Kimani (Suing as the Administrator of the Estate Michael Kimani Kariuki - Deceased) v Registered Trustees of the Catholic Church Diocese of Nakuru & 22 others (The Commissioner of Lands 2nd Defendant in the Counter- Claim) (Environment & Land Case 166 of 2013) [2024] KEELC 3486 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3486 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 166 OF 2013

A OMBWAYO, J

APRIL 25, 2024

BETWEEN

JACINTA WAIRIMU KIMANI (SUING AS THE ADMINISTRATOR OF THE ESTATE MICHAEL KIMANI KARIUKI - DECEASED) ..... PLAINTIFF

AND

THE REGISTERED TRUSTEES OF THE CATHOLIC CHURCH DIOCESE OF NAKURU ..... 1ST DEFENDANT

TRUSTEES OF THE ANGLICAN CHURCH OF KENYA DIOCESE OF NAKURU ..... 2ND DEFENDANT

PETER MUCHERU ..... 3RD DEFENDANT

FRANCIS GITAHI ..... 4TH DEFENDANT

PATRICK NJUGUNA KARENGO ..... 5TH DEFENDANT

JOSEPH FRANCIS GICHUHI MWERI ..... 6TH DEFENDANT

FRANCIS MBUGUA BURUGU ..... 7TH DEFENDANT

CHRISTOPHER KARANJA KIARIE (ALIAS MACHEKE) ..... 8TH DEFENDANT

PATRICK GACHIE NJENGA ..... 9TH DEFENDANT

FLORENCE WAIRIMU KABII ..... 10TH DEFENDANT

JOHN MUTURI ..... 11TH DEFENDANT

BONIFACE GITAU ..... 12TH DEFENDANT

PETER MOMANYI ..... 13TH DEFENDANT

JULIUS ONYANGO ..... 14TH DEFENDANT

JOHN KANYORO ..... 15TH DEFENDANT

ERICK ODERO ..... 16TH DEFENDANT

GEORGE STEPHEN N. WATAKU ..... 17TH DEFENDANT

ROBINSON KARIUKI ..... 18TH DEFENDANT

KANE WANJIRU GITAU ..... 19TH DEFENDANT

MOSES NGANGA ..... 20TH DEFENDANT

ADAMS HUHOLO ..... 21ST DEFENDANT

JOSEPH MWAURA (ALIAS UPENDO) ..... 22ND DEFENDANT

DAVID GATHOGA (TAXMAN) ..... 23RD DEFENDANT

THE COMMISSIONER OF LANDS 2ND DEFENDANT IN THE COUNTER-CLAIM

JUDGMENT

Introduction

1. Jacinta Wairimu Kimani (hereafter referred to as the plaintiff and suing as the administratrix of the estate of Michael Kimani Kariuki (Deceased)) approached the High Court on 4th December 2007 by way of plaint that was amended on 3rd September 2013 and further amended on 11th January 2020. The further amended plaint was filed on 18th September 2020. The plaintiff seeks judgment against the defendant in terms of a permanent injunction restraining them from remaining on, entering or re-entering into, carrying on any developments and or in any way dealing with and or interfering with the plaintiffs possession use and enjoinment of all that parcel of land known Title No.LR No.Molo Township Block 286 formerly UNS Residential plot B/Molo township. The plaintiff prays for damages, loss of user and costs of the suit and interest.

2. The defendant filed a defence and counter-claim whose gist is that the suit land was set aside for the purposes of the 1st and 2nd defendant by the relevant offices inclusive of the office of the president upon their request and that the plaintiff has fabricated the title. That they have occupied the land for 15 years before the filing of the suit land and hence have acquired prescriptive rights and that the plaintiffs claim is time barred. The plaintiff deny having demolished structures on the land. In the counter claim the defendant claim that the plaintiff obtained the title fraudulently with disregard of the defendants' interest. The defendant pray for judgment, against the plaintiffs for:-

    a. A permanent injunction restraining the defendants by themselves, their agents, servants, employees and/or workers from remaining on, entering or reentering into, carrying on any developments and/or in any way dealing with and/or interfering with the plaintiff's possession, use and enjoyment of all that pieces or parcel of land known as L.R Molo Township Block 2/86 (formerly Uns Residential Plot B Molo Towonship).

    b. Damages as aforesaid

    c. Loss of user as pleaded

    d. Costs of the suit

e. Interest on (b) and (c) above

3. The 2nd defendant in the counter claim is the Commissioner of Lands as he then was but now National Land Commission. He denies the allegation by the plaintiff/ counter claimant and states that the transaction occurred due to being misled by the 1st defendant in the counter- claim.

