



**Nguru v Joreth Limited & 2 others (Environment & Land Case  
1492 of 2014) [2024] KEELC 5062 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5062 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1492 OF 2014**

**EK WABWOTO, J**

**JUNE 28, 2024**

**BETWEEN**

**JOSEPH MURIUKI NGURU ..... PLAINTIFF**

**AND**

**JORETH LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ONESMUS MUCIRI MAINA ..... 2<sup>ND</sup> DEFENDANT**

**MARY NYAMBURA MUCHIRI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The dispute herein relates to ownership of property known as LR No 13330/237 also known as Plot number 368 in Thome Estate Farmers No 5 Limited. The Plaintiff commenced the suit vide a plaint dated 26<sup>th</sup> November 2014 which was subsequently amended on 21<sup>st</sup> April 2022. The following reliefs were sought:-
  - a. A permanent injunction restraining the Defendants whether jointly or severally by themselves, their agents, servants or otherwise howsoever from encroaching, trespassing, remaining or in any other manner dealing with Plot No 368 now known as LR No 13330/237.
  - b. A declaration that the transfer of the suit property Plot No 368 now known as LR No 13330/237 by the 1<sup>st</sup> Defendant or by anyone else to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was fraudulent, illegal and therefore null and void and an order that the said transfer be cancelled forthwith and that the suit property be registered in the name of the Plaintiff.
  - c. An order directing the Defendants to forthwith execute and process the transfer of title to LR No 13330/237 to the Plaintiff and in default thereof the Deputy Registrar of this court do execute all documents necessary to transfer the suit property LR No 13330/237 from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the Plaintiff.



- d. An eviction order against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to remove themselves and the structures they have erected on LR No 13330/237 at their cost within time to be set by this court and in default thereof a court bailiff be authorized to evict the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from the suit premises LR. No 13330/237.
  - e. In the alternative, the Defendants be ordered to pay to the Plaintiff full compensation by another plot or for the value of the suit property at current market price to be determined by valuation.
  - f. Such other or further reliefs as this court may deem fit and just.
  - g. Costs and interest thereon.
2. The suit was contested by the Defendants. The 1<sup>st</sup> Defendant filed a Statement of Defence dated 24<sup>th</sup> February 201 denying the averments made in the plaint and seeking for dismissal of the suit with costs. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants equally filed an Amended Statement of Defence dated 14<sup>th</sup> June 2022 denying the averments made in the plaint and sought for dismissal of the entire suit with costs.
  3. The Plaintiff also filed a reply to the amended statement of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants defence dated 25<sup>th</sup> June 2022 wherein he reiterated the averments made in his plaint and prayed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants defence be struck out.

#### **The Plaintiff's case**

4. It was the Plaintiff's case that the 1<sup>st</sup> Defendant was the registered proprietor of all that property known as LR No 1330 (being an amalgamation of two titles previously known as LR. No 4920/3/2 and LR No 4921/3/1 also owned by the 1<sup>st</sup> Defendant and which whole parcel of land the 1<sup>st</sup> Defendant sold to an entity known as Thome Farmers No 5 Limited in the year 1974. Following the sale of the whole of LR. No 13330 to Thome Farmers No 5 Limited, the same was subdivided into 500 plots measuring ½ an acre each and which were in turn sold by Thome Farmers No 5 Limited to its shareholders.
5. The Plaintiff averred that among the 500 plots was Plot No 368 which was sold to one John Muremwa Kironji by Thome Farmers No 5 Limited and the said John Muremwa Kironji was ultimately issued with a share certificate under entry Nos. 246 and 700 and which conferred ownership to him of the said Plot No 368 in Thome Farmers No 5 Limited. It was averred that John Muremwa Kironji paid the full purchase price for the suit property and also paid the necessary survey fee and other subscription charges pertaining to the said plot. The said purchaser took possession of the same and by a transfer dated 15<sup>th</sup> March 1991 John Muremwa Kironji sold the suit property to Wanyoike Mburu who took possession of the same upon purchase. Wanyoike Mburu was issued with a share certificate No 506 of 15<sup>th</sup> March 1991 by Thome Farmers No 5 Limited by which ownership of the said plot No 368 was conferred to him.
6. It was further averred that by another sale agreement dated the 2<sup>nd</sup> December 1991 made between the said Wanyoike Mburu and Joseph Muriuki Nguru the Plaintiff herein the Plaintiff purchased the suit plot for Kshs 275,000/= which he paid fully to the said Wanyoike Mburu and the Plaintiff took immediate possession of the same.
7. It was further averred that after survey work the plot was known as LR. No 13330/237 which according to the Plaintiff it was fraudulently sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The particulars of fraud were pleaded at paragraph 15 of the amended plaint.



