



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 196 OF 2012**

**LUCIA NYAGAKI.....PLAINTIFF**

**VERSUS**

**JOEL KURIA NDUNGU.....1<sup>ST</sup> DEFENDANT**

**JANE WACUKA GATURU.....2<sup>ND</sup> DEFENDANT**

**GRACE WANJIRU MUTERI.....3<sup>RD</sup> DEFENDANT**

**JOB SAMUEL MWANGI NDUNGU.....4<sup>TH</sup> DEFENDANT**

**MONICA MAKUMI.....5<sup>TH</sup> DEFENDANT**

**NANCY WAIRIMU NDERITU.....6<sup>TH</sup> DEFENDANT**

**ISAAC KARIUKI.....7<sup>TH</sup> DEFENDANT**

**JOSEPHAT KIMATA WA MUKUI**

**(Sued on behalf of the Estate of**

**Rebecca Wanjiku Mukui).....8<sup>TH</sup> DEFENDANT**

**ROY GACHUNGI MUNG'AU.....INTERESTED PARTY**

**JUDGEMENT**

1. There are three separate claims of ownership to the land known as Ruiru/Ruiru East Block 2/5042 (“the Suit Property”). The Plaintiff claims that she bought this parcel of land as a member of Nyakinyua Investments Limited. She claims that she was allocated the Suit Property by this company after paying the requisite fees and was issued a title deed over the land on 29/2/2008. The 1<sup>st</sup> to 7<sup>th</sup> Defendants claim that they bought plots comprised in the Suit Property from Bernadette Wambui Njoroge who owned the Suit Property and caused it to be subdivided into plots. The Interested Party claims that he bought the Suit Property from the late Rebecca Wanjiku Mukui who held the title over the Suit Property before her death.

2. In the amended plaint dated 2/6/2017, the Plaintiff seeks a declaration that she is the owner of the Suit Property and an injunction to restrain the Defendants from dealing with the Suit Property. The 1<sup>st</sup> to 7<sup>th</sup> Defendants filed their defence on 22/5/2012 denying the Plaintiff’s claim while urging that the land dispute ought to be canvassed in HCCC NO. 728 of 2005 and HCCC No. 1423 of 2005.

3. The 8<sup>th</sup> Defendant who was sued on behalf of the Estate of Rebecca Wanjiku Mukui admitted in his defence and counterclaim filed in court on 20/6/2017 that sometime in 2004 or 2005, the 1<sup>st</sup> to 7<sup>th</sup> Defendants entered onto the Suit Property and built residential premises on it. The 8<sup>th</sup> Defendant averred that his late mother Rebecca Wanjiku Mukui sold the Suit Property to the Interested Party in 1992. He maintained that his late mother was one of the original shareholders of Nyakinyua Investments Limited and was allocated the Suit Property in 1978 and that a title was issued to her on 6/10/1988. He averred that Bernadette Wambui Njoroge forged a title over the Suit Property, subdivided it and purported to sell portions of it to the 1<sup>st</sup> to 7<sup>th</sup> Defendants.

4. The 8<sup>th</sup> Defendant claimed that the Plaintiff was the treasurer of Nyakinyua Investments Company Limited and being privy to the

company's records, was aware that the Suit Property belonged to his late mother who sold it to the interested party. The 8<sup>th</sup> Defendant claimed that the Plaintiff used her position as treasurer of Nyakinyua Investments Limited to obtain clearance for the plot after his mother passed away on 13/2/2007. The 8<sup>th</sup> Defendant sought a declaration that the 8<sup>th</sup> Interested Party was the rightful beneficial owner of the Suit Property. He sought an injunction to restrain the 1<sup>st</sup> to 7<sup>th</sup> Defendants from dealing with the Suit Property.

5. The Plaintiff gave evidence. She stated that she was a member of Nyakinyua Investments Limited. She claimed that she was allocated the Suit Property after paying the requisite fees and that the title deed was issued to her on 29/2/2008. She stated that sometime in 2004/2005, the Defendants invaded the Suit property and started putting up residential houses while claiming that they had bought the plots from Bernadette Wambui Njoroge. Bernadette Wambui Njoroge filed **HCCC No. 728 of 2005** against Rebecca Wanjiku and Roy Gachungu Mung'au. The Plaintiff filed **HCCC No. 1423 of 2005** against Rebecca Wanjiku Mukui and Bernadette Wambui Njoroge. She stated that she withdrew **HCCC No. 1423 of 2005** when both Defendants in the two suits died since she was already registered as the owner of the Suit Property.

