



**Kang'ethe v Wambugu & 3 others (Environment & Land Case
100 of 2019) [2024] KEELC 1533 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 100 OF 2019**

JG KEMEI, J

MARCH 21, 2024

BETWEEN

GEORGE KIMANI KANG'ETHE PLAINTIFF

AND

LUCY GATHONI WAMBUGU 1ST DEFENDANT

JOSEPH LELO 2ND DEFENDANT

LAND REGISTRAR, KIAMBU COUNTY 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. Vide a Plaint dated 29/5/2019, the Plaintiff claims that he is the registered owner of land parcel known as Kiambu/Municipality/Block III/45 (the suit land). He accuses the Defendants of fraudulent collusion and transfer of the suit land to the 1st Defendant leading to issuance of a Certificate of lease on 23/2/2010. That the 1st Defendant has entered into an Agreement for Sale with the 2nd Defendant and executed a transfer which is pending registration. Further that the 2nd Defendant has entered the suit land and damaged it by digging up trenches for a perimeter wall hence the suit.
2. The Plaintiff prays for Judgment against the Defendants for;
 - a. A declaration that land title number Kiambu/Municipality/Block III/45 was illegally and fraudulently transferred to the 1st Defendant.
 - b. The register for land title number Kiambu/Municipality/Block III/45 be rectified by deleting the name of the 1st Defendant and reinstating the name of the Plaintiff as the registered proprietor thereof.



- c. A declaration that the Plaintiff GEORGE KIMANI KANG'ETHE is the legal owner of the land title number Kiambu/Municipality/Block III/45.
 - d. An order of eviction against the 1st and 2nd Defendants.
 - e. A permanent injunction to restrain the 1st and 2nd Defendants either through themselves or through any person whomsoever from entering Into, cultivating, fencing, building selling, developing, disposing, transferring and or in any other way interfering with the land title number Kiambu/Municipality/Block III/45.
 - f. Damages for trespass against the 1st and 2nd Defendants.
 - g. In any of the foregoing events, the costs of the suit.
3. The 1st Defendant filed her a Statement of Defence dated 20/6/2019. She denied the Plaintiff's claims and put him to strict proof. She stated that she has always been the registered owner of the suit land having acquired a valid title from the Plaintiff in the year 2010. She denied any fraudulent allegation against her and admitted the agreement for sale between her and the 2nd Defendant. She urged the Court to dismiss the suit with costs.
 4. Similarly, the 2nd Defendant filed his Defence and counterclaim dated 6/3/2020. With leave of Court the 2nd Defendant later filed an amended Defence dated 28/9/2020 and abandoned his counterclaim. In the amended Defence, he denied the Plaintiff's claim and stated that the suit land belongs to the 1st Defendant as evidenced by copies of official search dated 22/2/2019 and 30/4/2019. Refuting the particulars of fraud, he insisted that the transfer documents to the 1st Defendant bear the true signature of the Plaintiff and that he carried out due diligent on ownership of the suit land. He admitted entering into a sale agreement with the 1st Defendant for the suit land, conducted a boundary survey on the suit land to confirm acreage and obtained requisite documents to effect the transfer in his favor. That he is an innocent purchaser for value without notice of alleged fraudulent dealings by the 1st Defendant.
 5. The 3rd and 4th Defendants filed a joint Statement of Defence dated 17/7/2019. In a similar fashion they denied the Plaintiff's claims on ownership of the suit land and fraudulent activities levelled on them and put him to strict proof.
 6. The Plaintiff filed his reply to the 1st, 3rd and 4th Defendants' Statements of Defence dated 18/12/2019 and reiterated his averments in the Plaint entirely. He averred that the 1st Defendant has failed to demonstrate her acquaintance with him prior to the illegal transfer of the suit land in her name. That the 3rd and 4th Defendants' Defence is lacking in substance and consists of mere denials.
 7. Additionally, the 2nd Defendant filed a notice of indemnity against the 3rd Defendant in the event that the Plaintiff's suit succeeds. He prayed for refund of the deposit of the purchase price being Kshs. 10M and Kshs.1.5M stamp duty as well as general damages for loss of expectation of title over the suit land.
 8. Opposing the 2nd Defendant's notice of indemnity, the 3rd and 4th Defendants filed a response dated 15/9/2021. They maintained that they are strangers to the averments contained in the said notice.
 9. The Plaintiff, George Kimani Kangethe, testified as PW1. He relied on his statement filed on 19/2/2020 as his evidence in chief. It was his testimony that he purchased the suit land from Mumwe Investment Ltd in the year 2004 upon his offer having been accepted vide a letter dated 7/10/2003 by the appointed agents, Llyod Masika. That he engaged the firm of Waruhiu K'Owande and Ng'ang'a Advocates to act for him in the transaction whereas Cheptumo & Co. Advocates acted for Mumwe Investment Ltd. That he paid the entire purchase price of Kshs. 1M as shown by documents in page



