



**Kariuki v Kang'ong'a & another (Environment & Land Case
E024 of 2021) [2024] KEELC 5026 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E024 OF 2021**

BM EBOSO, J

JUNE 24, 2024

BETWEEN

DAMARIS WAITHIRA KARIUKI PLAINTIFF

AND

JOSPHAT KARANJA KANG'ONG'A 1ST DEFENDANT

RUIRU DISTRICT LAND REGISTRAR 2ND DEFENDANT

JUDGMENT

1. Through a plaint dated 19/2/2021, the plaintiff challenged the registration of the 1st defendant as proprietor of land parcel number Ruiru Kiu Block 2 (Githunguri)/2954 [referred to in this judgment as “the suit land” or “the suit property”]. The impugned registration was expressed as having been effected on 23/7/2018 pursuant to a transfer by M/s Githunguri Constituency Ranching Company Ltd [referred to in this Judgment as “the company”]. The plaintiff contended that the impugned registration was effected fraudulently.
2. The 1st defendant was served through a notice published in the Daily Nation Newspaper on 12/10/2021. He neither entered appearance nor filed a defence.
3. At the hearing, the plaintiff testified as PW1. In addition, he led evidence by the Chairman of Githunguri Constituency Ranching Company Ltd who testified as PW2. The said Chairman’s testimony was that the company did not execute any instrument of transfer conveying the suit land to the 1st defendant. He further testified that the suit land belonged to the plaintiff. PW2 testified that the 1st defendant had never owned the suit land, adding that the suit land fell within a subdivision scheme owned by the company.
4. Against the above background, this court is invited to determine whether the impugned registration and title were procured fraudulently and/or irregularly as alleged by the plaintiff. The court is further



invited to determine whether the 2nd defendant was privy to the alleged fraud or irregularities. I will briefly outline the parties' respective cases and evidence before I dispose the above two key issues.

Plaintiff's Case

5. The plaintiff's case is contained in the plaint dated 19/2/2021; her reply to the 2nd defendant's defence; her witness statement dated 19/2/2021; PW2's witness statement dated 19/2/2021; his [the plaintiff's] oral testimony tendered on 21/11/2023; the oral testimony of PW2 tendered on 21/11/2023; and the written submissions filed by M/s Kabiru & Co Advocates, dated 5/12/2023. In summary, the plaintiff's case is that she acquired shares in Githunguri Constituency Ranching Company Ltd. By virtue of her shareholding, she participated in a balloting exercise pursuant to which she was allotted the suit land in 1985. In 13/3/2015 and 29/9/2018, the company issued her with clearance and conveyance documents to facilitate registration of the suit land into her name. On presenting the clearance and the conveyance documents to the Land registrar, she learnt that the land had been registered in the name of the 1st defendant on 23/7/2018. She shared the above information with the company. The company assured her that the 1st was a stranger to them. The company further informed her that they had not issued a clearance or conveyance documents to the 1st defendant. Subsequent to that, the company wrote to the Land Registrar requesting him to rectify the land register to reflect her (the plaintiff) as the proprietor of the land. The request was not acceded to.
6. Consequently, the plaintiff brought this suit seeking the following verbatim reliefs against the defendants:
 - a. A declaration that the plaintiff is the bona fide owner of parcel number Ruiru Kiu Block 2 (Githunguri) 2954.
 - b. Cancellation of the title for parcel number Ruiru Kiu Block 2 (Githunguri) 2954 in the name of the 1st defendant.
 - c. An injunction order restraining the defendant from interfering with the parcel of number Ruiru Kiu Block 2 (Githunguri) 2954.
 - d. The 2nd defendant be ordered to issue the plaintiff with a title document bearing the plaintiff's name for ownership of the said parcel number Ruiru Kiu Block 2 (Githunguri) 2954.
 - e. The 1st defendant be ordered to execute all documents to enable the plaintiff obtain a title in her name in default of which the Deputy Registrar Environment and Land Court do execute all necessary documents and transfer to enable the title for parcel number Ruiru Kiu Block 2 (Githunguri) 2954 be issued in the plaintiff's name.
 - f. Costs of the suit.
 - g. Interest in (c) at court rate until payment in full.
 - h. Such further reliefs that this Honourable Court may deem fit.

