



**Mundia v Mwangi (Environment & Land Case 412 of 2012)
[2024] KEELC 5408 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 412 OF 2012**

**JO OLOLA, J
JULY 19, 2024**

BETWEEN

PATRICK MWANGI MUNDIA PLAINTIFF

AND

WANYEKI JAMES MWANGI DEFENDANT

JUDGMENT

Background

1. This suit was initially instituted at the High Court at Nyeri on 17th August 2012 as Nyeri HCCC No. 185 of 2012 before its transfer to this court in the year 2014.
2. By his Complaint dated 17th August 2012, Patrick Mwangi Mundia (the Plaintiff) sought Judgment against the Defendant for:-
 - a). A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property (and) an order of vacant possession thereof;
 - b). An injunction restraining the Defendant whether by himself, his servant and/or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property;
 - c). Costs of the suit and interest; and
 - d). Any such other or further relief as this Honourable Court may deem appropriate.
3. Those prayers were the result of the Plaintiff's contention that at all times material, he was the registered proprietor of all that parcel of land known as L.R. NO. Nyeri/Lusoi/35 (the suit property). It was the Plaintiff's case that despite his ownership of the land, the Defendant had permitted some strangers to enter the land and had been harvesting grass naturally growing thereon and committing other acts thereon inconsistent with the Plaintiff's ownership thereof without the Plaintiff's consent.



4. But in his Statement of Defence and Counterclaim dated 16th April 2014 as filed in court on 17th April 2014, Wanyeki James Mwangi (the Defendant) denies that the Plaintiff is the proprietor of the suit property. It is the Defendant's case that he is the owner of the said property and that the Plaintiff's registration as the proprietor thereof is as a result of apparent fraud.
5. By way of his counterclaim, the Defendant avers that he is the beneficiary of Nyeri/Lusoi/35 (formerly Plot No. 35 Lusoi Scheme) and that the Plaintiff had fraudulently obtained registration thereof. Accordingly, the Defendant prays for the Plaintiff's suit to be dismissed and urges the court to grant orders declaring the Plaintiff's title to parcel No. Nyeri/Lusoi/35 as fraudulently obtained and that the same be cancelled and a new title be issued in the name of the Defendant upon payment of what is due to the Settlement Fund Trustees. The Defendant also prays for the costs of the suit and the counterclaim.

The Plaintiff's Case.

6. At the trial herein, the Plaintiff called two witnesses in support of his case.
7. PW1 – Patrick Mwangi Mundia is the Plaintiff himself. Relying on his witness statement filed in court on 17th August 2012, PW1 testified that sometimes in the year 1998, his mother the late Felly Gathoni Mundia transferred the suit property to his name as a gift. PW1 told the court that he thereafter left for Nairobi to do business and that he entrusted an immediate neighbour to keep watch on the land and gave him permission to cut grass for making hay on a portion that was not in use.
8. PW1 told the court that sometime in the year 2011, the caretaker informed him that some strangers were harvesting natural grass from the land. When he enquired about their identity, he was informed that the strangers had been sent by another man who claimed that he was the owner of the land. Sometime in the year 2012 when PW1 sought to sell the land, the Defendant erected a sign post on the land indicating that the same was not for sale.
9. PW2- Antony Muriuki Magothe is a Nairobi businessman. He told the court that the suit property initially belonged to his father John Magothe Kahumbu who passed away on 4th April 2011. PW2 told the court his father had purchased the land from one Epathrus Kaara Kabuga who was the initial owner thereof. The said Kabuga had however allowed PW2's family to settle on what became known as LR. No. Nyeri/Lusoi/36.
10. PW2 told the court that when the said Kabuga acquired title for the suit property in 1987, he sold the same to one Mwai Gathegi who later sold the same to one Wambugu Gicha. In 1996, Wambugu sold the land to the Plaintiff's mother who allowed PW2's family to continue grazing livestock thereon. PW2 later came to learn from the Plaintiff that the Defendant was claiming to be the owner of the land. It was PW2's testimony that he had never seen the Defendant on the land prior to the time he made the claim.

The Defence Case

11. On their part, the Defendant called a total of four (4) witnesses at the trial.
12. DW1- Julia Wanjiku Wanyeki is a business woman and the widow of James Mwangi Wanyeki (the Defendant). She told the court her husband passed away on 10th September 2019. Relying on her statement dated 28th June 2022, DW1 told the court that her husband was allocated the suit property measuring 150 acres in 1977 by the Settlement Fund Trustees (SFT).