6. She produced a copy of the share certificate dated 5/3/1992 issued by Nyakinyua Investments Limited to her and a receipt on account of the survey fees dated 6/4/1983. She produced a copy of the ballot number 38 for 2/5042. She also produced a copy of the letter dated 18/10/2005 from Nyakinyua Investments Limited confirming that the suit plot belonged to her. She produced a copy of title deed issued on 29/2/2008 in her name and the receipt showing the payments made to the lands office. She produced copies of the demand letters which her advocates issued to the Defendant on 19/3/2012 together with the response from the 1<sup>st</sup> to 7<sup>th</sup> Defendants.

7. On cross-examination, the Plaintiff stated that she bought the suit land in 1973 and that it measured about an acre. She stated that she found people constructing on the land in 1996 and claimed that they built very fast. At first only one person had built on the land. She sued the Defendants. She stated that most of the suit land is developed leaving only a small part.

8. The 1<sup>st</sup> Defendant gave evidence. He testified on behalf of the 1<sup>st</sup> to 7<sup>th</sup> Defendants. He stated that he bought plot number 11 of L.R. No. Ruiru/Ruiru East Block 2/5042 on 22/1/2004 at Kshs. 165,000/= from Bernadette Wambui Njoroge. He was issued a certificate on 22/1/2004 and a title deed was to follow later on. Around 2005, the Interested Party went to the land claiming that it was his. The 1<sup>st</sup> Defendant reported the issue to Bernadette who filed suit since she claimed that she was the real owner. He was sued by the Plaintiff in 2012. This witness did not produce any evidence. He confirmed that Bernadette whom he bought the plot from did not have a title deed issued in her name and that when they did the search they established that the title was in the name of the person who had sold the land to Bernadette. The witness stated that they were to await completion of the subdivision process and sale of the remaining plots to other parties before their titles could be processed.

9. Emmanuel Chege Mukui gave evidence on behalf of the 8<sup>th</sup> Defendant. He is the son of the late Rebecca Mukui. The 8<sup>th</sup> Defendant and the other beneficiaries of the Estate of the late Rebecca Mukui petitioned for grant of letters of administration in **Succession Cause number 2660 of 2007**. The grant was confirmed. He produced a copy of the certificate of confirmation of the grant. He stated that his late mother sold the Suit Property to the 8<sup>th</sup> Interested Party and that they went to the Land Control Board and obtained consent to transfer the land to the Interested Party.

10. He stated that at the time they petitioned the court for grant of letters of administration for the estate of his late mother, they excluded the Suit Property from the assets of the estate because they were aware that his late mother had already sold the plot to the Interested Party. He averred that he only came to learn later that the transfer in favour of the Interested Party could not be registered because the green card had been interfered with. He produced a copy of the certificate of death showing that Rebecca Wanjiku Mukui died on 13/2/2007. He produced a copy of the share certificate issued by Nyakinyua Investments Limited issued to Mrs. Wanjiku Mukui on 27/11/1978. He produced a copy of the receipt issued by Nyakinyua Investments Limited dated 5/1/1987 on account of title deed fees. He produced a copy of the title deed over the Suit Property issued to his late mother on 6/10/1988 and a search dated 30/10/1993 over the Suit Property confirming that she was the registered proprietor.

11. He produced a copy of the sale agreement dated 18/1/1992 that his late mother entered into with the Interested Party. The agreement gave the purchase price as Kshs. 120,000/= and stated that the sum Kshs. 50,000/= had already been paid and that the balance of Kshs. 70,000/= was to be paid after the title deed had been issued in favour of the purchaser. On cross examination, the 8<sup>th</sup> Defendant stated that the balance of the purchase price which had not been paid was part of the assets of the estate of his late mother. The application for consent of the Land Control Board was made by his mother on 8/5/2003 and gave the consideration as 70,000/=. The letter of consent is dated 5/6/2003. It is not clear why his mother did not transfer the land to the Interested Party during her lifetime.

12. The Interested Party gave evidence. He stated that Rebecca Wanjiku Mukui bought 100 shares in Nyakinyua Investments Limited on 27/11/1978. She paid the survey fees on 15/12/1982 and was issued a title deed over the Suit Property on 6/10/1988. He stated that he completed payments for the land in 1992, and that he took possession of the of the Suit Property in 1992. He added that he took steps to secure the land, dug a pit latrine and constructed a temporary house on the land. He conducted a search on 30/9/1993 which showed that the suit land was registered under the name of Rebecca Wanjiku Mukui. Rebecca Wanjiku Mukui applied for Land Control Board Consent on 11/2/2000. The Interested Party applied for valuation of the suit land on 15/3/2004 to enable him pay the stamp duty. He lodged his application for registration as the owner of the Suit Property on 19/2/2004. He claimed that he repeatedly visited the Thika District Land Registry in an attempt to collect the title for the suit land for a whole year but would be turned away.