- 3 - 5 of his trial bundle. He added that the suit land was transferred to him and was issued with a Certificate of Lease dated 3/1/2005. That he took possession and farmed thereon and has paid land rates for the suit land to Kiambu County Govt upto the year 2025 and was issued with a Rates Clearance Certificate. That on 11/5/2019 his caretaker informed him of strangers on the suit land who were digging trenches to erect a perimeter wall. PW1 reported the incident at Runda Police station and later to the Directorate of Criminal Investigations. That investigations revealed that the 1st Defendant became the registered owner of the suit land after purportedly purchasing the suit land from PW1. PW1 was shown acknowledgment of payments allegedly signed by him which he denied in toto and maintained that the 1st Defendant is a stranger to him. PW1 termed the said transfer and acknowledgements as forgeries and stated that he has never ceded possession of his original Certificate of Lease. He urged the Court to nullify the 1st Defendant's title and revert the ownership of the suit land
10. He also produced PExh. 1 - 16 in support of his case. He denied knowing the 1st Defendant or entering into any sale agreement with the 1st Defendant and maintained that he held the original title of the suit land.
 11. In cross, PW1 confirmed his ID number is 11447670 just as it appears in the sale agreement dated 15/12/2009 at page 61 of the bundle; a certificate of lease in the 1st Defendant's names at pages 57-59 and page 67 copy of green card confirming the 1st Defendant's ownership. He said he did not know the 1st Defendant and only saw her in the Court during the hearing of the criminal case involving the subject suit land. Shown copies of official search dated 30/4/2019, PW1 conceded that it showed that the suit land is registered in the name of the 1st Defendant. He added that he had been paying land rates for the property for 2015-2025 as evidenced by copies of receipts at page 42 of his bundle. Shown the surveyors report, PW1 said he was not aware that the surveyor had visited the suit land to ascertain beacons/boundaries.
 12. PW1 further testified that he paid Kshs. 100,000/- on 24/10/2003 though he had no document to show he paid deposit before 17/10/2003. Moreover, PW1 admitted the Land Control Board consent had been acquired though he did not produce it. That he paid for stamp duty as demonstrated by receipt dated 5/1/2005.
 13. The Plaintiff's wife, Catherine Nyambura testified as PW2. She adopted her statement dated 18/12/2019 as her evidence in chief. It was her testimony that in 2003 she and PW1 bought the suit land and the transaction was completed in 2005 and a title deed issued to her husband, PW1. She denied the sale of the suit land to the 1st Defendant and termed any transfer thereof as fraudulent. In cross, PW2 said the transfer of the suit land to the 1st Defendant is fraudulent. Shown entry 7 of the green card PW2 said the 1st Defendant was issued with title on 23/2/2010. On Court's inquiry about occupation of the suit land, PW2 said it was not occupied by anybody.
 14. The 3rd witness was Kinyua Mwarania who also adopted his statement dated 18/12/2018. He informed the Court that he has known the Plaintiff for over 10 years and since 2015 he has been PW1's caretaker of the suit land. In cross, PW3 said between the years 2010 – 2015 he was employed by the Plaintiff as a caretaker of the suit land. However, he did not adduce any evidence to support the said employment.
 15. Daniel Gutu, a forensic document examiner took the stand as PW4. He told the Court that he prepared the forensic report dated 14/10/2018 based on the documents (certificate of lease for parcel 45, sale agreement dated 15/12/2009, green card) presented to him. Specimen signatures from the Plaintiff and the 1st Defendant before Court were forwarded to DCI by PC David Mailu. He produced his report as Pex.17.