13. DW1 testified that they had immediately taken possession of the land after the allocation and that they had put a perimeter fence around the same, built a stone water tank, constructed a dam, put up a 3 bedroom stone house and built some houses for their workers. Overtime they had cultivated a variety of crops on the land and also used it for rearing livestock.
14. DW1 testified that in the year 2005, they had allowed their daughter Wanyeki Wanjiku and her husband Simon Gichuru to farm the land. On 12th January 2012, Simon called DW1's husband informing him that one Peter Karoki had visited the land and was in the process of purchasing the same from one Patrick Mwangi Mundia (the Plaintiff).
15. DW1 told the court that they immediately reported the matter to the police after they met the Plaintiff and he insisted that he was the owner of the land. She further told the court they had not been issued with a title deed as her deceased husband was yet to complete paying the monies due to the Settlement Fund Trustees (SFT). Her husband later settled the Kshs. 323,958.11 that was due to the Settlement Fund Trustee and was issued with a Discharge of Charge.
16. DW2 Police Constable Kennedy Lubembe works at the DCI Headquarters as a Land Fraud Investigator. He told the court that sometimes in April 2019, they received a complaint from the Defendant who was accompanied by DW1. He told the court that their investigation had revealed that the parcel of land belonged to the Defendant.
17. DW3- David Maina Githanga is the Assistant Director of Settlement in charge of Nyeri County. He told the court that the suit property was allocated to the Defendant on 4th October 1977. A discharge of charge was issued to the Defendant on 29th October 2012.
18. DW4- Nathan Gioche Gathaiya is the Land Registrar, Nyeri County. He told the court that from their records, the Green Card for the suit property measuring 60 Ha. was opened on 22nd October 1979 in the name of the Settlement Fund Trustees (SFT). Entry No. 2 was made on 24th November 1987 in the name of Epaphrus Kihara Kabuga while Entry No. 3 made on 11th March 1988 shows it was transferred to Solomon Mwai Githegi.
19. DW4 further testified that their records show that the title was transferred to Feli Gathoni Mundia on 27th May 1996 before it was again transferred to the Plaintiff's name on 9th April 1998.

Analysis and Determination

20. I have carefully perused and considered the pleadings filed by the parties herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly carefully perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
21. By his Complaint dated 17th August 2021 as amended on 20th September 2021, Patrick Mwangi Mundia (the Plaintiff) has sought for a declaration that he is entitled to exclusive and unimpeded possession and occupation of the parcel of land known as LR. No. Nyeri/Lusoi/35 (the suit property). In addition, the Plaintiff has sought for an order of injunction restraining James Mwangi Wanyeki (the Original Defendant), his servants and/or agents from remaining on or continuing in occupation of the suit property.
22. The basis for those prayers was the Plaintiff's contention that he is the registered proprietor of the suit property measuring some 150 acres. It was further the Plaintiff's case that despite his ownership of the land, the Defendant had been entering the land without his authority and committing various acts of trespass thereon.



23. In his Statement of Defence and Counterclaim dated 16th April 2014, the Defendant denied the Plaintiff's claim to the land. It was his case that the Plaintiff's title was obtained through fraud and he therefore sought for the rectification of the register to the land by cancellation of the Plaintiff's name and the entry of his own as the rightful proprietor of the suit property.
24. As fate would have it, the Original Defendant passed away on 10th September 2019 before the conclusion of the trial herein and he was thereafter substituted by his wife Julia Wanjiku Wanyeki on 19th September 2022.
25. From the material placed before the court, it was common ground that the suit property was initially registered in the name of the Settlement Fund Trustees (SFT), a body corporate created under Section 167 of the Agriculture Act (Cap 318) of the Laws of Kenya.
26. According to the Plaintiff, the suit property was subsequently transferred to One Epathrus Kaara Kabuga by way of sale on 24th November 1987. The same was subsequently transferred by way of sale to other parties. On 27th May 1996, the suit property was according to the Plaintiff purchased by his mother one Felly Gathoni Mundia who subsequently transferred the same to the Plaintiff's name as a gift on 9th April 1998.
27. It was the Plaintiff's case that upon the transfer of the land into his name, he had immediately taken possession thereof and that since he was doing business far away in Nairobi, he had entrusted a neighbour to keep watch thereon with the permission to harvest grass therefrom. It was further the Plaintiff's case that it is the said neighbor and caretaker who later in the year 2011 informed them of the Defendant's activities on the said parcel of land.
28. According to the Defendant however, the suit property was allocated to her deceased husband by the Settlement Fund Trustees on 14th October 1977. It was the Defendant's case that following the allotment, they had immediately taken possession thereof, put up a perimeter fence around the same before building a stone water tank, constructing a dam thereon and putting up a 3 bedroom stone house together with other houses for their workers. It was further the Defendant's case that they had overtime cultivated a variety of crops and reared livestock on the suit property.
29. It was the Defendant's case that sometime in the year 2005, they had allowed their daughter Wanyeki Wanjiku and her husband to use a portion of the land for farming. On 12th January 2012 they had received a call from their daughter's husband informing them that the Plaintiff herein had gone to the land claiming ownership thereof and that the Plaintiff was in the process of selling the land to a third party.
30. In support of his case, the Plaintiff produced a copy of the Green Card for the suit property, a certificate of Official Search conducted on 14th November 2011, as well as a copy of the Title Deed in his name. The Plaintiff also called as his witness one Anthony Muriuki Magothe (PW2) whose family resides on LR. No. Nyeri/Lusoi/36 said to abutt the suit property.
31. On her part, the Defendant produced a copy of the Allotment Letter dated 14th October 1977 in her husband's name together with a charge issued by the Settlement Fund Trustees (SFT) dated 1st February 1978. She also produced a copy of a receipt issued to her husband by the Settlement Fund Trustee (SFT) indicating that on 13th December 2012, her deceased husband had paid the sum of Kshs. 345,534/= to the Fund. The Defendant has further exhibited a Discharge of Charge dated 29th October 2012 issued to her husband by the Fund. It was however the Defence case that the Discharge could not be registered as the suit property had since been transferred to other parties.