13. He averred that he visited the Suit Property on 20/4/2005 and found trespassers had encroached on the land and were constructing on it claiming they had bought the land from Bernadette Wambui Njoroge who bought it from Hannah Wanjiku Wanyoike. He was sued by Bernadette Wambui Njoroge who claimed that she was the owner of the Suit Property in **HCCC No 728 of 2005**. He wrote a letter to the Chief Land Registrar in June 2005 requesting that an investigation be undertaken at the Thika Lands office to establish the owner of the Suit Property. The Thika Land Registrar responded on 27/6/2005 clarifying that according to their records, the true owner of the Suit Property was still Rebecca Wanjiku Mukui. Rebecca Mukui died on 13/2/2007. He conducted a search on 14/3/2017 which showed that the Plaintiff had been issued a title deed over the Suit Property.

14. He stated that as an official of Nyakinyua Investments Limited, the Plaintiff had access to the company's records and was aware that Rebecca Wanjiku Mukui had sold the plot to him. He questioned how the Plaintiff obtained title over the Suit Property two weeks after Rebecca Mukui died. The Interested Party claimed that although strangers had occupied portions of his land, he has been in possession of the unoccupied plots since 1992. He produced copies of the documents showing that Rebecca Wanjiku Mukui owned the Suit Property and his letter to the Chief Land Registrar. He also produced letters from the Ministry of Housing and Lands in relation to the ownership of the Suit Property. He produced copies of the title deed issued to Hannah Wanjiku Wanyoike on 16/3/1993 and Bernadette Wambui Njoroge on 21/4/2004.

15. Parties filed submissions which the court has considered. The Plaintiff submitted that she withdrew the suit against Bernadette Wambui Njoroge in ELC No. 1719 of 2007 to pave way for the filing of this suit. The Plaintiff submitted that under Section 8 (1) of the Land Control Act, the application for the consent of the Land Control Board should have been made within six months of the date of agreement. She faulted the late Rebecca Mukui for waiting for almost ten years to apply for Land Control Board consent.

16. The Plaintiff raised the issue that the Suit Property was not listed among the assets of the estate of the late Rebecca Mukui when her administrators applied for grant of letters of administration over her estate. The Plaintiff maintained that the 8<sup>th</sup> Defendant had failed to prove the allegations of fraud against her in the acquisition of her title over the Suit Property. The Plaintiff submitted that the 1<sup>st</sup> to 7<sup>th</sup> Defendants' recourse was to claim a refund or damages from the person who sold the plots to them. The Plaintiff sought damages in the sum of Kshs. 2,000,000/= against the 1<sup>st</sup> to 7<sup>th</sup> Defendants who are in occupation of the suit land.

17. The 1<sup>st</sup> to 7<sup>th</sup> Defendants submitted that they were innocent purchasers for value who had constructed permanent houses on the land and have stayed on it for over 20 years without any interference. They submitted that the doctrine of laches disentitled the Plaintiff from claiming the suit land. The Defendants added that the court has wide discretion and can infer adverse possession in their favour even without them pleading this. They submitted that the issue in this case revolves around the authenticity of titles and that the Plaintiff had failed to call the Land Registrar to confirm that her title to the Suit Property was authentic. They urged the court to find that the 1<sup>st</sup> to 7<sup>th</sup> Defendants were innocent purchasers for value without notice.

18. The 8<sup>th</sup> Defendant and Interested Party filed common submissions to which they attached a copy of a ruling made by Lady Justice Gitumbi on 23/1/2015, in which the judge found that the consolidated suit was still alive and could not have been withdrawn by one party. Lady Justice Gitumbi directed that this suit would be consolidated with **HCCC No 728 of 2005** and **HCCC No 1423 of 2005** for the court to determine the issue of ownership. The Interested Party and the 8<sup>th</sup> Defendant submitted that the Plaintiff's intention in withdrawing the suit was to extinguish the claims by other parties to the suit land.

