



Thuo (Suing on behalf of The Estate of the Late Teresia Wambui Chege) v Theuri & another (Environment & Land Case 376 of 2017) [2023] KEELC 21713 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 376 OF 2017**

**BM EBOSO, J
NOVEMBER 6, 2023**

BETWEEN

LUCY NJOKI THUO (SUING ON BEHALF OF THE ESTATE OF THE LATE TERESIA WAMBUI CHEGE) PLAINTIFF

AND

FRANCIS WAKAHU THEURI 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

JUDGMENT

1. This suit challenges two registrations effected on 8/11/2013 in the land registers relating to land parcel number Ruiru/Mugutha Block 1/T5339 and land parcel number Ruiru/Mugutha Block 1/T5340. The two impugned registrations transferred the two parcels of land from the late Teresia Wambui Chege to Francis Wakahiu Theuri. The plaintiff alleges that the deceased had died prior to the two impugned registrations. The plaintiff further alleges that the said registrations were procured fraudulently because the deceased neither sold nor transferred the two parcels to the 1st defendant. One of the key issues to be determined in this Judgment is whether the said registrations were procured fraudulently and/ or illegally. Before I dispose the key issues that fall for determination in the suit, I will briefly outline the parties’ respective cases, evidence and submissions. For convenience, I will in this judgment identify the two parcels of land as “the suit properties” or simply as “the suit land”. Teresia Wambui Chege will be identified as “the deceased”. Parties to this suit will be identified by their above respective designations.



Plaintiff's Case

2. The plaintiff initiated the suit through a plaint dated 1/3/2016. The claim was lodged at Milimani [Nairobi] as ELC Case No. 218 of 2016. It was subsequently transferred to Thika ELC in March 2017 and registered as Thika ELC Case No. 376 of 2017.
3. In summary, the plaintiff's case is that she is the administrator of the estate of the late Teresia Wambui Chege [the deceased], pursuant to a grant issued to her on 6/10/2015. The deceased acquired the suit properties from Nyakinyua Investments Limited. The suit properties were registered in the name of the deceased in 1992. The deceased subsequently died on 13/8/2013. In August 2014, she discovered, through official searches, that the two parcels of land had been registered in the name of the 1st defendant on 8/11/2013, about three months after the death of the deceased.
4. The plaintiff terms the registrations as fraudulent. She has itemized various particulars of fraud on part of the 1st defendant and the Land Registrar, and contends that the transfers through which the registrations were procured were forged after the death of the deceased.
5. The plaintiff prayed for the following reliefs: (i) an interlocutory injunction against the 1st defendant; (ii) an order cancelling the impugned registrations; (iii) an order declaring that the impugned titles were procured fraudulently, invalidating the titles, and directing the Land Registrar to cancel or annul the titles; (iv) a permanent injunction against the 1st defendant; (v) general damages for trespass; and (vi) costs of the suit.

Defendant's Case

6. The defendant filed a statement of defence dated 9/5/2016. He denied fraud in the procurement of the registrations. He admitted that the late Teresia Wambui Chege [the deceased] was the allottee and the registered proprietor of the suit properties, adding that she sold to him the suit properties through an agreement dated 2/3/2007. It was the case of the 1st defendant that the said agreement was witnessed by Joseph Macharia Chege and Pauline Wanjiku Chege. The 1st defendant further averred that the deceased attended the Land Control Board at Ruiru to obtain consents to transfer the two parcels of land to him. He urged the Court to dismiss the plaintiff's case.

