

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E268 OF 2022

JOSEPH KAMAU KIBURU

PLAINTIFF

VERSUS

MARY WANJIRU GATHUNGU 1ST

DEFENDANT

JACKSON GATHUNGU NJERU 2ND

DEFENDANT

NEWTON GITONGA KINYUA 3RD

DEFENDANT

**ROYSAMBU HOUSING CO-OPERATIVE
SOCIETY LIMITED 4TH**

DEFENDANT

CHIEF LAND REGISTRAR NAIROBI 5TH

DEFENDANT

THE HON. ATTORNEY GENERAL 6TH

DEFENDANT

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JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 17th August 2022. He averred that by virtue of his shareholding in the 4th Defendant, he was allotted **Nairobi/Block 116/404** hereinafter referred to as the 'suit land', and his name was forwarded to the 5th Defendant for registration and issuance of Lease. However, around 2011, he discovered that the suit land was fraudulently registered to the 1st and 2nd Defendants' jointly, who then sold it to the 3rd Defendant who in turn put up permanent structures thereon. He particularized alleged elements of fraud against the Defendants.
2. In the Plaint, the Plaintiff sought for the following Orders:
 - a) **An order of demolition of all that structures erected on Nairobi/Block 116/404 by the Defendants at their own costs under the supervision of the area OCS or the in-charge provision administrator.**

- b) A permanent injunction be issued as against the 1st, 2nd and 3rd Defendants through themselves, agents, servants, employees or anyone else claiming through them from trespassing, building, alienating, selling, transferring or in any other manner dealing with Nairobi/Block 116/404.**
- c) That the certificate of lease for land parcel Nairobi/Block 116/404 issued to the 1st, 2nd and 3rd Defendants be cancelled, annulled or revoked and the same be transferred to the Plaintiff absolutely.**
- d) That the Plaintiff be awarded damages for trespass or mesne profits which the court deems fit to grant.**
- e) The Plaintiff be awarded costs and interest of the suit.**

3. The 1st to 3rd Defendants despite being duly served via substituted service in a local newspaper of 10th May, 2023, failed to enter appearance nor defend the suit.

4. The 4th Defendant filed a statement of defence in which it admitted that the Plaintiff is its member and that it allotted him **land parcel No. 195**, which upon survey became **LR Nairobi Block 116/404**. It contended that it forwarded the Plaintiff's name to then Commissioner of Lands and that the name was entered in the initial Green Card. It attributed fraud to registration of the suit land to third parties and absolved itself from any blame, citing lack of control of the 5th Defendant's affairs and transactions.
5. The 5th and 6th Defendants filed a statement of defence dated 7th November 2022. They denied allegations of fraud leveled against them and averred that if at all a title deed was issued in favour of the 1st and 2nd Defendants, the same was based on documents presented before the 5th Defendant, who believed its genuineness and proceeded to register them.

Evidence

6. The Plaintiff as PW1 testified that he is a member of the 4th Defendant

and by virtue of his shareholding, he was allotted Plot No. 195, which upon survey became **LR Nairobi Block 116/404** (suit land). Further, that the 4th Defendant then forwarded his name to the 5th Defendant for registration and issuance of Lease. It was his testimony that in 2011, he discovered that the suit land was registered to the 1st and 2nd Defendants jointly and his demands that the said registration be annulled have been in vain despite the 4th Defendant severally confirming that he is the bonafide owner /allotee of the said suit land.

7. He explained that it was fraudulent for the 1st and 2nd Defendants to obtain registration over the suit land, yet they had not been allotted the same by the 4th Defendant. Further, that they transferred it to the 3rd Defendant despite knowledge of his claim in an effort to defeat justice. He also took issue with the 4th Defendant for declining to initiate the process of cancelling the 1st to 3rd Defendants title despite knowledge and evidence that he is the bonafide owner

thereof and the 5th Defendant for allowing registration of the suit land, in the 1st and 2nd Defendants' favour, yet the list forwarded to them by the 4th Defendant did not have such information. Further, for the 5th Defendant in executing a transfer to the 3rd defendant despite numerous objections.