16. That marked the close of the Plaintiff's case.
17. The 1st, 3rd and 4th Defendants did not call any witnesses.
18. On his part, the 2nd Defendant Joseph Lelo testified as DW1. He relied on his statement dated 6/3/2020 as his evidence in chief supported by documents he produced as Dex1-7. The gist of his testimony was a replica of the contents of the amended Defence summarized in para. 5 above. In cross, DW1 said he entered into a sale agreement with the 1st Defendant though the registration had not been done. DW1 admitted that he did not have a presentation book number nor proof of payment. Regarding his counterclaim, DW1 said he claims Kshs. 10M from the 3rd Defendant which was paid to the 1st Defendant. That his claim is based on the fact that the lands office issued searches showing that the land was registered in the 1st Defendant's name and he relied on the said searches to purchase the suit land.
19. On 23/10/2023 directions were taken for parties to file their submissions. None of the parties complied.
20. The issues that commend themselves for determination in my view are;
 - a. Who is the bona fide owner of the suit land?
 - b. Has the Plaintiff proven his claim?
 - c. Who meets the cost of the suit
21. It is trite that he who alleges must prove. See Section 107 of *Evidence Act* provides as follows;
 - “ 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.”
22. The Plaintiff's case is that he is the registered proprietor of the suit land which according to him was fraudulently transferred to the 1st Defendant without his knowledge or consent. To buttress his case he produced Pex. 1- 16 and called three witnesses including an expert witness. The Defendants deny the Plaintiff's averments and put him to strict proof. The 1st Defendant though served did not lead any evidence in contravention of the Plaintiff's case.
23. The Plaintiff produced an offer letter by Lloyd Masika LTd dated 7/10/2003 for LR No. 5974/45 for an agreed purchase price of Kshs. 1M; banker's cheque of Kshs. 971,008/= in favor of his Advocates, Waruhiu K'Owade & Nganga Advocates, transfer of sale in his name dated 10/8/2004, certificate of lease for the suit land issued to PW1 on 3/1/2005, clearance certificate of the suit land issued by Kiambu County Govt on 25/11/2014, clearance certificate serial no. 000361 valid upto 25/2/2025; copy of OB number reported at Runda police station, certificate of lease issued to 1st Defendant on 23/2/2010, sale agreement between Plaintiff and 1st Defendant dated 15/12/2009, acknowledgement of Kshs. 1M by Plaintiff, copy of green card for the suit land, sale agreement between the 1st and 2nd Defendants and Affidavit of negation of spousal consent by the 1st Defendant.
24. Moreover PW1's wife also testified that they purchased the suit land together and the Plaintiff was duly registered as the proprietor. The 3rd witness Daniel Gutu a forensic document examiner testified that as regards the signatures in the transfer documents he examined, the signatures by the Plaintiff were dissimilar and, in his opinion, therefore, the Plaintiff did not sign the transfer documents.