Plaintiff's Evidence

7. The plaintiff testified as PW1. She adopted her witness statement dated 15/3/2016. She produced the following nine exhibits: (i) Grant of Letters of Administration relating to the estate of the deceased; (ii) Police Abstract relating to loss of title relating to parcel number Ruiru/Mugutha Block 1/T5339; (iii) Kenya Gazette Notice Nos. 6501 and 6503; (iv) Certificates of Search relating to the two parcels; (v) Green Cards [Land Registers] relating to the two parcels; (vi) Day Book Nos 194/3/15 and 195/3/15 relating to cautions lodged in relation to the two parcels; (vii) Plaintiff's Advocates' Letter to the Director of Criminal Investigations Department dated 4/12/2015; (viii) Plaintiff's Advocates Letter to the Thika Land Registrar dated 4/12/2015; and (ix) Death Certificate relating to the deceased.
8. The Plaintiff's evidence was that she was a daughter of the late Teresia Wambui Chege [the deceased] and the administrator of her estate. The deceased was the registered proprietor of the suit properties, having acquired them through her shareholding in Nyakinyua Investments Limited. The deceased lost her title documents relating to the two parcels of land in 2011. She reported the loss at Thika Police Station. She caused the loss of the two titles to be gazetted in May 2013 vide Kenya Gazette Notice Nos 6501 and 6503.



9. It was the plaintiff's evidence that in August 2014, with a view to initiating succession proceedings relating to her late mother's estate, she applied for searches at the Thika Land Registry. The searches revealed that the two parcels of land had been transferred to the 1st defendant three months after the death of the deceased. She added that she knew, as a matter of fact, that the deceased had neither sold nor transferred the parcels of land to the 1st defendant, adding that at the time of the alleged transfers, the estate of the deceased did not have an administrator.
10. The plaintiff applied for witness summons and caused the Ruiru Land Registrar to be summoned to produce the land registers and the parcel files relating to the two parcels of land. The Ruiru Land Registrar, Robert Mugendi Mbuba, testified as PW2. In relation to parcel number Ruiru/Mugutha Block 1/T5339, he produced the following exhibits: (i) the land register [Green Card] [P. Exh No. 10a]; (ii) the transfer vesting the land in the name of the deceased, registered on 23/9/1992 [P.Exh No. 10b] and (iii) the unregistered caution by the plaintiff [P. Exh No. 10c]. With regard to parcel number Ruiru/Mugutha Block 1/T5340, PW2 produced the following exhibits: (i) the land register [Green Card] [P.Exh No. 11a]; (ii) the transfer vesting the land in the deceased, registered on 23/9/1992 [P. EXh No. 11b]; (iii) the caution by the plaintiff registered on 6/3/2015 [P. Exh No 11c] and (iv) Restriction [letter dated 4/12/2015] by the plaintiff's Advocates registered on 7/12/2015 [*P.Exh No. 11d*].
11. PW2 testified that the registrations vesting the suit properties in the name of the 1st defendant were both registered on 8/11/2013, adding that for a transfer of land to be effected, there must be: (i) an executed transfer form; (ii) the original title; (iii) the original consent of the Land Control Board; (iv) certified copies of the transferror's and the transferees' ID cards and Kenya Revenue Authority Personal Identification Numbers [PINs]; and (v) the original receipt. It was the evidence of PW2 that the above requisite documents were not in the respective parcel files. PW2 confirmed that loss of the titles was noted in the registers, adding that there was, however, no entries relating to re-issuance of the lost titles. PW2 further testified that there were no entries relating to succession to the estate of the deceased.