8. He alleged that the 3rd Defendant has put up a permanent building on the suit land despite knowledge of his interest. He produced various correspondence, receipts, notice of payment by Roysambu Housing Cooperative Society Limited, Official Searches and Photograph of the development on the suit land as exhibits.
9. In cross-examination by Counsel for the 4th Defendant, PW1 confirmed that the 4th Defendant's Advocates in the suit (Maosa & Company Advocates) were also the 4th Defendant's lawyers at the time of the transaction. Further, that the 4th Defendant had the membership list wherein it was confirmed that the suit land belonged to him and he was listed as owner of **Plot No. 195**. He confirmed that the aforementioned

advocates did their best to help him recover the suit land on instructions of the 4th Defendant. Further, that they even wrote to the Commissioner of Lands confirming he owned the suit land.

- 10.** In cross-examination by Counsel for the 5th and 6th Defendants, PW1 confirmed that he was never issued with a Letter of Allotment nor a Certificate by the 4th Defendant but he was issued with receipts and the 4th Defendant's Chairman's letter dated 27th February 2018 addressed to the Ministry of Lands confirmed his ownership status.
- 11.** The 4th, 5th and 6th Defendants closed their cases without calling any witnesses.

Submissions

- 12.** The Plaintiff submitted that having demonstrated that he was a member of the 4th Defendant and that he was allotted the suit land, his claim is superior to that of the 1st and 2nd Defendants who were not members of the 4th Defendant. He further submitted that he had demonstrated the root of his

title. He contended that the 1st and 2nd Defendants title is vitiated by being obtained corruptly and it ought to be cancelled under Section 80 of the Land Registration Act. He also submitted that since he has been denied usage of the suit land, he is entitled to general damages for trespass.

13. To buttress his averments, he relied on the following decisions: **Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR; James Njoroge Gitau v Lucy Chepkurui Kimutai [2018] eKLR; Hubert L Martim & 2 Others v Margaret J Kumar & 5 Others [2016] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Kamoye v Tipa xxcngo & 2 Others (ENVIRONMENT & LAND CASE E011 OF 2023) [2024] KEELC 4227 (KLR) (14 May 2024).**

14. On its part, the 4th Defendant submitted that the suit is premised on a defective plaint which fails to disclose a reasonable cause of action against it, in that no elements of fraud were proved against it. Further, that there is no

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specific pleading as to whether the prayers in the plaint are sought against the five (5) Defendants herein jointly and severally thus ensuing orders from this court will be incapable of execution. It pointed out that the prayer for mesne profits is incapable of execution as the Plaintiff did not establish which party is liable for trespass among the Defendants.

15. The 5th and 6th Defendants submitted that since the 4th Defendant as the custodian of the members register corroborated the Plaintiff's evidence that he was its member and shareholder and was allotted **Plot No. 195**, which translated to **Block 116/404**, and given that the 1st to 3rd Defendants did not tender any evidence to defend their title, the Plaintiff is the bonafide owner of the suit land as he proved the root of his title. On the prayer for award of damages for trespass or mesne profits, they submitted that the Plaintiff did not disclose who is in occupation of the suit

land, for how long and the profits accruing from the occupation thus he is not entitled to the same.

