



Gitau v District Land Registrar & another (Environment & Land Case 114 of 2021) [2024] KEELC 7277 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 114 OF 2021
JG KEMEI, J
OCTOBER 31, 2024**

BETWEEN

ANGELINE WAIRIMU GITAU PLAINTIFF

AND

DISTRICT LAND REGISTRAR 1ST DEFENDANT

PATRICIA WANJIKU KAHURA 2ND DEFENDANT

JUDGMENT

1. Vide a Plaint dated the 14/10/2021, the Plaintiff filed suit against the Defendants seeking orders that:-
 - a. A declaration that due process was followed in acquiring the title deed for LR Ruiru/Mugutha Block1/3847 (suit land) issued on the 20/11/2020 in the name of the Plaintiff and to that extent belongs to the Plaintiff.
 - b. An order quashing the deletion, removal and replacement of the name of the Plaintiff from the Ruiru Lands Register in respect to the suit land.
 - c. An order revoking any title issued after the 20/11/2020 other than the title document issued to the Plaintiff in respect to the suit land.
 - d. A permanent injunction against the office of the Lands Registrar Ruiru or successors thereto from altering the records in respect to the suit land except with the express application of the Plaintiff.
 - e. An order revoking any title issued to any other person except the Plaintiff in respect of the suit land
 - f. That all the records in the Land Register in regards to the suit land be rectified and returned to the name of the Plaintiff



- g. A permanent order restraining the 2nd Defendant or her agents from encroaching trespassing or in any way affecting quiet enjoyment of the Plaintiff's property
 - h. Costs of the suit.
2. It is the Plaintiff's case that she is the registered owner of the suit land having acquired it from Regina Nyambura Kariuki (Regina), deceased, the original allottee from Nyakinyua Investments Ltd (Nyakinyua). That Regina was a member of Nyakinyua Company. That as a member, she was issued with Share Certificate No 4647, ballot No. 3847 and a clearance letter with respect to the suit land. Further she averred that she was gifted the suit land by the said Regina who happened to have been her aunt in appreciation of the goodwill extended to her.
 3. That following her demise, the family of Regina in adherence with her wishes handed over the original documents to her and with their consent, the suit land was transferred to the Plaintiff on 4/10/2019 on payment of the sum of Kshs. 20,000/- to Nyakinyua. Thereafter the Plaintiff was issued with a new Share Certificate No 00923 in her name. She paid an additional Kshs. 30,000/- to Nyakinyua being title processing fees. That at an undisclosed date and on the prompting of the company she collected the title from Nyakinyua. To confirm the authenticity of her acquisition, she carried out a land search on the 15/1/2021 whose results confirmed the title was registered in her name. Desirous of subdividing the suit land, she commissioned a surveyor to confirm the beacons but was confronted by a group of armed men in the company of the 2nd Defendant's representatives who wasted no time in declaring that the suit land belonged to the 2nd Defendant.
 4. To her utter surprise she received a letter from the 1st Defendant dated the 18/1/21 calling for the return of her title deed failure to which it would stand cancelled. She terms the actions of the 1st Defendant unjustified, malicious and without any basis in law.
 5. Further she averred that she was not given the opportunity to be heard before her title was cancelled by the 1st Defendant.
 6. The 1st Defendant denied the Plaintiff's claim vide her Statement of Defence dated 10/11/2021 and admitted that the Plaintiff's title was cancelled vide orders in ELC 121 of 2019, Ruiru which Judgment has not been set aside, appealed and or vacated. The Court was urged to dismiss the suit.
 7. The 2nd Defendant denied the Plaintiff's claim vide her Statement of Defence dated 2/3/2023 in which she contended that there is no cause of action against her given that the suit is res judicata on account of MCELC No. 121 of 2019 and urged the Court to hold that in the overall the suit of the Plaintiff is fatally defective and ought to be dismissed.
 8. PW1 – Angeline Wairimu Gitau testified and relied entirely on her written statement dated 14/10/2021. In support of her claim she produced the documents marked as PEX No. 1 – 12.
 9. She stated that she is the registered owner of the suit land having obtained title on 20/11/2020. That the title was wrongly cancelled by the 1st Defendant allegedly based on the decision of the Court in MCLE No. 121 of 2019 for which she was not a party.
 10. Further she stated that the land was gifted to her (intervivos) in 2008 by Regina Nyambura Kariuki, her auntie who was allotted the land by Nyakinyua vide ballot No. 3847 Share Certificate No. 4647
 11. She informed the Court that her title and that of the 2nd Defendant are different, the 2nd Defendant's title being parcel T. 3847 and hers being parcel 3847.