25. Despite being served and given opportunity to present her case, the 1st Defendant failed to tender her Defence and case was deemed closed on 23/10/2023.
26. The 2nd Defendant testified as DW1 and admitted entering into a sale agreement with the 1st Defendant and the transfer was pending registration. He produced certificate of lease in the 1st Defendant's name issued on 23/2/2010 and lease dated 13/1/1992, sale agreement dated 27/2/2019 between him and 1st Defendant, application for official search and copy of official search dated 30/4/2019; copy of boundary survey report dated March 2019; clearance certificate in 1st Defendant's name dated 9/5/2019, copy of receipt for lodging the transfer, assessment for stamp duty and its receipt. In cross, DW1 admitted that the application for official search did not have a daybook number and there was no proof of payment for the search. Regarding his notice of indemnity against the 3rd and 4th Defendants, DW1 said he is seeking a refund of Kshs. 10M paid as stamp duty. That the amount was paid to the 1st Defendant and not the 3rd Defendant but he blamed the Lands office who issued searches confirming the 1st Defendant's ownership and on that basis he proceeded to purchase the suit land.
27. 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, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”

28. Section 25 [Land Registration Act](#) (LRA) fortifies the rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided for in the Act.
29. Last but not least Article 40 (6) of [the Constitution](#) of Kenya confers protection to the right to own property. It states as follows:-
- “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”
30. The Plaintiff adduced evidence to prove his ownership of the land. He explained to the Court how he purchased the land from Mumwe Investment Ltd and a certificate of lease issued thereof. In accusing the Defendants of fraud, the Plaintiff called an expert witness who gave testimony on the forged signatures. He stated that the signatures on the transfer to the 1st Defendant are forgeries and that according to his report the same are not attributed to the Plaintiff. The evidence of the expert witness has not been rebutted by the Defendants.



31. In the Court of Appeal case of *Munyu Maina Vs. Hiram Gathiha Maina Nyeri* Civil Appeal No. 239 of 2009 [2013] eKLR the Learned Judges stated that when a registered proprietor's 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 need not be noted on the register.
32. The 1st Defendant failed to defend her alleged ownership of the suit land which she purportedly bought from the Plaintiff. It is trite that one cannot pass a better title than she has. The 2nd Defendant's claim that he is an innocent purchaser for value falls on quicksand because he failed to prove the elements necessary for a bona fide purchaser for value as held in the case of *Katende Vs. Haridar & Company Limited* [2008] 2 E.A.173 the Court of Appeal in Uganda held that:
- “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;
 - g. he was not party to any fraud.”
33. In addition, the 2nd Defendant failed to prove payment of the purchase price of Kshs. 25M for the suit land according their sale agreement dated 27/2/2019. It was his testimony that he paid a deposit of Kshs. 10M through his counsel but was not certain how much was paid directly to the 1st Defendant. Further there was no evidence of payment of the balance of Kshs. 15M, if at all. There was also no evidence of obtaining or seeking Land Control Board consent. It was his concession also that he did not have a title in his name because the transaction was pending registration as at the time of the hearing. On his volition DW1 told the Court that he had abandoned his counterclaim against the 1st Defendant.
33. The Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado* [2015] eKLR dismissed an appeal by the appellant who in the trial Court sought indemnity from the Respondent for cancellation of his name from the land register thereby reverting ownership of the suit land to the initial owner. Declining the appeal, the Court of Appeal observed as follows;
- “Since the appellant's title is under challenge, in order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”



34. The Appellate Court went on to hold that;

“Without any documents to support the registration of the appellant as the proprietor of the suit property, the appellant failed to discharge the evidentiary burden of proof as required, and the only conclusion that we can reach on a balance of probabilities is that, since the appellant has not proved or shown the root of his purported title, he could not acquire title to the suit property, which in any event, was incapable of passing to him upon the registration of the purported transfer

Accordingly, having failed to conduct a proper due diligence on the ownership of the suit property, or prove how he acquired his title we find that the appellant has not demonstrated that he was a bonafide purchaser, and further having failed to prove that he paid any consideration for the suit property, we find that he was not a bona fide purchaser for value. As a result, we consider that, the learned judge rightly ordered the rectification of the register to restore the Plaintiff as the registered proprietor.”

