



REPUBLIC OF KENYA



**Wamai v Mwema & another (Environment & Land Case 25 of 2021)  
[2022] KEELC 14900 (KLR) (7 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14900 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT & LAND CASE 25 OF 2021  
AK BOR, J  
NOVEMBER 7, 2022  
(FORMERLY NYERI ELC CASE NO. 231 OF 2013)**

**BETWEEN**

**JOHN MWANIKI WAMAI ..... PLAINTIFF**

**AND**

**TERESA GATHIRI MWEMA ..... 1<sup>ST</sup> DEFENDANT**

**WILLIAM NGATIA KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit seeking a permanent injunction to restrain the defendants from disposing of, leasing, transferring, constructing on, trespassing or in any manner dealing with the land known as Laikipia/Tigithi/Matanya Block 3/955 (Matanya Centre) measuring approximately 1.2 hectares (“the suit property”). He also sought to have the Land Registrar in Nanyuki ordered to nullify the 1<sup>st</sup> defendant’s title issued on May 7, 2009 and for a new title to be issued to him.
2. The plaintiff claimed that he purchased the suit property from the 2<sup>nd</sup> defendant for valuable consideration and the land was transferred to him and he was registered as the owner. On conducting a search on October 24, 2013 he was shocked to learn that the suit property was registered in the 1<sup>st</sup> defendant’s name yet he had never entered into any transaction with the 1<sup>st</sup> defendant over the land. Upon inquiry the Land Registrar informed him about the decision made in Land Tribunal Claim No 27 of 2007 between the 1<sup>st</sup> and 2<sup>nd</sup> defendants which he was not aware of. He denied being party to any fraud in relation to the suit land. He averred that he had enjoyed quiet and uninterrupted possession of the land for seven years. He contended that he held an absolute and indefeasible title over the suit property and that the Tribunal had no power to annul his title deed over the suit property.
3. The 1<sup>st</sup> defendant denied the plaintiff’s claim and contended that the sale of the suit property by the 2<sup>nd</sup> defendant to the plaintiff was invalid because the 2<sup>nd</sup> defendant did not have a good title which



- he could pass to the plaintiff. She pleaded that she acquired the suit property in 1983 from Matanya Estates Limited after balloting as one of the shareholders of that company. She maintained that she had priority of ownership over the suit land.
4. The 2<sup>nd</sup> defendant confirmed in his defence filed in court on February 12, 2014 that he sold the suit property to the plaintiff. He contended that the Lamuria Land Dispute's Tribunal lacked jurisdiction to determine the dispute and that the tribunal never gave the suit property to the 1<sup>st</sup> defendant. He averred that she obtained her title fraudulently. His position was that the plaintiff was being unfairly deprived of land which he lawfully sold to him. Further, that the Plaintiff's title was wrongfully and unprocedurally cancelled and should be reinstated.
  5. The suit was heard by Lady Justice Lucy Waithaka on October 11, 2016 when the plaintiff testified. He told the court that he bought the parcels of land known as Laikipia/Tigithi/Matanya Block 3/955 (Matanya Centre) and Laikipia/Tigithi/Matanya Block 3/956 (Matanya Centre) from the 2<sup>nd</sup> defendant for Kshs 230,000/= vide the sale agreement dated July 1, 2006, a copy of which he produced. He stated that he paid the purchase price and was registered as the owner of the land. He produced a copy of his title dated November 7, 2006. He also produced a copy of the search he conducted on the land before he purchased it which confirmed that the 2<sup>nd</sup> defendant owned the land. On or about October 23, 2013, he learned from his friend who resides in Matanya Market that some unknown people were fixing beacons on the suit property. He did a search on October 24, 2013 which revealed that the suit property was registered in the 1<sup>st</sup> defendant's name yet he had not transacted any business with her. He produced a copy of the search.
  6. When he inquired at the lands' office, he was informed about the decision of the Land Disputes Tribunal dated April 8, 2008 which referred the 1<sup>st</sup> defendant to the District Resident Magistrate to pursue the title deed because he had had a title deed for more than 10 years hence the tribunal lacked jurisdiction to determine ownership of the suit property. He was not a party to the proceedings before the tribunal. He told the court that he had been deprived of quiet possession of the suit property yet he was a bona fide purchaser for value and did not obtain his title through fraud. He maintained that his title was not procedurally cancelled. He stated that there were no encumbrances registered against the suit property when he purchased it from the 2<sup>nd</sup> defendant and that he was never summoned by the tribunal regarding his interests over the land.
  7. He stated that on April 8, 2008 the tribunal referred the dispute to the District Resident Magistrate because it lacked jurisdiction as the objector had held the title over 10 years. He produced a copy of the decision of the Lamuria Land Dispute Tribunal. The other findings of the tribunal were that the 1<sup>st</sup> defendant had all the documents including ballot for plot 955 and that the 1<sup>st</sup> defendant's name appeared in the 1989 register while the 2<sup>nd</sup> defendant appeared in the title register.
  8. He stated that he was shown the suit property by the 2<sup>nd</sup> defendant who pointed out the beacons to him. He did not know the history of the land in Matanya nor did he know of Matanya Estates Company Limited. He did not have the consent because he surrendered it to the Lands Office for issuance of title.
  9. The 1<sup>st</sup> defendant told the court that her late husband, John Mwema Kamau was one of the original shareholders of Matanya Estates Company Limited. Her husband had bought one share. He died in 1977 before the company had allocated him land. After his death she took over and balloted for the land in 1983 and got plot number 75. She claimed that she was later shown the land by the surveyor and that she put beacons to mark the boundaries. She fenced the land in 1984. She applied for a title deed in 1986 and was issued a receipt. The ballots were checked by the Nanyuki District Officer in January 1989. They were checked again in February. She was required to obtain clearance from the District Officer.