Plaintiffs Case

4. When the matter came up for hearing, the plaintiff Jacinta Wairimu Kimani(PW1) testified that she is a teacher by profession and that she resides in Nakuru and that she is the widow to Michael Kimani Kariuki. When he passed on, she took over the prosecution of the case. She produced an allotment letter demonstrating that her husband was allocated the land. The plaintiff further produced a letter of acceptance and the receipt. The letter of allotment had an attached P.D.P dated 5th August 1994, approved on 12th April 1996. The proposed use was a residential plot. She produced the lease dated 17th October 2000 and registered on 15th September 2001. A certificate of lease was issued on 15th September upon registration. To buttress her case, the plaintiff produced the Survey plan. The plaintiff further produced the map of the area and evidence that she has been paying land rent and land rates. She states that her husband is the legal owner of the land and produced the certificate of official search. The plaintiff took possession, planted trees, cultivated and fenced and constructed a timber rental house. The plaintiff states that on 11th November 2007 the 1st and 2nd defendant trespassed on the land and demolished everything and threw out her tenants and did so without notice and that she lost income. She reiterated that the title to the land was obtained procedurally and not fraudulently.

5. On cross examination by Mr. Kahiga learned counsel for the defendants, she states that there was no permanent structure on the land. She did not have receipts to prove construction the structures, or rents. She did not have a rent record. She was never informed of the cancellation.

6. PW2, James Macharia Mwangi, a retired teacher but not tired as he states, testified that he knew the late Michael Kimani Kariuki since 1992, he knows the widow. He took the photos that are on record. He is not a trained photographer but owns a canteen. He admitted that the photographs are not dated.

7. PW3, Caroline Wahome, a valuer with Metrocosmo Valuers Ltd relied on her report prepared on 6th November 2012 prepared by Patrick Mwangi. The parcel of land being valued was Molo Township Block2/86. The land measured 0.702 acres located in the outskirts of Molo town. On cross examination he states that he was not the author of the report. She did not produce any document that she was a valuer. She did not do the valuation it was done by someone else.

Defence Case

8. The defence called Silvester Osodo as PW1, a Senior Land Officer at National Land Commission. He produced a letter of allotment dated 6th March 1997 addressed to the Catholic Diocese of Nakuru. It was for unsurveyed religious plot. At the time of allocation, it was not surveyed.

9. The letter of allotment was signed by PW1 himself which was an extension of LR533/292. He states that the plot belonged to the Catholic Diocese and that he is aware of the allotment letter issued to Michael Kimani which refers to the same plot. According to Mr Osodo, the allotment letter was issued to Michael Kimani Kariuki first but the Catholic Diocese complained to the District Commissioner and were issued with the second allotment letter. The former President, the late Daniel Toroitich Arap Moi Directed that the plot be given to the churches.

10. On cross examination, he states that he did not have records for Michael Kimani Kariuki. Further that he did not have documents for the Catholic Diocese. He admits that the allotment letter dated 30th March 1995 was for Michael Kimani Kariuki. He admitted that Michael Kimani Kariuki followed the procedure required after allotment. He admitted that the allotment letter was accompanied with the PDP. He states that the allotment letter for Michael Kimani Kariuki was cancelled verbally.

11. DW2, Ven. Canon Jane Wangari Munyui is the Vicor ACK St Albans Molo. She states that she has no information about the case and that she has no case with the plaintiff. The ACK has no claim on the title by Jacinta Wairimu, the plaintiff.

12. DW3 Peter Mucheru, a catholic priest states that in 2007, he was engaged in Molo Catholic parish. He relied on his statements and added that they have an allotment letter for the suit property. At the time the allotment letter was given, the parcel of land was a field for Weddings. They have not been issued with title as the same was being processed. He stated that the plaintiff's allotment had been cancelled. He is not aware that the plaintiff was on the land. He states that there was an illegality on the part of the Commissioner of lands he prays that the title be cancelled. On cross examination by M/s Mukira learned counsel for the plaintiff, he states that the church was not aware of the other allotment letter. He states that Kimani's allotment letter came first. He states that the plot belonged to the church and was being used for weddings. The structures belonged to the church. DW4, Collins Liyai Aliela testified that the parcel of land was registered in the plaintiffs name.

