



**Ithangi v Irungu & another (Environment & Land Case 673 of 2014)
[2024] KEELC 5941 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5941 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 673 OF 2014
JO OLOLA, J
SEPTEMBER 20, 2024**

BETWEEN

JOSEPH GITHINGA ITHANGI PLAINTIFF

AND

LAWRENCE GITHINJI IRUNGU 1ST DEFENDANT

STEPHEN KIURI MWANGI 2ND DEFENDANT

JUDGMENT

Background

1. This suit was initially instituted as Nyeri High Court Civil Suit No. 34 of 1978. By her Complaint dated 3rd March 1978, Wandegwa Gichohi (the Original Plaintiff) had sought for a number of orders against one Irungu Gaitho (the Original Sole Defendant).
2. The said Original Plaintiff passed on and was substituted by her son Johnson Macharia Mwaniki who also passed on and was substituted by the current Plaintiff Joseph Githinga Ithagi. As fate would have it, the sole original Defendant- Irungu Gaitho also passed away and was substituted by his son Lawrence Githinji Irungu. The Complaint was subsequently amended on 20th September 2013 by which amendment Stephen Kiuri Mwangi was enjoined as the 2nd Defendant.
3. By the Amended Complaint dated 20th September 2013, the Plaintiff prays for Judgment against the Defendant and urges the court to grant orders listed as follows:-
 - a) That the register relating to the title number Githi/Igana/328 be rectified and be registered in the name of Wandegwa Gichohi as sole proprietor;
 - aa) That the register relating to the title number Githi/Igana/328 be rectified and be registered in the name of Joseph Githinga Ithagi as Sole Proprietor;



- aaa) The Honourable Court be pleased to declare that the transfer of the suit land to the deceased first defendant was illegal and thus null and void;
 - aaaa) The Honourable court be pleased to declare that the removal of the substituted Plaintiff's caution and the subsequent transfer of parcel number Githi/Igana/328 to the second defendant is tainted with fraud and should be cancelled and the land should go to the substituted Plaintiff;
 - b) That the costs of this suit be provided for; and
 - c) Any other or further relief as this Honourable court would deem fit to grant.
4. Those prayers arise from the Plaintiff's contention that until 1st February 1974, the original Plaintiff was the registered proprietor of the suit property. It is the Plaintiff's case that in February 1974, the Original Sole Defendant fraudulently caused the suit property to be registered in his name. It was further the Plaintiff's case that following the death of the Original Sole Defendant and during the pendency of this suit, the 1st Defendant herein fraudulently removed a caution registered on the suit property and thereafter proceeded to transfer the same to the name of the 2nd Defendant.
5. In his statement of Defence dated and filed on 29th March 1978, Irungu Gaitho (the 1st Defendant) admitted that the Plaintiff was initially the registered proprietor of the suit property. It was however his case that he did purchase the suit property in the normal course of business for valuable consideration.
6. Stephen Kiuri Mwangi (the 2nd Defendant) equally denied that he had acquired the suit property illegally. It was his case that sometimes in the year 2011, the family of Irungu Gaitho (deceased) offered the suit property for sale and he accepted to purchase the same. The 2nd Defendant asserts that upon execution of a Sale Agreement with the family, he had lawfully caused the same to be transferred to his name.
7. The 2nd Defendant avers that he is an innocent purchaser of the suit property for valuable consideration without notice of any fraud and that his rights thereto are protected under *the Constitution*.

The Plaintiff's Case.

8. Joseph Githinga Ithagi (PW1) testified as the sole witness in the Plaintiff's case. He told the court that the Original Plaintiff herein Wandegwa Gichohi was his grandmother. PW1 told the court that his grandmother had testified before her death in 1988 and asked the court to adopt her testimony and treat it as his own.
9. PW1 told the court that the suit property belonged to his deceased grandmother and that she took the title to the Area Assistant Chief who was the Original Defendant to help to sub-divide the same as she intended to gift one acre of the same to the Thukuma Community to build a school. PW1 told the court that by then a title deed had not been issued for the land and that after the Defendant went with his grandmother to the Lands Office, the title for the land was fraudulently issued in the Defendant's name instead of that of his grandmother.

The Defence Case.

10. The 1st Defendant did not call any testimony at the trial.
11. Stephen Kiuri Mwangi (DW1) testified as the sole witness in his case as the 2nd Defendant. He testified that at one point in time, he was requested by the 1st Defendant's son one Wanjohi who told him they were selling the suit property. DW1 did a search and confirmed that the suit property was registered in



the name of Irungu Gaitho. As the said Irungu Gaitho was already dead by then, DW1 entered into negotiations with Irungu's sons after which he purchased the property.