10. When she went to collect her title, she was informed that the 2<sup>nd</sup> defendant had already collected it. She took the matter to the Lamuria Land Disputes Tribunal where she produced the necessary documents. She stated that the 2<sup>nd</sup> defendant did not produce documents in support of his claim. They were referred to Nanyuki court where she obtained a judgment and a decree was issued to her. She took the decree to the lands office and was issued the title deed over the suit property. She maintained that the land belonged to her and that the 2<sup>nd</sup> defendant could not have legally transferred the land to any other person including the plaintiff.
11. She produced a copy of the letter dated April 24, 1984 from Matanya Estates Company confirming to the Public Trustee that her late husband was a member of the company and that he had been allocated parcel number 75. She was summoned by an investigating officer to confirm that her name was in the register and paid Kshs 7,000/= in 1986. They were summoned again in 1989 to confirm whether their names were in the company register. After confirming that her name was in the register, she was asked to collect her clearance certificate. She delayed in doing so and when she eventually went she was informed that it had been collected by the 2<sup>nd</sup> defendant. She followed up at the lands office and was referred to the tribunal.
12. She stated that the Public Trustee wrote to the Company in 1984 and it responded that her husband was its member and she had been allotted plot number 85. She produced ballot card number 75. She attended the tribunal four times before the 2<sup>nd</sup> defendant appeared before the tribunal. The 1<sup>st</sup> defendant told the court that the 2<sup>nd</sup> defendant stated before the tribunal that he had misplaced his ballot and only produced a clearance certificate.
13. She confirmed that the plaintiff was not a party to the dispute before the tribunal nor did he participate in the suit before the Nanyuki Senior Magistrate's Court. She stated that the 2<sup>nd</sup> defendant was asked to bring take the plaintiff before the tribunal but he never did so. She explained that although the tribunal found that the suit property rightfully belonged to her, it lacked the jurisdiction to order the plaintiff to surrender his title hence it referred the case to the court. She produced a copy of the tribunal's decision.
14. She did a search at the Registrar of Companies and got the list of members of the company in 1971. She produced that list which showed her husband's name on page 9. She confirmed that she did not file a succession cause after her husband died in 1977. The matter was handled by the Public Trustee. She stated that before 1983 her husband's name appeared in the register for Matanya but after 1983 her name was reflected on the register. She told the court that she produced her birth and marriage certificates in order to be allowed to ballot. She did not report the 2<sup>nd</sup> defendant to the police for collecting her clearance certificate. She filed ELC Case No 27 of 2014.
15. Lewis Wanyoike Kang'ethe, a farmer from Mweiga and a close friend of the 1<sup>st</sup> defendant and her late husband also gave evidence. He was a shareholder of Matanya Estates Limited with the 1<sup>st</sup> defendant's late husband. He stated that the 1<sup>st</sup> defendant took over her husband's share in the company when he died. He confirmed that he was present when the 1<sup>st</sup> defendant balloted for the suit property in 1982 as he also balloted. He was also present when the suit property was pointed out to the 1<sup>st</sup> defendant by a surveyor and that he assisted in fencing it. He did not know of any succession proceedings over the estate of the 1<sup>st</sup> defendant's late husband. He did not know when the 1<sup>st</sup> defendant's name replaced that of her late husband. He did not know whether the 2<sup>nd</sup> defendant was a shareholder of Matanya Estates Company Limited.
16. This suit was transferred from the Nyeri ELC to the Nanyuki ELC for hearing and determination on August 20, 2021. It came up for directions before this court on September 28, 2021 and on October 13, 2021 the court directed that proceedings were to be typed. The 1<sup>st</sup> defendant's advocate informed



