



REPUBLIC OF KENYA



**Mutinda v Ogol & another (Environment & Land Case 809 of 2017)  
[2024] KEELC 1554 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1554 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 809 OF 2017**

**BM EBOSO, J  
MARCH 11, 2024**

**BETWEEN**

**JOYCE MUKONYO MUTINDA ..... PLAINTIFF**

**AND**

**FREDRICK OUMA OGOL ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR – THIKA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The primary claim in this cause was initiated by Joyce Mukonyo Mutinda on 30/10/2017 through a plaint of even date. She sought the following verbatim reliefs against the two defendants:
  - a. An order for cancellation of the registration/ title made to the 1st defendant by the 2nd defendant in respect of land parcel no. Ruiru/Kiu/ Block 10 (Mahiira)/1251 and the registration of the plaintiff in respect of the said land parcel be upheld.
  - b. Costs of the suit.
2. In response to the suit, the 1st defendant filed a defence and a counterclaim dated 17/1/2023. He contested the plaintiff's claim. By way of counterclaim, he prayed for the following verbatim reliefs against the plaintiff and the 2nd defendant:
  - a. A declaration that he is the legal and bonafide proprietor of Land Reference No. Ruiru/Kiu/ Block 10 (Mahiira)/1251.
  - b. An order directing the District Land Registrar Ruiru to cancel any and all other entries on the land register including green cards interfering with or diminishing his right to the property as the registered proprietor.



- c. A permanent injunction barring the plaintiff and the 2nd defendant or their agents from interfering, alienating or dealing with Land Reference No. Ruiru/Kiu/Block 10 (Mahiira) 1251 in any manner whatsoever prejudicial to the rights and interest of the 1st defendant.
  - d. Costs of this suit
  - e. Any other relief as this honorable court may deem just to grant.
3. The Attorney General entered appearance for the 2nd defendant and filed a defence dated 9/9/2022 to the primary claim. The Attorney General did not file a defence to the counterclaim. He did not also attend the hearing of the counterclaim.
  4. The plaintiff was not present to prosecute her claim when the suit came up for hearing on 16/2/2023. Consequently, her claim was dismissed and the 1st defendant's counterclaim was heard. The court subsequently reserved the case for Judgment on 14/3/2023. Subsequent to that, the plaintiff brought a notice of motion dated 8/3/2023 through which she sought orders reinstating her suit and re-opening the trial. The said application was allowed through a ruling dated 20/6/2023 on condition that the plaintiff would pay the 1st defendant throw-away costs of Kshs 25,000 within 30 days. In default, the plaintiff's suit was to stand dismissed.
  5. The plaintiff did not comply with the terms of the ruling. On 30/11/23, upon confirming that the plaintiff had not complied with the orders issued on 20/6/2023, the Court affirmed that the primary suit stood automatically dismissed as at 20/7/2023. What therefore falls for determination in this Judgment is the 1st defendant's counterclaim.

#### **1st Defendant's Case**

6. The case of the 1st defendant is that he is the bonafide owner of land parcel number Ruiru/Kiu Block 10(Mahiira)/1251, having purchased the land through acquisition of shares in Mahiira Housing Company Limited way back in 1986. He contends that the land falls within a subdivision scheme that belonged to Mahiira Housing Company Limited. He adds that the title which the plaintiff is waving is a fraudulent one and should be annulled.

