



**Mureithi v Wainaina & 2 others (Environment & Land Case
1134 of 2016) [2022] KEELC 2556 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1134 OF 2016**

OA ANGOTE, J

JULY 7, 2022

BETWEEN

NYAMU GUTU MUREITHI PLAINTIFF

AND

PETER CHEGE WAINAINA 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

Background

1. Vide a Complaint dated 15th September, 2016, the Plaintiff seeks as against the Defendants the following reliefs;
 - a) A Declaration that the Plaintiff is the legal owner and absolute proprietor of land parcel number Nairobi/block 110/865 instead of the 1st Defendant.
 - b) An order directing to the 3rd Defendant to rectify the register so as to reflect the name of the Plaintiff as the absolute proprietor and legal owner of Land Parcel number Nairobi/block 110/865 and cancel the names of the 1st Defendant.
 - c) A permanent injunction against the 1st Defendant and/or any other person claiming under him from entering, and/or in any other way purporting to interfere or deal in Land Parcel Number Nairobi/block/110/865.
 - d) General Damages for trespass of all that parcel of land known as Nairobi/block 110/865.
 - e) Interest on (a) and (d) above.



- f) Costs to be provided for.
 - g) Any other order that the court may issue to serve the interest of justice.
2. It is the Plaintiff's case that he is the registered proprietor of all that property known as Land Parcel Number Nairobi/block 110/865 situated at Thome Estate, Nairobi (hereinafter the suit property) by virtue of holding a Title Deed and whose physical possession and ownership he has held from 1989 to date; that he purchased the suit property from Thome Farmers No. 1 Limited in the year 1989 and that he has been duly paying rent to the County Council of Nairobi.
 3. It was averred in the Plaintiff that sometime in the year 2015, the Plaintiff discovered that the white card of the suit property as well as the rates register had been tampered with to reflect the 1st Defendants' names; that the documents of the original transactions evincing his ownership are held by Dorcas Nanjero, Advocate who presided over the transaction of sale and transfer of ownership from the land buying company to individual members; that the Plaintiff was a shareholder with Certificate Number 1403 and that the 1st Defendant who was born in 1973 was not a member of the said company.
 4. The Plaintiff asserts that his rights to legitimate expectation as protected under Articles 20(1) and(2) have been violated by the 3rd Defendant who fraudulently altered his documents at the lands registry; that his right to property as expressed under Article 40 has also been violated by the 1st and 3rd Defendants who colluded to deprive him of the suit property; that he has been subjected to trauma contrary to his rights to security and that there is real danger of his property being alienated.
 5. According to Plaintiff, the 1st and 2nd Defendants are guilty of fraudulent actions particulars of which include changing the ownership records at the registry and substituting his name with the 1st Defendant, forgery and alteration of land rate documents, forging the land registrar's signature, altering the lodging day book number at the Lands Registry, Nairobi and generally tampering with the Plaintiff's ownership documents.
 6. Despite service, the 1st Defendant did not enter appearance nor file a Defence. The 2nd and 3rd Defendants filed a Defence dated 1st February, 2017 in which they denied all the averments as set out in the Plaintiff.

Hearing & Evidence

7. PW1 informed the court that she is the Plaintiff's sister; that the Plaintiff is based in the United States of America; that she has a duly registered Power of Attorney from the Plaintiff; that according to the 1st Defendant's identity card, he was born in 1973 and that at the time of purchasing the suit property in 1992, the 1st Defendant was 19 years old.
8. It was the evidence of PW1 that the Plaintiff has a Share Certificate issued by Thome Farmers No 1 Limited in 1989 and used to pay land rates on the property; that in 2015, they discovered that the records had been changed to reflect the 1st Defendant's name; that despite the changes, they are still paying rates and that it is the Plaintiff who is in possession of the suit property on which their last born sibling is cultivating.
9. It was averred that she wrote a notice to the Attorney General which notice was responded to; that the 1st Defendant was fraudulently registered as the owner of the property; that the 1st Defendant has never made any other attempts to gain possession of the property.