1st Defendant's Case

7. As observed in the introductory part of this Judgment, the 1st defendant was served through a notice published in the Daily Nation Newspaper edition of Tuesday 12/10/2021. He neither entered appearance nor filed a defence. Consequently, the plaintiff's claim against the 1st defendant is uncontested by the 1st defendant.



2nd Defendant's Case

8. The 2nd defendant is the Land Registrar – Ruiru. He entered appearance through the Hon Attorney General. He filed a statement of defence; witness statement by Mr Robert Mbuba dated 16/2/2022; and list and bundle of 8 documents dated 16/2/2022. The case of the 2nd defendant was that, on 23/7/2018, the suit land was registered in the name of M/s Githunguri Constituency Ranching Company Ltd. On the same day, the land was transferred to the 1st defendant and a title deed was issued to the 1st defendant. On 29/8/2018, Githunguri Constituency Ranching Company Limited caused a restriction to be registered on the land register relating to the suit land. The 2nd defendant contended that the Land Registrar conducted all transactions relating to the suit land in accordance with the law, adding that, if there was any fraud or irregularity perpetuated by any party in relation to the suit land, the Land Registrar was not privy to the fraud or irregularity.

Plaintiff's Evidence

9. Damaris Waithira Kariuki [the plaintiff] testified as PW1. She adopted her witness statement dated 19/2/2021 as part of her sworn evidence-in-chief. She produced the following 16 exhibits: (i) Letter from the Ministry of Lands and Physical Planning, addressed to Josphat Karanja Kang'ong'a dated 5/2/2020; (ii) Letter dated 4/2/2020 from Githunguri Constituency Ranching Company Limited-Ruiru, addressed to the District Land Registrar; (iii) Copy of title deed for parcel number Ruiru/Kiu Block 2 (Githunguri/2954); (iv) Copy of O.B number 38 dated 16/10/2018; (v) Letter addressed to the Chairman of Githunguri Constituency Ranching Company Limited dated 5/10/2018; (vi) Copy of receipt number 817733 for Githunguri Constituency Ranching Company Limited; (vii) Copy of receipt number 786726 for Githunguri Constituency Ranching Company for shares, dated 26/5/1983; (viii) Copy of receipt number 0000972 for survey of shamba number 1851 dated 24/1/1990; (ix) Copy of receipt number 0003397 for Githunguri Constituency Ranching Company, dated 24/1/1990; (x) Copy of receipt number 11797 for Githunguri Constituency Ranching Company dated 23/2/1985; (xi) Share Certificate number 2361 for Damaris Waithira Kariuki dated 19/10/1972; (xii) Share Certificate number 2514 for Damaris Waithira Kariuki dated 12/2/19; (xiii) Copy of Receipt number 303 ; (xiv) Clearance Certificate for Damaris Kariuki dated 9/7/2010; (xv) Clearance Certificate for Damaris dated 13/3/2015; and (xvi) Clearance Certificate for Damaris dated 29/9/2018.
10. It was PW1's testimony that she was a member of Githunguri Constituency Ranching Company Limited. She stated that by virtue of her shareholding, she was allotted land parcel number Ruiru Kiu Block 2 (Githunguri) 2954 representing the previously un-surveyed 1 ¼ acre land denoted by ballot number 1851. PW1 added that the Company issued her with a clearance certificate and a duly executed transfer forms on 13/3/2015 and 29/9/ 2018 respectively for the of processing a title to the suit property.
11. PW1 stated that upon submitting the registration documents at the office of the Land Registrar at Ruiru, she discovered that the 1st defendant had been registered as the proprietor of the suit property. She further stated that she reported the matter to the Company and the company informed her that the 1st defendant was a stranger to them. She added that the company wrote a letter to the Land Registrar requesting him to rectify the records and have the title processed in the plaintiff's name. It was PW1's evidence that the 1st defendant failed to submit his title to the 2nd defendant for cancellation despite the 2nd defendant requesting him to do so through a letter dated 5/2/2020.
12. John Maina Mburu testified as PW2. He stated that he was the Chairman of the Board of Directors of the Company from 12/9/2009 when he was elected. It was his testimony that an investor had to



contribute funds and buy a minimum of 100 shares to become a shareholder in the company. He added that upon acquiring the 100 shares, a shareholder was entitled to 1 ¼ acres land, ¼ acre plot and 1/8 acre plot. He stated that for a shareholder to obtain a title deed, he/she would have to be cleared by the Company's directors, who would also execute the transfer forms and affix their photos on the transfer forms.