Rival Submissions

13. The gravamen of the plaintiffs submissions is that the plaintiffs was a bonafide allottee of the Uns Residential Plot B Molo Township Pursuant to a letter of allotment dated 30th March 1995 produced as evidence in court. The defendants equally produced a letter of allotment ref No.40869 dated 6th March 1997. The plaintiff submits that the applicable principle in this instance is the equitable principle that where two equities are equal, the first in line prevails and relies on the case of Gitwamy Investment's Ltd -vs- Tajmal Ltd and 3 others (2006) eKLR where HonJustice Lenaola, High Court judge as he then was held that where the Commissioner of Lands issues two titles, and he acknowledges so, then the same are deemed to have been issued regularly, legally, procedurally without fraud, then the first in time prevails.

14. The plaintiff also refers to Ashmin investment Ltd -vs- Riakina Ltd (2021) KECA 184 KRR (19th November 2021 where the court of Appeal held that when there are two allotments, the first in time to satisfy the conditions of allotment prevails. The plaintiff counsel argues that the plaintiff was the first to satisfy there terms of allotment.

15. Secondly, the plaintiff counsel argues that the plaintiff was lawfully registered as the absolute and indefeasible first registered owner of Molo Township Block 2/86 formerly Uns Residential plot B Molo Township. The plaintiff relies on section 24, 25 and 26 of the *Land Registration Act* no 3 of 2012. The plaintiff's counsel submits that the plaintiff is the lawfully registered proprietor of the suit land.

16. Furthermore, the plaintiff submits that the defendants trespassed and encroached on the suit land and demolished the structures on the suit land. The plaintiff submits that sufficient evidence was produced that proved the trespass and destruction. The plaintiff submits further that the valuer found the value of the property at Kshs2,000,000. The plaintiff urges the court to award the plaintiff a reasonable amount of general damages.

17. On whether the plaintiff is entitled to an order of permanent injunction restraining the defendant and their agents from remaining, re-entering or dealing with the land in any manner whatsoever, the

plaintiff submits that she has satisfied the condition of grant of injunction thus a prima facie case with a likelihood of success and that she will suffer irreparable damages and that the balance of convenience tilts towards granting the injunction. On the counter- claim, whether to grant the prayers sought by the defendants, the plaintiff submits that the defendant has not proved fraud as required by law and therefore the counter claim ought to be dismissed with costs.

Analysis And Determination

18. I have considered the pleadings on record, available evidence and rival submissions and do find that it is crystal clear that the plaintiff was issued with an allotment letter on 30th March 1995 by the commissioner of Lands in respect of unsurveyed Residential plot B Molo Township that was later registered as parcel of land number Molo Township Block2/86. Though belatedly and contrary to the condition of the allotment letter the plaintiff paid the statutory fees on 29th March 1996 and a receipt was issued. A lease was prepared by the Commissioner of Lands and forwarded to the Nakuru Land Registrar and executed as was required by the law and the lease was registered on 15th May 2001 and a certificate of lease was issued on the said date.

19. This court finds that it was proved by the plaintiff on a balance of probabilities that the plaintiff entered the land and erected a perimeter wall and erected some structures semi- permanent so to speak. However, it was not proved that rent was Kshs13,500 per month. The court further finds that there is photographic evidence that the structures were invaded in November 2007 by the defendants and the plaintiff was evicted therefrom and the structures demolished. The plaintiff filed the suit at the backdrop of these activities claiming to be the lawful owner of the suit property. The plaintiff boasts of an allotment letter dated 30th March 1995, a lease, certificate of lease and a certificate of official search. The defendants boasts of an allotment letter dated 27th February, 1997 and possession of the property. This court identifies four issues for determination thus:-

    1. Whether the plaintiff's allotment letter prevails over the defendants' allotment letter.
    2. Whether the certificate of lease dated 15/ 5/2001 by the Land Registrar Nakuru was issued procedurally and lawfully.
    3. Whether the plaintiff was proved that the defendants are trespasses on the suit land.
    4. Which order should the court grant.

Whether The Plaintiff's Allotment Letter Prevails Over The Defendant's Allotment Letter.

20. It is an equitable principle of law that where two equities are equal, the first in time prevails. Time is important in equity. Where two claimants have strong cases, equity will favor the person who acquired his rights first. The general rule is that the person whose rights are created first takes priority in the court of equity. In this case the equitable principle is applicable because both parties were issued with the allotment letters by the Commissioner of Lands. The plaintiff was issued with the allotment on 30th March 1995 whereas the 1st defendant was issued with the allotment letter on 6th March 1997. This court finds that the allotment letter issued to the plaintiff prevails under the above principle. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997, where the court held that:

> 'Where there are two competing titles the one registered earlier is the one that takes priority '

The same position was held in the case of Gitwany Investment ltd vs. Tajmal Ltd & 3 Others (2006) eKLR where the Court held that:-

> '....the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail'

21. Furthermore, the 1st defendant did not satisfy the conditions set out in the allotment letter and therefore failing to accept the offer in the allotment letter and payment of prerequisite fees rendering the allotment letter issued to the 1st defendant of no legal effect and on the other hand, the plaintiff was issued with the allotment letter paid the prerequisite fees executed the lease which was forwarded to the County Land Registrar Nakuru and was registered. A certificate of lease was issued and the plaintiff took possession of the land. This court finds that the allotment letter issued to the plaintiff prevails over the allotment letter issued to the defendant.