- 16.** To support their averments, they relied on the following decisions: **Munyu Maina v Hiram Gathiha Maina [2013] eKLR; James Njoroge Gitau v Lucy Chepkurui Kimutai [2018] eKLR; Karanja Mbugua & Another v Marybin Holding Company Limited [2014] eKLR** and **Peter Mwangi Mbuthia & Anor v Samow Edin Osman [2014] eKLR.**

Analysis and Determination

- 17.** Upon consideration of the Plaintiff, Statements of Defence, testimony of the witness, exhibits and rival submissions, the following are the issues of determination:

- **Who is the owner of the suit land?**
- **Whether the title held by the 3rd Defendant should be cancelled.**

- **Whether the Plaintiff is entitled to an order for damages for trespass/ mesne profits.**

As to who is the owner of the suit land or if the title held by the 3rd Defendant should be cancelled

18. The Plaintiff claims he was allotted **Plot No. 195** which translated to **Block 116/404** by virtue of his membership and shareholding in the 4th Defendant, which fact was confirmed by the 4th Defendant. At the submission stage, the 5th and 6th Defendants urged the Court to find that the Plaintiff is the bona fide owner of the suit land based on the admission by the 4th Defendant and the evidence presented by the Plaintiff.

19. In his plaint, the Plaintiff alleged that the suit land was fraudulently transferred to the 1st and 2nd Defendants then to the 3rd Defendant. The Court of Appeal stated as follows in **Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR;**

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.

20. From the evidence tendered by the Plaintiff including the exhibits produced, it is not in doubt that the Plaintiff was indeed allotted Plot No. 195 by the 4th Defendant. As per the 4th Defendant’s Chairman’s letter dated 27th February 2018, addressed to the Department of Lands, Ministry of Lands Housing and Urban Development, he stated as follows:

“As Chairman, I wish to confirm that the above land parcel belongs to one Joseph Kamau Kiburu ID No. 5908010 of P.O. Box 1007 Kiambu as per the Society records. Mr. Kiburu is a bona fide member of the society.”

21. Further, as per the letter dated 25th March, 2000, addressed to the Commissioner of Lands where the 4th Defendant sent a comprehensive list of its original allottees for purposes of processing of title, I note it indicates Plot No. 195 belongs to

Joseph Kamau Kiburu who is the Plaintiff herein. Even from the receipts produced by the Plaintiff, which are dated 27th December, 1977, 27th October, 1976 and 7th April, 1978 respectively, it is evident it is the Plaintiff who was paying for the suit land including survey fees. Further, in the official receipt, dated the 7th December, 1990, which was issued to the Plaintiff, it was for Plot No. 195 for transfer and subdivision fees.

22. From the evidence presented in Court, it is not clear how the 1st and 2nd Defendants who were not even members of the 4th Defendant acquired the relevant documents and processed their title to plot No. 195. What is baffling is that the 1st and 2nd Defendants acquired the title on 13th November, 2006, charged it to Housing Finance Company of Kenya Limited on the same date. Further, on 14th November, 2018, the suit land was transferred to the 3rd Defendant, despite the fact that the 4th Defendant's advocate had written a demand letter dated the 1st March, 2017, to the 1st and 2nd

Defendants informing them that they had acquired the said land fraudulently. It is worth noting that the Commissioner of Lands also effected the transfer despite the fact that the 4th Defendant's Advocate vide his letter dated the 10th October, 2011, had informed him that the suit land belonged to the Plaintiff and not the 1st and 2nd Defendants.

23. On validity of a title, Sections 26 (1) (b) of the Land Registration Act stipulates thus:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except -

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. Emphasis Mine

24. On root of a title, the Court of Appeal held as follows in the case of **Munyu Maina v Hiram Gathiha Maina [2013] eKLR;**

“We state that when a registered proprietor 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.”

25. While the Court of Appeal stated as follows in **Wambui vs Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR):**

“...No court of law should sanction either the acquisition of title to property in favour of a party (christened crooks by the court) who has acquired such title from a legally registered

innocent proprietor using forgery, deceit or any kind of fraud...”

26. Further, in **Dina Management Ltd v. County Government of Mombasa & 5 Others, Pet. No. E010 of 2021**, the Supreme Court stated thus:

“...where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

27. Based on the facts before Court while associating myself with the decisions cited, I find that the Plaintiff has indeed demonstrated the root of his title. Since the title is now in the name of the 3rd Defendant, I opine that the said title was acquired fraudulently since the root is fettered and he cannot be deemed as a bona fide purchaser for value without notice.