1st Defendant's Evidence

12. The 1st defendant testified as DW1 and closed his case. He adopted his witness statement dated 31/1/2020. He produced the following exhibits: (i) sale agreement dated 2/2/2007; (ii) copy of receipt number 238 expressed as issued by Nyakinyua Investment Ltd; (iii) copy of share certificate number 3139 expressed as issued by Nyakinyua Investment Ltd; (iv) share certificate number 3140 expressed as issued by Nyakinyua Investment Ltd; (v) title relating to parcel number Ruiru/Mugutha Block 1/T5339 bearing his name; and (vi) title relating to parcel number Ruiru/Mugutha Block 1/T5340 bearing his name.
13. The 1st defendant's evidence was that on 2/3/2007, he entered into a sale agreement with the deceased, pursuant to which he purchased the suit properties from the deceased at Kshs. 110,000/-. He added that the sale agreement was witnessed by Joseph Macharia Chege and Teresia Wambui Chege, the deceased's children. He stated that, together with the deceased, they proceeded to the Land Control Board at Ruiru where they obtained consents to transfer the parcels of land to him. It was his evidence that the plaintiff had all along known that her mother sold the two parcels of land to him, adding that the plaintiff wanted to "take advantage of the situation to enrich herself." He stated in his witness statement that he had been in possession of the suit properties since 2007. He denied fraud.
14. During cross-examination, the 1st defendant admitted that the deceased did not sign the sale agreement dated 2/3/2007, adding that she was sick at the time the sale agreement was signed. It was the 1st defendant's evidence in cross-examination that the deceased did not sign the sale agreement dated



2/3/2007 because she trusted her children. Asked about the agreed purchase price, the 1st defendant answered that he could not remember the agreed purchase price, adding that he needed to look at the agreement to remember. He confirmed that the amount expressed in figures did not tally with what was expressed in words.

15. The 1st defendant further testified in his evidence in cross-examination that he paid purchase price to the deceased's children. He added that he did not know if he went to the Land Control Board, adding that he was sick at the time of the transaction and could not recall. It was his further evidence that he did not know who signed the transfers on behalf of the deceased. He stated that he did not know if he [the 1st defendant] signed the transfers. He further testified that he did not have a copy of the transfers which conveyed the parcels of land into his name. Lastly, he testified that he needed to look at his documents to establish the identity of the persons who signed the sale agreement on behalf of the deceased.

Plaintiff's Submissions

16. The plaintiff filed written submissions dated 21/2/2023 through M/s Kimondo Mubea & Co Advocates. Counsel for the plaintiff identified the following as the three issues that fell for determination in the suit: (i) Whether the acquisition of the 1st defendant's title to the suit properties was regular, lawful and procedural; (ii) Whether the 1st defendant's title should be cancelled; and (iii) Whether the plaintiff is entitled to the reliefs sought.
17. On whether the acquisition of the 1st defendant's title to the suit properties was regular, lawful and procedural, counsel submitted that the 1st defendant fraudulently intermeddled in the estate of Teresia Wambui Chege (the deceased) and caused the transfer of the deceased's titles to himself whereas administration of the deceased's estate had not been undertaken and a grant had not been issued. Counsel added that, during her lifetime the deceased never signed any documents with the intention of alienating or parting with possession of the suit properties. Counsel submitted that the 1st defendant could only have transferred the suit properties to himself through collusion with the Land Registrar. Counsel submitted that the 1st defendant could not obtain any good title to the suit properties as the action of transferring the suit properties to himself without complying with the Law of Succession Act was illegal. Counsel relied on the case of Zacharia Wambugu Gathimu & Another v John Ndungu Maina [2019] eKLR.
18. Counsel further submitted that the deceased neither parted with possession of the suit property nor entered into any transaction with the 1st defendant for the alienation of the suit properties. He added that the deceased caused the gazettement of the loss of the titles relating to the suit properties after having reported the loss at Thika Police Station. Counsel argued that the fact of the loss of the titles was corroborated by PW2 who produced in evidence the green cards relating to the suit properties which showed that the loss of the said titles had been endorsed on the registers relating to both titles. Counsel further submitted that the 1st defendant did not produce any documentary evidence to rebut the claim by the plaintiff that the deceased did not sign any documents to alienate the suit properties. Counsel argued that the failure by the 1st defendant to demonstrate the surrender of the titles relating to the suit properties as well as the failure to produce transfer forms and the completion documents relating to the transactions coupled with their unavailability in the parcel files indicated collusion between the 1st defendant and officers in the Lands Registry in the transfer of the suit properties into the name of the 1st defendant.
19. On whether the 1st defendant's titles should be cancelled, counsel submitted that the plaintiff having demonstrated that the 1st defendant did not acquire good titles to the suit properties, the titles ought to be cancelled. Counsel argued that Section 80 of the Land Registration Act empowers the court to



order the cancellation of the titles given that they had been proven to have been obtained by fraud. Counsel relied on the cases of Zacharia Wambugu Gathimu & Another v John Ndungu Maina [2019] eKLR, Wambui v Mwangi & 3 others Civil Appeal 465 of 2019[2021] KECA 144 (KLR) and Chemey Investments Limited v Attorney General & 2 others [2018] eKLR.

