated with an intent of depriving the Defendant of her property and the Defendant has tendered a sale agreement to demonstrate that she had purchased one acre of the suit land from Peter Karanja Kabura (Deceased).
133. The Defendant ends by submitting that from the evidence tendered and the judicial decisions cited, it is clear that the Defendant has substantiated and/or proved her claim on the balance of probabilities and should be granted orders sought.
134. The Defendant also submits that the general rule is that costs follow the event and that if this court finds merit in her case then she should be awarded costs.



## **Analysis And Determination.**

135. It is my considered view that, the following issues arise for determination:
- a. Whether the Plaintiff has proved that he has proprietary interest in the whole of the suit land i.e. Land Parcel Number Nyandarua/South Kinangop 1599.
  - b. Whether the Defendant has proved beneficial interest in a one-acre portion of the suit land occupied by her i.e. Land Parcel Number Nyandarua/South Kinangop 1599.
  - c. Who should bear costs of this suit?

### **A. Whether The Plaintiff Has Proved That He Has Proprietary Interest In The Whole Of The Suit Land I.e. Land Parcel Number Nyandarua/south Kinangop 1599.**

136. It is the Plaintiff's case that he is the registered owner of all that parcel of land known as Nyandarua/South Kinangop 1599 situated in Nyandarua District.
137. The Plaintiff narrates how he acquired the suit parcel and his evidence is that suit parcel was previously owned by the settlement scheme. His evidence is that he bought it from Ruth Watiri (Deceased) and that he also paid the loan owing by Ruth Watiri to the settlement scheme. The Plaintiff has not produced evidence of such loan repayment or loan documents to prove the existence of any such loan.
138. The Plaintiff has also not produced the agreement of sale of the suit parcel as between himself and Ruth Watiri (deceased)
139. The Plaintiff produced a copy of the title deed issued on 9<sup>th</sup> April, 1992 which shows that he is the registered proprietor of the of suit property i.e. Nyandarua/South Kinangop/599.
140. The Plaintiff also produces a copy of the consent from the Land Control Board. It is dated 25<sup>th</sup> July, 1986. It is consent to transfer 7 acres from Ruth Watiri to James Njoroje Karuga. The parcel No. is Nyandarua Kinangop/599B and is at South Kinangop Scheme. The Plaintiff does not mention the original title for the suit land, a certificate of search or the sale agreement that as a matter of practice are required to be presented at the Land Control Board before consent is obtained.
141. The Plaintiff in cross-examination confirmed that he attended the Land Control Board alone. His evidence is that neither Ruth Watiri nor Peter Karanja Kabura (her son) was with him. This is curious. A person selling land is required to attend the Land Control Board meeting. The Plaintiff's evidence is that Ruth Watiri did not need to attend and that he only needed her documents, which documents he did not submit in evidence.
142. The Plaintiff's case is that sometime in the year 1996, the Defendant trespassed onto half an acre of the suit land, constructed a wooden house thereon and started cultivating on the same piece of land.
143. The evidence and documents tendered are summarised as follows:
- a. The Plaintiff claims to have purchased land from the deceased Ruth Watiri. No sale agreement has been produced, not evidence of payment has been tendered and no witness corroborated the fact of sale to the Plaintiff.
  - b. The Defendant and her witness, however, have testified that they are aware of sale of a portion of the suit land to the Plaintiff by the deceased.
  - c. The Defendant states that she does not know where the Plaintiff got the title to the suit property or when he changed it to his name.



