



**Kamau v Chege & 2 others (Environment & Land Case 243 of 2017)  
[2024] KEELC 3545 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3545 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 243 OF 2017**

**JG KEMEI, J**

**APRIL 30, 2024**

**BETWEEN**

**DANIEL MUNDIA KAMAU ..... PLAINTIFF**

**AND**

**PAUL KARIUKI CHEGE ..... 1<sup>ST</sup> DEFENDANT**

**ESTHER WANJIKU KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**GITHUNGURI CONSTITUENCY RANCHING CO LIMITED .... 3<sup>RD</sup>  
DEFENDANT**

**JUDGMENT**

1. This suit was initially filed in Nairobi as Nairobi High Court ELC No. 612 of 2010 and later upon establishment of this Court and on account of geographical jurisdiction, it was transferred to Thika ELC on 2/2/2017 and renumbered Thika ELC No. 243 of 2017.
2. Vide a further Amended Complaint dated 8/9/2020, the Plaintiff's claim against the Defendants is that at all material times he was the bonafide shareholder of Githunguri Constituency Ranching Co. Ltd (hereinafter the Company) vide Share Certificate number B 1596 upon being allocated land parcel no. Ruiru KiuBlock 2 (Githunguri) 3446 (hereinafter the suit land). He accuses the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of unlawful and fraudulent collusion in transferring the suit land to the 2<sup>nd</sup> Defendant and enumerated particulars of fraud at para. 7 of the Complaint thereof. He prayed for Judgment against the Defendants as follows;
  - a. A declaration that the Plaintiff is the bona fide owner of the land parcel number Ruiru Kiu Block2 (Githunguri) 3446 and that the Plaintiff is entitled to general damages.



- b. An order directing the District Land Registrar Thika to cancel all entries on the 2<sup>nd</sup> Defendants' title on said land parcel number Ruiru Kiu Block 2 (Githunguri) 3446 and register the Plaintiff as the new owner of the same.
  - c. Eviction order against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and demolition of structures erected on said land parcel number Ruiru Kiu Block 2 (Githunguri) 3446.
  - d. Costs of this suit.
3. The Defendants oppose the Plaintiff's suit. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Joint Further Amended Defence dated 15/10/2020. They denied the Plaintiff's claim in toto and put him to strict proof. In particular the 1<sup>st</sup> Defendant contended that he bought LR Ruiru/Kiu Block 2/3446 (hereinafter the parcel 3446) from the Company in 1992 for Kshs. 4,850/= which he paid in five installments between 20/11/92 – 31/10/03. That thereafter he was issued with Share Certificate No. 4626 on 15/1/93. That on 12/11/2003 the Company cleared the 1<sup>st</sup> Defendant so that he would be registered as the owner of parcel 3446 and obtain a title deed. That the 1<sup>st</sup> Defendant obtained parcel 3446 for valuable consideration and free of any encumbrances. That in the alternative the Plaintiff's claim to parcel 3446 is time barred by dint of Section 7 of Limitation of Actions Act since the Defendants have been in occupation for over 19 years.
  4. It was further contended that the Company determined the dispute of ownership pitting the Plaintiff and 1<sup>st</sup> Defendant in July 2010 where it was resolved that the land belonged to the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant had his wife (the 2<sup>nd</sup> Defendant) registered as the land owner on 9/4/03. That he has constructed a 10 roomed house on the land at a cost of Kshs. 2.5M and denied encroaching the Plaintiff's and unlawfully erecting structures thereon. They urged the Court to dismiss the suit with costs.
  5. The Plaintiff filed his reply to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Further Amended Defence dated 1/12/2020.
  6. The Court proceedings of 20/1/2020 indicate that the suit against the 3<sup>rd</sup> Defendant was withdrawn as per the Plaintiff's Notice of Motion dated 21/2/2020. However vide a Chamber Summons dated the 15/6/2021 the 2<sup>nd</sup> Defendant applied and successfully obtained orders to enjoin Githunguri Ranching Company in the case.
  7. Similarly, the 3<sup>rd</sup> Defendant filed its statement of defence dated 22/11/2022. Partially conceding the Plaintiff's case, it averred that the Plaintiff is the owner of the suit land denoted by Share Certificate No. B - 1596 and Ballot No. 1484. The 3<sup>rd</sup> Defendant averred that Henry Wainaina Kihoro was not a director in the year 1992 and he was kicked out of the office due to misconduct. That as far as it is concerned, no transfer of the suit land has been authorized and in particular by way of issuance of a Clearance Certificate as is the norm. That the documents used by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are all forgeries, fraud, illegal and the same should be disregarded and any resultant titles to that end should be annulled or revoked since the suit land belongs to the Plaintiff.