36. On the question of trespass, it is the Plaintiffs case that the 2nd Defendant trespassed onto the land and dug trenches for purposes of fencing the suit land. That in the process of so trenching the land the 2nd Defendant cut trees on the land hence occasioning him loss and damage. The 2nd Defendant admitted the acts of trespass as pleaded by the Plaintiff but explained that he was trenching the land for purposes of fencing as he had purchased the same from the 1st Defendant. The Court having held as it did in the preceding paras that the transfer of the suit land to the 1st Defendant was a pure fraud, the 1st Defendant therefore did not acquire any interests title capable of being conveyed to any third party. Having nothing she therefore sold nothing to the 2nd Defendant. Consequently the Defendant acquire no interest title in the suit land so much so that his entry into the suit land was unlawful; unauthorized and without the consent of the Plaintiff, the legitimate land owner. The Court therefore finds that trespass was admitted. It is trite that trespass is actionable perse and based on the evidence led in the trial the Court awards the Plaintiff the sum of Kshs 1.0 Million trespass against the 2nd Defendant.

37. The 2nd Defendant has taken out third party proceedings against the 3rd Defendant in form of indemnity for the loss he has suffered he sought the following orders;

- a. Indemnity against the Plaintiff's claim herein in case the same succeeds.
- b. Refund of all the sums paid being the deposit of purchase price in the sum of Kshs. 10,000,000/-, all the sums used towards acquisition of the property including stamp duty paid in the sum of Kshs. 1,584,040/-.
- c. Full indemnity in respect of the general damages suffered for loss of expectation of title over the suit property.
- d. Costs of defending the suit hereof payable to its Advocates on indemnity basis.

38. The record shows that the 2nd Defendant failed to proof his claim against the 3rd party, he led evidence as follows;

“I am seeking a refund of Kshs. 10M and the stamp duty that I paid from the 3rd Defendant. ..
The amount of Kshs. 10 M was paid to the 1st Defendant”

39. The 2nd Defendant failed to lead evidence to show that he paid any monies to the 3rd Defendant. After all he admitted that the Kshs 10 Million was paid to the 1st Defendant and that the transfer had not



been registered by the time the suit was filed. The Court finds that this claim has not been proven and it therefore fails.

40. Relying on the above findings and the weight of the evidence and material before Court, the Court finds that the Plaintiff has discharged the burden of proof to the required standard. The suit is allowed as prayed.
41. Final orders for disposal;
 - a. It is hereby declared that title No Kiambu/Municipality/Block III/45 was illegally and fraudulently transferred to the 1st Defendant.
 - b. It is hereby ordered that the register for title number Kiambu/Municipality/Block III/45 be and is hereby rectified by deleting the name of the 1st Defendant and reinstating the name of the Plaintiff as the registered proprietor thereof.
 - c. It is further declared that GEORGE KIMANI KANG'ETHE is the legal owner of the land title number Kiambu/Municipality/Block III/45.
 - d. It is hereby ordered that the 1st and 2nd Defendants be and are hereby evicted forthwith.
 - e. A permanent injunction to restrain the 1st and 2nd Defendants either through themselves or through any person whomsoever from entering into, cultivating, fencing, building selling, developing, disposing, transferring and or in any other way interfering with the land title number Kiambu/Municipality/Block III/45 be and is hereby issued.
 - f. Damages for trespass against the 2nd Defendant in the sum of Kshs 1.0 Million to be paid jointly and severally.
 - g. The prayer for indemnity against the 3rd Defendant be and is hereby dismissed.
 - h. The costs of the suit shall be in favour of the Plaintiff.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 21ST DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Murugu HB Macharia for Plaintiff

Njehu for 1st Defendant

Jane Okoth for 2nd Defendant

3rd and 4th Defendants – Absent

Court Assistant –Oliver

