



REPUBLIC OF KENYA



**Theuri & 18 others v Theuri & another (Environment & Land Case E46 of 2022) [2024] KEELC 4284 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4284 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E46 OF 2022**

**A OMBWAYO, J**

**MAY 23, 2024**

**BETWEEN**

**GEORGE THEURI ..... 1<sup>ST</sup> PLAINTIFF**  
**HANNAH WANGUI KAMAU ..... 2<sup>ND</sup> PLAINTIFF**  
**GEORGE NJOROGE NJIRU ..... 3<sup>RD</sup> PLAINTIFF**  
**JANE WAMBUI MUGUCHIA ..... 4<sup>TH</sup> PLAINTIFF**  
**CHRISTOPHER KARUMBA ..... 5<sup>TH</sup> PLAINTIFF**  
**PAUL WAWERU NGUNGU ..... 6<sup>TH</sup> PLAINTIFF**  
**GRACE WANJIRA KABAIKU ..... 7<sup>TH</sup> PLAINTIFF**  
**JUDITH MOKEIRA OREKO ..... 8<sup>TH</sup> PLAINTIFF**  
**JOSHUA OGAMBA OUKO ..... 9<sup>TH</sup> PLAINTIFF**  
**MERCY NYABOKE OREKO ..... 10<sup>TH</sup> PLAINTIFF**  
**MURIIITHI KIBOKO KIMAGO ..... 11<sup>TH</sup> PLAINTIFF**  
**EUNICE NJERI MACHARIA ..... 12<sup>TH</sup> PLAINTIFF**  
**BEATRICE MAGOMA OMIGO ..... 13<sup>TH</sup> PLAINTIFF**  
**MARY EKENO ..... 14<sup>TH</sup> PLAINTIFF**  
**SHEILA MIDACHI ..... 15<sup>TH</sup> PLAINTIFF**  
**MARY NJOKI KIMANI ..... 16<sup>TH</sup> PLAINTIFF**  
**HANNAH AKAI NGITO ..... 17<sup>TH</sup> PLAINTIFF**  
**LEAH KHAVAYI INDECHE ..... 18<sup>TH</sup> PLAINTIFF**  
**JOHN KIHORIA NGUGI ..... 19<sup>TH</sup> PLAINTIFF**



**AND**

**NESTER WANJA THEURI ..... 1<sup>ST</sup> DEFENDANT**

**RUKENYA COMMERCIAL AGENCIES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit vide a Complaint dated 5<sup>th</sup> August, 2022 against the Defendants seeking the following orders:
2. A declaration do issue that the Plaintiffs Purchased the respective plots numbered 1-20 as hived from Shawa/Gicheha Block12/18 (Kamwago Farm) in the year 2006/2007 and are therefore legal owners of the same.
3. In the alternative and without prejudice, a declaration do issue that the Plaintiffs have occupied their respective portions as Block12/18 (Kamwago Farm) continuously uninterrupted since 2006/2007 to date hived from Shawa/Gicheha and have acquired the same by way of adverse possession.
4. An order compelling the 1st Defendant to execute the transfer forms and obtain the relevant Land Control Board consents in favor of the Plaintiffs failure to which the same to be executed by the Deputy Registrar of this court.
5. A permanent injunction do issue restraining the Defendants jointly and severally, whether by themselves or through their servants or agents from entering upon, interfering with, transferring or dealing in any manner with the Plaintiffs' respective portions as hived from Shawa/Gicheha Block12/18 (Kamwago Farm).
6. The Defendants be condemned to jointly and severally meet the costs of this suit.
7. The 1<sup>st</sup> Defendant entered appearance and filed her amended defence and counterclaim dated 23<sup>rd</sup> June, 2023 where she averred that the Plaintiffs purchased their respective plots from the 2<sup>nd</sup> Defendant. She averred that the 2<sup>nd</sup> Defendant was not the registered owner of the suit property. She further averred that the Plaintiffs are not bonafide purchasers and in illegal occupation of the properties to the 1<sup>st</sup> Defendant's detriment.  
She prayed for judgment against the Plaintiffs (now Defendants) for:
8. An order for eviction do issue against the Plaintiffs from the suit property known as Title Number: Shawa/Gicheha Block 12/18 (Kamwago Farmers, Njoro, Nakuru).
9. That this Honourable court be pleased to grant a demolition order for the permanent structures that the Plaintiffs have erected on the suit property at their own costs.
10. The OCPD Njoro Police Station be directed to provide security during the eviction and demolition exercise.
11. Costs of and incidental to the suit.

