



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiarie v Thiongo & another (Environment & Land Case  
E225 of 2021) [2024] KEELC 4948 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4948 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E225 OF 2021**

**JA MOGENI, J  
JUNE 24, 2024**

**BETWEEN**

**PETER NGANGA KIARIE ..... PLAINTIFF**

**AND**

**WINNIE MUTHONI THIONGO ..... 1<sup>ST</sup> DEFENDANT**

**JANE NJOKI MAINA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 23/06/2021, the Plaintiff herein sought for the following orders against the Defendants;
  - a. A declaration that the Plaintiff is the Lawful /legal owner of land parcel LR No. Nairobi/Block 168/386.
  - b. An order compelling the defendants to vacate from land parcel LR No. Nairobi/Block 168/386 or an order for the eviction of the defendants in case they fail to vacate.
  - c. An Order compelling the defendants to demolish the illegal structure/building constructed on land parcel LR No. Nairobi/Block 168/386.
  - d. General damages for trespass
  - e. Costs of the suit
  - f. Interest on (d) and (e) above
  - g. Any other just relief
2. In his plaint, the Plaintiff averred that he is the registered proprietor of the suit property known as LR. No. Nairobi/Block 168/386 situated at Kcc Village having purchased it from one Patrick Njoroge



Kinyua at a purchase price of One Hundred and Ten Thousand Kenya Shillings(Kshs.110,000/=) in terms of a Sale Agreement executed on 21/11/2014, and issued with a Lease Nairobi/Block 168/386 dated 26<sup>th</sup> June 2018. It is its contention that upon purchase of the property, he enjoyed uninterrupted occupation until the year 2015 when he visited his parcel of land with an architect so that he could draw architectural plans, he found out that a person by the name Francis Maina Ndegwa had trespassed on his parcel of land and put up temporary structures.

3. That he took up the matter with the relevant authorities and the structures were demolished but then the said Francis Maina Ndegwa even after the structures were demolished fraudulently and illegally sold the piece of land to the defendants.
4. He particularized the acts of fraud and illegalities by the said Francis Maina Ndegwa as follows:
  - a. Selling property that does not belong to him
  - b. Transferring a false title to the defendants
  - c. Pretending to be the owner of the suit property
  - d. The plaintiff has never sold or transferred his interest to the defendants
  - e. Pretending to have any interest in the property
5. He also particularized the acts of fraud and illegality by the defendants as follows:
  - a. Accepting to buy property from a person without title
  - b. Trespassing/encroaching on plaintiff's piece of land
  - c. Failing to carry out due diligence before buying the property
6. He also stated that the defendants, illegally and unlawfully trespassed on his parcel of land LR No Nairobi/Block 168/386 sometime in the year 2019 and put up a permanent structure on it. He therefore seeks to have the defendants vacate his premises or be evicted as well as have the structures illegally constructed demolished. Further that despite demand issued the defendants have failed/refused to heed the same hence the suit.
7. The suit is not contested and the 1<sup>st</sup> and 2<sup>nd</sup> defendants despite being served by way of substituted service through an advertisement in The Daily Nation of 24/05/2022 they failed to enter appearance and thereby failed to defend the suit. They also did not appear during trial despite being served. In consequence and pursuant to Order 10 Rule 9 of the *Civil Procedure Rules*, the case was set down for formal proof hearing wherein the Plaintiff only had himself testifying and closed his case thereafter.

#### **Plaintiff's Case**

8. PW1 – Peter Ng'ang'a Kiarie adopted his witness statement and produced a list of documents as exhibits. It was his dispute that someone purchased his plot from the defendants and have trespassed on the suit property and they have constructed a commercial building. He contends that he is the owner of the said suit property. That a lease was prepared between himself and Nairobi City County.
9. It was his testimony that he purchased the suit property from one Patrick Njoroge Kinyua who was allotted the plot by Nairobi City Council. It was his testimony that he had produced the sale agreement and also the original letter of allotment and a search dated 5/02/2024 showing that he is the owner of the suit property.
10. He urged the Court to allow his claim and cancel the Title to the defendants.