Whether The Certificate Of Lease To The Plaintiff Issued On 15Th May, 2001 By The Land Registrar Nakuru Was Procedural.

23. This court finds that the plaintiff was issued with an allotment letter in respect of the unsurveyed plot B Molo which later became LR No Molo Township Block 2/86. The plaintiff complied with the conditions set out in the letter of allotment and paid the requirement fees. The Commissioner of Lands caused a lease to be executed by the plaintiff and registered at the Nakuru Lands office and a certificate of lease was issued. I note that these properties were registered under the repealed Registered *Land Act* which is now governed by The *Land Act*, 2012 and The *Land Registration Act*, 2012. Indeed the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the *Land Registration Act* provides as follows:

> " the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts 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 the 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
>
> b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

The above provisions are extremely protective of title and provide only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

Article 40 (6) of *the constitution* of Kenya 2010 read with Section 26 (1) (b) can be interpreted to remove protection from an innocent purchaser or innocent title holder so long as title was obtained unprocedurally. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have

contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.

The Court of Appeal in the case of Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR, held as follows:

> 'We state 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.'

Mr Collins Liyayi Aliela eloquently explained how the process of registration of the rights of the plaintiff was undertaken.

I do find that the plaintiff was lawfully registered as the proprietor of the suit parcel of land and that the certificate of lease was procedurally and legally issued.

Whether The Plaintiffs Has Proved Trespass Against The Defendants.

24. The *trespass Act* Cap 294 Laws of Kenya defines trespass as follows:-Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."
>
> I do find that the defendants unlawfully entered the parcel of land in dispute and forcibly evicted the plaintiffs and caused damage to the property. The plaintiff produced photographs duplicating the scenes at the parcel of land during eviction. I do find that the defendants are trespassers on the suit parcel of land.

Whether the plaintiff is entitled to general damages.

25. Trespasser is actionable perse. Once the plaintiff proves trespass he is entitled to damages. The plaintiff alleged that she was receiving rent of Kshs13,800 per month but such evidence was not produced. The tenant was not called to produce evidence. The valuer placed the valuation of the property of 2,000,000. This evidence was not controverted.

26. On the issue of general damages for trespass, the issue that arises is: what is the measure of it? This question was answered by E. Obaga J in the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014]eKLR where it was held as follows:

> The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).

27. In Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR where the court faced such a similar situation it was held as follows:

> A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full."

28. In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000* (a case cited by the plaintiff), the court stated that;

> There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that K.Sh. 10 000 000 is a reasonable award for general damages".

29. I do find that the defendants are trespassers on the suit property and do grant general damages at Ksh2, 000,000. The court finds further that the plaintiff is entitled to the prayers sought for injunction and grants orders that judgment against the defendant in terms of a permanent injunction restraining them from remaining on, entering or re-entering into, carrying on any developments and or in any way dealing with and or interfering with the plaintiffs possession use and enjoyment of all that parcel of land known Title No.LR No.Molo Township Block 286 formerly UNS Residential plot B/Molo township.

30. On the counter- claim this court finds that the defendant counter claimant has failed to prove fraud against the plaintiff. It is the duty of the defendant to prove fraud against the plaintiff but that has not been done.

31. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In Koinange & 13 others vs Charles Karuga Koinange 1986 KLR at page 23 the court held that:

> When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required."

32. In the case of Kinyanjui Kamau v George Kamau [2015] eKLR the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

> It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo vs Ndolo [2008]1KLR (G & F) 742 wherein the court stated that ".. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

In case where fraud is alleged it is not enough to simply infer fraud from the facts.

33. Under the provisions of sections 107 to 109 of the *evidence Act*, the burden of proof is on the Plaintiff to prove that the transactions were fraudulent. The plaintiff has not discharged the burden. The upshot of the above is that the Counter Claim is dismissed with costs. Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 25TH DAY OF APRIL 2024.

A O OMBWAYO

JUDGE