- d. The Defendant evidence is that she does not know how much land the Plaintiff bought.
- e. The Defendant is categorical that at the time of purchase by her, the Plaintiff was in occupation of part of the suit land but not the portion purchased by her.
144. This court ordered that a survey be carried out to establish the acreage of the suit parcel and also ordered that the Land Registrar files a search certificate in respect of the suit land.
145. Parties to this suit agreed that the surveyor's report be admitted in evidence and the same was marked and produced as Exhibit D4. The report is by the County Surveyor Nyandarua South and is dated 2<sup>nd</sup> December, 2022. It states as follows;
- “Surveyors from this office visited the ground on 22<sup>nd</sup> November, 2022 for the purpose of ground area confirmation for the above mentioned parcel of land. Ground area realized is 2.999 Ha (7.41 acres approx).”
146. On the question of ownership, the Land registrar wrote to court and stated as follows;
- “...efforts to trace the Green card/Register for Nyandarua/ South Kinangop 599 has proved futile and they are therefore not able to issue a search certificate in respect of the said parcel.”
147. It is trite law that he who alleges must prove. This is set out in section 107 of the *evidence Act*. It is as follows:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
148. In civil cases, proof is on a balance of probabilities. The Plaintiff case is that he purchased the entire suit parcel from the late Ruth Watiri but has not tendered any evidence towards this purchase save that he has a title document for the suit land. This is the basis upon which he seeks orders of permanent injunction and eviction of the Defendant.
149. The Defendant acknowledges that the Plaintiff purchased the suit parcel from the deceased but states that it did not include the portion occupied by her.
150. The Court of Appeal, in *Munyu Maina Vs. Hiram Gathiha Maina* 2013 eKLR held thus;
- “We state that when a registered proprietors 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 would not be noted in the register”.
151. The Defendant has challenged the title held by the Plaintiff and states that she is the equitable and beneficial owner of land currently occupied by her being one acre in area. In her evidence she states that she doesn't know how the Plaintiff acquired the title to the said parcel.



152. In *Samuel Kamere Vs. Land Registrar, Kajiado* (2015) e KLR, the Court of Appeal stated thus;

“... there is nothing in evidence to show that the Appellant paid valuable consideration, or indeed, any consideration at all, for the property. He did not produce a bank statement evidencing the cash withdrawal, or provide any relevant proof of payment. Further, no sale agreement was produced showing that a purchase had taken place. There was no seller in evidence who testified. (Emphasis mine). He did not produce any acknowledgements confirming receipt of the purchase price. Without such evidence, we are not satisfied that that the appellant actually paid any consideration, and if at all, to whom....”

153. This decision goes further to point out that the Plaintiff has failed to discharge his burden of proof. The Plaintiff swung a title document at the court as evidence of ownership. There is no explanation whatsoever as to how he acquired it. He has also not produced the sale agreement as evidence of the extent of land purchased by him. This is at the heart of the dispute herein.

154. In the absence of a sale agreement, it is not possible for this court to make a finding that the Plaintiff has proprietary interest in the whole of the suit land i.e. Land Parcel Number Nyandarua/South Kinangop 599 and was therefore entitled to have it registered in his name. It follows that all other prayers as set out in the plaint also fail.

**B. Whether The Defendant Has Proved Beneficial Interest In A One-acre Portion Of The Suit Land Occupied By Her I.e. Land Parcel Number Nyandarua/south Kinangop 1599.**

155. The Defendant produced an agreement between her and one Peter Karanja Kabura as Exhibit D1. The sale agreement is dated 9<sup>th</sup> October, 1995. It states, in part, as follows

“I Mr. Peter K. Kabura of ID /card No 2886261 do here state as follows: I’m selling my portion of land size I acre to Mrs. Hannah Njoki Kamuya holder of ID card No 6433999/69.....”

156. The Defendant explained that Ruth Watiri did not have the title document to the suit land as she owed some money to the government. The Plaintiff also confirms the fact of a loan that he allegedly had to settle before he could obtain title to the suit property. However, he does not disclose how much the loan was.

157. The Defendant expressed surprise at the fact that the Plaintiff had obtained title to the entire parcel of land. The Defendant and her witness gave evidence of a probable sale that may have been entered into between the deceased and the Plaintiff herein but did not have details of it.

158. The Defendant’s evidence is that she has been in occupation of one acre of the suit property since 1995 when she purchased it from Ruth Watiri’s son; Peter Karanja Kabura.

159. The Defendant’s further evidence is that the suit parcel is 8 acres and that she is therefore entitled to 1 acre of it. Her evidence is also that the one-acre portion which she occupies has a grave and has been fenced from the time of purchase and that it was fenced off by Peter Karanja Kabura.

160. DW2 who was the area chief of the locality in which the suit parcel is situate testified and gave a history of the parcel occupied by the Defendant. He narrated that a man by the name Mundia Chobu died and he was approached by his family with a complaint that they had been prevented from burying him on the suit parcel by one James Njoroge Karuga. His testimony is that he had never dealt with a problem of this nature and after consultation he was advised to get the help of a surveyor. His evidence is that the surveyor after establishing the extent of 7 acres on the suit parcel, put beacons on the portion



that remained and this reminder is the portion on which Mundia Chobu was buried and subsequently purchased by the Defendant.