11. After close of pleadings, the Court directed the Plaintiff to file written submissions which the Court has now carefully read and considered together with the cited authorities and the relevant provisions of law. The Court has also considered the pleadings, evidence adduced and the exhibits thereto and renders itself as follows;
12. Though the Defendants were duly served, they did not enter appearance nor defend the suit. The fact that the suit has not been defended means that the Plaintiff's evidence remained unchallenged and uncontroverted. However, the Court will not just enter Judgment without interrogating the veracity of the evidence placed before it by the Plaintiff as the Plaintiff is still required to prove his case on the required standard of balance of probabilities. See the case of *Shaneebal Limited... Vs...County Government of Machakos* (2018)eKLR, where the Court cited the case of *Karuru Munyororo....Vs...Joseph Ndumia Murage & Another*, Nyeri HCCC No.95 of 1988, where the Court held that:-

“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaint and in the absence of the Defendant’s and or their Counsel to cross examine her on evidence, the Plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”
13. The fact that the evidence is not challenged does not entirely mean that the Court will not interrogate the evidence tendered by the Plaintiff. The Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as *exparte* evidence is not automatic prove of a case on the required standard. The Plaintiff has to discharge the burden of proof. See the case of *Kenya Power & Lighting Company Limited... Vs... Nathan Karanja Gachoka & another* [2016] eKLR, the Court stated: -

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”
14. Further in the case of *Gichinga Kibutha...Vs...Caroline Nduku* (2018) eKLR, the Court held that: -

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
15. Having considered the available evidence, the Court finds the issue for determination is whether the Plaintiff is entitled to the orders sought.
16. The Plaintiff has sought for an order to have it declared as the legal proprietor of the suit land and to prove its ownership. In that regard, the Plaintiff produced a Sale Agreement which evidenced that it bought the suit land from one Patrick Njoroge Kinyua, the original letter of allotment and a search dated 5/02/2024 showing that he is the owner of the suit property.
17. Therefore, *prima-faciely*, the Plaintiff is the owner of the suit property.

Without any evidence to controvert the same, this Court finds and holds that the Plaintiff is indeed the legal owner of the suit property. This is so as registration of a person over a suit property gives that person the rights and privileges over the property. Further the registration of a person as a proprietor of the property is a *prima facie* evidence that the person is the owner of the suit property. Without any



evidence to controvert it, then this Court finds and holds that the Plaintiff is the legal proprietor of the suit property.

18. The law is very clear on the position of a holder of a title in respect to the land. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

19. Section 26(1) of the [Land Registration Act](#) provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as *prima facie* evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party or;
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

20. The Plaintiff has proved that he is indeed the registered owner of the suit property and therefore the rightful owner having purchased the same lawfully. The Plaintiff stated that the Defendant had trespassed onto the suit land to the extent of putting up a commercial building on the suit property.

21. From the foregoing, it is apparent that after the Plaintiff bought and/or purchased, what now constitutes the suit property unfortunately he was not able since 2014 to enjoy peaceful possession of the suit land owing to Defendants’ misdeeds.

22. I find that the Plaintiff is entitled to all the rights, interest and privileges that pertain to the land and is therefore entitled to the prayers sought.

23. The plaintiff has not canvassed the general damages

### **Disposal Orders**

24. From the foregoing analysis, the Plaintiff has proved his case on a balance of probabilities and in this regard, this Court makes the following final orders;

- a. A declaration be and is hereby issued that the Plaintiff is the Lawful /legal owner of land parcel LR No. Nairobi/Block 168/386.
- b. An order is hereby issued compelling the defendants to vacate from land parcel LR No. Nairobi/Block 168/386 and where they fail to vacate the plaintiff can apply for an order of eviction to the defendants to issue.
- c. An Order is hereby issued compelling the defendants to demolish the illegal structure/building constructed on land parcel LR No. Nairobi/Block 168/386.
- d. The plaintiff is entitled to nominal general damages of Kesh 1,500,000/= for trespass
- e. Costs of the suit is awarded to the plaintiff



It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24<sup>TH</sup> JUNE 2024.**

.....

**MOGENI J**

**JUDGE**

In the presence of:

Mr. Kaburu for Plaintiff

No appearance for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Caroline Sagina - Court Assistant