the court on February 14, 2022 that the 2<sup>nd</sup> defendant had died but she did not know when he died. The 2<sup>nd</sup> defendant's advocate, Mr Gori Ombongi attended court on June 15, 2022 and confirmed to the court that his client died over a year ago. He asked to be excused from the proceedings. The plaintiff's advocate Mr John Abwuor and the 1<sup>st</sup> defendant's advocate Mr Kebuka Wachira agreed that they would file submissions touching on the plaintiff's claim and the 1<sup>st</sup> defendant.

17. The plaintiff filed his submissions and clarified that following the ruling of March 11, 2015, ELC Case No 27 of 2014 and ELC Case No 231 of 2013 were consolidated. He raised two issues for determination, that is, whether he was a bona fide purchaser protected by law and whether he had proved his case to the required standard. He submitted that he was a *bona fide* purchaser without notice and that the 1<sup>st</sup> defendant did not follow the legal procedure in having his title cancelled since he had an absolute and indefeasible title. He added that there was no proof that his title was obtained by fraud, misrepresentation or a corrupt scheme. He added that the 1<sup>st</sup> defendant had admitted that he was not a party in the dispute before the Tribunal. He pointed out that the 1<sup>st</sup> defendant admitted that she got the suit property from her late husband without obtaining grant of letters of administration contrary to section 45 of the [Law of Succession Act](#) hence her title was null. He relied on [Martha Wangui Thurura & Another v Henry Gitani Thurura & 3 others](#) [2021] eKLR.
18. He submitted that his title was protected by section 26 of the [Land Registration Act](#) and that he was denied a fair hearing before the court and tribunal with respect to the suit property contrary to the rules of natural justice, section 4 of the [Fair Administrative Action Act, 2015](#) and article 47(1) of the [Constitution](#).
19. The Plaintiff reiterated that the 1<sup>st</sup> defendant did not prove the conditions under section 158 of the [Land Act](#). Further, that section 80 of the [Land Registration Act](#) protected his ownership of the suit land. He submitted that there was no evidence proving that he had knowledge of any omission, fraud or mistake to support rectification of the register. To buttress his arguments, he relied on [Martha Wangui Thurura; Falcon Global Logistics Co Limited v Management Committee of Eldama Ravine Boarding Primary School](#) [2018] eKLR and [Samwel D Omwenga Angwenyi v National Land Commission & 2 others](#) [2019] eKLR.
20. The plaintiff further submitted that the Court of Appeal settled the law on the principle of an innocent purchaser for valuable consideration without notice in the case of [Lawrence P Mukiri Mungai & another v Attorney General & 4 others](#) [2017] eKLR.
21. On whether he had proved his case to the required standard, the plaintiff submitted that he had proved that he was a *bona fide* purchaser and the 1<sup>st</sup> defendant failed to prove fraud, omission, mistake or corrupt scheme. Further, he submitted that the 1<sup>st</sup> defendant's claim was incompetent and bad in law because she obtained the title contrary to section 45 of the [Law of Succession Act](#) and failed to join the plaintiff to the case before the tribunal. The plaintiff sought to be paid costs.
22. The 1<sup>st</sup> defendant submitted that under section 26 of the [Land Registration Act](#), a title can be impeached if it is found to have been acquired fraudulently, through misrepresentation, illegally, unprocedurally or through a corrupt scheme. She relied on [Nelius Muthoni Thegetha v Julius Ndungu Mwangi & another](#) [2020] eKLR where the court held that when a person's title is under attack, he must give an account of how he acquired the land. She also cited [Munyu Maina v Hiram Gathiba Maina](#) Civil Appeal No 239 of 2009 where the Court of Appeal held that when a registered proprietor's root of title was challenged, it was not sufficient to dangle the instrument of title as proof of ownership because that instrument of title was being challenged and the registered proprietor needed to go beyond the instrument to prove that the acquisition was legal, formal and free from any encumbrances including any interests which did not need to be noted on the register.