### **The evidence**

8. Before the matter was set down for hearing, the 1<sup>st</sup> Defendant passed on in October 2020. There is no evidence of his substitution herein. The suit against him thus stood abated as at October 2021.
9. After numerous interlocutory applications, the matter was set down for hearing on 21/3/23. Despite service of the hearing date (See Affidavit of Service sworn on 10/3/23), the hearing proceeded in the absence of the 2<sup>nd</sup> Defendant.



10. The Plaintiff Daniel Mundia Kamau testified as PW1. He adopted his witness statement dated 18/2/2011 as his evidence in chief. He also produced copies of documents listed in the LOD dated 18/2/2011 as P. Ex. 1 - 8 namely Share Certificate no B3845, bundle of receipts, Share Certificate no. 1596 and Clearance Certificate dated 21/5/2010.
11. It was his testimony that his mother Susan Mwhaki Kamau was the initial bonafide shareholder and member of the Company vide Share Certificate no. B3845 and later allocated the suit land. That on 29/4/2010 her mother transferred her share and suit land to PW1 leading to issuance of his Share Certificate dated 21/5/2010 (P.exh.7), that when he visited the suit land he discovered that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had encroached on the suit land and constructed a permanent structure thereon. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants informed PW1 that they had purchased the land from the Company through its then Company Secretary Henry Wainaina Kihoro. That the said purchase was fraudulent because the Defendants were not shareholders of the Company and the action by the Company Secretary was null and void. He added that the 2<sup>nd</sup> Defendant is in possession of the suit land and urged the Court to grant his prayers as contained in the further Amended Plaintiff.
12. The Plaintiff's mother Susan Mwhaki Kamau testified as PW2. She adopted her witness statement dated 18/2/2011 as his evidence in chief. Her evidence was a replica of PW1's evidence above. That marked the end of the Plaintiff's case.
13. Defence hearing was set for 11/7/2023 but the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not present despite service as captured in the Affidavit of Service sworn on the 7/7/23 on record.

### **The Written Submissions**

14. The Plaintiff through the firm of Ng'ang'a Ngigi & Co. Advocates filed submissions dated 10/8/2023. He rehashed the background of the case and drew 6 issues for determination.
15. Firstly, whether the Plaintiff is the bonafide shareholder of the Company to which he answered in the affirmative having acquired his share from his mother. That the fact of his mother's initial ownership has not been challenged and the 3<sup>rd</sup> Defendant admitted the Plaintiff's ownership of the suit land. The next issue was whether the Plaintiff was allocated the suit land by the Company which was also answered in the affirmative and it was pointed out that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants conceded that fact but alleged that Susan declined to take it up because it was rocky.
16. On whether the purported sale between the 1<sup>st</sup> Defendant and the Company over the suit land was binding, the answer was in the negative for reasons that; there was no evidence that PW2 refused to take up possession of the suit land on grounds that it was rocky and unsuitable as alleged, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not shareholders of the company, there were no minutes of the Company to sanction the alleged sale, PW2's name was not removed from the company's register and that the Defendants were not entered in the company's register. Further that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants unlawfully and fraudulently acquired the suit land noting that their title according to the green card extract was issued on 9/4/2003 yet the Company issued the Clearance Certificate issued to the 1<sup>st</sup> Defendant is dated 12/11/2003. Accordingly, therefore that the said title is tainted with illegality and is unclean. In the end the Plaintiff submitted that he is entitled to reliefs sought in his Amended Plaintiff and his suit is not time barred. That the Defendant having failed to attend Court despite service, her assertions remain mere unsubstantiated claims and to support this proposition the case of *Gateway Insurance Company v Jamila Suleiman & Anor* [2018] eKLR was relied upon.
17. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file their submissions.



