



**Ngunjiri v Nderitu & 3 others (Environment & Land Case
223 of 2014) [2024] KEELC 5749 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5749 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 223 OF 2014**

**A OMBWAYO, J
JULY 31, 2024**

BETWEEN

JOHN MUTHEE NGUNJIRI PLAINTIFF

AND

VINCENT KAGO NDERITU 1ST DEFENDANT

JOSHUA WACHIRA WACIURI 2ND DEFENDANT

THE NAKURU DISTRICT LAND REGISTRAR 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide a Plaint dated 24th July, 2014 against the Defendants seeking the following orders:
 - a. That there be orders of vacant possession against the Defendant, his servants and/or agents from title No Dundori/Lanet Block 11/647.
 - b. Costs of and incidental of this suit.
 - c. Any other or further relief that this Honourable Court may deem fit and just to grant.
2. The 1st Defendant filed his Amended Defence and Counter claim dated 28th November, 2018. He sought for the following orders in his counter claim:
 - a. A declaration that the registration of the suit property in the name of the Defendant is null and void.



- b. The title deed in respect of Dundori/Lanet Block 11/647 registered in the name of John Muthee Ngunjiri (the 1st Defendant herein) be cancelled and the same be registered in the name of Vincent Kago Nderitu, the Plaintiff herein being the lawful owner.
 - c. An order of permanent injunction restraining the 1st and 2nd Defendants either by themselves their agents, servants and/or relatives from using, trespassing, entering, occupying and/or interfering with the Defendant's quiet possession of the suit property in any manner whatsoever.
 - d. Costs of the suit.
3. The 3rd and 4th Defendants filed their Statement of Defence to the Counter claim where they denied the averments.

Plaintiffs' Case

4. John Muthee Ngunjiri the Plaintiff herein testified as PW1. He produced his statement dated 24/7/2014 which the court adopted as his evidence in chief. He also produced his list of documents filed on 30/7/2014. The documents were produced and marked as follows: PEX1- Sale Agreement dated 17th June, 2014, PEX2- Copy of Title Deed issued on 19th June, 2014, PEX3- Letter dated 24th June, 2014, PEX4-Sale Agreement dated 21st March, 2013, PEX5- Copy of Title Deed issued on 22nd March, 2013
5. He testified that the 2nd Defendant sold him Ndundori/Lanet Block 11/64 vide an agreement dated 17/6/2014. He further testified that he did a search after which the 2nd Defendant took him to the site. It was his testimony that they found a structure of the foundation for a house. He testified that they then went to his lawyer, Lawrence Mwangi where they executed an agreement.
6. He testified that upon transfer, he was issued with title on 19/6/2014 and later when he went back to the plot, he found the 1st Defendant on the suit land. He added that he wrote him a letter on 24/6/2024 to vacate but he refused after which he sued him. He testified that he also found documents in favour of the 2nd Defendant and added that there was an agreement between the 1st and 2nd Defendant dated 21/3/2013. He further testified that while at the CID, it was established that the 1st Defendant Vincent had given his ID transfer plots the 2nd Defendant
7. PW1 testified that when purchasing, there was an intended structure of a house with no activity on the ground. He testified that he paid Kshs 300,000 in 2014 and urged the court to issue an eviction order.
8. Upon cross examination by Ms Kipruto for the 1st Defendant, PW1 denied knowing the owner of the land before the 2nd Defendant. He stated that upon conducting a search, he found the 2nd Defendant's title to be genuine. PW1 admitted that the search was not in the court record. He further confirmed that when he visited the land, there was a foundation on the suit land but no one was in occupation. He also confirmed that when he purchased the land, the 1st Defendant was in occupation. He stated that there was a temporary wall and that the compound was secured with barbed wires. PW1 admitted that he did not have documents from the land's office. He also added that he was not aware of any transaction between 1st and 2nd Defendant.
9. Upon re-examination, he stated that before he bought the suit land, it had not been fenced. He added that on 24/6/2014 it was had been fenced. That marked the close of the Plaintiff's case.



