



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Ngunjiri (Environment and Land Appeal E045 of 2022)
[2024] KEELC 1789 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E045 OF 2022**

JG KEMEI, J

APRIL 11, 2024

BETWEEN

NAOMI WAITHERA KARIUKI APPELLANT

AND

JOSEPH NYAMBARI NGUNJIRI RESPONDENT

*(Appeal from the Judgment of Hon C K Kisiangani (SRM)
in CMELC No 7 of 2021-Ruiru delivered on the 12/5/2022)*

JUDGMENT

Introduction

1. The Appeal arises from the Judgment of the Hon C K Kisiangani (SRM) in CMELC No 7 of 2021 - Ruiru delivered on the 12/5/2022 in which the Appellant was the Plaintiff and the Respondent was the Defendant. Upon hearing and determining the suit, the Court issued Judgement in favour of the Respondent as follows;
 - a. A declaration is hereby given that the Defendnat is the legally registered owner of land known as Ruiru/Kiu Block 2 (Githunguri)/T.298.
 - b. A permanent injunction is hereby issued against the Plaintiff either personally, through her agents, employees or assigns not to interfere in any way whatsoever with the quiet possession and ownership of the Defendant in land parcel number Ruiru/Kiu Block 2 (Githunguri)/ T.298.
 - c. The Defendant will have the costs of the counter claim.
 - d. R/A explained.



2. Aggrieved by the said decision of the trial Court the Appellant proffered this appeal on the following grounds;
 - a. THAT the Learned Magistrate erred in law and facts in not appreciating that Ruiru Kiu Block 2 (githunguri)T.298 and Ruiru East Block 2 Kiu T.298 is the same parcel of land.
 - b. THAT the Learned Magistrate erred in law and facts in finding that the Respondent herein is the legally registered owner of land known as Ruiru Kiu Block 2 (githunguri)T. 298 while no evidence was placed before her to demonstrate this legal registration.
 - c. THAT the Learned Magistrate erred in law and facts when she failed to appreciate that the size of the Appellant property was not the same as the size of the property that the Respondent herein purports to have purchased.
 - d. THAT the Learned Magistrate erred in law and facts when she failed to appreciate the facts that the Clearance Certificate used by the Appellant to get registration as the legal owner of the parcel of land was from Githunguri Constituency Ranching Company Limited.
 - e. THAT the Learned Magistrate erred in law and facts in not appreciating that investigations had indicated that this was a cause of double allocation of the parcel of land by Githunguri Constituency Ranching Company Ltd.
 - f. THAT the Learned Magistrate erred in law and facts in not appreciating that the Respondent herein was allocated the purported property by Githunguri Constituency Ranching Company Ltd, but no evidence of his ownership was available from the Company register.
 - g. THAT the Learned Magistrate erred in law and facts in relying on the evidence of John Maina Mburu, and which evidence was purely speculation.
 - h. THAT the Learned Magistrate erred in law and facts when she recorded that a John Kungu Mbutia indicated that he sold to the Respondent ¼ acre of land while in fact the witness said that the sold 1/8 acre of land to the Respondent herein.
3. Consequently, the Appellant sought the following orders;
 - a. The Judgment of the Honourable C. K. Kisiangani Senior Resident Magistrate delivered on 12th day of May, 2022 in MCL & E CASE No. E007 of 2021 – Ruiru be wholly overturned.
 - b. Costs of the appeal.
 - c. The further and other orders be made as are just in the circumstances of this case

The case of the parties in the trial Court

4. Briefly, the case of the Plaintiff is comprised in the plaint dated the 19/1/2021 in which the Plaintiff averred that she is the legal owner of Ruiru East Block2/kiu/T.298 (the suit land) having acquired the same through her membership with Githunguri Constituency Ranching Company Limited (GCRCL or the Company) vide Share Certificate No 2701 issued on the 8/5/1990 for a ¼ acre plot. Prior to acquiring the title the Plaintiff asserts that she was issued with a clearance certificate by the Company on 13/8/1991 on payment of the sum of Kshs 500/- . Eventually that she was issued with a title on the 3/1/1992. That the Defendant has entered into her land and destroyed a site structure which she constructed on or around the 14/1/2021.
5. The Plaintiff sought the following orders;