8. During trial, the Plaintiff testified as the sole Plaintiff witness. He relied and adopted his witness statement dated 21<sup>st</sup> April 2022 and the Plaintiff's bundle of documents dated 26<sup>th</sup> November 2014, supplementary bundle dated 21<sup>st</sup> October 2021 and another supplementary bundle of documents dated 20<sup>th</sup> June 2022.
9. When cross-examined by Counsel for the 1<sup>st</sup> Defendant he stated that he went to the offices of Thome Farmers No 5 Limited to confirm if Mr. Wanyoike was one of its shareholders. He also stated that there was a relationship between Joreth Limited the 1<sup>st</sup> Defendant herein and Thome 5 and he referred to a resolution made in 1974 which was produced in evidence. He also stated that there was evidence that Arthur Maguyu had confirmed that Joreth Limited had sold the land to Thome 5. He also stated that by 1992 he was a shareholder of Thome. He further stated that he was not aware of any consent made in respect to HCCC No 6206 of 1992 and neither had he seen any newspaper advert listed at page 108 of the 1<sup>st</sup> Defendant's bundle. He also stated that he never paid any money to Joreth Limited neither did he have any agreement with them.
10. When cross-examined by Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, he stated that he did due diligence before buying the property and he personally paid the purchase price of the property. He also stated that he entered into the land in 2007 and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants committed fraud when buying the land since they did not do due diligence. He also stated that the register at page 66 of the Plaintiff's bundle does not show the name of Wanyoike since it only shows the name of John Kironji.
11. When re-examined, he stated that he had no issue with Mr. Wanyoike as he performed his duty as was expected. He also stated that he physically visited the land before purchase and equally visited the offices of Thome Farmers 5 Limited and confirmed that Mr. Wanyoike owned the land.

### **The case of the 1st Defendant**

12. The 1<sup>st</sup> Defendant filed a Statement of Defence dated 24<sup>th</sup> February 2015. It was averred that the suit property has not now or ever been registered in the name of Thome Farmers No 5 Limited, John Muremwa Kironji or Wanyoike Mburu or any other person other than the 1<sup>st</sup> Defendant. In addition the 1<sup>st</sup> defendant averred that the transfer of the suit property to wit LR No 13330/237 to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was legal as the property had been registered in the name of the 1<sup>st</sup> Defendant and as such rightfully sold and transferred the said property to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
13. During trial, Jonathan Ciano testified on behalf of the 1<sup>st</sup> Defendant. He relied on his witness statement and the 1<sup>st</sup> Defendant's bundle of documents that were on record. It was his testimony that the 1<sup>st</sup> Defendant was the registered owner of the suit land before the same was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He also stated that in 1990 the 1<sup>st</sup> Defendant had a case with Thome 5 where judgment was issued in favour of the 1<sup>st</sup> Defendant in respect to the suit property. He also stated that there was a consent which was filed wherein the 1<sup>st</sup> Defendant was given permission to sell the property. The Plaintiff was not a party to the suit. There was also a newspaper advert which was issued for anybody having an interest in the land to follow up with their office but the Plaintiff never responded to it. Subsequently thereafter the land was sold to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The date of the transfer was 25<sup>th</sup> April 2007 which was 2 years after the notice had been issued.
14. When cross-examined by Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants he stated that the 1<sup>st</sup> Defendant was the owner of the suit property and it never dealt with the Plaintiff. He also stated that the Plaintiff never responded to the notice that was issued earlier.



