



Kimotho (Suing as Personal Representative of Kimotho S/O Ngure alias Charles Kimotho Ngure) v Gachoka & another (Environment & Land Case 93 of 2016) [2025] KEELC 3809 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 93 OF 2016**

JO OLOLA, J

MAY 15, 2025

BETWEEN

DOUGLAS WACHIRA KIMOTHO (SUING AS PERSONAL REPRESENTATIVE OF KIMOTHO S/O NGURE ALIAS CHARLES KIMOTHO NGURE) PLAINTIFF

AND

PETER NDUNGU GACHOKA 1ST DEFENDANT

GEORGE KAIRIANJA NGAHU 2ND DEFENDANT

JUDGMENT

Background

1. By a Plaint dated 5th May, 2016 as filed herein on 13th May, 2016, Douglas Wachira Kimotho, suing as the Personal Representative of Kimotho s/o Ngure alias Charles Kimotho Ngure prays for the following:
 - a. An order that the Register in respect of LR. Nos Thegenge/Kihora/881 and 882 be rectified by cancelling the two titles and merging them back into the original title i.e Thegenge/Kihora/210 in the name of Kimotho S/o Ngure alias Charles Kimotho Ngure;
 - b. Kshs 327,595/= being the value of the damage caused on the suit land plus interest from the date of filing suit until full payment;
 - c. A permanent injunction restraining the Defendants by themselves, agents, servants, family, friends or otherwise howsoever from interfering with Kimotho s/o Ngure 's land once the rectification of title is done;
 - d. General damages for trespass; and



- e. Costs of the suit plus interest.
2. It is the Plaintiff's case that at all times material, the said Kimotho Ngure was the registered proprietor of all that parcel of land known as Thegenge/Kihora/210. The Plaintiff avers that on 5th May, 2011, the 1st Defendant fraudulently and secretly caused the said parcel of land to be divided into two, the same being Thegenge/Kihora/881 and Thegenge/Kihora/882 and proceeded further to fraudulently sell LR. No. Thegenge/Kihora/882 to the 2nd Defendant.
3. The Plaintiff avers that on 4th August, 2015, the 2nd Defendant proceeded to the parcel of land purportedly sold to him and caused damage to Kimotho s/o Ngure's crops therein with the value of the damage being assessed at Kshs. 327,595/=.
4. Peter Ndung'u and George Kairianja Ngahu (the 1st and 2nd Respondents) are opposed to the claim. In their joint statement of Defence dated 6th June, 2016, the 2nd Defendant denies any knowledge of the Plaintiff or the fact that the land belongs to the said Kimotho S/o. Ngure. He avers that he bought LR. No. Thegenge/Kihora/882 as a clean title without any encumbrance and for value without notice of the alleged fraud and that he took possession thereof and has developed the same.
5. The 1st Defendant avers that the sub-division and issuance of new titles was as a result of valid Court orders and all deeds for the sub-division and transfer were effected through validly executed documents by the Executive Officer of the court pursuant to orders issued in the presence of the Plaintiff in Nyeri CMCC Award Case No. 47 of 2007.
6. The Defendants aver that these proceedings are res judicata the judgment of the Lower Court in the said Nyeri CMCC Award Case No. 47 of 2007.
7. At the trial herein, the Plaintiff called three (3) witnesses. On their part, the Defendants called a total of four (4) witnesses who testified in support of their case.

Analysis and Determination

8. I have carefully perused and considered the pleadings filed by the parties, the testimonies of all the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties.
9. The Plaintiff's case is that Kimotho S/o Ngure was at all times material the registered proprietor of all that parcel of land known as Thegenge/Kihora/210. It is the Plaintiff's case that sometime on 5th May, 2011, the 1st Defendant proceeded to secretly and fraudulently cause the said parcel of land to be divided into two equal parcels, that is, Thegenge/Kihora/881 and Thegenge/Kihora/882.
10. The Plaintiff told the Court that after the sub-division of the said parcel of land, the 1st Defendant proceeded further in July, 2015 to sell the portion that had now become known as Thegenge/Kihora/882 to the 2nd Defendant. It is the Plaintiff's case that following the transaction between the two Defendants, the 2nd Defendant did forcefully enter the said portion of land thereby damaging and destroying his crops therein valued at Kshs. 327, 595/=.
11. The Plaintiff asserts that as a result of the said actions on the part of the Defendants, he has suffered loss and damage. As a result, the Plaintiff urges the Court to grant orders cancelling the two new titles and merging the same into the original title number Thegenge/Kihora/210. He prays that he be paid the value of the damaged crops and for an order of injunction to issue restraining the Defendants from any further interference with the suit property.