20. On whether the plaintiff is entitled to the reliefs sought, counsel submitted that the plaintiff having demonstrated fraudulent and illegal acquisition of the suit properties by the 1st defendant, she was entitled to the reliefs sought in the plaint. Counsel added that the import of the cancellation of the titles was to ensure the quiet enjoyment of the suit properties by its rightful owner. Counsel added that the plaintiff having demonstrated that the deceased proprietor was still the valid owner of the suit properties, the 1st defendant was a trespasser and thus the plaintiff was entitled to an award of general damages of Kshs 20,000,000 for trespass. Counsel relied on the cases of Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR, Samuel Odhiambo Oludhe & 2 others v Jubilee Jumbo Hardware Limited & Another [2018] eKLR and Ajit Bhogal v Kenya Power and Lighting Co. Ltd [2020] eKLR.

1st Defendants' Submissions

21. The 1st defendant filed written submissions dated 13/6/2023, through M/s Muturi Njoroge & Co Advocates. Counsel for the 1st defendant identified the question as to whether the acquisition of the 1st defendant's titles to the suit properties was regular, lawful and procedural, as the main issue falling for determination in this suit.
22. Counsel submitted that the 1st defendant entered into an agreement with Teresia Wambui Chege (the deceased) for the sale of the suit properties at a consideration of Kshs 110,000. Counsel further submitted that the sale agreement was made in the presence of Teresia Wambui Chege's children. Counsel added that based on the evidence tendered at the hearing, Teresia Wambui Chege gave Joseph Macharia Chege [her son] authority to execute the sale agreement on her behalf because she was sick. Counsel submitted that the two parties to the sale agreement subsequently proceeded to the Land Control Board at Ruiru and obtained consents to transfer the suit properties to the 1st defendant.
23. Counsel submitted that the 1st defendant thereafter obtained titles to the two parcels of land. Counsel added that the Ruiru Land Registrar availed all records for the two parcels which demonstrated that the suit properties were initially registered in the name of Teresia Wambui Chege (the deceased) and subsequently transferred to Francis Wakahiu Theuri. Counsel argued that the 1st defendant was not to blame for the disorganization at the Land Registry and should neither be punished for it nor be accused of colluding with the land officials to commit fraud. Counsel relied on the cases of Kuria Kiarie & 2 others v Sammy Magera [2018]eKLR and Eviline Karigu v M'Chabari Kinoro [2022] eKLR.

Analysis and Determination

24. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a concise common statement of issues to be determined by the court. Taking into account the pleadings, evidence and submissions that were tendered, the following are the key issues that fall for determination in this suit: (i) Whether the late Teresia Wambui Chege sold the suit properties to the 1st defendant; (ii) Whether the registrations of the suit properties in the name of the 1st defendant were procured fraudulently and/or illegally; (iii) Whether the estate of the late Teresia Wambui Chege is entitled to the reliefs sought in the Plaint; and (iv) What order should be made in relation to costs of this suit. I will analyse and dispose the four issues sequentially in the above order.
25. The first issue is whether the late Teresia Wambui Chege sold the suit properties to the 1st defendant. There was common ground that the suit properties were previously registered in the name of the



