



**Kunyaga v Mwangi (Environment and Land Case Civil Suit
669 of 2017) [2024] KEELC 1501 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 669 OF 2017
MN GICHERU, J
MARCH 18, 2024**

BETWEEN

EDWARD WANDIA KUNYAGA PLAINTIFF

AND

NAOMI MUTHONI MWANGI DEFENDANT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendant.
 - i. The defendant be permanently restrained by herself, her authorized agents, servants or employees from trespassing and or in any other way from interfering with the plaintiff's ownership, possession and user of Plot No. 303/Business-Ongata Rongai Trading Centre.
 - ii. An order of mandatory injunction be issued compelling the defendant by herself and or by her authorized agents, servants and employees to demolish the semi permanent structures erected by the defendant on Plot No. 303/Business-Ongata Rongai Trading Centre.
 - iii. Damages for trespass.
 - iv. Costs of the suit.
 - v. Any other or better relief that this court may deem just and proper to grant.

This is per the plaint dated 27/2/2013.

2. The plaintiff's case is as follows. He is the owner of Plot No. 303/Business- Ongata Rongai Trading Centre which he bought from Stanley Konana Massengke vide a sale agreement dated 27/1/2012 for Kshs. 4 million. Before purchasing the land, the plaintiff conducted a search and established that it was in the name of the said Stanley Konana. He also visited the land and confirmed that it was vacant. He



then took possession and constructed 12 stores which he let out to tenants. A caretaker by the name of Moses Munyobi was also employed to take care of the land.

3. On 17/2/2013, the plaintiff received a report from his caretaker that some people had trespassed onto the land and were in the process of erecting a semi-permanent mabati structure. He learnt that the said trespassers had been sent by the defendant. It is then that he also learnt that the defendant was claiming ownership of the suit premises. He insists that he is the owner of the suit land and prays for the orders as per paragraph 1 above.
4. In support of his case, the plaintiff filed the following evidence.
 - a. Witness statements by himself, Moses Munyobi, Samson Nabusi, Peter Monare and Stanley Konana.
 - b. Copy of certificate of official search dated 20/5/2013.
 - c. Copy of sale agreement dated 27/1/2012.
 - d. Copy of transfer dated 26/1/2012.
 - e. Copy of certificate of official search dated 25/1/2012.
 - f. Copy of letter of allotment whose date is not clear. The date captured is 16/1/200.
 - g. Copies of money transfer request dated between 7/2/2012 and 17/4/2012 for Kshs. 1, 350,000/-.
 - h. Copy of application for transfer dated 25/1/2012.
 - i. Copy of rates clearance certificate dated 3/2/2012.
 - j. Copy of map.
 - k. Copy of plaintiff's witness statement dated 19/7/2016.
 - l. Copy of map certified on 28/11/2019.
 - m. Copies of photographs showing structures of Plot No. 303 business.
 - n. Reports of site visit dated 12/3/2018 and 30/5/2018 written by the County Physical Planner.
5. The defendant, through counsel on record filed a written statement of defence dated 15/4/2013 in which she avers as follows.

Firstly, she is the owner of Plot No. 730 Residential-Ongata Rongai Trading Centre which was purchased by her husband Justus Ngure Nyaga (now deceased) from Duncan Gachoka Kaihuri on 12/6/1987.

Secondly, the deceased took vacant possession of the land and developed it by building a home in the year 1995 where they resided until the year 2010.

Thirdly, following the death of the defendant's husband she moved out of the home and left it under a caretaker by the name Darius Isoka.

Fourthly, around December 2011, the defendant was shocked to find that her home had been destroyed and her property stolen. The destruction and the theft involved a four bedroom wooden house together with furniture, clothing and documents. Also destroyed was a stone house which was under construction up to the lintel level and a vehicle KTG 253 Volvo 244 GL was stolen.



Fifthly, the matter was reported at Ongata Rongai Police Station under OB No. 32/27/12/2011 whereupon the police visited the site and took photographs.

Sixthly, in January and February 2012, the plaintiff entered the land and started developing it.

Finally, the defendant has been paying land rent and rates for Plot No. 730 since 1987 to the local authority and the plaintiff has used the materials belonging to the defendant to construct on her land.

For the above and other reasons, she prays for the following orders in the counter claim.

- i. That the plaintiff and anybody claiming through him be evicted from Plot No. 730.
- ii. An order compelling the plaintiff and anybody claiming through him to demolish the structures on the defendants' land.
- iii. Damages for trespass
- iv. Dismissal of the suit with costs and the costs of the counterclaim be awarded to the defendant.