**Plaintiffs' Case**

12. George Theuri testified as PW1 where he testified that he is the 1<sup>st</sup> Plaintiff and has brought this case on behalf of his colleagues with their authority. He produced his undated statement filed on 17<sup>th</sup> August,



2022 which was adopted as evidence in chief. He also produced his list of documents dated 5<sup>th</sup> August, 2022 as follows:

- Advert by Rukenya Commercial Agencies for sale of the plots- PEX 1
- Proposed subdivision of the 20 plots- PEX 2.
- Sale agreement between Rukenya and himself dated 8/9/2006- PEX 3.
- Sale agreement dated 7/9/2006. PEX 4
- Receipt dated 8/11/2006 for Kshs. 80,000 -PEX 5
- Electricity quotation-PEX 6
- 13. Sale agreement between Antony Kamui and Lukenya Commercial agencies dated 19/6/2006-PEX 7
- Sale agreement dated 19/6/2006 for Kshs130,000-PEX 8.
- Sale agreement dated 19/6/2006 for Kshs. 80,000- PEX 9.
- Receipt dated 30/9/2006 for Kshs. 45,000- PEX 10
- Sale agreement dated 7/1/2006 -PEX 11.
- Receipt dated 7/1/2007 for Kshs. 36,000- PEX 12.
- Sale agreement dated 13/2/2007-PEX13.
- Receipt dated 16/6/2007 for Kshs. 7,000-PEX14.
- Receipt dated 19/2/2007 for Kshs.15,000-PEX15.
- Receipt dated 7/4/2007 for Kshs.10,000 for Ruffus Kinyua-PEX16
- Receipt dated 13/2/2007 for Kshs. 31,000 for Ruffus Kinyua-PEX17
- Receipt dated 18/10/2007 for Kshs. 7,000 for Ruffus Kinyua-PEX18.
- Sale agreement for Mary Wanjiru Karumba dated 15/1/2007-PEX 19
- Receipts to Christopher Karuba dated 25/1/2007 PEX 20 and 21.
- 14. Sale agreement between Peter Kairu Mwangi and Mary Njoki Kimani-PEX 22.
- 15. Sale agreement dated 22/6/2006 between Antony W Kairu and Mary-PEX 23.
- 16. Sale agreement dated 25/7/2006 between Antony W Kairu and Paul Waweru Ndungu- PEX 24.
- Receipt dated 10/4/2007 for Kshs. 2,000 for Weweru Ndungu-PEX 25.
- Receipt dated 25/7/2006 for Kshs. 4,000– PEX 26
- Receipt dated 16/5/2007 for Kshs. 500 -PEX 27.
- Receipt dated 29/3/2007 for Kshs. 2,000-PEX 28
- Sale agreement dated 14/3/2014 for Kshs. 180,000-PEX 29
- Receipt dated 7/4/2006 for 26,000-PEX 30
- An undated receipt for Kshs. 5000-PEX 31
- Receipt dated 24/2/2007 for Kshs. 2,000-PEX 32.
- Receipt dated 2/7/2007 for Kshs. 20,000-PEX 33.



- Sale agreement dated 4/3/2014-PEX 34
- Sale agreement dated 12/2/2007-PEX 35.
- Sale agreement dated 25/11/2006- PEX 36.
17. Sale agreement from Joseph Mwangi Njoroge to Eunice Njau dated 7/5/2021-PEX 37.
- Receipt- PEX 38.
- Sale agreement dated 8/5/2014-PEX 39
- Sale agreement-PEX 40.
- Demand letter dated 13/6/2023-PEX 41
18. He testified that the 5<sup>th</sup> Plaintiff was issued a receipt but he did not know the relation. It was his testimony that they have been in occupation of the land from 2006 and that nobody has claimed the land. He testified that he met the 1<sup>st</sup> Defendant in 2022. He further testified that he was not sure whether the 2<sup>nd</sup> Defendants were agents of the 1<sup>st</sup> Defendant. He stated that the owner of the land was Antony Karimi and added that the 1<sup>st</sup> Defendant has never been interested with their possession. He testified that the land is the 1<sup>st</sup> Defendant's home and that when they bought the land it was in the 2<sup>nd</sup> Defendant's name. He testified that the land belonged to the 1<sup>st</sup> Defendant's husband.
19. Upon cross examination by Ms. Onsare for the 1<sup>st</sup> Defendant, PW1 was referred to PEX3 where he confirmed that the agreement was signed by Antony Karimi and the 1<sup>st</sup> Plaintiff. He further stated that the consideration was received by Antony Karimi. He admitted that they did not do a search hence they did not know the owner of the land. He stated that he has constructed but admitted that he did not have any evidence to prove the same. He stated that the agreement PEX 7 was between Antony Karimi and Hannah and that the owner of the land did not sign. The witness was shown PEX 22 sale agreement dated 28/10/2015. He stated that the land belonged to the deceased husband of the 1<sup>st</sup> Defendant. He added that Antony Karimi was an agent for Peter.
20. PW1 stated that he came to know the owner of the land later. He further stated that Antony was the owner of the 2<sup>nd</sup> Defendant but admitted that he did not have evidence to prove the same. He stated that he came to know the 1<sup>st</sup> Defendant in the year 2022 at a chiefs meeting. He stated that they were told that he bought the land in an illegal manner and were told to pay afresh. He stated that he signed the agreement dated 10/6/2022 and paid Kshs400,000/=. He admitted that he did not go through the documents. He stated that he bought the land from Antony Karimi who received the money. He admitted that he should follow up with Antony Karimi.
21. Upon reexamination, PW1 stated that he signed the agreement thinking that the titles were coming soon. He stated that the agreement was signed before the filing of the suit.
- That marked the close of the Plaintiffs' case.