15. On cross-examination by Counsel for the Plaintiff he stated that he is the Special Manager of the 1<sup>st</sup> Defendant having joined them in 2016 and that the event being referred to occurred before he joined them. When asked about the correct status of the suit property, he stated that he could not confirm the same. When asked about the subdivisions that were done, he stated that the said subdivisions occurred with the knowledge and consent of the 1<sup>st</sup> Defendant and Thome.
16. On re-examination, he stated that the registered owner of the 2 properties that were amalgamated was the 1<sup>st</sup> Defendant. The sale agreement was never completed and that is why the 1<sup>st</sup> Defendant went to court in 1992. He also stated that Arthur Magugu was a shareholder of Joreth Limited and that Thome 5 had not acquired any title to the property. No transfer was done from Joreth to Thome and he had not seen any documents between the Plaintiff and Joreth Limited.

### **The case of the 2nd and 3rd Defendants**

17. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a Statement of Defence dated 5<sup>th</sup> February 2015 which was later amended on 14<sup>th</sup> June 2022. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's case that they have not encroached on the suit property as they followed due process in its acquisition. The original plot 368 was sold to them through unlawful means. They did not participate in any fraud. The Plaintiff never responded to the notice dated 2<sup>nd</sup> April 2005 that was put out in the Daily Nation.
18. During trial, Onesmus Maina testified on their behalf. He relied on his witness statement dated 5<sup>th</sup> February 2015 and also the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's bundle on record in his evidence in chief. He testified that he is owner of the suit property owning it jointly with his wife. He acquired the same after seeing it from the newspaper advert. He did due diligence before purchase. The same was bushy and vacant. The title deed was issued in the year 2008 and he has developed it and currently residing on the said property.
19. When cross-examined by Counsel for the 1<sup>st</sup> Defendant, he stated that the plot was not fenced at the time of purchase. He did a search before its purchase. He paid for the stamp duty and has been in occupation after purchasing it.
20. On cross-examination by Counsel for the Plaintiff he stated that the plot had not been fenced in 2006 when he went to see it. He took possession in 2007 and fenced it off. Plot No 368 is the same as LR No 13330/237. He did not have any information on the history of the plot and that he did not know of the relationship between the 1<sup>st</sup> Defendant and Thome 5.

### **Plaintiff's submissions**

21. The Plaintiff filed written submissions dated 3<sup>rd</sup> April 2023. It was submitted that the Plaintiff had during trial tendered an affidavit sworn by Joseph Wambaa which confirmed a resolution dated 26<sup>th</sup> February 1974 when Joreth Limited the 1<sup>st</sup> Defendant herein agreed to sell LR No 4920/3/2 and 4921/3/1 to Thome Farmers No 5 Limited. The two titles were later amalgamated and became one title LR No 13330. It was also submitted that there was evidence adduced that the 1<sup>st</sup> Defendant and its directors were paid by Thome Farmers No 5 Limited towards the purchase of the land. It was also submitted that the 1<sup>st</sup> Defendant's former Chairman and Director Arthur K. Maguyu had acknowledged the sale of the land to Thome Farmers and hence the Defendant cannot deny the existence of the said sale.
22. It was also submitted that the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant is dated 22<sup>nd</sup> February 2007, the transfer is dated 25<sup>th</sup> April 2007 and registered on 9<sup>th</sup> March 2008 which process was



undertaken when the Plaintiff was away in the USA and hence therefore the said title can be impeached since it was acquired illegally, unprocedurally and through a corrupt scheme.

23. It was also submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not innocent purchasers for value since they acquired the said property unprocedurally and illegally. The court was urged to grant the reliefs sought in the amended plaint since the Plaintiff had proved his case to the required standard.