23. The 1<sup>st</sup> defendant also relied on *Moses Ageya Kembe v Washington Okello Sule* [2022] eKLR in which the court cited the case of *Elijah Makeri Nyangw'ara v Stephen Mungai Njuguna & another* [2013] eKLR where the court stated that for section 26(1)(b) to be operative, it was not necessary that the title holder be a party to the vitiating factors of the title being obtained illegally, unprocedurally or through a corrupt scheme.

That the heavy import of section 26(1)(b) was to remove protection from an innocent purchaser or innocent title holder. That it meant that the title of an innocent person was impeachable if it was obtained illegally, unprocedurally or through a corrupt scheme even if the title holder did not contribute to these vitiating factors. The court was of the view that the purpose of section 26(1)(b) was to protect real title holders from being deprived of their titles by subsequent transactions.

24. On the issue of costs, the 1<sup>st</sup> defendant relied on section 27 of the *Civil Procedure Act* and submitted that the plaintiff had acquired title to the suit property illegally and that she had proved her case on a balance of probabilities and she ought to be awarded the costs of the suit.

25. The court notes that after the 1<sup>st</sup> defendant entered appearance in this suit she filed another suit at Nyeri Environment and Land Court Case No 27 of 2014 against both the 2<sup>nd</sup> defendant and the plaintiff claiming the suit property. Hon Lady Justice Waithaka in a ruling delivered on May 11, 2015 consolidated the two suits with ELC Case No 231 of 2013 being the lead file. After the plaintiff and the 1<sup>st</sup> defendant closed their respective cases the case was transferred to Nanyuki ELC for determination.

26. The 1<sup>st</sup> defendant's claim in Nyeri ELC Case No 27 of 2014 was for a declaration that the 2<sup>nd</sup> defendant did not buy shares for the suit property in Matanya Estates Limited and did not ballot for the land; a declaration that the title for the suit property which the 2<sup>nd</sup> defendant obtained and later transferred to the plaintiff was obtained fraudulently and was not valid; a declaration that the 2<sup>nd</sup> defendant had no valid title to transfer to the plaintiff and his title should be cancelled and the 1<sup>st</sup> defendant declared to be the genuine and bona fide owner of the suit property and costs.

27. The issues that the court has to determine are whether the 2<sup>nd</sup> defendant had a good title to pass onto the plaintiff; whether the plaintiff was a *bona fide* purchaser of the suit property for valuable consideration without notice; who between the plaintiff and the 1<sup>st</sup> defendant has a superior claim to the suit property; and lastly, whether the 1<sup>st</sup> defendant was required under the *Law of Succession Act* came to obtain a grant of letters of administration for her late husband's estate before her name could replace his name on the company's register.