10. On cross-examination, it was the testimony of PW1 that she obtained the green card from the lands office; that she has never seen a title bearing the name Peter Chege Wainaina; that the ledger extract was obtained from the office of Dorcas Nanjero Advocate and that she does not have the current search.
11. During re-examination, PW1 stated that they discovered the change of the name in the title in 2015; that they have been paying rates to the Nairobi County government; that they went to the lands office and were unable to get the green card; that the name appearing on the title is Peter Chege Wainaina; that they went to Huduma Centre where they obtained details of Peter Chege Wainaina who was born in 1973 and that the Plaintiff purchased the suit property in 1989 and was issued with the title in 1992.
12. The 2nd & 3rd Defendants did not call any witness at the hearing.

Submissions

13. The Plaintiff, through her counsel, submitted that other than the Defence filed by the 2nd and 3rd Defendants, the suit is un-opposed; that as held in the case of *Board of Trustee Meru Diocese Kirimara Parish vs Dores Wanja Bore* [2020] eKLR, that the 2nd and 3rd Defendants' Defence did not question the original title held by the Plaintiff and that it is clear from the foregoing that the 2nd and 3rd Defendants' Defence does not raise any triable issue.
14. Reliance in this respect was placed on the case of *Olympic Escort International Co Ltd and 2 others vs Parminder Singh Sandhu and Another* [2009] eKLR; that this Court has jurisdiction to order for the cancellation of any title if it is proved that the same was acquired through fraud and that the Plaintiff proved fraud as against the 1st and 3rd Defendants.
15. It was submitted by the Plaintiff's counsel that the evidence on record shows that the Plaintiff is the duly registered proprietor of the suit property and as such, his title is protected pursuant to Section 26(1) of the *Land Registration Act*.
16. The 2nd and 3rd Defendants, through the Hon Attorney General, submitted that fraud is a serious allegation which must be pleaded and proved on a balance higher than that of probabilities. Reliance in this respect was placed on the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR and *Kinyanjui Kamau vs George Kamau* [2015] eKLR.
17. That as expressed by the Court of Appeal in *Munyu Maina vs Hiram Gathiba Maina* [2013] eKLR, where a registered proprietor's root of title is under challenge, the proprietor must go beyond the instrument and prove the legality of how he acquired title to the property and that the Plaintiff failed to call necessary parties such as Thome Estate from whom she purportedly purchased the suit property.

Analysis & Determination

18. Having carefully considered the pleadings, the evidence and submissions by the parties herein, the following arise as the issues for determination;
 - i. Who is the bonafide owner of the suit property?
 - ii. Whether the Plaintiff has proven the allegations of fraud as against the Defendants?
 - iii. What are the appropriate orders to issue?
19. The Plaintiff instituted this suit seeking inter-alia, a declaration that he is the legitimate owner of the suit property having been deprived of the same by the Defendants through fraudulent actions. It is the Plaintiff's case that he purchased the suit property from Thome Farmers No 1 Limited sometime in 1989 and has been in physical possession of the same.



20. According to the Plaintiff, he has been paying land rates and rent since then; that sometime in 2015, he discovered that the suit property's white card as well as the property's rates register had been interfered with and altered to reflect the 1st Defendant's name by indicating that he was purportedly issued with a Title Deed on 1st December, 1992.
21. In support of the Plaintiff's claim to ownership, PW1 adduced copies of the Title Deed in the Plaintiff's name dated 1st December, 1992, rates payment requests for the years 2008-2015, green card for the suit property, the share certificate from Thome Estate Farmers No 1 Limited, Thome Estate records, land rent payment receipts, official search dated 5th December, 2006 and the receipt thereof, ledger extracts from Dorcas Nanjero Advocate, records of Peter Wainaina Chege, receipts for payment of rates, stamp duty and registration fees and the Power of Attorney issued to Beatrice Wairimu Gutu.
22. The 1st Defendant, despite service, did not enter appearance nor file a Defence. On the other hand, whereas the 2nd and 3rd Defendants filed a Defence, they did not file any documents nor testify at the hearing. It therefore follows that the entirety of the Defence consists of mere allegations and the Plaintiff's evidence is uncontroverted.
23. Notwithstanding the above, it is common ground that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case remains the same and that burden of proof is in no way lessened because the Defendants did not adduce any evidence. As expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR;

“The suggestion, however, implicit... that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his Defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the Defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.”