- a. A declaration that the Plaintiff is the bona fide owner of all that parcel of land known as Ruiru East Block 2/KIU/T.298.
 - b. An order of permanent injunction against the Defendant, their servants, agents, employees and all those claiming through or under the Defendant's restraining them from trespassing on the Plaintiff's parcel of land.
 - c. Mesne profits.
 - d. That OCS Ruiru supervises compliance with orders of this Court.
 - e. Costs and interest of this suit.
 - f. Any other orders that this Honourable Court may deem fit and just to grant.
6. The Defendant on the other hand denied the claim of the Plaintiff in his statement of defense and counterclaim dated the 17/6/2021. The Plaintiff was faulted for; contradicting her averments in the plaint against the evidence given at the full board of GCRCL that she purchased the land from a person not known to her; the Plaintiff was issued with a clearance certificate erroneously therefore should produce the original ballot; her national identity card in the title and that in the green card differ; the suit land parcel Ruiru Kiu Block 2 (githunguri)/T.298 (claimed by the Defendant) are on separate locations as per the survey maps.
7. It was the case of the Defendant that he owns parcel Ruiru Kiu Block 2 (githunguri)/T.298 which land is different from the suit land claimed by the Plaintiff and has held it for the last 10 years hence the Plaintiffs claim is time barred. He denied destroying any site structures on the suit land and contended that the structures are intact. He was emphatic that he has no claim on the suit land and that his claim is entirely on Ruiru Kiu Block 2 (githunguri)/T.298, which is separate and identifiable from the suit land.
8. In his counterclaim he contended that he is the registered owner of Ruiru Kiu Block 2 (githunguri)/ T.298 and sought orders as follows;
- a. A declaration that the Plaintiff is the legally registered owner of land known as Ruiru/kiu Block 2 (githunguri)T. 298.
 - b. A Court order to be issued to the Registrar of Lands to cancel any title deed / certificate of lease issued touching on land known as; Ruiru/kiu Block 2 (githunguri)T.298.
 - c. A permanent injunction against the Defendant; either personally, through her agents, through her employees; through her assigns or representative not to interfere in anyway whatsoever with the quiet enjoyment and possession of the ownership of the Plaintiff's land known as; Ruiru/ kiu Block 2 (githunguri)T. 298.
 - d. An Order that the O.C.S, Ruiru Police Station do oversee the enforcement of Court Orders issued herein.
 - e. Any such other or further relief as this Honourable Court may deem appropriate to grant.
9. The Plaintiff testified and relied on her witness statement dated the 11/1/2021 and produced documents marked as PEX No 1-15 in support of her case. That on enquiry at the Company she was informed that there was a lady who was selling ¼ acre of land and upon being informed by the officials of the Company that the land being sold was genuine, she purchased the land, got a ballot, Clearance Certificate and a Share Certificate thereof. That in 2019 she got information that the Defendant