12. The 1st Defendant does not deny the accusation that he caused the original parcel of land to be sub-divided into two portions. What he denies is the accusation that he did so secretly and/or in a fraudulent manner. According to the 1st Defendant, the sub-division and issuance of new titles was the result of valid court orders issued in Nyeri CMCC Award Case No. 47 of 2007.
13. The 1st Defendant asserts that all deeds for the sub-division and transfer were effected through validly executed documents by the Executive Officer of the court pursuant to lawful orders issued in the said case and that the Plaintiff neither appealed the decision nor did he seek a stay of the proceedings therein. The 1st Defendant further asserted that the judgment of the Lower Court stands to-date and hence his decision to dispose of his portion of the land to the 2nd Defendant.
14. On his part, the 2nd Defendant avers that he bought LR. No. Thegenge/Kihora/882 as a clean title without any encumbrance. It is his case that he is a bona fide purchaser of the said property for valuable consideration and that he had no notice of the alleged fraud or want of title on the part of the 1st Defendant.
15. From the material placed before the court, there was no dispute that the parcel of land known as Thegenge/Kihora/210 was at all times material registered in the name of the Plaintiff-Kimotho S/o Ngure alias Charles Kimotho Ngure. Sometimes in the year 2004, Peter Ndungu Gachoka (the 1st Defendant) lodged Tetu Land Disputes Tribunal Case No. 1 of 2004 against the Plaintiff. It was the 1st Defendant's case that the Plaintiff was holding the parcel of land measuring 3.0 acres in trust for himself and the family of the 1st Defendant.
16. In a Ruling rendered on 24th December, 2004, the Tribunal made a finding that there was indeed a customary trust affecting the land and proceeded to award the 1st Defendant 1.5 acres of the suit property. Aggrieved by the said decision, the Plaintiff lodged an Appeal with the Provincial Appeals Committee in Nyeri PAC Case No. 1 of 2005. In its decision rendered on 3rd August, 2007, the Appeals Committee upheld the Award of the Tribunal and directed that the suit property be sub-divided into two equal portions.
17. Aggrieved by the said decision, the Plaintiff herein lodged Nyeri HCCA No. 95 of 2007. In a Judgment rendered on 21st February, 2014, the Honourable Justice J.K. Sergon did find that the Land Disputes Tribunal and the Appeals Committee had no jurisdiction to hear and determine a dispute based on trust and over a title to land and proceeded to set aside the Awards issued by both the Tribunal and Appeals Committee.
18. As it turned out, while the Appeal was pending before the High Court, the 1st Defendant herein went back before the Lower Court in Nyeri CMCC Award Case No. 47 of 2007 whereat they got the decision of the Tribunal adopted as an order of the Court. The 1st Defendant then proceeded to execute the Judgment of the Lower Court by causing the suit property to be sub-divided into two on 5th May, 2011.
19. Some one and a half years after the decision of the High Court setting aside the awards made by the Tribunal and the Appeals Committee, the 1st Defendant proceeded to "sell" the portion of the suit property that had now become known as Thegenge/Kihora/882 to the 2nd Defendant in a Sale Agreement dated 14th July, 2015. On 22nd July, 2015, the 2nd Defendant was issued with a Title Deed for the said portion.
20. As it were, during the trial herein, the 1st Defendant acknowledged that he was well aware of the High Court's decision before he entered into the Sale Agreement and transferred the land to the 2nd



Defendant. He could not have failed to know, for, from a perusal of the record herein, the 1st Defendant participated in those proceedings and was represented at all times by an Advocate.