## Analysis and Determination

18. Having considered the pleadings, evidence and submissions tendered before Court, the main issue for determination in my view is whether the Plaintiff's case is merited.
19. The Plaintiff's case is a claim for declaration of ownership over the suit land having obtained the same by way of transfer from PW2, his mother. That PW2 was the initial member and shareholder of the Company which allocated her Share Certificate No. B1596 and later the suit land. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without any color of title illegally encroached on the suit land hence the prayer for eviction and cancellation of the Defendants' registration as owners of the suit land.
20. It is trite that he who alleges must prove. Sections 107 – 109 of the *Evidence Act* provide;
  - “ 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.
  108. Incidence of burden  
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
  109. Proof of particular fact  
The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
21. The standard of proof in civil claims like the instant is balance of probabilities. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.
22. In this instant the Defendants filed their opposition to the Plaintiff's suit but failed to appear in Court for their rebuttal hearing. Even in such cases the burden of proof upon the Plaintiff to prove his case remains constant.
23. Supporting his claim, the Plaintiff produced copies of Share Certificates No. 3845 issued to his mother Susan Mwhaki Kamau dated 30/11/1981. Alongside the said Share Certificate is the receipt in the sum of Kshs 600/- issued to her on the 25/2/1985. The land measured 1.25 acres represented by ballot No 1484. It was the Plaintiff's case that the land was transferred to him by his mother and a Share Certificate No. 1596 issued to him in 2010. Prior to the issuance of the Share Certificate the Plaintiff was issued with a Clearance Certificate on 21/5/2010 for plot No 3446 measuring 1.25 acres
24. It is the Plaintiff's case that the 2<sup>nd</sup> Defendant acquired the land through fraud whose particulars were pleaded and particularized under para 5 of the Plaint. The evidence of the Plaintiff that his mother was the original allottee of the land in 1985 has not been challenged. It goes without saying that if the



land was alienated to the Plaintiff's mother in 1981 there was therefore no land available for sale by the 3<sup>rd</sup> Defendant in 1991/1992. It has been admitted in the defence that the Plaintiff's mother was indeed allocated the suit land but that she declined to take it on grounds that it was rocky and therefore unsuitable. That following the decline to take the up the land the 3<sup>rd</sup> Defendant sold the land to the 1<sup>st</sup> Defendant who caused it to be registered in the name of his wife. That the Plaintiff's mother gave up the land for a replacement. Neither the 2<sup>nd</sup> nor the 3<sup>rd</sup> Defendant produced evidence to show that the Plaintiff's mother indeed was offered and accepted a replacement parcel in place of the suit land. This allegation is unproven and the Court finds that is unfounded.

25. Further a close look at the green card shows that the suit land was registered in the name of the 2<sup>nd</sup> Defendant on the 9/4/2003 while the Clearance Certificate was issued on the 12/11/2003. The import of the Clearance Certificate is to inform the Land Registrar to register the bearer of the same as owner of the suit land. It is the land buying Company who knows who their members are and the details of their holdings. How the title was registered before the issuance of the confirmation puzzles this Court. Based on the above analysis it is not difficult to conclude that the Clearance Certificate was an afterthought to cover up the mischief.
26. In the absence of any challenge to the Plaintiff's case the Court is satisfied that on the facts and evidence laid before it the Plaintiff has proven his case and I enter judgement in his favour as follows;
  - a. A declaration that the Plaintiff is the bona fide owner of the land parcel number Ruiru Kiu Block2 (Githunguri) 3446.
  - b. An order directing the District Land Registrar Thika to cancel all entries in the 2nd Defendants' title on said land parcel number Ruiru Kiu Block 2 (Githunguri) 3446 and register the Plaintiff as the owner of the same.
  - c. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants be and are hereby ordered to vacate the suit land within the next 45 days and demolish the structures erected on said land parcel number Ruiru Kiu Block 2 (Githunguri) 3446.
  - d. In default eviction be and is hereby ordered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents and or assigns forthwith.
  - e. I make no orders as to costs.
27. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Wainaina HB Ngige for Plaintiff

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants - Absent

Court Assistants – Phyllis/Oliver