13. PW2 stated that according to the records held by the Company, the suit land was previously denoted by ballot no. 1851 and was held in the name of the plaintiff. He further stated that the 1st defendant was not a member of the Company and that the company had never transacted with him at any point. PW2 added that on 09/07/2010, 13/03/2015 and 29/09/2018 respectively, the Company issued the plaintiff with clearance certificates, duly signed and sealed transfer forms for 1 ¼ acre of parcel, number Ruiru Kiu Block 2 (Githunguri)2954, for the purpose of processing the title in her name.
14. It was PW2's testimony that the plaintiff reported to them that she was not able to process the title in her name because the suit land had been registered in the name of the 1st defendant. PW2 stated that the company made inquiries with the Land Registrar in Ruiru and requested him to rectify records relating to Ruiru Kiu Block 2(Githunguri)2954 but their request was not granted. Consequently, they reported the matter at the Directorate of Criminal Investigations in Ruiru. He added that the suit property belonged to the plaintiff. He urged the Court to accord the plaintiff assistance to facilitate registration of the land in her name.

2nd Defendant's Evidence

15. Robert Mbuba Mugenda testified as DW1. He adopted his witness statement dated 16/2/2022 as part of his sworn evidence-in-chief. He produced the following 8 exhibits: (i) Copy of the transfer instrument drawn by Githunguri Constituency Ranching Company Limited; (ii) Copy of PIN Certificate for Githunguri Constituency Ranching Company Limited; (iii) Copy of the Certificate of Incorporation for Githunguri Constituency Ranching Company Limited; (iv) Copy of ID and PIN Certificate for Jane Wambui Maina; (v) Copy of Clearance Certificate dated 21/9/2012 in the name of Jane Wambui Maina; (vi) Copy of practicing certificate for David Ngata Kamau; (vii) Copy of letter for request for rectification of records, from Githunguri Constituency Ranching Company Limited dated 4/2/2020; and (viii) Copy of letter from the Land Registry addressed to Josphat Karanja Kang'ong'a dated 5/2/2020.
16. DW1 stated that he was Land Registrar number 327 stationed at the Ruiru Land Registry. It was DW1's testimony that a green card to Ruiru/Kiu Block (Githunguri) 2/2954 was opened on 23/7/2018. DW1 stated that on the same day, the land was registered in the name of Githunguri Constituency Ranching Company Limited and was transferred to one Josphat Karanja Kang'ong'a and a title deed was issued in his name. DW1 further stated that on 29/8/2018, a restriction was registered against the title at the behest of Githunguri Constituency Ranching Limited. DW1 further stated that the office of the Land Registrar-Ruiru conducted all transactions relating to the suit property in accordance with the law. He added that if there was any fraud perpetuated by any party in respect to the suit property, then the same was done without the knowledge or involvement of the Land Registrar.
17. During cross-examination, he stated that the Company, which was the allocating agency, having confirmed that the plaintiff was the lawful land owner of the suit property, then the position should prevail. He added that the 1st defendant could not be the lawful owner of the suit property given that he was not a member of the Company.



Submissions

18. The plaintiff filed written submissions dated 5/12/2023 through M/s Kabiru & Co Advocates. The 2nd defendant filed written submissions. The 1st defendant did not file submissions. The court has considered the filed submissions.