21. Having conceded that he was aware that the decision which purported to confer ownership of the land upon himself had been set aside, it was clearly an act of fraud and serious impunity on the part of the 1st Defendant to proceed to enter into the Sale Agreement with the 2nd Defendant wherein he purports to be the proprietor of the parcel land registered as Thegenge/Kihora/882. That Agreement was void ab initio as the 1st Defendant did not have capacity to enter into the same with the 2nd Defendant.
22. While the Defendants contended that the decision in the said Nyeri CMCC Award Case No. 47 of 2007, had not been appealed, it was clear to me that under the now repealed Land Disputes Tribunal's Act, what was appealable was the decision of either the Tribunal and/or the Appeals Committee. The order of the Magistrate's Court adopting the award as a decision of the court was not what was the subject of Appeal. The Plaintiff followed the procedure set up in the law resulting in the High Court decision that rightfully annulled the two awards.
23. In the circumstances herein, the Plaintiff was entitled to the full benefit of the said judgment whose effect was that the parties herein were returned to the same position they were before the 1st Defendant took the matter to the Tribunal. By purporting to dispose of the suit property while aware of the Judgment delivered by the High Court, the 1st Defendant had clearly acted in contempt of Court and this Court cannot shut its eyes to such egregious acts of impunity.
24. In support of his case, the 2nd Defendant asserted that he had bought a clean title without any encumbrance and that he was a bona fide purchaser for value without notice. It was his position that he had through land agents done due diligence before purchasing LR. No. Thegenge/Kihora/882.
25. In the Ugandan Case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173; the Court observed as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud; and
- g. he was not party to any fraud.”

26. At the trial herein, the 1st Defendant conceded that the decision of the Tribunal on which he relied to sub-divide the suit property was set aside on Appeal and that he was ordered to pay costs to the Plaintiff. He told the court he had indeed paid the costs as ordered. The 1st Defendant further conceded that as at 14th July, 2015 when he entered into a Sale Agreement with the 2nd Defendant he was already aware of the decision of the Court. That being the case, the 1st Defendant was at the time of the purported sale aware that he had no valid title that he could transfer to the 2nd Defendant.



27. In support of his case, the 2nd Defendant relied on his List of Documents dated and filed in court on 11th October, 2018. While he purports to have purchased the land for valuable consideration, I was unable to find any support for that contention. A perusal of the Sale Agreement (2nd Dexh. 7) reveals that the property was being sold for Kshs. 1,600,000/=. At paragraphs 2 and 3 of the Agreement, the 1st and 2nd Defendants state as follows:

- “2. The Purchaser will upon execution of this Agreement pay Kenya Shillings One Hundred and Seventy-Six Thousand (Kshs. 176,000/=) of the purchase price to the vendor.
3. The balance of the purchase price being Kenya Shillings One Million, Four Hundred and Twenty-Four Thousand only (Kshs. 1,424,000/=) shall be paid to the vendor on the Completion Date.”

28. From the material placed before the Court, there was absolutely no evidence to demonstrate that the two payments were made and in what form they were made to the 1st Defendant. That being the case, I was not persuaded that the 2nd Defendant had purchased the property and/or paid any valuable consideration therefor.

29. It was also evident that on the first day he visited the suit property the 2nd Defendant was confronted by the Plaintiff and had to get help from the Area Chief and the police. If he was an innocent bona fide purchaser, that was the time for him to undertake further due diligence to establish the circumstances surrounding the suit property.

30. While he denies destroying the Plaintiff's crops on the land, it was clear to me that the 2nd Defendant was guilty of the destruction of the crops. In his testimony before the court the 2nd Defendant conceded that he found crops on the disputed parcel of land and that he assumed they belonged to the 1st Defendant. Without stating what happened to the crops, it was his testimony that he proceeded to fence off the land. I was not persuaded that the 2nd Defendant could have put up a perimeter wall on the land leaving the crops intact.

31. Indeed, the Plaintiff has not only produced photos of the damaged crops but he also called the Nyeri County Agricultural Officer who visited the land and did a Crop Damage Assessment Report on 14th March, 2016 giving the value of the damaged crops as Kshs. 327,595/=.

32. In the circumstances herein, I was persuaded that the Plaintiff has proved his case against the two Defendants on a balance of probabilities. In the premises I allow the Plaintiff's case in terms of prayers 'a', 'b' and 'c' of the Plaint dated 5th May, 2016.

33. The 1st Defendant shall bear the costs of this suit.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 15TH DAY OF MAY, 2025

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J.O. OLOLA

JUDGE

In the presence of:

a. Ms. Firdaus Court Assistant.



b. Mr. Waweru Macharia Advocate for the Plaintiff

c. Mr. Karweru Advocate for the 1st Defendant.

d. No Appearance for the 2nd Defendant

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