#### **1st Defendant's Evidence**

7. Fredrick Ouma Ogol [the 1st defendant] testified as DW1. He adopted his witness statement dated 17/01/2022. He produced the following four exhibits contained in his list and bundle of documents dated 17/01/2022: (i) receipts and share certificate number 1383 dated 23/6/1989; (ii) title deed dated 20/3/2013; (iii) official search dated 5/11/2015; and (iv) a letter dated 7/7/2016 requesting for registration of a restriction on the land registrar relating to the suit land.
8. DW1's evidence was that he was the original allottee of the parcel of land that was surveyed and registered as Ruiru/Kiu Block 10 (Mahiira)/1251. DW1 added that he was issued with receipts and share certificate number 1383 dated 23/6/1989 in respect of the suit land by virtue of being a member of Mahiira Housing Company Ltd. He added that he was subsequently issued with the title deed to the suit land on 20/3/2013 after Mahiira Housing Company Ltd transferred the land to him. DW1 stated that he conducted an official search on the suit land on 5/11/2015 and the official search confirmed that he was the registered proprietor of the land.
9. DW1 further stated that upon being informed that the plaintiff was laying claim to the suit land, he reported the matter to the Thika Criminal Investigation Directorate Office. He subsequently lodged a restriction on the suit land vide a letter dated 7/6/2016 written by his advocates.



10. DW1 stated that the registration of Samuel Mbauni Gachahi on 11/9/1996 and the subsequent registration of the plaintiff as proprietors of the suit land were fraudulent and illegal and meant to deprive him of ownership of the suit land. He added that the suit land was never transferred from the Government of Kenya to an individual, contending that it was transferred to Mahiira Housing Company Ltd after which the company transferred the land to him. He urged the court to allow his counterclaim.

### **1st Defendant's Submissions**

11. The 1st defendant filed written submissions dated 27/2/2023 through M/s Mbuthia Kinyanjui & Company Advocates. Counsel for the 1st defendant identified the following as the three issues that fell for determination in the suit: (i) Whether the 1st defendant had a good title; (ii) Whether the 1st defendant's title was protected under the law; and (iii) Whether the 1st defendant was entitled to the reliefs sought in the counterclaim.
12. On whether the 1st defendant has a good title, counsel submitted that both the plaintiff and the 1st defendant hold certificates of title which were purportedly issued by the Land Registrar. Counsel added that the 1st defendant testified that he got the suit land by virtue of being a shareholder in Mahiira Housing Company Ltd. Counsel added that the 1st defendant produced evidence of a title deed, receipts and a share certificate issued by Mahiira Housing Company Ltd. Counsel added that the green card produced by the 1st defendant confirmed that the suit land was owned by Mahiira Housing Company Ltd before it was transferred to the 1st defendant. Counsel contended that the 1st defendant was able to show the root of his title. Counsel added that the 1st defendant was the first in time to be registered as the owner of the suit property after Mahiira Housing Company Ltd transferred the land to him. Counsel relied on the decision in the cases of: (i) Hubert L Martin & 2 Others vs Margaret J. Kamar & 5 Others; and (ii) Munyu Maina v Hiram Gathiha Maina.
13. On whether the 1st defendant's title is protected under the law, counsel relied on Sections 24, 25, 26, 79 and 89 of the *Land Registration Act*. Counsel further relied on the decision in the cases of *Arthi Highway Developers Limited v West End Butchery Limited* 2018] eKLR and *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others*.
14. Counsel submitted that the 1st defendant enjoys indefeasible rights over the suit land given that his name appears on the register and he has a valid certificate of title which was issued first in time compared to the plaintiff's title. Counsel contended that the plaintiff was fraudulently registered by the 2nd defendant as proprietor of the suit land in a scheme to defeat the 1st defendant's title over the suit property. Counsel faulted the 2nd defendant for issuing a certificate of title to the plaintiff on 3/12/2015 with the knowledge that a title deed relating to the suit land had already been issued to the 1st defendant on 20/3/2013. Counsel contended that despite being the proprietor of the suit land, the 1st defendant was neither served with a notice by the 2nd defendant nor a court order by either the plaintiff or the 2nd defendant authorizing them to issue another title deed in respect of the suit land. Counsel argued that the 1st defendant's title was protected under the law.
15. On whether the 1st defendant is entitled to the reliefs sought in the counterclaim, counsel submitted that the 1st defendant had proved his case on a balance of probabilities. Counsel contended that the plaintiff's title was issued to her by the 2nd defendant. Counsel urged the Court to enter judgment in favour of the 1st defendant as sought in the counterclaim.