1st Defendant's Case

10. Vincent Kago Nderitu testified as DW1 where his statement dated 26/4/2016 was adopted as evidence in chief. He also produced his list documents filed on 29/4/2016. The documents were produced as follows: DEX1- Sale Agreement dated 21st March, 2013, DEX2- Mpesa Statement, DEX3- Letter for repayment of loan dated 18th December, 2013, DEX4- Letter dated 12th August, 2003, DEX5- Letter dated 30th July, 2010, DEX6-Receipt dated 16th July, 2003 for Kshs 37,500, DEX7- Receipt dated 7th July, 2005 for Kshs 45,000, DEX8-10- Photographs of the suit land as at 2013, DEX11- Green card
11. He testified that he borrowed money from the 2nd Defendant on 21/3/2013 which he was to repay with Kshs 40,000 on top. He added that his title was security and that the 2nd Defendant would take the land if he failed to refund. It was his testimony that he refunded the money on 21/6/2013. He also testified that that he returned the cash on 22/5/2013 but that the 2nd Defendant was not available. He testified that the Plaintiff bought the land yet it had an issue. He added that he was living in the house with his family.
12. It was his testimony that he had constructed a house in 2007 which had a perimeter wall. He testified that the sale agreement dated 21/3/2013 was a loan but not an agreement of sale. He went on to testify that he bought the land from Nyandarua Teachers Sacco Society for Kshs90,000 in the year 2003. He testified that he requested Kshs 40,000 loan where he was to refund Kshs 52,000. He further testified that as at 2013 the value of the land was about 3.5 million or 4 million. He also testified that he was legally in possession of the suit land. It was his testimony that the statement he wrote at DCI was allegedly twisted by inspector Mugambi. It was also his testimony that his family members were not aware of the sale. He also added that there was no Land Board consent. It was also his evidence that he did not sign a transfer form.
13. DW1 testified that he gave his photos and ID so that in the event he defaulted the loan, they would transfer. He urged the court to cancel the title deed in the Plaintiff's name. He testified that he was ready to negotiate with the Plaintiff for any costs.
14. Upon cross examination by Mr. Otieno for the Plaintiff, he confirmed that the loan was for Ksh40,000 while the interest was Kshs12,000 making the total repayable amount Kshs 52,000. He further stated that the sale agreement was a loan agreement. DW1 stated that they had agreed that he would pay the 2nd Defendant Kshs 52,000 which he did. He explained that he was dealing with shylocks and that he surrendered his title, ID and photograph. He stated that nothing would have stopped them from transferring the property to themselves.
15. Upon reexamination, he stated that when making the payments he was not aware that the title deed had been transferred. He further stated that he never executed any transfer before the Land Registrar. He added that the counter-claim is against the 2nd Defendant.

3rd Defendant's case

16. Collins Liyai Atiela (DW2) testified that he is an advocate of the High court of Kenya, practicing as a Land Registrar officer. He testified that he was present in court pursuant to summons issued on 27/2/204 which required him to appear and avail the file and register for the suit land. He produced a certified copy of green card of suit parcel of land of Ndundori/Lanet/Block11/647 measuring approximately 0.43 Ha. He testified that entry No 1 dated 30/11/2002 was registered to Government of Kenya. He further testified that as per entry No 2 dated 21/12/2011, the same was transferred to the 1st Defendant and title issued. It was his testimony that as per entry No 4 dated 22/3/2013, the suit land



was transferred to the 2nd Defendant. He added that as per entry No 6 dated 19/6/2014 the plot was transferred to the Plaintiff while entry No 7 dated 19/6/2014 the title deed was issued. He testified that Muwa was a land buying company. He added that the members' register had about 220 members and that 647 was a subdivision of parcel number 314, which was originally allotted to Nyandarua Teachers Coop Society. He testified that he could not trace any transfer document or LCB consent. He added that there was no application nor evidence of stamp duty or valuation. He testified that the documents are in their custody. That marked the close of the 3rd Defendant's case.