- had entered her land and fenced it. That she reported the matter to Ruiru Police station. They were summoned with the Defendant to proof their claims and even visited the land with a police officer on the 18/7/19. That the matter was also heard by the Directors of the Company who concluded that the Defendant was the owner of the land. That later she delivered material on site but was assaulted by the Defendant in the Company of other men forcing her to report a case of assault at the Ruiru Police station.
10. In cross she stated that her land is the suit land and not Ruiru Kiu Block 2 (githunguri)/T.298. That her land is opposite Kwihota School. She stated that she bought the land from a member of the Company. That the Company officials assured her that the land was authentic. She stated that she had no agreement of sale in respect to the transaction nor a copy of the Share Certificate of the original owner. That she was given a ballot for $\frac{1}{4}$ acre plot and a new Share Certificate in her name. She confirmed the ID number on the title is hers. That the receipts and the ballot emanated from the Company. She clarified that the structure on the land was constructed by the Defendant.
 11. The Defendant led evidence and relied on his witness statement dated the 11/6/2021 and produced documents marked as DEX No 1-20 in support of his defense and counterclaim. He stated that he is the owner of parcel Ruiru Kiu Block 2 (githunguri)/T.298. That his land and that of the Plaintiff are different. That earlier he had filed a case in Thika which case he withdrew.
 12. Further he stated that he acquired the land on the 13/7/2009 vide an agreement of sale from John Kungu Ngugi (Ngugi), the grandson of Kungu Mbuthia (Mbuthia) the original shareholder who held 3 plots under his membership in the Company. That his name was not entered in the register of the Company upon acquisition of the land though he was given a ballot, Share Certificate dated the 17/7/2009 and original receipts in the name of Mbuthia and a clearance certificate from the Company. That upon presenting the documents for registration he was informed at the Lands Registry- Ruiru that ballot No 1363 is already titled in the name of the Plaintiff and that the land belongs to the Plaintiff.
 13. DW2 - John Kungu Ngugi (Ngugi) testified and relied on his statement dated the 11/6/2021 in support of the Defendant's case. He explained that he is the grandson of Mbuthia, a former member of the Company who held a full share comprising of three plots. That Mbuthia died in 1989. The witness could not remember how and when the land was transferred to him but says his family agreed that he takes over the land. He stated that he transferred the land from Mbuthia to the Defendant upon sale in 2009 for the sum of Kshs. 400,000/-. That Mbuthia held Share Certificate No 280 and a ballot No 1363. That he sold $\frac{1}{8}$ acre of land to the Defendant.
 14. John Maina Mburu (DW3) testified and stated that he is the Chairman of the Company since 12/9/09. He stated that the Company was formed in 1968 as a land buying Company. That members started contributing by buying shares in 1968 upto 1984 and the monies raised was used to acquire 8000 acres of land in Ruiru. That 8000 - acre piece of land was subdivided into 3 blocks namely Ruiru West Block 1, Ruiru East Block 1 and Ruiru Kiu Block 2. That a full share comprised of a 1.25 acre land (shamba), a $\frac{1}{8}$ residential land and $\frac{1}{4}$ acre plot. That the first to be allocated were $\frac{1}{8}$ acre residential plots in Ruiru West Block 1 from the year 1973.
 15. He added that Mbuthia held ballot No R/W001363 for three plots. That the Plaintiff has never been their member and that the land she holds belongs to Nyakinyua and not the Company. That the two parcels of lands are 10 kilometers apart. When shown the green card entries he raised doubt on how the title could have been registered on the same day and yet the procedure to process title from the Company through the office of the Commissioner of Lands was lengthy. It was his evidence that the Plaintiff was issued with a duplicate (secondary) ballot and entered in the Company's register by error.



That the Company ruled that the land belongs to the Defendant because he holds an original ballot in comparison to the Plaintiff's ballot. In cross DW3 stated that ballot R/W001363 became plot No 298. He confirmed that neither the names of the Defendant, Mbutia's or Ngugi are in the register but that of the Plaintiff. That he was not a Director of the Company in 1991 when the Plaintiff acquired the land. That during the hearing of the dispute at the Company offices on 10/12/2009 a Mr Kamunge confirmed that the Share Certificate and the clearance certificate was issued erroneously to the Plaintiff and that it is irregular. That the ballot number 1363 is wrong and the stamp of the Company affixed on the ballot does not belong to the Company. That all titles for Ruiru East Block2 belong to Nyakinyua Investment Limited and not the Company. That the two blocks are separated by a river. That Ruiru Kiu Block 2 (githunguri)/T.298 emanated from the Company's three blocks and not the suit land. He stated that Mbutia held two plots being the 1.25 and 1/8 acres according to the Register and equally the Plaintiff held the suit land. That according to their records ballot No 1363 belongs to a Veronica Njoki measuring 1.25 acres. That the Company designed a unique ballot system to weed out confusion in handling the plots in the three blocks and that ballot No 1363 cannot be for the suit land.