12. In cross though she stated that the land was transferred to her by Regina's children, she was not aware if the estate of Regina was succeeded.
13. PW2 – Ms. Nduta Ndirangu Chege stated that though she did not produce any evidence, she is the Chairlady of Nyakinyua. She relied on her witness statement dated 14/10/2021 in evidence in chief.
14. She confirmed to the Court that the ballot receipts for the suit land emanated from Nyakinyua. That the land was allocated by Nyakinyua. That the plot ownership certificate was issued to Regina on 14/10/1991; Clearance Certificate on 9/9/2016; receipts dated 11/10/2019 and 2/10/2020.
15. With respect to Thika Criminal Case No. 886 of 2004 the witness confirmed that though she was a witness, the charges against the 2nd Defendant were dismissed. She further stated that the ballot of Regina was not in the members register and that she did not produce the register of members during the hearing of the criminal case as well as the current case. That said she confirmed to the Court that despite the absence of the name of Regina in the members register she transferred the land to the Plaintiff after the demise of Regina.
16. DW1 – Robert Mbuba testified and stated that he received orders from the Court in CMCC No 121 of 2019 directing him to open a register for the 2nd Defendant conditional upon the 2nd Defendant complying with the provisions of Section 33 of the *Land Registration Act*. By then he discovered that the Plaintiff had prior been issued with a title erroneously 5 days before which he duly recalled for cancellation on notice.
17. The witness further stated that parcels Nos. 3847 and T3847 are one and the same land on the ground. He stated that the Plaintiff is not the registered owner of the land.
18. DW2 – Patricia Wanjiku Kihura stated that she is the owner of the land. That in 2019 she sued Gabriel Kamau Kariuki (Gabriel) the administrator of the estate of Regina Nyambura and obtained orders restraining them from interfering with the land. Inter alia she also obtained conditional orders to be issued with a new title, her original title having been lost in police custody in 2004 or thereabouts.
19. That upon presenting the orders before Land Registrar for implementation she found out that a title had been issued in the name of Plaintiff which title was later recalled and cancelled by the Land Registrar.
20. Further she explained that the land was allotted to her in 1995 by Nyakinyua vide ballot No. 3847 and transferred to her on 28/2/1995. She produced a search on page 22 of her trial bundle in support. That the Plaintiff's title was registered in 2020 long after she got title in 1995.
21. Parties filed written submissions which I have read and considered.
22. Flowing from the pleadings, rival evidence and the written submissions the Court finds the following issues are ripe for determination: -
 - a. Whether the Plaintiff has proved title.
 - b. Who meets the costs of the suit?
23. This case undoubtedly has had a chequered history in the corridors of justice since 2004, a period close to two decades. In the main the Plaintiff's case is challenging the cancellation of title by the Land Registrar on the grounds that she held a valid title to the land. Further she faults the cancellation as illegal and that she was not accorded the opportunity to be heard.