- late Teresia Wambui Chege [the deceased]. The plaintiff contended that the deceased neither sold nor transferred the suit properties to the 1st defendant during her lifetime. It was her evidence that the 1st defendant colluded with officers in the Land Registry to fraudulently procure registration of the suit properties in the name of the 1st defendant. On his part, the 1st defendant contended that the deceased sold to him the suit properties through a sale agreement dated 2/3/2007.
26. Under Section 107 of the *Evidence Act*, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. Did the 1st defendant prove sale of the suit properties to him by the deceased?
 27. The 1st defendant relied on a sale agreement expressed as made on 2/3/2007. The two sellers in the said sale agreement are identified as Joseph Macharia Chege and Pauline Wanjiku Chege. The buyer is identified as Francis Kahiu Theuri. The deceased, Teresia Wambui Chege, was not a party to the said sale agreement. She did not execute the said sale agreement.
 28. In his evidence during cross-examination, the 1st defendant [DW1] confirmed that the deceased did not sign the sale agreement, adding that the deceased was sick and that she trusted her children. He further testified that he could not remember the amount he paid as purchase price, adding that he paid the purchase price to the deceased's children. He did not lead any evidence by the alleged children of the deceased who he alleged signed the agreement on behalf of the deceased. He did not tender evidence of any valid power of attorney vesting in the alleged sellers the legal power to execute the sale agreement on behalf of the deceased.
 29. The purported sale agreement is expressed as dated 2/3/2007. At that time, the now repealed Registered *Land Act* was still in force. Similarly, Section 3(3) of the *Law of Contract Act* was in force. Section 3(3) of the *Law of Contract Act* contained a legal framework on formal requirements for a contract disposing an interest in land. First, the contract had to be in writing. Second, the contract had to be signed or executed by all the parties thereto. Third, the signatures of each party signing the contract had to be attested by a witness present at the time of signing. The framework in Section 3(3) is still in force to date.
 30. From the evidence that was tendered by the 1st defendant, there was nothing to suggest that the above formal requirements were met. The totality of all the above evidence is that there was no sale of land contract between the deceased and the 1st defendant. That is my finding on the first issue.
 31. The second issue is whether the registrations of the suit properties in the name of the 1st defendant were procured fraudulently and/or illegally. The impugned registrations were procured on 8/11/2013. There was uncontroverted evidence that the deceased proprietor, Teresia Wambui Chege, died on 13/8/2013 and that succession relating to her estate had not been initiated at the time the impugned registrations were procured. First and foremost, under the *Law of Succession Act*, any person seeking to procure transfer of land from the name of a deceased proprietor after the death of the proprietor was obligated to first initiate succession proceedings and obtain an appropriate grant under the *Law of Succession Act*. This is not what the 1st defendant did. The 1st defendant illegally procured the registrations in contravention of the mandatory requirements of the *Law of Succession Act*. That is not all.
 32. During cross-examination, the 1st defendant stated that he did not know who signed the instruments of transfer on behalf of the deceased proprietor. He further stated that he did not know if he went to the Land Control Board to obtain the requisite consents. He added that he did not have any of the instruments of transfer which conveyed the suit properties into his name. No single conveyance document relating to the impugned transfers was presented to the court to demonstrate the basis upon which the transfers were effected.