Submissions

17. Counsel for the Plaintiff filed his submissions dated 18th March, 2024 on 20th March, 2024. He gave a summary of the evidence tendered and submitted that the Plaintiff is the registered proprietor of the suit property. Counsel further submitted that the Plaintiff numerously informed the 1st Defendant to vacate the suit land but the same bore no fruits. He submitted that the Plaintiff has failed to peaceably enjoy possession of his property to which he is lawfully entitled to.
18. Counsel for the Plaintiff submitted that the 1st Defendant confirmed to having executed a sale agreement and transfer forms in favour of the 2nd Defendant. He added that in view of the same, the 1st Defendant relinquished his title and interest over the suit property. He relied on Section 26 (1) of the *Land Registration Act* and the case of *Maathi & 2 others v City Council of Nairobi & 2 others* (1994) 1KLR (E&L). Counsel submitted that the certificate of title was conclusive evidence that the Plaintiff is the absolute owner of the suit property. He also relied on the case of *Zacharia Onsongo Momanyi v Evans Omurwa Onchagwa* [2014] eKLR and submitted that the Plaintiff has suffered inconvenience of not enjoying peaceful ownership of the suit property. He added that the Plaintiff has since suffered damages by the 1st Defendant's trespass and interference with the suit property.
19. In conclusion counsel for the Plaintiff urged the court to grant the prayers as sought by the Plaintiff.
20. Counsel for the 1st Defendant filed his submissions dated 30th May, 2024 the following day where he gave a background of the case and identified two issues for determination. One, whether the orders sought in the plaint or the counter claim should be granted as prayed. He submitted that the 1st and 2nd Defendant entered into a loan agreement which was to be refunded within two months. Counsel submitted that at the time of the said transaction, there were no loan agreement forms forcing the parties to enter into the said loan agreement in form of a sale agreement.
21. He argued that DW1's title deed was used as security for the said loan only to later find that the title had already been transferred to the 2nd Defendant. He submitted that the value of the suit property was much higher than Kshs 52,000. He submitted that from the receipts produced, each member was to pay about Kshs 88,500 in order to acquire property in Muwa project phase 2. Counsel submitted that the 1st Defendant refunded the loan which evidenced that there was misrepresentation of facts by the 2nd Defendant. He submitted that the purported price of the land was undervalued and urged the court to find that the transaction was not a sale but a loan borrowing and lending transaction. He added that the said transfer resulted in a null and void transfer of the suit property to the Plaintiff.
22. Counsel for the 1st Defendant submitted that the Defendants in the counterclaim engaged in fraud, misrepresentation and illegality in obtaining the title deed. He added that DW2 confirmed that he did not trace the transfer and LCB forms to the suit property that resulted in transfer of the suit property from the 1st to the 2nd Defendant. It was his submission that the root of the title could not be traced hence there was no valid transfer. He relied on Section 26 of the *Land Registration Act* and submitted that the title deed issued to the 2nd Defendant was not legally acquired. Counsel also relied on the case of *Gathogo v Robinson & 3 others* [2023] KEELC 22418 (KLR).



22. He relied on Section 12(1) of the *Matrimonial Property Act* and the case of *Mugo Muiru Investments Ltd v EWB & 2 others* [2017] eKLR. He submitted that there is an overriding interest of the 1st Defendant's spouse over the suit property and lack of her spousal consent cannot be overlooked. Counsel argued that the suit property was not up for sale to the 2nd Defendant hence the lack of the spousal consent. He submitted that the title deeds obtained by the 1st and 2nd Defendants in the counter claim do not qualify as indefeasible titles and ought to be cancelled and the suit property be issued in favour of the Plaintiff in the counterclaim.
23. Counsel submitted that that the 1st Defendant is not a trespasser as the Plaintiff found him in actual possession of the suit property when the Plaintiff purchased the same from the 2nd Defendant. He argued that the Plaintiff purports to be an innocent purchaser for value yet when he purchased the suit property, the 1st Defendant had been in occupation of the suit property with developments. Counsel submitted that the Plaintiff's claim under the umbrella of an innocent purchaser for value does not hold and should be disregarded by this court. He submitted that the 1st Defendant in cohorts with the 2nd Defendant deliberately duped the 1st Defendant into signing the sale agreement in place of a loan agreement and transferrin his interests to the 2nd Defendant without the 1st Defendant's knowledge.
24. Counsel further submitted that the Plaintiff's evidence was marred with speculations thus failed to prove that he was an innocent purchaser for value. He relied on the case of *Sara Leitich v Joshua Rutto & 2 others* [2021] eKLR. He submitted that the 1st Defendant in has proved his case on a balance of probabilities and urged the court to dismiss the Plaintiff's case and the Counter claim be allowed with costs.
25. The second issue for determination is whether the costs of the suit should be borne by the Defendants in the counterclaim. Counsel relied on Section 27 of the *Civil Procedure Act* and urged the court to order that the Defendants' in the counterclaim be ordered to meet the costs of the suit. Counsel submitted that the 1st Defendant proposed to refund the sums that exchanged hands as long as he could have the title registered in his name.
26. In conclusion, he urged the court to dismiss the plaint and grant the prayers in the counterclaim.