32. I have taken a keen look at the testimonies of the witnesses as well as the exhibits placed before the court. It was interesting to note that while the documents produced by the Defendant purport to indicate that the suit property was allocated to the late James Mwangi Wanyeki on 14th October 1977 and that the same was charged to him on 1st February 1978, by the Settlement Fund Trustees (SFT) there was nothing on record to indicate that the Fund had owned the suit property at the time.
33. In his List of Documents dated 5th February 2015 as filed in court on 6th February 2015, the Defendant has listed as number 3 a copy of the Green Card for the suit property. That Green Card is similar in content to the one produced by the Plaintiff as Pexh 1 as well as the one produced by the Land Registrar, Nyeri (DW4). The said Green Card indicates that the suit property was registered in the name of the Settlement Fund Trustee on 22nd October 1979 and not before. It was therefore not clear how the Settlement Fund Trustees (SFT) could have charged the property in the name of the Defendant's husband's in 1978.
34. Perhaps more significantly, that Green Card does not have the name of the Original Defendant herein. All the records produced by the parties as well as the Land Registrar appear to suggest that the suit property was transferred from the Settlement Fund Trustees on 24th November 1987 to one Epathrus Kaara Kabuga. On 11th March 1988, the property was transferred to one Solomon Mwai Gathegi who subsequently transferred it to one John Wambugu Gicha on 17th November 1993. That Green Card further indicates that on 27th May 1996, the property was transferred to the Plaintiff's mother Felly Gathoni Mundia who subsequently transferred it to the Plaintiff on 9th April 1998.
35. While the Defendant contended that the transfer into the Plaintiff's name was fraudulent, I was unable to find any evidence of such fraud on the part of the Plaintiff. While indeed it was not clear how the property had ended up in the hands of the said Epathrus Kaara Kabuga in 1987 it was evident from the records held at the Lands Office and from the testimony of PW2 that the said Kabuga was the initial owner of the land before it passed down to the others.
36. It was further evident to me that while indeed the late James Mwangi Wanyeki may have initially tried to secure allotment of the suit property, he had certainly failed to fulfill the requirements of the allotment. A copy of the charge dated 1st February 1978 clearly indicates that he was required to pay to the Settlement Fund Trustees (SFT) the sum of Kshs. 43,629/= in 56 consecutive half-yearly installments of Kshs. 1,702/= effective 30th September 1980. That would mean that the Defendant had some 4 ½ years to make the payment.
37. As it were, there was nothing that was placed before the court to demonstrate that any such payment was made and/or that the Defendant took possession of the property as alleged and made any developments thereon. It was clear from the late James Mwangi Wanyeki's statement filed herein on 6th February 2015 that it was only when he learnt of the Plaintiff's intention to sell the land that he went back to the Settlement Fund Trustees (SFT) and enquired on the full amount payable to facilitate the processing of the title.
38. As it turned out, the title had long been processed and been issued and the same had exchanged hands severally. In that respect, Section 26 of the [Land Registration Act](#), 2012 provides as follows:-
- “26. 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 the 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.”

39. In the circumstance of this case, nothing was placed before me to suggest even remotely that the title issued to the said Epathrus Kaara Kabuga in 1987 was fraudulent and /or that the Plaintiff was a party to such fraud and /or misrepresentation.

40. It follows that I am persuaded that the Plaintiff has established his claim on a balance of probabilities and that the Defendant’s counterclaim lacks merit.

41. Accordingly, I hereby make orders as follows:-

- a). The Defendant’s Counterclaim is hereby dismissed.
- b). A declaration is hereby made that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property and to vacant possession thereof.
- c). An order of injunction is hereby issued restraining the Defendant, her servants and/or agents from remaining on or continuing in occupation of the suit property.
- d). The Plaintiff shall have the costs of both the suit and the counterclaim.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 19TH DAY OF JULY, 2024.

In the presence of:

Mr. C.M. Kingori for the Plaintiff.

No appearance for the Defendant.

Court Assistant: Michael

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J. O. OLOLA

JUDGE