### **1<sup>st</sup> Defendant's case**

22. Nester Wanja Theuri testified as DW1 where her witness statement dated 11/9/2023 and filed on 18/9/2023 was adopted as evidence in chief. She also produced her documents 1<sup>st</sup> DEX 1- DEX 5. It was her testimony that she acquired the land after her husband died and that the property was transferred to her after succession. She testified that she did not know the 2<sup>nd</sup> Defendant and that her late husband had no agreement with them. She further testified that when she visited the land she found ongoing activities. She also testified that she could not find Antony that's when she contacted



the area chief. It was her testimony that they met with chief Muthoni, Plaintiff and other people. She testified that she had not authorized anybody to sell the land. She also testified that they agreed that they sign her agreement and that they were to pay her but they never did. She testified that her husband died on 25/5/2007.

23. Upon cross examination by Mr. Tombe for the Plaintiff, DW1 stated that the land was registered in the name of Charles Theuri. She stated that she concluded succession in 2009 and added that she did not know how the Plaintiffs took occupation. She also stated that she did not know or engage Karimi. She confirmed that she does not cultivate the land and admitted that she has not been frequently visiting the land. She also confirmed that the houses were constructed by people she did not know. She further stated that she received Kshs500,000 from Antony Karimi before going to the chief and that the money was deposited through the lawyer. She stated that Antony wanted to purchase the plots from her hence he paid Kshs500,000 as purchase price.
24. On reexamination, DW1 stated that she had entered into agreement with Antony on 14/3/2017 as he wanted to purchase the land. She further stated that he was to pay the whole purchase price and Kshs. 500,000 was the deposit. She stated that she went to the chief on 24/5/2022. DW1 was shown DEX 4 where she stated that she did not know who erected the development. She also stated that she never visited the property as she feared for her life.

That marked the close of 1<sup>st</sup> Defendant case.

The 2<sup>nd</sup> Defendant did not participate in the case.

### **Submissions**

None of the parties have filed their submissions.

### **Analysis and Determination**

25. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:
  - a. Whether there was a valid sale agreement between the Plaintiffs and the 2<sup>nd</sup> Defendant.
  - b. Whether the Plaintiffs are bonafide purchasers for value.
  - c. Whether the Plaintiffs are entitled to the orders sought
  - d. Whether the 1<sup>st</sup> Defendant is entitled to the orders sought in her Counterclaim.
26. It is not in dispute that the 1<sup>st</sup> Defendant is the registered proprietor of the suit land Shawa/Gicheha Block12/18 (Kamwago Farm) evidenced by the copy of title issued on 14<sup>th</sup> February, 2019. The Plaintiffs contend that they purchased plots numbered 1-20 as hived from the above suit property between 2006 and 2007. They produced copies of the sale agreements as well as receipts as proof of payment. This court has keenly perused the sale agreements and it is not in dispute that the vendor was the 2<sup>nd</sup> Defendant. It is also clear that the receipts of payment were issued by the 2<sup>nd</sup> Defendant. PW1 testified that they paid the purchase price of the plots to Anthony Karimi and added that they were not sure whether the 2<sup>nd</sup> Defendant was an agent of the 1<sup>st</sup> Defendant. He also testified that he did not have evidence to confirm that Anthony Karimi was the owner of the 2<sup>nd</sup> Defendant. He confirmed that they had not conducted a search before purchase of the said plots only to later realize that the 1<sup>st</sup> Defendant was the owner of the suit property.