6. In support of her case, the defendant filed the following evidence.

- i. Witness statements by herself, Daniel Ngure Nyaga, Benard Maina Mbuthia, James Muhia Kaberere, Moses J. Jemnyango and Corporal Joseph Karanja.
- ii. Copy of sale agreement dated 12/6/1987.
- iii. Copy of letter dated 5/10/1998 by Duncan G. Kaihuri.
- iv. Copy of letter dated 27/7/2006.
- v. Copy of sale agreement between Isaac Kariuki Karinu and Stanley Massenke Konana.
- vi. Copy of letter by the director of National Registration dated 27/7/2012.
- vii. Identification reports for Isaack Kamau Karinu and John Ojung'a Oluoch both printed on 20/7/2012.
- viii. Rent payment receipt dated 14/9/2012.
- ix. Complaint letter on trespass dated 10/10/2012.
- x. Defendant's witness statement to the police dated 12/10/2012.
- xi. Transfer form of the suit plot to the defendant dated 13/11/2012.
- xii. Copies of certificates of official search dated 28/12/2012 and 15/4/2013, for Plot No. 730.
- xiii. Photographs and maps showing the defendant's house before demolition and the land on the official maps.
- xiv. Other relevant documents.

7. In addition to the evidence filed by the parties, there are two reports filed by County Physical Planner dated 12/3/2018 and 30/5/2018 respectively. The report dated 30/5/2018 says at Observation and Conclusion Number 3, "As indicated in the report submitted in court on 20/3/2018, the disputed Plot (indicated as 303 on the map) has temporary structures but also has an old foundation of a demolished house and old fence".



8. At the trial which lasted from 5/12/2017 to 17/5/2023, the plaintiff testified and called one witness by the name of Stanley Konana. We also had the evidence of Isaac Parashina, the Kajiado County Physical Planner. On the other hand, the defendant testified and called three witnesses who included Daniel Mburu Nyaga, Moses Jemmjango and Corporal Joseph Karanja of DCI Ongata Rongai.
9. Counsel for the parties were to file and serve written submissions by 31/1/2024 and 29/2/2024 respectively but only the defendant was able to comply with the above timelines. In writing this judgment, I have only considered the defendant's submissions.
10. I have carefully considered all the evidence adduced by the parties including the witness statements, documents and testimony at the trial. I have also considered the written submissions by the defendant, the issues raised therein and the law cited. I find that there is only one issue to be determined namely – who between the plaintiff and the defendant has established a better claim to the disputed land and why?
11. I find that it is the defendant who has proved that she is the owner of the disputed land for the following reasons.

Firstly, it is the defendant whose ownership goes to the root of the title. Not only has the defendant proved that she inherited the land from her husband but she has also proved that he bought it from Duncan Gachoka Kaihuri way back on 12/6/1987. The ownership of the three has not been challenged at all by the plaintiff. The plaintiff's ownership has been successfully challenged because it has been proved that Isaac Kariuki Karimi who purported to sell the same land to Stanley Konana Ole Massenke who sold it to the plaintiff used an identity card number 2488490 in the sale agreement. This ID card number has been proved to belong to John Ojunga Oluoch and Isaac Kariuki Karimi not only used a false ID card number but also a false name because his real name is Isaack Kamau Karimi and the real ID is No. 24222592. In the case of Munyu Maina –versus- Hiram Gathiha Maina Civil Appeal no. 239 of 2006, the Court of Appeal held, inter alia,

“...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...”

In this case, it is obvious that the purported seller to Stanley Konana who sold to the plaintiff was a fraudster using false identity. He could not therefore pass a good title to both Stanley Konana and the plaintiff.

12. Secondly, the evidence by the defendant that she occupied the land prior to the occupation by the plaintiff has been proved by her evidence which is consistent and credible and which is also corroborated sufficiently in material particulars by the evidence of her neighbor Moses Jemnyango who said that the defendant was his neighbor along Gatakaa Road near Beacon Hope Hospital.

The evidence from the two site visits confirms the existence of temporary structures and an old foundation of a demolished house and old fence. Paragraph 8 of the sale agreement dated 27/1/2012 between the plaintiff and Stanley Konana provides,

“The land is sold with vacant possession and the purchaser is at liberty to take possession of the property upon payment of the 1st instalment”.

From the evidence from the defendant, her witnesses and the county physical planner, the land was not vacant. Why did the plaintiff not ask the seller about the presence of the structures on the land?



It was upon the plaintiff to ensure that he was buying clean land and he failed in this duty. Section 16 of the *Evidence Act* provides as follows.

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner”.

13. Since it has been found that the defendant was in possession of the suit land when the plaintiff purported to buy it from Stanley Konana, he acquired an extra burden, over the above the normal burden in Sections 107 and 108 of the *Evidence Act*, to prove that the defendant, as the occupier, was not the owner. None of these two burdens has been discharged by the plaintiff in this case.

14. For the above stated reasons, I dismiss the plaintiff's suit with costs to the defendant.

Secondly, I enter judgment for the defendant as prayed for in the counterclaim together with costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 18TH DAY OF MARCH 2024.

M.N. GICHERU

JUDGE