The written submissions

16. Upon admitting the appeal for hearing the parties elected to canvass the appeal by way of written submissions. The Appellant's submissions were filed by the law firm of Prof Kiama Wangai & Co Advocates while that of the Respondent were filed by the firm of Kanini CM Advocate.
17. Learned Counsel Prof. Wangai in his lengthy submissions filed on behalf of the Appellant reiterated the pleadings of the parties in extenso. He further submitted that the copy of the register produced by DW3 indicates that ballot No 1363 belongs to the Appellant and that the Respondent's name is not in the register therefore the Appellant remains the true owner of the land. That the suit land and Ruiru Kiu/block 2 (githunguri)/T.298 is one and the same. Further that Ngugi is alleged to have sold 1/8 acre land to the Respondent and not ¼ acre plot and that the Appellants land measuring ¼ cannot be the land that was allegedly sold to the Respondent.
18. Counsel for the Respondent faulted the Appellant's Counsel for intentionally omitting documents of the Respondent from the Record of Appeal even despite the orders of the Court to regularize and file a complete record of appeal. He pleaded with the Court in the interest of justice to make reference to the original trial Court record as necessary.
19. Counsel framed three issues for the determination by the Court to wit; firstly, where is the suit land, registry map sheet No 15 and 20 measuring 0.12 ha located?; secondly, where is Ruiru/kiu Block 2 (githunguri)/T.298, registry maps sheet No 1 measuring 0.1 ha located and thirdly who between the Appellant and the Respondent possesses the original and genuine ballot from the Company.
20. It was submitted that the suit land is situate in the map for Ruiru East Block 2 under the management of Nyakinyua Investment Limited and that is why the map indicates Nyakinyua Investments on the top. That parcel No Ruiru/kiu Block 2(githunguri)/T.298 is located within Kiu Block 2 which map is headed "Githunguri" at the top. That according to the testimony of DW3 one of the three blocks acquired by the Company was Ruiru Kiu Block 2. That Ruiru Kiu Block 2 is situate 10 kilometers from Ruiru East Block 2 which comprises of the suit land. That the surveyors report stated that the Respondent's parcel is on RIM Sheet No 1&2 in Ruiru Kiu Block 2. Further that the said Survey report indicated that the specific RIM sheet No 15 and 20 cannot be traced. All in all Counsel submitted that the Appellant's and the Respondent's lands are separate; on separate locations; not on the same RIM sheet survey map and not the same contrary to the Appellant's proposition on appeal. That the Respondent has no interest on the land belonging to the Appellant and that explains why the learned Hon Magistrate did not cancel the title of the Appellant.



21. Relying on the provisions of Section 107 of the *Evidence Act* on the burden of proof, the Learned Counsel submitted that the Respondent proved that he is the legally registered owner of the Ruiru/kiu Block 2(githunguri)/T.298 by producing the original ballot R/W001363 which ballot was confirmed in evidence by DW3 as genuine; Share Certificate No B886 issued by the Company in his name; clearance certificate from the Company clearing him to apply for registration of the title in his name; DW3 confirmed that the seller of the plot is a member of the Company by virtue that his name appears on its register. The Court was urged that in a case of double allocation of land the information provided by the land buying Company should prevail. See the case of John Kimuhu Njurumba Vs. District Land Registrar (ELC 216 OF 2007).
22. It was further submitted that the Appellant failed to proof her title. That she admitted purchasing land from a person she could not remember; failed to produce a sale agreement in accordance with Section 3(3) of the *Law of Contract Act*; she was found not to be a shareholder despite her false claim; produced clearance certificate which was termed as a con by the DCI officers who investigated the matter. The Court was urged to hold that the Learned Magistrate did not err in holding that the Appellant did not possess the proper documents to support her ownership of the title and membership of the Company.
23. Counsel added that the Appellant is a trespasser having encroached on parcel Ruiru/kiu Block 2 (githunguri)/T.298. She was faulted for not staying the orders of the trial Court so much so that the Respondent has executed the same with the consequence that he now holds a title for parcel Ruiru/kiu Block 2(githunguri)/T.298 pursuant to the decree of the Court. That in the forgoing the status of the land has drastically changed so much as to render the appeal superfluous and overtaken by events.
24. The Court was urged to dismiss the appeal.