24. The 1st Defendant on the other hand informed the Court that the title was cancelled in accordance with the law upon due notice and that the Plaintiff has no legal right in the land.
25. The 2nd Defendant's defence is that she is the rightful owner of the land having acquired it in 1985, took possession and held title since 1995 to date. That in 2004 she lost her title in the hands of the Criminal Investigation Department (CID) who were investigating a criminal case instigated by Regina against her. That on completion of the case the title was not returned to her despite following up with the Land's Office. That vide the orders of the Court issued on 25/11/2020 in CMCC No 121 of 2019 the Court ordered the 1st Defendant to issue her with a new title in line with the provisions of Section 33 of the Land Registration Act. That upon serving the 1st Defendant with the said orders it was discovered that the Plaintiff had unprocedurally been issued with a title on the 20/11/20, 5 days before the delivery of the Judgement. That following the cancellation of the Plaintiff's title erroneously issued, she remains the undisputed owner of the suit land.
26. It is trite that whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. In this case the Plaintiff bears the burden to prove that she holds a valid title and that the cancellation was but irregular. See Sections 107 – 109 of the Evidence Act.
27. Before determining the key issue, it is imperative to address the question whether or not parcel T.3837 and parcel 3847 are different parcels. This has arisen from the Plaintiff's assertion that her title is parcel 3847 and that of the 2nd Defendant's is T3847 and therefore the Court is dealing with two different parcels. The answer is found in the evidence led by DW1 that the land is one and the same. This finds support in the previous Court cases where Regina and the 2nd Defendant were fighting over the suit land. In all the cases the description of the land is interchangeably parcel 3847 and in others parcel T3847.
28. In the absence of a surveyor's report to prove otherwise, the Court holds that the suit land is one and the same. In fact going by the scanty land records admitted by the Land Registrar, the actual registration is parcel T. 3847 but the parties have used the descriptions interchangeably.
29. Has the Plaintiff proven title? It is not disputed that the title, the subject of the suit traces its root to Nyakinyua, the allotting company. For that reason therefore it is imperative that the Plaintiff must trace a clear unbroken and unencumbered root of the title to the said allotting entity.
30. In the case of *Munyu Maina v Hiram Gathiha Maina Nyeri Civil Appeal No. 239 of 2009* [2013] eKLR where the Learned Judges stated 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. The Plaintiff led evidence that she is the niece of Regina Nyambura, the original allottee of the land. That Nyambura was allotted land by Nyakinyua vide a ballot No 3847 and original Share Certificate No. 4647 dated the 14/10/1991.
32. In addition she produced a Clearance Certificate dated the 9/9/2016 from Nyakinyua to the effect that the suit land belonged Regina and that the 2nd Defendant was erroneously entered into the register as



a member. PW2 failed to table the minutes of the meeting that allegedly took place in 2016 and that revealed that the allotment of the suit land in the name of the 2nd Defendant was a mistake. Further it was not explained who moved the company to give the clearance noting that Regina had long passed away in 2014. The Court finds that the Clearance Certificate is doubtful.

33. Save for the 3 documents presented by the Plaintiff, no evidence was led to support that the said Regina was a member of Nyakinyua, evidence of payments of the land and whether she was given a Clearance Certificate during her lifetime. Neither the Plaintiff nor her witness, PW2- Nduta who claimed to be the chairlady of Nyakinyua discharged the burden. Infact, PW2 admitted more than once that the name of Regina was never in the register of members. This perhaps explains why she failed to produce the members register in Criminal Case No 866 of 2004 as well as in the current case despite having testified in both cases in support of Regina and currently the Plaintiff. In the absence of any evidence to the contrary, the Court finds that there was no evidence that Regina was a member of Nyakinyua.
34. It was the Plaintiff's case that Regina gifted her the land in 2008 during her lifetime. That the gift was in consultation and consent of her children. That said she failed to table any evidence of consultation and or consent of the children of Regina. In addition none of the children, including Gabriel, the administrator of Regina's estate was called to testify. PW2 informed the Court that she transferred the ballot from Regina to her children upon production of a death certificate however she failed to produce any documents in support.
35. It is trite that for a gift to be valid, the donor must have done everything which according to the nature of the property comprised in the gift was necessary to be done by him in order to transfer the property and which was in his power to do.
36. In the case of in Re: Estate of the late Gideon Manthu Nzioka (Deceased) [2015]eKLR the Court stated as follows:-