Analysis and Determination

27. This court has carefully considered the pleadings and the evidence on record and is of the view that the issues for determination are:
 - a. Who is the lawful owner of the suit property?
 - b. Whether the Plaintiff should be granted the prayers sought.
 - c. Whether the 1st Defendant is entitled to the prayers sought in his counterclaim.
 - d. Who should bear the costs of this suit.
28. On the first issue for determination, it was the Plaintiff's case that the 2nd Defendant sold him Ndundori/Lanet Block 11/64 the suit property herein vide an agreement dated 17/6/2014. PW1 testified that he had conducted a search but admitted that he did not have it in court. He testified that they signed the transfer forms after which the title deed was issued in his name on 19/6/2014. It was the Plaintiff's case that at the time of purchase of the suit property, he found there was a foundation on the suit land but no one was in occupation. He also confirmed that the 1st Defendant was in occupation. PW1 admitted that he did not have documents from the land's office.



29. The 1st Defendant on the other hand testified that he had constructed a house in 2007 on the suit property. It was his testimony that the sale agreement dated 21/3/2013 was a loan he took from the 2nd Defendant but not an agreement of sale. It was the 1st Defendant's case that he bought the land from Nyandarua Teachers Sacco Society for Kshs 90,000 in the year 2003. The 3rd Defendant, produced a certified copy of the green cards and testified that from the entries, the suit land was transferred from the 1st to the 2nd Defendant. He however confirmed that he could not trace any transfer document or LCB consent. He further confirmed that there was no application nor evidence of stamp duty or valuation.

Section 24(a) of the *Land Registration Act* provides that:

“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 rights and privileges belonging or appurtenant thereto.”

Section 26(1) of the *Land Registration Act* further provides that:

“...the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. [Emphasis mine]

30. The Supreme Court in the case of *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) cited the case of *Munyu Maina v Hiram Gatbiha Maina* [2013] KECA, where the court held as follows:

“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 and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

31. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows; -

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”



32. The 1st Defendant alleged that the Plaintiff and 2nd Defendant acquired the suit property fraudulently, however, he did not adduce any evidence to prove the same. It is this court's view that even though the Plaintiff may hold a title to the suit property, he failed to convince this court how he acquired it. From the Plaintiff's testimony, it was clear that he did not establish the root of his title. It was his evidence that he purchased the suit land from the 2nd Defendant but he failed to provide documentary evidence in support of the same. In addition, the Land Registrar corroborated this by confirming that he could not trace any transfer document, LCB consent nor evidence of stamp duty or valuation. The 2nd Defendant failed to give any evidence in support of his case.
33. The 1st Defendant testified that he bought the suit land from Nyandarua Teachers Sacco Society for Kshs 90,000 in the year 2003. He produced receipts as proof of payment as well as a letter from the Cooperative Society dated 30th July, 2010 which confirmed that the said plot belonged to him. The Land Registrar also confirmed that the said Cooperative Society was a land buying company and from the evidence adduced of the members register, the 1st Defendant was indeed a member and was allocated the suit property. It was the 1st Defendant's case that the title deed was used as security for a loan he took only to later discover that the title had already been transferred to the 2nd Defendant.
34. From the overall evidence and testimonies given by both parties, this court finds that the 1st Defendant is indeed the lawful owner of the suit property. This means that the title held by the Plaintiff and 2nd Defendant over the suit property is invalid and of no legal effect for the reason that it was obtained illegally and unprocedurally.
35. On the second issue for determination, this court having found that the Plaintiff and 2nd Defendant acquired the title to the suit property unprocedurally, the Plaintiff is therefore not entitled to the prayers as sought in his Complaint dated 24th July, 2014.
36. Further, having already established that the suit property belongs to the 1st Defendant, it is this court's view that he is therefore entitled to the orders sought in his Counter claim. In the upshot, having found that the 1st Defendant proved his claim to the required standard of probabilities, judgment is hereby entered in favour of the 1st Defendant in the following terms:
- a. A declaration that the 1st Defendant is the lawful proprietor of Dundori/Lanet Block 11/647.
 - b. An order is hereby issued directing the 3rd Defendant to recall and cancel the title held by the Plaintiff and 2nd Defendant in respect to Dundori/Lanet Block 11/647.
 - c. The 3rd Defendant be and is hereby directed and ordered to effect rectification of the registers of the parcels of land referred in (a) and (b) above to the 1st Defendant's name and re-issue fresh title in his name.
 - d. An order of permanent injunction is issued restraining both the Plaintiff and 2nd Defendant by themselves, servants or lawful agents from trespassing upon, entering, remaining, dealing in or otherwise in any other manner whatsoever from interfering with Dundori/Lanet Block 11/647.
 - e. The Plaintiff, 2nd and 3rd Defendants shall bear the costs of the suit.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTRONICALLY ON THE 31ST JULY 2024

A.O.OMBWAYO

JUDGE

