



Nganga v Land Registrar, Kiambu & another (Environment & Land Case E084 of 2021) [2024] KEELC 954 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 954 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E084 OF 2021**

JG KEMEI, J

FEBRUARY 22, 2024

BETWEEN

SAMSON KURIA NGANGA PLAINTIFF

AND

LAND REGISTRAR, KIAMBU 1ST DEFENDANT

ROSE WANGARI WAMUI 2ND DEFENDANT

JUDGMENT

1. Vide a Complaint dated 12/8/2021 and filed herein on 11/8/2021, the Plaintiff avers that at all material times he was the registered owner of LR No. Kiambaa/Thimbigua/3227 (hereinafter referred to as the suit land) and was issued with a title deed on 10/11/1997. That the suit land was a subdivision of LR No. Kiambaa/Thimbigua/626 which he claims he jointly co-owned with Bedan Gachugua Kihara after purchasing the late Mungai Kihara's share in 1994. Mungai Kihara and Bedan Gachugua Kihara were brothers. That sometime in the year 2021 the Plaintiff realized that his title deed he had to the suit land was missing and, in an attempt to apply for replacement, and to his shock, learnt that the suit land had been fraudulently transferred on 23/5/2003 to the 2nd Defendant without his knowledge or consent.
2. The Plaintiff has listed particulars of the Defendants' fraud at para. 9 of the Complaint thereof and maintains that he has all along been in occupation of the suit land and even buried his daughter and brother thereon. He prayed for Judgment against the Defendants jointly and severally for;
 - a. An order under Section 26 of *Land Registration Act* ordering the Cancellation of the title deed to LR No. Kiambaa/Thimbigua/3227 issued to the 2nd Defendant after 10th November 1997 and all transactions, accruing there from and all entries entered in the register and/or green cards be hereby declared null and void and be cancelled forthwith.



- b. A permanent injunction restraining the 2nd Defendant, her kin, agents, servants or anyone claiming under them from trespassing, ingressing, cultivating, selling, transferring, subdividing, disposing off, from doing or suffering to be done any act or omission that will in any way interfere with the extent, boundaries and/or acreage of the property or in any other manner interfering with LR No. Kiambaa/thimbigua/3227.
 - c. A declaration that LR No. Kiambaa/thimbigua/3227 belongs to the Plaintiff to the exclusion of the 2nd Defendant or anyone claiming title under them whatsoever.
 - d. General damages.
 - e. Costs of this suit.
 - f. Interest on (d) and (e) above until payment in full.
 - g. Any other relief that this honorable Court may deem just and fair to order.
3. The suit is unopposed despite evidence of service of summons having been effected upon the 1st Defendant. With leave of Court on 5/7/2022 the 2nd Defendant was served by substituted service by way of an advert in the newspaper - DN of 22/9/2022. It is on record that the 1st and 2nd Defendants failed to enter appearance and file any defence.
 4. On 17/10/2023 the Plaintiff, Samson Kuria Ng'ang'a solely testified as PW1. He relied on his witness statement dated 12/8/2021 as his evidence in chief supported by documents listed in his List of Documents of even date namely copies of green cards issued on 6/1/2021 and 12/4/2021; copies of title deeds for the suit land and LR No. Kiambaa/Thimbigua/626; official search dated 31/3/2021 and copies of obituaries of his daughter and brother indicating their place of burial in the suit land which obituaries were produced as PEX1-4. PW1's testimony was a replica of the averments in his plaint already summarized above.
 5. The Plaintiff's Learned Counsel Mr. Mwangi proposed to file written submissions in support of his case but failed to do so. This notwithstanding the Court shall determine the dispute based on the material placed before it on record.
 6. The germane issue for determination is whether the Plaintiff has proven his case.
 7. It is trite that he who alleges must prove. Section 107 [Evidence Act](#) provides;
 - “ 107. Burden of proof
 - (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
 8. The burden of proof in civil cases is on a balance of probabilities. This burden is borne by he who asserts. The standard required is that proof of the case against the Defendant is “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence adduced before it, the occurrence of an event was more likely than not. Even in undefended cases, the burden of proof is not diminished in any way.



9. The Plaintiff's case is that he purchased the suit land from the late Mungai Kihara sometime in the year 1994 and he was duly issued with his title deed on the 10 /12/1997 (see PEX 3). The suit land was a subdivision of Kiambaa/Thimbigua/626. That without his knowledge or consent, the suit land was allegedly fraudulently transferred to the 2nd Defendant by the 1st Defendant. PW1 testified that he discovered the fraudulent transfer on or about 2021 and accused the Defendants of fraudulently forging his signature in the transfer forms, obtaining his original title deed and using it to effect the transfer, misrepresenting his attendance in the Land Control Board.
10. Has the Plaintiff discharged the burden of proof? The Plaintiff produced a copy of first the joint title deed (with Bedan Kihara) issued on 3/3/1994 as buttressed by entry No. 2 in the copy of Green card issued on 6/1/2021 and his own title deed issued on 10/11/1997. This ownership is also backed by entry No. 1 in the Green card for partition 626 issued on 12/4/2021. Absent any evidence to the contrary, the evidence of the Plaintiff is uncontroverted and remains unchallenged.
11. Section 26 of the [Land Registration Act](#) provides:-
- “26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The Certificate of Title issued by the Registrar upon registration ... 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.”
12. Recently the Court of Appeal in [Bandi v. Dzomo & 76 Others](#) (Civil appeal 16 of 2020) (2022) KECA 584 cited with approval its earlier decision in [Benja Properties Limited v. Syedna Mohammed Burhannudin Sabed & 4 Others](#) [2015]eKLR, that:-
- “It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of *Wuta-Ofei v Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”
13. Having tendered evidence of ownership and demonstrated possession and occupation of the suit land by way of burial of his kin on the suit land, and in the absence of evidence that contradicts the Plaintiff's case, the Court finds that the Plaintiff has discharged the burden of proof required of him.



14. On the question of general damages, the Court finds that the same is not awardable seeing that the Plaintiff has not guided the Court on the nature of injury suffered. In the absence of any evidence in support of the claim, the same is dismissed.
15. In the end the Court enters Judgment in favour of the Plaintiff as follows:-
- a. An order under Section 26 of [Land Registration Act](#) ordering the cancellation of the title deed to LR No. Kiambaa/Thimbigua/3227 issued to the 2nd Defendant after 10th November 1997 and all transactions, accruing there from and all entries entered in the register and/or Green cards be hereby declared null and void and be cancelled forthwith.
 - b. A permanent injunction restraining the 2nd Defendant, her kin, agents, servants or anyone claiming under them from trespassing, ingressing, cultivating, selling, transferring, subdividing, disposing off, from doing or suffering to be done any act or omission that will in any way interfere with the extent, boundaries and/or acreage of the property or in any other manner interfering with LR No. Kiambaa/Thimbigua/3227.
 - c. A declaration that LR. No. Kiambaa/Thimbigua/3227 belongs to the Plaintiff to the exclusion of the 2nd Defendant or anyone claiming title under them whatsoever.
16. I make no orders as to costs.
17. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent but served

1st Defendant – Absent but served

2nd Defendant – Absent but served

Court Assistants – Phyllis/Oliver