In that regard while relying on section 80 of the Land Registration Act, I will direct that Certificate of Lease over the suit land registered in the name of the 3rd Defendant, be cancelled forthwith and reverted to the name of the Plaintiff.

As to whether the Plaintiff is entitled to an order for damages for trespass/ mesne profits.

28. The 4 to 6th Defendants opposed the Plaintiff's prayer for damages for trespass and mesne profits on the basis that they were not specifically pleaded and proved. On trespass, Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 defines it as follows:

“Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”

29. Section 3 of the Trespass Act further provides that,

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

30. Further, on the issue of mesne profits, I wish to refer to Section 2 of the Civil Procedure Act Cap 21 which defines it as follows: -

“Mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;”

31. On trespass, in the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR**, P. Nyamweya J (as she then was) held that:

“As regards the award of mesne profits, these are special damages which not only need to be
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pleaded but also proved. The Plaintiff did not bring any proof of the basis for the mesne profits of Kshs. 50,000/= per month, but brought evidence to show that the land was in a state that was unusable, and it therefore could not provide any sort of profits.....once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass" emphasis mine

32. In the case of **Attorney General v Halal Meat Products Limited [2016] eKLR**, the Court of Appeal observed that:

'It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.'

33. Based on the evidence before me, noting that the 1st to 3rd Defendants never demonstrated the root of their title and with the 4th Defendant confirming that the Plaintiff is its member and was entitled to the suit land, I hence find that the 3rd Defendant's acts of being on the said suit land amounts to trespass. Since the Plaintiff confirmed that the 3rd Defendant' had constructed on the suit land and produced a photograph showing a permanent multi-storeyed structure thereon, I opine that this amounts to continuous trespass and the Plaintiff is hence entitled to damages for trespass. However, I note the Plaintiff did not tender any evidence to prove mesne profits and will decline to grant the same. In the foregoing, I will award the Plaintiff Kshs. 1, 000,000/= as damages for trespass only.

34. On costs, since the Plaintiff is the inconvenienced party, I find that he is entitled to the same but to be borne by the 1st, 2nd and 3rd Defendants only.

35. It is against the foregoing that I find that the Plaintiff has proved his case on a balance of probability as against the 1st, 2nd, 3rd and 5th Defendants. I will however exonerate the 4th Defendant and proceed to enter judgement in favour of the Plaintiff in the following terms:

- a. An order is hereby issued directed at the Chief Land Registrar (5th Defendant) that the certificate of lease for land parcel Nairobi/Block 116/404 issued to the 1st and 2nd Defendants and in turn transferred to 3rd Defendant should be cancelled, annulled or revoked and the same be transferred to the Plaintiff absolutely.**
- b. A permanent injunction be and is hereby issued as against the 1st, 2nd and 3rd Defendants through themselves, agents, servants, employees or anyone else claiming through them from trespassing, building, alienating, selling, transferring or in any other manner dealing with Nairobi/Block 116/404.**
- c. An order of demolition be and is hereby issued of all that structures erected on Nairobi/Block**

116/404 by the 3rd Defendant, after ninety (90) days from the date hereof, at his own costs under the supervision of the area OCS or the in-charge provincial administrator.

- d. The Plaintiff is hereby awarded damages for trespass amounting to Kshs. 1,000,000/= to be borne by the 1st, 2nd and 3rd Defendants.**
- e. The Plaintiff is awarded costs of the suit to be borne by the 1st, 2nd and 3rd Defendants.**
- f. Interest on (d) and (e) at court rates, to accrue until payment in full.**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
21ST DAY OF OCTOBER, 2025**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Maosa for 4th Defendant

Wachira holding brief for Kanyi Kiruchi for Plaintiff

Mwalozi holding brief for Nyawira for 5th and 6th Defendants
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Court Assistant: Joan

ORIGINAL