12. DW1 told the court that at the time of purchase, the land had no encumbrances and that he was unaware that the same had a dispute in court. Upon purchase, he took possession of the land and built his home thereon.

Analysis and Determination

13. I have carefully perused and considered the Pleadings filed herein by the parties, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
14. This suit has spent quite some considerable time in our corridors of justice. By a Plaint dated and filed in court on 3rd March 1978, Wandegwa Gichohi (the original Plaintiff) commenced these proceedings against one Irungu Gaitho (the original Sole Defendant) claiming ownership of the parcel of land known as Githi/Igana/328 said to be measuring some 7.5.acres in size.
15. It was the Plaintiff's case that until 1st February 1974, she was the sole proprietor of the suit property. She accused the Defendant who was the then Area Assistant Chief of taking advantage of her attempt to have a title processed in her name to fraudulently cause the same to be registered in his own name as the proprietor thereof.
16. On 1st August 1979, the Plaintiff presented her testimony and was cross examined thereon at length before the Honourable A.M. Cockar J (as he then was). For reasons that were not very clear from the record, the matter dragged on at length in court and in the year 1988, the said Wandegwa Gichohi would pass on without bringing her case to conclusion.
17. Her place as the Plaintiff was then taken by her step-son one Johnson Macharia Mwaniki. Apparently, the step –son was of ill-health. He too passed away on 12th June 1999 as the matter continued to drag on in court. It was evident from the material placed before the court that the original Defendant- Irungu Gaitho equally passed on around the same time.
18. Almost some 10 years after the substituted Plaintiff's death, his son Joseph Githinga Ithagi instituted a Chamber summons application dated 23rd June 2009 in which he urged the court to revive the suit and to substitute him in the place of his father to enable him pursue the claim initially instituted by his step-grandmother. In addition, the Applicant sought an order that Lawrence Githinji Irungu said to be a Legal Representative of the original Defendant be substituted for the Defendant. That application was allowed in a Ruling delivered by the Honourable J,K Serгон J on 19th February 2010.
19. When the matter came up for hearing on 18th June 2013, the court was informed that the substituted Defendant did transfer the suit property to a third party and that there was need to amend the pleadings. That prayer was allowed and on 20th September 2013, Stephen Kiuri Mwangi was enjoined in these proceedings as the 2nd Defendant.
20. In support of his case, the second substituted Plaintiff adopted the testimony of his grandmother as captured in the proceedings conducted on 1st August 1979. It was the Plaintiff's case that sometime in February 1974, the 1st Defendant's father, the said Irungu Gaitho had fraudulently and without the consent of her grandmother caused the suit property to be registered in his name.



21. In his statement of Defence filed in court on 29th March 1978, the 1st Defendant admits as a matter of fact that the Plaintiff was the original owner of the suit property. It was however, his case that he did thereafter purchase the suit property for valuable consideration from the Plaintiff.
22. The Plaint as amended in particularized the alleged acts of fraud committed by the 1st Defendant to include misuse of his position as an Assistant Chief of the area, to illegally acquire the Plaintiff's land. The 1st Defendant was further accused of taking advantage of the Plaintiff's senility to take over her land. It was the Plaintiff's case that the proper process for the transfer of land were never followed and that she had not executed any documents of transfer in favour of the 1st Defendant.
23. As it were, it was not in dispute that the suit property as at 1974 had been registered in the name of the Plaintiff. It was the Plaintiff's case that the 1st Defendant took advantage of his position as the Area Chief in 1974 and kept her in his house for a period of about four months when they would visit the Lands Office in search of the title deed which was to be processed. That title deed eventually did not come out in the name of the Plaintiff. Instead it came out in the name of the 1st Defendant.
24. Asked about the circumstance in which the title came to be registered in the name of the 1st Defendant, the court record for 1st August 1979 reveals her responses to the 1st Defendant's Advocate questions as follows:-

“When I reported the matter to the Police, the defendant was told to bring the title deed. The defendant gave the title deed to the Police. When the Police told me the title deed was registered in the defendant's name I told them I did not know anything about that. This was about 2 months after the defendant had released me from his home.

It is true I told the Police I had not thumb printed any documents. It is untrue that the Police took a set of my finger prints. We were told to file a case in court. I did not thumbprint any document. The Police also did not take any finger prints of mine. The police gave back the title deed to the defendant and not I do not know. I do not have the title deed.”