## Analysis & Determination

16. I have considered the pleadings, evidence and submissions tendered in this suit. I have also considered the relevant legal frameworks and jurisprudence. The primary suit stood dismissed on 20/7/2023 due to the plaintiff's non-compliance with the terms of the order which had reinstated the primary suit on 20/6/2023. Secondly, the plaintiff and the 2nd defendant elected not to respond to the 1st defendant's counterclaim. Consequently, the 1st defendant's counterclaim was heard ex-parte as an undefended claim. Neither the plaintiff nor the 2nd defendant tendered evidence to controvert the evidence which the 1st defendant tendered in support of his counterclaim.
17. Taking into account the parties' pleadings and the above circumstances, the following are the two key issues that fall for determination in this Judgment: (i) Whether the 1st defendant has discharged his burden of proof under the law; and (ii) Whether the reliefs sought in the 1st defendant's counterclaim are available. I will dispose the two issues sequentially in the above order.
18. Notwithstanding the fact that the suit was undefended, the legal framework in Sections 107, 108 and 109 of the *Evidence Act* obligated the plaintiffs to place before this court evidence that would constitute proof on the balance of probabilities.
19. Has the 1st defendant discharged his burden of proof? The 1st defendant testified as DW1. He adopted his written statement dated 17/1/2022. He produced the following exhibits: (i) two receipts dated 21/6/1989 and share certificate number 1383 issued to him by Mahiira Housing Company Ltd; (ii) title deed dated 20/3/2013; and official search dated 5/11/2013. The 1st defendant testified that he was at all material times a shareholder of Mahiira Housing Company Ltd and an allottee of the suit property. He tendered evidence demonstrating that the suit property is a subdivision within a scheme that is owned by Mahiira Housing Company Ltd. He further tendered evidence showing that he acquired the suit property from Mahiira Housing Company Ltd through acquisition of shares and that the said company transferred the land to him in March 2013. The official search confirmed that he was registered as proprietor of the land on 20/3/2013.
20. In the absence of any controverting evidence, the court is satisfied that the 1st defendant has proved that he is the legitimate proprietor of the suit land. Put differently, the 1st defendant has proved his counterclaim on the balance of probabilities. That is the finding of the court on the first issue.
21. Are the reliefs sought in the counterclaim available? I have looked at the reliefs that are sought in the 1st defendant's counterclaim. Prayer (a) is a declaratory order affirming the 1st defendant as the legitimate proprietor of the suit property. Prayer (b) is a plea for an order cancelling the title held by the plaintiff. Prayer (c) is a plea for an injunctive relief against the plaintiff and the 2nd defendant. Taking into account the fact that the plaintiff's claim was dismissed and the 1st defendant has proved his counterclaim to the required standard, the court is satisfied that the above reliefs are available.
22. On costs, the plaintiff came to court waving a title. He failed to demonstrate how he acquired the title. His claim was dismissed. In the circumstances, the principle in Section 27 of the *Civil Procedure Act* will be invoked. Consequently, the plaintiff will bear costs of the primary suit and the counterclaim.

## Disposal Orders

23. In the end, the following disposal orders are made in relation to the primary suit by the plaintiff and the counterclaim by the 1st defendant:
  - a. The primary suit by the plaintiff is marked dismissed pursuant to the ruling of the court rendered on 20/6/2023.



- b. The 1st defendant's counterclaim is allowed in the following terms:
- (i) It is hereby declared that Fredrick Ouma Ogol is the legal and bonafide proprietor of land parcel number Ruiru/Kiu Block 10 (Mahiira) / 1251
  - (ii) The relevant Land Registrar is hereby directed to cancel any other title or parallel land register existing in relation to the said land.
  - (iii) A permanent injunction is hereby issued restraining Joyce Mukonyo Mutinda [the plaintiff] and the 2nd defendant from interfering with or dealing with the suit land in any manner prejudicial to the 1st defendant.
- (c) The plaintiff shall bear costs of the primary suit and the counterclaim.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 11TH DAY OF MARCH 2024**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Ms Odhiambo for the 1st Defendant

Court Assistant: Hinga