Analysis and determination

25. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as thus:

“.... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....”
26. The Court relies on the decision of the Court in *Ephantus Mwangi & Anor Vs. Duncan Mwangi Wambugu* [1984]eKLR that a Court will not normally interfere with a finding by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on the wrong principle in reaching the findings she did.
27. Bearing the above principles in mind I shall now analyse the appeal and make conclusions as necessary.
28. Having considered the Appeal, the Record of Appeal, the trial Court record the written submissions and all the material placed before me, the key issues for determination are: whether the Respondent is the legally registered owner of Ruiru/kiu Block 2(githunguri)/T.298; whether the title in respect to Ruiru/kiu Block 2(githunguri)/t.298 should be cancelled; whether eviction should be issued against the Appellant or the Respondent; who is entitled to mesne profits; whether the appeal is merited.



29. The gist of the Appellant's claim in the trial Court is that she is the registered owner of the suit land having acquired the same from a former member of the Company whereupon she was issued with a ballot number, clearance certificate and a Share Certificate in the Company and later the title was issued in her name in 1992. That sometimes in 2021 she was informed that the Respondent had encroached on her land and constructed a site house, information which she confirmed on visiting the suit land. That the dispute was submitted to the Company Directors who upon hearing both sides ruled that the land belongs to the Respondent hence the filing of the suit. That the Directorate of Criminal Investigations also investigated the dispute and finally concluded that the Company ought to sort out the mess arising from double allocation of the land.
30. The Respondent on the other hand averred that the suit land and parcel Ruiru/kiu Block 2(githunguri)/T.298 are different in location and even on the survey maps. That the Appellants' title is found in Ruiru Kiu Block 2 under the management of Nyakinyua Investments Limited. That the Respondent is not claiming the land held by the Appellant at all.
31. I have carefully considered the claim of the Respondent in the trial Court and what I gather is that the Respondent acknowledges the title of the Appellant but the only divergence is that it is located in a different location and different RIM survey maps. That being so, clearly the title of the Appellant has not been challenged. The Respondent has not attacked this title as can be seen in his evidence led in the trial Court when he stated;
- “ The land that I am claiming and that of the Plaintiff are different.”
32. The Respondent has submitted even more succinctly in his submissions that he is not interested in the suit land held by the Appellant as the same does not belong to him. I shall revert to this later.
33. As to whether the Respondent is the legally registered owner of Ruiru/kiu Block 2(githunguri)/T.298 the Court will examine the evidence led in answer to the question. The Respondent has maintained throughout the pleadings that he is the registered owner of the Ruiru/kiu Block 2 (githunguri)/T.298 yet he led evidence that he is yet to obtain title as when he tried to register the land, the Land Registrar informed him that the same could not be registered as the land was registered in the name of the Appellant.
34. It was the Respondent's case that he purchased the land from Ngugi, the grandson of Mbuthia, the original shareholder. DW3 led evidence that Mbuthia held three parcels of land to wit; 1.25 acre shamba, 1/8 residential plot and a ¼ acre plot. DW2 led evidence that his grandfather gave his two sons 1.25 acres and ¼ acre respectively and that he was given 1/8 acre plot for his financial assistance and care to the old man before he died. Evidence was led by DW2 and DW3 that Mbuthia held an original ballot No R/W001363 which entitled him the three plots. That said the Share Certificate No 280 in the name of Mbuthia was not presented in Court in support of this evidence.
35. DW2 led evidence that Mbuthia died in 1989. This was supported by the death certificate presented in evidence dated the 20/7/1992 on record. It was his evidence as captured in his witness statement that;
- “ Before his demise (Mbuthia) in the year 1989 he gifted my father and his only brother (my uncle) the 1.25 acre. He equally gifted me the other ¼ of an acre in a manner to compensate me for the financial support I had given him over the years, he instructed his sons to allow me to find a buyer for the 1/8 of an acre to dispose it off and share the proceeds from thereon with my other relatives.”



36. From the above paragraph, DW2 was given ¼ acre and 1/8 was to allow him to sell. The Respondent led evidence that he purchased ¼ acre from DW2 vide the agreement of sale dated the 13/7/2009. I have perused the said agreement which does not contain the description of the land being sold. Throughout his testimony he stated ;

“My grandfather had three pieces of lands. I sold the Defendant 1/8 acre. Certificate 280 has ¼ acre which is under my name.”