#### **The submissions of the 1st Defendant**

24. The 1<sup>st</sup> Defendant filed submissions dated 5<sup>th</sup> June 2023 and submitted on the following issues; whether the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acquired good title to the suit property from the 1<sup>st</sup> Defendant and who should bear costs of the suit.
25. Citing the provisions of Section 26 of the *Land Registration Act* and the cases of *Kuria Kiarie & 2 others v Sammy Magera* (2018) eKLR and *Richard Nyamwange & another v Samuel Kimani Gathemba & 10 others* (2020) eKLR it was submitted that the 1<sup>st</sup> Defendant held a good title which he had passed onto the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Joseph Wambaa was never called as a witness. There was no sale agreement between the 1<sup>st</sup> Defendant and Thome Farmers and that the Plaintiff had not proved any allegations of the root of title held by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
26. It was also submitted that the Plaintiff had also not met the ingredients of adverse possession and had failed to prove the same during trial. The cases of *Gabriel Mbui v Mukindia Manyara* (1993) eKLR, *Powell v McFarlane* ChD (1997) and among others were cited in support. The court was urged to dismiss the suit with costs.

#### **The 2nd and 3rd Defendant's submissions**

27. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed written submissions dated 24<sup>th</sup> April 2023. The following issues were outlined for consideration by the court. Validity of the sale agreement between the Plaintiff and Wanyoike Mburu, John Muremwa Kironji and Thome Farmers No 5 Limited and the connection of the same to the 1<sup>st</sup> Defendant on the other hand if any, whether there was a valid agreement for sale of land between Thome Farmers No 5 Limited and 1<sup>st</sup> defendant and whether the Plaintiff has proved fraud, misrepresentation, illegality or corrupt scheme on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to warrant cancellation of their title.
28. It was submitted that there is no valid sale agreement between Thome farmers No 5 Limited and John Muremwa Kironji and equally there is no valid contract for sale of land between John Muremwa Kironji and Wanyoike Mburu that would pass a valid title to the Plaintiff as alleged and hence therefore the subsequent contract between John Muremwa Kironji and wanyoike Mburu and Thome Farmers No 5 Limited cannot be valid. The transaction between the Plaintiff and the alleged Thome Farmers No 5 Limited cannot bind the 1<sup>st</sup> Defendant who was not a party to the said contract.
29. It was further submitted that Thome Farmers No 5 Limited did not have any property and or land to sell to the Plaintiff. HCCC No 6206 of 1992 *Joreth Limited v Lewis Kibue & 24 others* was a case filed involving squatters who had invaded the suit properties No 4920/3 and 4921/3 which were later merged to 13330 wherein Thome Farmers applied to be joined as the 24<sup>th</sup> Defendant. The said case was not determined conclusively as some squatters agreed to pay Kshs 200,000/= to Joreth Limited to obtain titles.
30. On whether the Plaintiff had proved fraud to warrant impeachment of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's title it was submitted that the Plaintiff has never been in possession of the suit property, no fraud had been proved and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were lawful owners of the suit property.



31. The court was urged to dismiss the suit with costs.

### **Analysis and Determination**

32. The court has considered the pleadings filed, evidence adduced together with written submissions filed by the parties and has outlined the following salient issues for consideration by the court:-

- i. Who is the bonafide owner of the suit property.
- ii. Whether the Plaintiff is entitled to the orders sought.
- iii. What orders should issue as to costs of the suit.

### **Issue No 1 Who is the bonafide owner of the suit property**

33. Article 40 of the Constitution of Kenya, 2010, elaborates on the right to own property in Kenya. It provides as follows; -

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.”

34. Both parties having laid claim to the property are deserving proprietary protection and to adequately donate this protection this Court must look into the root to its ownership. This approach was well appreciated in the case of Hubert L. Martin & 2 others v Margaret J. Kamar & 5 others [2016] eKLR. Equally in the case of Nairobi High Court Civil Suit No 1024 of 2005 (OS), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

35. As earlier stated both parties are laying claim to the suit property. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows:

- (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.”