Analysis and Determination

19. Taking into account the parties' pleadings, evidence and submissions, the following are the two key issues that fall for determination in this suit: (i) Whether the registration of the suit land in the name of the 1st defendant and the title held in the name of the 1st defendant were procured fraudulently and/or irregularly; and (ii) Whether the 2nd defendant was privy to the fraud/irregularities alleged in the registration of the suit land and issuance of the title in the name of the 1st defendant. I will be brief in my analysis.
20. The impugned registration was procured by the 1st defendant. The plaintiff filed an affidavit of service indicating that the 1st defendant was served with summons to enter appearance through a notice published in the Daily Nation Newspaper edition of 12/10/2021. The 1st defendant neither entered appearance nor filed a defence. Consequently, the 1st defendant has not stepped forward to contest the allegation of fraud and/or irregularities in the impugned registration and title.
21. On her part, the plaintiff led evidence demonstrating that the suit land falls within a subdivision scheme that was owned by M/s Githunguri Constituency Ranching Company Ltd. She led evidence showing that, by dint of her shareholding in the company, she balloted for and was allotted the suit land. She also led evidence by the Chairman of the land buying company. The said Chairman testified as PW2. His testimony was that the 1st defendant was a stranger to the company, adding that the company allocated the suit land to the plaintiff. It was his evidence that the company did convey the suit land to the 1st defendant. He termed as fraudulent the title held by the 1st defendant, adding that upon discovering the impugned registration, the company lodged a complaint at the Directorate of Criminal Investigations and at the same time requested the Land Registrar to rectify the Land Register to remedy the fraud.
22. The totality of the above evidence is that the plaintiff fully discharged her burden of proof in relation to her claim against the 1st defendant. At that point, the burden shifted to the 1st defendant to demonstrate that the impugned registration and title were procured legitimately. He did not step forward to discharge the evidential burden.
23. Our superior courts have time and again emphasized the evidential duty of a title holder once a claimant challenging the title discharges his burden of proof. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR emphasized this principle in the following words:

“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.”
24. The 1st defendant having failed to step forward to controvert the allegations and evidence tendered by the plaintiff, this court finds that the registration of the 1st defendant as proprietor of land parcel number Ruiru/Kiu Block 2 (Githunguri)/2954 was procured fraudulently and/or irregularly. The court further finds that the title issued to the 1st defendant on 23/7/2018 was and remains a fraudulent title that does not vest ownership of the suit land in the 1st defendant.



25. Was the Land Registrar privy to the fraud and/or irregularities? Mr Robert Mbuba testified as DW1. His evidence was that he was the Land Registrar in charge of Ruiru Land Registry at the time of testifying. He testified that the Land Registrar was not privy to the fraud. It was his further evidence that the Land Registry did not have any registered instrument of transfer conveying the land to the 1st defendant.
26. What clearly emerges from the evidence that is before the court are elements of negligence in the manner in which the Land Registry handled the records relating to the suit land. This is because, documents that are unrelated to the impugned registration were found in the parcel file while the fraudulent documents that culminated in the impugned registration were missing. There is, however, no tangible evidence of fraud on part of the Land Registrar. Indeed, the moment the fraud was brought to the attention of the Land Registrar, he recorded a restriction to preserve the suit land. Further, he invited the 1st defendant to show cause why the registration should not be cancelled. For the above reasons, I will not hold the Land Registrar culpable of the fraud and/or irregularity that were pleaded. In view of the fact that negligence was not pleaded, I will say no more.
27. On costs, there is no basis for a departure from the principle in Section 27 of the *Civil Procedure Act* - that costs follow the event.
28. In the end, the court is satisfied that the plaintiff has proved her case on the balance of probabilities. Judgement is accordingly entered in favour of the plaintiff in the following terms:
- a. It is hereby declared that the plaintiff, Damaris Waithira Kariuki, is the bonafide owner of land parcel number Ruiru/Kiu Block 2 (Githunguri)/2954.
 - b. An order is hereby issued cancelling the registration of Josphat Karanja Kang'ong'a as proprietor of land parcel number Ruiru/Kiu Block 2 (Githunguri)/2954.
 - c. The title issued to the said Josphat Karanja Kang'ong'a on 23/7/2018 is hereby cancelled.
 - d. The 2nd defendant is hereby ordered to register the plaintiff as proprietor of land parcel number Ruiru/Kiu Block 2 (Githunguri)/2954 and issue her with a title forthwith.
 - e. The Deputy Registrar of this Court shall execute all instruments/documents necessary for registration of the plaintiff as proprietor of land parcel number Ruiru/Kiu Block 2 (Githunguri) /2954.
 - f. A permanent injunction is hereby issued restraining the 1st defendant together with his agents /servants against interfering with land parcel number Ruiru/ Kiu Block 2 (Githunguri) /2954.
 - g. The 1st defendant shall bear costs of this suit.
 - h. Interest on costs shall accrue from the date of taxation/ assessment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF JUNE 2024

B M EBOSO

JUDGE

In the presence of: -

M/s Muthee for the Plaintiff



Court Assistant: Hinga