28. The 2<sup>nd</sup> defendant died before he had testified. He was not substituted by the administrators of his estate. Order 24 rule 1 of the *Civil Procedure Rules* provides that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. Under order 24 rule 4(3) the suit as against the 2<sup>nd</sup> defendant abated a year after he died since there was no application for substitution. The court will determine this dispute based on the evidence tendered by the plaintiff and 1<sup>st</sup> defendant in accordance with order 24 rule 2 of the *Civil Procedure Rules*.

29. The plaintiff's case is inextricably linked to the 2<sup>nd</sup> defendant from whom he purchased the suit property. The plaintiff's case is that he purchased the suit property from the 2<sup>nd</sup> defendant alongside parcel number 956 for Kshs 230,000/= vide the sale agreement dated July 1, 2006 and a title over the suit property was issued to him on November 7, 2006. He produced a copy of the search dated October 24, 2013 which showed that at that time the land was registered in the 1<sup>st</sup> defendant's name. He also produced other documents from the Land Disputes Tribunal which confirm that the 2<sup>nd</sup> defendant participated in those proceedings.



30. The tribunal referred the case to the District Resident Magistrate for the 1<sup>st</sup> defendant to pursue her title in light of the fact that the 2<sup>nd</sup> defendant had had his title for more than 10 years hence the tribunal lacked jurisdiction. The plaintiff produced a copy of the decree issued on February 10, 2009 in Nanyuki SRMC Land Case No 8 of 2008 through which the award of the Lamuria Land Disputes Tribunal dated April 11, 2008 relating to parcel number 955 was adopted as a judgment of the court. That decree directed the Land Registrar to register the 1<sup>st</sup> defendant as the owner of the suit property and issue another title deed to her. The 2<sup>nd</sup> defendant was required to surrender his title over the suit land.
31. The 1<sup>st</sup> defendant's husband died in 1977. The Law of Succession came into force on July 1, 1981. Section 2 of that Act states that the written laws and customs which applied at the date of death would apply. The Law of Succession Act was not applicable at the time when the 1<sup>st</sup> defendant's husband died.
32. The 1<sup>st</sup> defendant stated that she balloted for the land in the company in 1983. She led evidence to show that her late husband was registered as a member of the land buying company until 1983 when her name was put on the register in place of her late husband's name. This is supported by the search from the Registrar of Companies giving the list of members of the company in 1971 where her late husband's name appears. She also led evidence to show the process she followed to obtain her title over the suit property.
33. The plaintiff contended that he was an innocent purchaser for value without notice. He relied on the sale agreement dated July 1, 2006 which relates to parcel numbers 955 and 956. Paragraph 3 gives the agreed purchase price as Kshs 230,000/= and paragraph 4 indicates that the plaintiff was to pay a down payment of Kshs 100,000/= and the balance immediately after the land control board gave the consent for the transfer. No evidence was tendered by the plaintiff to prove that he paid the purchase price to the 2<sup>nd</sup> defendant. The plaintiff did not produce a copy of the transfer or evidence of payment of stamp duty which according to the analysis of the Court of Appeal in the *Lawrence P Mukiri Mungai* case have a bearing on who can be described as a *bona fide* purchaser for value. The plaintiff failed to prove that he was a *bona fide* purchaser for value of the suit property.
34. Weighing the evidence of the plaintiff against that of the 1<sup>st</sup> defendant, the court is satisfied that the 1<sup>st</sup> defendant has proved that she has a better claim over the suit property than the plaintiff because she was able to trace the root of her title over the land. There was no evidence given to prove that the 2<sup>nd</sup> defendant held a valid title over the suit property which he could transfer to the plaintiff.
35. The court declines to award the 1<sup>st</sup> defendant costs because there is no evidence that she served the decree issued by the Nanyuki Magistrate Court on the plaintiff.
36. The plaintiff's claim fails and is dismissed. Each party will bear its own costs.

**DELIVERED VIRTUALLY AT NANYUKI THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**KOSSY BOR**

**JUDGE**

**In the presence of:**

Mrs. G. Maina holding brief for Mr. K. Wachira for the 1<sup>st</sup> Defendant

Ms. Stella Gakii- Court Assistant

No appearance for the Plaintiff and the 2<sup>nd</sup> Defendant