Question: Do you remember the defendant giving you Kshs. 7000/= by 3 instalments?

Answer: I did not receive anything from him.”

25. In light of such a strong denial from the Plaintiff of any sale having taken place between herself and the 1st defendant, one would have expected the 1st defendant and/or his substitutes to come to court and present the evidence of any transaction they had with the original Plaintiff before the suit property was transferred from her name. In his wisdom however, the 1st Defendant chose not to file any documents in support of their claim to the land nor to testify before this court as to the circumstances in which they acquired the same.
26. That being the case, the suit as against the 1st Defendant went undefended. While the Plaintiff was cross-examined about payments made and sale agreements and other documents allegedly thumb printed by herself, no such documents were produced as exhibits before this court. It was the Plaintiff's case that she had neither sold the land to the 1st Defendant nor did she receive any consideration thereto. That testimony was supported by the substituted Plaintiff and their evidence remain unchallenged by the 1st Defendant.
27. In regard to the 2nd Defendant, it was his position that he was an innocent purchaser for value without notice. The particulars of fraud as listed by the Plaintiff against the 2nd Defendant were inter alia, that he conspired with the 1st Defendant to transfer the land during the pendency of this suit which suit they were aware of and further that they caused a caution that was registered on the property to be removed.



28. In his testimony before the court, the 2nd Defendant stated that sometime in 2011, he was approached by a son of the 1st Defendant who told him they were in the process of selling the suit property having filed Nyeri High Court Succession Cause No. 1002 of 2011. It was his case that he agreed to purchase the property after conducting a search and confirming that it was in the name of the deceased- Irungu Gaitho. After executing the Sale Agreement and paying the sum of Kshs. 3,000,000/= to the Gaitho family, he was issued with his title deed on 7th September 2012.
29. It was in addition, the 2nd Defendant's testimony that he was unaware of the history of the land and in particular the fact that there was an on-going dispute in court. He stated that he had been working all along in Nairobi and was therefore not aware of the occurrences relating to the suit land.
30. From the material placed before the court, it was evident that when the 1st Defendant and family had instituted Nyeri High Court Succession Cause No. 1002 of 2011, they were aware of the on-going case involving the suit property. They knew the matter was pending in court, had filed Grounds of Opposition dated 6th November 2009 to oppose the revival of the suit and appointed a new Advocate on record to represent them in this suit.
31. It was also apparent that the 1st Defendant and family did not await for the Succession proceedings to be completed. They were in a hurry and hence sold the land to the 2nd Defendant as a beneficiary of the Estate of Irungu Gaitho. The land they sold was not in their name. The alleged owner had died and the 2nd Defendant must have been aware that he was not a beneficiary of the Estate of the deceased man.
32. As we have found above, the 1st Defendant's title was tainted by fraud and they had no land to sell, from the very beginning. They had no capacity to sell that which did not belong to them and the 2nd Defendant did not therefore acquire any valid title from them.
33. The claim by the 2nd Defendant that he was unaware of the matter pending in court was not helpful to him either. While he may have been away in Nairobi as stated, he came from the locality and was legally under a duty to make enquiries and ascertain the proper position of the land before venturing into the purchase thereof. As Turner L.J had long stated in the Old Case of Bellamy –vs- Sabine [1857] J De J 566:
- “Every man is presumed to be attentive to what passes in the courts of Justice of the State or Sovereignty where he resides. Therefore purchase made of property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the Judgment or decree in the suit...”
34. As it were, lis pendens is a common law principle that was enacted into statute by Section 52 of the Indian Transfer of Property Act (ITPA) now repealed. As was stated by Turner L. J. in the Belamy – vs- Sabine Case (supra):
- “It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite, were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the defendant alienating before the Judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”
35. In the premises, I am persuaded that the title for the suit property in the name of the 2nd Defendant was obtained by way of fraud, illegally and in breach of known principles of law and equity.



36. Accordingly, I hereby enter Judgment in favour of the Plaintiff as against the Defendants and in terms of the Amended Plaint dated 20th September 2013.

37. In the circumstances of the case each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 20TH DAY OF SEPTEMBER, 2024.

In the presence of:

Mrs. Maina holding brief for K. Wachohi for the Plaintiff.

Mr. Kibicho holding brief for Ng'ang'a for the 1st Defendant.

Mr. Stephen Mwangi – 2nd Defendant in person.

Court Assistant: Michael

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J. O. OLOLA

JUDGE