37. The Court finds that the description of the land sold to the Respondent is unknown and the evidence of the Respondent that he purchased ¼ acre is doubtful. The onus to prove such critical element lay with the Respondent.

38. I shall now examine the issue of membership or shareholding in the Company. DW3 led evidence and explained to the Court how land was allocated in the Company. He stated as follows;

“That the procedure of allocating members of their plots was that a member was supposed to prove his/her shareholding by producing his/her share certificate and receipts of contribution for purchase of shares.

That the procedure of allocating plot to members is only through balloting.

That the ballot issued to a member is evidence of ownership of the plot held by that ballot.

That once a ballot has been issued to a member another ballot cannot be issued to another member for the same plot unless the original ballot is withdrawn in writing by the Board of Directors.”

39. In respect to this case, DW3 led evidence that according to the records of the Company, Mbuthia purchased 3 parcels of land in the Company all vide Share Certificate no 280. He led evidence that Mbuthia was allocated the 1/8 residential plot in 1974 vide plot No Ruiru West Block1/1998. The second plot being the 1.25 acre shamba was allotted to him in 1985 through ballot No 2527 and gave rise to parcel No Ruiru Kiu Block 2/2203. That the 3rd allotment of ¼ bonus share was done in 1989 vis ballot No R/W 001363 and this generated parcel Ruiru Kiu Block 2/298.

40. Further the witness tabled an extract of the register that showed that Mbuthia was registered as against ballot No 1998 and 2527. From the register plot No Ruiru West Block1/1998 being 1/8 was transferred to Ngugi and this documentary evidence agrees with the evidence led by DW2- (Ngugi) during the trial. Neither the Respondent nor DW2 or DW3 produced any register in the name of Mbuthia with respect to ¼ plot namely plot No 298. Instead the record bears witness that according to the register of the Company the Appellant is registered as owner of parcel 298 vide ballot No 1363.

41. It's not clear why Mbuthia got the ballots for the two plots and not the third one being ¼ acre. Why is it that his name was not entered into the register for the ¼ acre especially that he was allocated the land in 1989 before the Appellant purchased it in 1990. It is expected that Mbuthia having acquired the land in 1989 would have been registered as such and not the Appellant who acquired it later. The Court finds that this evidence goes to create doubt in the title claimed by the Respondent.

42. The Court has found that parcel 1998 being 1/8 was transferred to DW2 (Ngugi) who claimed in evidence that he sold 1/8 to the Respondent. The Respondent holds that DW2 sold him ¼ acre plot. There is no evidence that has been led to show where Ngugi got ¼ acre plot to sell to the Respondent. The Court was shown a Share Certificate No B in the name of Ngugi dated the 17/7/2009 as the registered proprietor of parcels 1.25, ¼ and 1/8 plots. From the analysis in the proceeding paras, it



is clear that the first two plots were registered in the name of Mbutia according to the register of the Company and therefore the plots were not available for Ngugi in 2009. Moreover Ngugi does not appear in the register of the Company as the registered owner of the said plots let alone the ¼ parcel. The Court finds that the trial Court did not receive any cogent evidence to support that Ngugi owned ¼ acre plot (or 298). The Court consequently finds that Share Certificate No 886 in the name of the Respondent remains unsupported because he acquired it from Ngugi whose Share Certificate is doubtful.

43. Further even if it is assumed (which I cannot) that the ¼ acre plot belonged to Mbutia (which was not seeing that it was missing in the register), then the capacity of Ngugi to sell the land would be brought in to sharp doubt. Ngugi did not present any letters of grant of administration to support the allegation in the agreement of sale that he was the administrator of the estate of the late Mbutia. Ngugi led evidence that his family allowed him to take over the land. That said he failed to present any documents in support.

44. Section 45 of the *Law of Succession Act* states as follows;

“45. No intermeddling with property of deceased person (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall — (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

45. Mbutia having died in 1989, the actions of Ngugi of purporting to acquire a Share Certificate for the three parcels in 2009 and purporting to sell ¼ acre to the Respondent in 2009 are illegal in the eyes of the law. These actions are acts of intermeddling with the estate of Mbutia, actions that are forbidden by the law. Consequently if indeed the Respondent purchased land from Ngugi as alleged, then the sale is illegal, irregular and was an act of intermeddling with the estate of Mbutia by both the Respondent and Ngugi and the Court finds such transaction illegal null and void.