27. The 1<sup>st</sup> Defendant on the other hand testified that she acquired the suit land upon the death of her husband which was transferred to her after succession in 2009. She testified that her husband died on 25/5/2007 and added that she never knew the 2<sup>nd</sup> Defendant. She also testified that her late husband had no agreement with the 2<sup>nd</sup> Defendant. She confirmed that her late husband prior to his demise had demarcated the suit property into sub-plots and engaged Anthony Karimi to market the same for him. She also confirmed that before his husband's death, they had completed the sale of plot numbers 2,3 and 20. It is the 1<sup>st</sup> Defendant's case that Anthony Karimi disposed off the remaining plots without her approval and in a bid to amicably settle the same, she agreed to enter into agreement with Antony on 14/3/2017 for him to purchase the rest of the plots for Kshs. 5,100,000 where he paid Kshs. 500,000 as deposit but failed to clear the balance.

Section 3 (3) of the Law of Contract Act provides as follows:

“(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;...”

28. In the instant case, it is not disputed that the Plaintiffs executed sale agreements for purchase of the said plots as well as made payments in consideration. Going by the 1<sup>st</sup> Defendant's unchallenged testimony that the deceased died on 25/5/2007, it meant that the deceased was alive when the agreements were being executed. It is the Plaintiffs case that one, Anthony Karimi was the deceased's agent thereby authorized to sell the said plots on his behalf. The 1<sup>st</sup> Defendant on the other hand argued that neither his deceased's husband nor herself had authorized sale of the plots. It is this court's view that the burden to prove that the 2<sup>nd</sup> Defendant was the deceased's agent rested on the Plaintiffs.

29. Given that the 1<sup>st</sup> Defendant argued that the deceased never authorized any sale of plots aside from plots 2,3 and 20 as excised from the suit property, it was imperative for the Plaintiffs to prove otherwise. I am not satisfied that the Plaintiffs proved that the 2<sup>nd</sup> Defendant was the deceased's agent authorized to sell the plots on his behalf. Section 107, 108 and 109 of the Evidence Act makes provision as to who bears the burden of proof and provide as follows: -

#### 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.



30. Further, the Court of Appeal in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR held as follows:

“We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

31. From the above provisions it is clear that the Plaintiffs had the burden to prove that the 2<sup>nd</sup> Defendant was the authorized agent of the vendor, in this case the 1<sup>st</sup> Defendant’s deceased’s husband. The Plaintiffs failed to discharge that burden and it was not enough for them to claim that they executed agreements and paid consideration for the plots. There was no proof that the 2<sup>nd</sup> Defendant was acting as an agent for deceased. The Sale Agreements produced by the Plaintiffs were not express to the extent that the 2<sup>nd</sup> Defendant was to represent the deceased in the sale of the plots. It is this court’s view that the lack of an authorized agent for the vendor vitiated the contract and the same is rendered null and void.

32. Going to the 2<sup>nd</sup> issue for determination, the Court of Appeal in Samuel Kamere v Lands Registrar [2015] eKLR stated as follows:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

33. PW1 admitted that they never conducted any due diligence before purchasing the said plots. He testified that they only came to know the owner of the suit property later after they had already paid the consideration. It is this court’s view that the Plaintiffs failed to fulfil the requirements of a bona fide purchaser. This court therefore finds that the Plaintiffs are not bona fide purchasers for value.

34. It is noteworthy that the 1<sup>st</sup> Defendant admitted that her deceased’s husband sold plots number 2,3 and 20 which evidence the Plaintiffs never challenged. This court therefore finds that the remaining plots in dispute are plots number 1 and 4-19.

35. The upshot of the above is that the Plaintiffs have failed to prove their case on a balance of probabilities and are therefore not entitled to the orders sought. The 1<sup>st</sup> Defendant’s counter claim therefore succeeds.

36. Consequently, I find that the 1<sup>st</sup> Defendant has proved her case as per the Counterclaim and will proceed to enter judgement her favour in the following terms:

37.

- a. The plaintiff to vacate the suit property within 90 days from today failure of which an eviction order be and is hereby issued directed to the Plaintiffs, their servants, agents and/ or any other



persons whatsoever in occupation of the property known as Shawa/Gicheha Block 12/18 (Kamwango Farmers, Njoro, Nakuru).

- b. The OCPD Njoro Police Station do oversee the enforcement of the said eviction order by a licensed auctioneer issued with court execution warrants.
- c. The Plaintiffs shall bear the costs of the suit.

It is so ordered.

**JUDGMENT DATED SIGNED AND DELIVERED ON 23RD DAY OF MAY 2024.**

**A.O. OMBWAYO**

**JUDGE**