Sections 109 and 112 of the same Act states;

“109. 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.



“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

36. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’mairanyi & others v Blue Shield Insurance Company Limited* -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

37. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

38. The Court will be guided by the aforementioned provisions and cases. From the evidence tendered herein, it is evident that Joreth Limited, the 1<sup>st</sup> Defendant herein, was the registered owner of two parcels of land known as LR No 4290/3/1 and 4921/3/1 which were amalgamated to form LR No 13330. Thome Farmers No 5 Limited (Thome Farmers) is alleged to have bought the parcel of land known as LR No 13330, the Mother Title, took possession thereof, commenced sub-division of the land into half acre plots and allocated the plots to its shareholders, vide a sub-division scheme approved by the Ministry of land and Settlement through a letter dated 23<sup>rd</sup> January, 1987.

39. The evidence before this court shows that the Plaintiff vide a sale agreement dated 2<sup>nd</sup> December 1991 purchased a share in Thome Farmers No 5 Limited which he was issued with a Share Certificate No 1335 of 30<sup>th</sup> August 1993 which was issued in the name of his wife Mary Waithera Muriuki. Upon purchase the Plaintiff entered and took possession by fencing the Plot No 368 (LR No 13330/237) and later relocated to the USA between July 1993 to July 2013.



40. From the evidence that was tendered herein, it is not in dispute that the suit property is an amalgamation of the properties which later became 13330. There was evidence adduced to the effect that the Plaintiff acquired the property way before the same could have been transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The suit property could not have been available for sale to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants without the consent of the Plaintiff. This court, on the basis of the evidence adduced by the Plaintiff is satisfied that the Plaintiff lawfully acquired the respective plot. The court is also satisfied with the evidence produced which shows that the Plaintiff took possession of the respective plot immediately upon purchase.
41. In this case, the Plaintiff has been able to demonstrate a good root and acquisition of the suit property and it is the finding of this court that the Plaintiff is the bonafide owner of the suit property.

### **Issue No II Whether the Plaintiff is entitled to the reliefs sought**

42. The Plaintiff sought for several reliefs in his amended plaint. These included an eviction order, permanent injunction and a declaration that the transfer of the suit property by the 1<sup>st</sup> Defendant to 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was illegal. The Plaintiff also sought for an alternative prayer for compensation by another plot or compensation by payment of the value of the suit property at court market price to be determined by valuation. During trial the Plaintiff produced a valuation report dated 14<sup>th</sup> June 2022 prepared by Gyneth K. Magiri a Registered and Practising valuer which indicated the reserve value of the property as Kshs 19,500,000/-.
43. The court having held earlier that the Plaintiff is the bonafide owner of the suit property has to consider what is the appropriate relief to grant. During trial, evidence was tendered herein and both parties agree that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are currently residing in the suit property and have already developed the same. In view of the foregoing and considering the alternative prayer sought for compensation of the suit property at current market price, this court will consider to grant the alternative prayers sought as the most appropriate relief to grant herein.
44. In respect to costs of the suit, the same follow the event unless for good reasons the court orders otherwise. In the circumstances, the Plaintiff is the successful party to the suit and he shall have the costs of the suit payable by the 1<sup>st</sup> Defendant.

### **Final orders**

45. In conclusion, it is the finding of this court that the Plaintiff has proved his case to the required standard of balance of probabilities as against the Defendants and judgment is hereby entered in the following terms:-
- a. The Defendants are hereby ordered to pay the Plaintiff full compensation by another plot of similar value or an equivalent sum of the value of the suit property amounting to Kshs 19,500,000/=
  - b. The Plaintiff is awarded costs of the suit which shall be paid by the 1<sup>st</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Miss Njeri holding brief for Wangui Koech for 1<sup>st</sup> Defendant.



Mr. Gachuhi for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

No appearance for Plaintiff.

Court Assistant: Caroline Nafuna.