161. DW2 also produced Exhibit D2 in evidence. It is a letter dated 28<sup>th</sup> August, 2003, written by him to whom it may concern. Briefly, the letter states that the Defendant bought land from the son of Ruth Watiri (Peter Karanja Kabura). It further states that the land was occupied by Ruth Watiri's brother Mundia Chobu. It goes on to state that Ruth Watiri had earlier on sold 7 acres of the said parcel to Mr. James Njoroge under the belief that the parcel was more than 7 acres. It further explains that before James obtained title for the 7 acres, Mundia Chobu died and was buried on a one-acre portion of the suit land which had been given to Peter Karanja Kabura. The letter goes on to narrate that thereafter James Njoroge Karuga went to the Land Registry and found that the suit land was 7 acres. He explains that the initial surveyor whom he had contracted to carry out a survey found that the land was larger than 7 acres. The letter narrates that subsequently, James Njoroge Karuga demanded that the defendant vacates the suit land. The letter goes on to state that Peter Karanja Kabura bought another parcel elsewhere and that he died before he could help resolve the dispute between the Plaintiff and the Defendant.
162. The Defendant and her witness seem to believe that the suit land is larger than 7 acres. The Defendant's evidence is that it is 8 acres while DW2's evidence is that it is larger than 7 acres.
163. The Defendant in her witness statement dated 11<sup>th</sup> March, 2022, states that Peter Karanja Kabura inherited the suit land from his late mother Ruth Watiri who inherited it from the original owner Mundia Chobu (deceased) who had no child nor wife. She states that prior to Peter Karanja Kabura's death and her late mother Ruth Watiri, she tried to have the sold land transferred to her but was unable to do so.
164. The Defendant contends that the acquisition of the title deed was done illegally and through concealment of material fact.
165. I am dismayed by the response from the Land Registrar Nyandarua/ Samburu on the non-availability of the parcel file relating to the suit property. The response is not only casual but borders on reckless. The Land Registrar Nyandarua has set such low standards for the office entrusted to them. The Learned Judge in *Elias Joseph Waburi Wamunyu v Joseph Mwangi Njoroge* [2017] eKLR at paragraph 68 stated thus:

“...I need to emphasize that land officers hold a position of trust. Title abstracts and RIMs are sacred land documents. They are the pillars upon which our land administration system is founded. They are documents that should never, ever, be interfered with unless in accordance with the law. Supportive documents regarding dispositions also need to be well kept, maintained, and Protected. It is a shame that Registers and Presentation Books can be torn and become illegible and it is necessary that good storage systems need to be established for these vital documents. Records of dispositions, including transfers, mutations, charges, etc, must be properly kept in land parcel files, and they need to stay there. It is time we stopped hearing that these records are missing and indeed they cannot walk out of files on their own, if it is not for gullible land officers for hire. Land officers need to properly undertake their work. It is a duty that they owe Kenyans...”
166. The evidence adduced points to the fact that Peter Karanja Kabura had an interest in a portion of the suit parcel. This is the interest that he sold to the defendant.
167. Regrettably the surveyor's report does not contain information on the actual acreage occupied by the Defendant.



### **C. Who Should Bear Costs Of This Suit?**

168. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21).
169. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs.

### **Disposition.**

170. In the result, I find that the Plaintiff's Suit fails and is hereby dismissed with costs to the Defendant.
171. The Defendant's Counterclaim succeeds and judgement is entered in her favour in the following terms:
- a. A declaration is hereby made that the Defendant is the beneficial owner of the portion of Nyandarua/South Kinangop/599 in her possession and occupation.
  - b. The Land Surveyor Nyandarua County and Land Registrar Nyandarua/Samburu County are hereby ordered to visit the parcel of land known as Nyandarua/South Kinangop/599 in the presence of the parties herein, demarcate the extent of it that is in the Defendant's use and occupation and amend the Registry Index Map within 60 days of the date hereof.
  - c. On compliance with (b) above, the Land Registrar Nyandarua/Samburu County shall cancel the tittle held by the Plaintiff, rectify the register for Nyandarua/South Kinangop/599 to reflect the sub-division and issue titles accordingly.
  - d. The Plaintiff shall execute any documents necessary for purposes of sub-division and rectification of the register for Nyandarua/South Kinangop/599 and in default, the Deputy Registrar of this Court shall execute such documents on behalf of the Plaintiff.
  - e. The Defendant shall have costs of the suit and the counterclaim.
172. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023**

**L. A. OMOLLO**

**JUDGE**

In the presence of:

Mr. Machage for the Plaintiff.

Ms Wambui Ndungu for the Defendant.