46. DW3 led evidence that the Share Certificate and the clearance issued to the Appellant was by error and or mistake and that during the meeting held to resolve the dispute in the Company the former secretary of the Company one Mr. Kamunge admitted the error and stated that the Appellant obtained the documents irregularly. It is noteworthy that DW3 admitted that he was not a Director of the Company in 1990-1992 when the Appellant purchased and acquired title to the land. Any evidence led therefore in that regard is but mere hearsay. Secondly the said Kamunge was not called to give evidence in Court or by way of affidavit evidence. Moreover the minutes that the DW3 relied on does not contain the name of Kamunge and no evidence was placed before the Court to show that the said Kamunge did sign the said minutes despite being stated to have been present in the meeting. In the end the Court finds that the documents of the Appellants being the ballot, the clearance certificate and the Share Certificate have not been successfully assaulted or attacked.

47. With respect to the receipts produced in evidence in the name of Mbutia, the Court finds that all the receipts dated after 11/4/98 must have been made or paid by other parties other than Mbutia given that he died on 11/4/98.



48. I shall now turn my attention to the survey maps and the location of the suit land and Ruiru/kiu Block 2(githunguri)/T.298. That parties hold divergent views on whether or not the titles refer to the same or different lands. According to the Appellant her land is the same one claimed by the Respondent on the ground. She claimed that the Respondent has constructed a site house which is confirmed by the Respondent. She also stated that her land is next to Kwihota School. The Respondent on the other hand states that the Appellants land is located 10 kilometers away from the suit land. That it is located in a block separated from Githunguri block by a river. That the said block is under the management of Nyakinyua Investments Limited and that the Appellants land is in Nyakinyua's side of the river. The Respondent has referred to a surveyor's report which was not produced in evidence (at least I have not seen any evidence in the proceedings) to support the proposition that the suit land is not registered and that the survey with respect to the suit land does not exist.
49. The Court finds that the evidence of the surveyor was critical in resolving this dispute. The Respondent failed to call the Land Registrar and the County Surveyor to shed light on the location of the two plots and further identify the survey map which support the creation of the two plots. The absence of this evidence inadvertently misled the Court to arrive at the conclusion that it did.
50. In summary, the Court finds that evidence of ownership of the plot by Mbuthia, Ngugi and the Respondent was doubtful, DW3 evidence with respect to the transaction that took place in 1990 was hearsay and that Ngugi led evidence that he sold 1/8 acre of land to the Respondent and therefore the Respondent could not have purchased ¼ acre plot from him.
51. In addition, and as alluded earlier on in this Judgement the Court finds that there is no case before it challenging the title of the Appellant. The Respondent asserted a title over Ruiru/kiu Block 2(githunguri)/T.298, which assertion the Court has found unsuccessful. The Court also found that the Respondent has not proven the root of his title in his counterclaim.
52. The Appellant's claim therefore that the Respondent has trespassed on to her property need to be looked into. Trespass is defined under the *Trespass Act* as follows;
- “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.”
53. Evidence was led by the Appellant that the Respondent encroached her land and constructed a site house. This fact was admitted by the Respondent wherein he stated that he has been in occupation of the land for the last 10 years. The Court having not received any justifiable reason for the continued occupation of the Appellant's land the Court finds that continued trespass has been proven.
54. With respect to mesne profits, it is trite that mesne profits are treated in the same way as special damages and must be pleaded and proved. The Appellant failed to lead evidence in support of this claim and the Court finds that being unsupported, it fails. The order for mesne profits was not proven. It is disallowed.
55. In the end I find that the appeal succeeds partially and the Judgment of the trial Court is set aside in its entirety and substituted with the Judgment in favour of the Plaintiff.
56. The costs in the trial Court and on appeal shall be in favour of the Appellant.
57. Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 11TH DAY OF APRIL, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Absent but served

Muhita for Respondent

Court Assistants – Phyllis/Oliver