24. The Plaintiff's case is that he purchased the suit property in 1989 and was registered as the proprietor thereof in 1992. Indeed, the Title Deed adduced shows that the Plaintiff was registered as proprietor of the suit property on 1st December, 1992. The Title Deed was issued under the repealed Registered *Land Act* and as such, by dint of the provisions of Section 107 of the *Land Registration Act*, 2012, the law applicable to the title held by the Plaintiff is the Registered *Land Act*, (now repealed).
25. The Registered *Land Act*, (now repealed) provided in Section 27 as follows:

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”



26. Whereas Section 28 thereof provided;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

27. It is clear from the foregoing that the registration of a person as the proprietor of a suit property gives that person the rights and privileges over the property and is prima facie evidence that the person is the owner of the suit property. In the present circumstances, the Plaintiff’s registration of the suit property having not been challenged or controverted, this Court finds and holds that the Plaintiff is the legal proprietor of the suit property.

28. According to the Plaintiff, the 1st and 3rd Defendants fraudulently caused the transfer of the suit property into the 1st Defendant’s name. The Plaintiff has in this respect adduced in evidence a copy of the property rates payment request and a Green Card extract showing the registration of the 1st Defendant as proprietor of the suit property. Whereas no recent search was adduced, the court finds that on the basis of the evidence on record, particularly the green card extract, there was fraudulent registration of the title in favour of the 1st Defendant.

29. Indeed, by failing to attend court and defend the suit, the 1st Defendant failed to explain the root of his title, if at all. In any event, there is no way that the suit could have been transferred to the 1st Defendant without the Plaintiff relinquishing his title.

30. In view of the court’s finding that the suit property belongs to the Plaintiff, it follows that the registration of the suit property in favour of the 1st Defendant as evinced by the green card was procured fraudulently. However, whereas fraud can be attributed to the 1st Defendant, the Plaintiff has not proven fraud as against the 3rd Defendant.

31. Whereas the Plaintiff seeks general damages for trespass against the 1st Defendant, there appears to be no basis for the same. Trespass is defined under Section 3 of the the [Trespass Act](#) as follows:

“Any person who without reasonable exercise enters, is or remains upon, or erects any structure on or cultivates or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

32. There is no allegation that the 1st Defendant has in any way physically interfered with the suit property. In fact, PW1 affirmed that they are in physical possession of the property. The claim for general damages for trespass therefore fails.

33. In conclusion, the court is satisfied that the Plaintiff has proved his case on a balance of probabilities and enters judgment for the Plaintiff against the Defendants as follows;

- a. A declaration be and is hereby issued that the Plaintiff is the legal owner and absolute proprietor of land parcel number Nairobi/Block 110/865.
- b. An order be and is hereby issued directing the 3rd Defendant to rectify the register so as to reflect the name of the Plaintiff as the absolute proprietor and legal owner of land parcel number Nairobi/Block 110/865 and cancel the name of the 1st Defendant.



- c. A permanent injunction be and is hereby issued against the 1st Defendant and/or any other person claiming under him from entering, and/or in any other way purporting to interfere or deal in Land Parcel Number Nairobi/Block/110/865.
- d. Costs of the suit to be paid by the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7TH DAY OF JULY, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kahuthu for the Plaintiff

Ms Fatma for the 2nd and 3rd Defendants

No appearance for the 1st Defendant

Court Assistant - June