19. The other two suits that were consolidated with this case were not heard and parties did not disclose the existence of those other suits and the issue of the consolidation to the court during the trial. It is not clear whether the suits which abated a year after the deaths of Rebecca Wanjiku Mukui and Bernadette Wambui Njoroge were ever revived or whether the two parties were substituted by their legal representatives. The court shall nevertheless make a determination as to the ownership of the Suit Property based on the evidence tendered by the parties in this suit.

20. The 8<sup>th</sup> Defendant and the Interested Party maintained that Rebecca Wanjiku Mukui's title over the Suit Property was valid. They claimed that Bernadette Wambui Njoroge's title was forged and did not originate from the Thika District Land Registrar. They relied on the letter dated 27/6/2005 from the Land Registrar which stated that Bernadette Wambui Njoroge's title did not originate from Thika Lands Officer. The 8<sup>th</sup> Defendant and the Interested Party submitted that it was irregular for the Plaintiff to have been issued a title deed over the Suit Property 20 years after another title had been issued to Rebecca Wanjiku Mukui. Further, that there was no evidence that Rebecca's title was ever revoked or cancelled by the Land Registrar.

21. The issue for determination is who between the Plaintiff on the first hand, the Interested Party on the second hand and the 1<sup>st</sup> to 7<sup>th</sup> Defendants on the third hand has a valid claim to the Suit Property. The Plaintiff claimed that she bought the suit land from Nyakinyua Investments and that she was a shareholder of this company. She attached a receipt for payment of Kshs. 2100/= which she claimed was for survey dated 3/5 without the year being indicated. She produced a share certificate dated 5/3/1992 bearing certificate number 5275. The receipt issued by Nyakinyua Investments for payment of Kshs. 600/= dated 6/4/83 bears share certificate number 01062 and the ballot number 38 which the Plaintiff produced is not dated. There is nothing to link the ballot to the suit land which the Plaintiff claims was allocated to her by Nyakinyua Investments. The Plaintiff did not lead evidence to show when she acquired the suit land and the process through which she acquired title over the suit land. The Plaintiff did not explain why it took her 25 years from 6/4/1983 when she paid the survey fees to process the title in 2008. It is highly unlikely that she could have paid the survey fees for the plot on 6/4/1983 if she was issued a share certificate by Nyakinyua Investments Limited on 5/3/1992 because logically speaking the share certificate which confirms membership ought to precede the allocation of the plot and payment of survey fees.

22. Going by the letter dated 27/6/2005 from the Land Registrar, Thika, stating that the land register for the Suit Property was missing, the Plaintiff should have adduced evidence to show that the land register was eventually traced before the title deed was issued to her in 2008. The Plaintiff did not call a witness from the lands office to verify the authenticity of the title deed she holds over the Suit Property.

23. The 8<sup>th</sup> Interested Party's witness contradicted the evidence of the Interested Party on the payment of the purchase price for the suit land. The Interested Party claimed he had paid the purchase price in full in 1992 while the 8<sup>th</sup> Interested Party's witness testified that he paid Kshs. 50,000/= and the balance of Kshs. 70,000/= formed part of the assets of the Estate of Rebecca Mukui. The 1<sup>st</sup> to 7<sup>th</sup> Defendants have been on the suit land from 2005. No explanation was given as to why neither the Interested Party who claimed to have taken possession in 1992 and Rebecca Wanjiku Mukui did not take steps to have the 1<sup>st</sup> to 7<sup>th</sup> Defendants before Rebecca died on 13/2/2007. No evidence was led to show how Rebecca acquired the land from Nyakinyua Investments Limited. The documents from Nyakinyua Investments which the 8<sup>th</sup> Defendant produced could possibly relate to the plots listed in the certificate of confirmation of the grant produced by the 8<sup>th</sup> Defendant.

24. Neither the Plaintiff nor the 8<sup>th</sup> Defendant called a witness from Nyakinyua Investments to give evidence on how they acquired the suit land from this company.

25. The Plaintiff has failed to prove her claim to the Suit Property on a balance of probabilities, it is dismissed. The 8<sup>th</sup> Defendant and the Interested Party did not prove their counterclaims on a balance of probabilities, they are dismissed. Each party will bear its own costs.

Dated and delivered at Nairobi this 21<sup>st</sup> day of November 2019.

**K.BOR**

**JUDGE**

**In the presence of: -**

Mr. Anthony Burugu for the Plaintiff

Mr. D. Kirwa holding brief for S.W. Ndegwa for the 1<sup>st</sup> to 7<sup>th</sup> Defendants

Mr. A.K. Muchigi holding brief for Mrs. Wainaina for the 8<sup>th</sup> Defendant and the Interested Party

Mr. V. Owuor - Court Assistant