33. The Land Registrar testified as PW2. One of the key aspects of his evidence was that at the time the impugned registrations were procured, there existed a note in the parcel registers to the effect that the titles of the deceased had been reported as lost. There were no subsequent entries relating to issuance of the lost titles. Further, whereas there existed prior restrictions in the said land registers, there were no entries relating to removal of the restrictions prior to effecting the impugned registrations. Thirdly, there were no entries relating to succession to the estate of the deceased proprietor. All these point to the fact that the impugned registrations were effected illegally.
34. Further, the impugned registrations were effected at a time when the Land Registration Act was in force. Section 44 of the Land Registration Act contained the following mandatory requirements on execution of instruments disposing interest in land:-
1. Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.
 2. The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person's signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.
 3. The execution of any instrument referred to in section (1) by a corporate body, association, cooperative society or other organization shall be effected in accordance with the provisions of the relevant applicable law and in the absence of provisions on execution of instruments, the execution shall be effected in the presence of either an Advocate of the High Court of Kenya, a Magistrate, a Judge or a notary public.
 4. Where practicable, an instrument processed and executed electronically by persons consenting to it by way of an advanced electronic signature or an electronic signature shall be deemed to be a validly executed document.
 5. An instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe.
 6. The transferee shall in addition to executing the instrument, attach the following-
 - a. A copy of an identity card or passport; and
 - b. A copy of a Personal Identification Number Certificate;
 - c. Passport-size photographs;
 - d. Where applicable, a marriage certificate; or
 - e. A copy of the certificate of incorporation in the case of a corporate entity; or
 - f. Such other identification documents as the Cabinet Secretary may prescribe.
35. It is clear from the evidence that was presented during trial that the impugned registrations were done in violation of the above mandatory requirements of Section 44 of the Land Registration Act. The registrations were, for the above reasons, both fraudulent and illegal. That is my finding on the second issue.
38. Is the estate of the late Teresia Wambui Chege entitled to the reliefs that were sought in the Plaint? In light of the above findings, the court is satisfied that the plaintiff has proved the estate's case to the



required standard. Consequently, it is the finding of the court that the estate is entitled to prayers (a), (b), (c), (d) and (f). Prayer (a) will, however, be spent at the time the disposal orders in this suit are pronounced.

39. On general damages for trespass, it is clear that the 1st defendant illegally laid claim to and occupied the suit properties on the basis of the fraudulent and illegal titles that he procured. He is a trespasser in every respect. However, no evidence was led to assist the court arrive at a specific quantum. In the absence of evidence on quantum, I will grant the estate nominal damages of Kshs. 1,000,000/- for trespass on each of the two parcels, making a total of Kshs. 2,000,000/-.
40. On costs, the general principle is that costs follow the event. No special circumstances have been demonstrated to justify a departure from the general principle. Consequently, the 1st defendant, as the party behind the fraud and the illegality leading to this suit, will bear the plaintiff's costs of the suit. The Chief Land Registrar will not be awarded costs because it is clear from the evidence on record that officers in the relevant Land Registry aided in the perpetuation of the fraud and the illegality. The only reason why the Department of Lands has been spared is that no relief was sought against them.

Disposal Orders

41. In the end, Judgment is entered in favour of the plaintiff in the following terms:
- a. An order is hereby issued cancelling the registration of Francis Wakahiu Theuri as the proprietor of land parcel numbers Ruiru/ Mugutha Block 1/T5339 and Ruiru/ Mugutha Block 1/T5340.
 - b. Upon cancellation of the said registrations, the two parcels shall vest in the name of Teresia Wambui Chege who was the registered proprietor prior to the above registrations.
 - c. An order is hereby issued decreeing that the titles held by Francis Wakahiu Theuri relating to the two parcels of land were procured fraudulently and the same are cancelled and annulled forthwith.
 - d. A permanent injunction is hereby issued restraining Francis Wakahiu Theuri together with his servants and/or agents or any person claiming title through him from interfering with the quiet and peaceable possession of land parcel numbers Ruiru/Mugutha Block 1/T5339 and Ruiru/ Mugutha Block 1/T5340 by the estate of the late Teresia Wambui Chege.
 - e. The 1st defendant shall pay the estate of Teresia Wambui Chege nominal damages in the sum of Kshs 2,000,000 for trespass on the two parcels of land, with interest on the amount from the date of judgment.
 - f. The 1st defendant shall bear the plaintiff's costs of this suit.
 - g. There shall be no award of costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF NOVEMBER 2023

B M EBOSO

JUDGE

In the presence of: -

Mr Kingara holding brief for Mr Mubea for the Plaintiff

Mr Njoroge for the 1st Defendant



Court Assistant: Osodo/Hinga