“In law gifts are of two types (gift inter-vivos and gifts made in contemplation of death (gifts Mortis Causa: For gifts inter-vivo, the requirements of law are that the said gift may be granted by deed, an instrument in writing, or by delivery, by a way of a declaration of a trust by the donor, or by way of resulting trusts or the presumption of gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of a trust in writing, gift's inter-vivos must be complete for the same to be valid.”
37. If indeed Regina had gifted the Plaintiff the land, nothing stopped her from transferring the ballot to her name in the register of members; obtaining a clearance for the transfer of the land to the Plaintiff; causing the company, as, it was its tradition, to process a title in her name; delivered the suit land to the Plaintiff. All these did not happen in the lifetime of Regina. The Court thinks that the allegation of a gift was an afterthought and it is the finding of the Court that no such gift in form of the suit land was donated by Regina to the Plaintiff.
38. It is trite that a donor will only convey something that they own, within their control and possession. The next area for examination is whether indeed Regina held title to the suit land. I have already alluded as much in the preceding paras that she did not. I say so because since 2004 Regina was fighting in Court to wrestle the ownership of the land from the 2nd Defendant and so far no evidence was adduced in support that the Court adjudged her the owner of the suit land.
39. According to the documents on record the 2nd Defendant was allocated land in 1985 by Nyakinyua vide ballot No 3847 and issued with a Share Certificate No 4647 dated the 13/4/1991. On 28/2/1985 the Commissioner of Lands on behalf of Nyakinyua registered a transfer in favour of the 2nd Defendant



and a register was opened in the lands office on 28/2/1995 – see green card certified on 12/3/2003. A title search dated the 10/11/2004 further evidences the ownership of the 2nd Defendant. Another one dated the 21/7/2008 still shows the 2nd Defendant as the owner of the land. Up and until this time the Plaintiff would want the Court to believe that Regina gifted her the land in 2008, the overwhelming evidence on record shows that Regina had no proven interest in the suit land so much so that she could donate any to the Plaintiff.

40. In 2004 the 2nd Defendant was charged in a Criminal Case No 866 of 2004 for obtaining registration of the title of the suit land by false pretences. It would appear that the hearing aborted, in a sense when PW2 failed to produce the members register to proof that Regina was the owner of the land. As fate would have it, the case was dismissed.
41. The 2nd Defendant has led evidence that she submitted her original documents to the CID during the investigations but never got them back. This was supported by the letter dated the 19/12/2006 addressed to the Registrar of Lands who admitted that the documents in the Lands Office were submitted to the CID and were not returned to the registry and that explains why the documents were missing in the registry.
42. Having suffered defeat in the 2004 criminal case Regina attempted to register a caution on the suit land on 22/2/2008, which caution DW1 confirmed was rejected.
43. Vide CMCC No 175 of 2012, Regina sued the 2nd Defendant seeking inter alia that the 2nd Defendant's title be cancelled and be registered in her name. Indeed in this case Nyakinyua was sued as a co-conspirator of the 2nd Defendant. The Court was not given any evidence to show the outcome of the suit. But the import is that up and until 2012 Regina was not the owner of the suit land therefore could not have gifted the Plaintiff land that she did not own in 2008.
44. Fastforward, in 2014, unfortunately Regina died before she succeeded in wresting the title of the suit land from the 2nd Defendant. One would have thought this would see the end of the case. The 2nd Defendant led evidence that Gabriel continued to interfere with her quiet possession of the land forcing her to file a suit in CMCC No 121 of 2019. In this suit the 2nd Defendant sued Gabriel, the administrator and son of the late Regina seeking restraining orders as well as orders to compel the 1st Defendant to issue her with the a new title or a copy of the title in place of the lost one.
45. According to the Court record Gabriel failed to defend the case and on the 25/11/2020 the Court rendered itself as follows;

“For these reasons, I allow prayer (b) of the amended Plaintiff on condition that the Plaintiff provides the required documents as stated in Section 33 of the [Land Registration Act](#). For these reasons, the Plaintiff's claim succeeds as prayed in the Plaintiff amended on 7th September, 2019. The 1st Defendant shall bear the costs of the suit since the Plaintiff has failed to prove the allegations of fraud or illegality against the 2nd Defendant. R/A explained.”

46. In the main the Court allowed the prayers of the 2nd Defendant and ordered the 1st Defendant to issue the 2nd Defendant with a replacement title subject to the provisions of Section 33 of the [Land Registration Act](#). The Court empathically addressed itself to the question of ownership in passing as follows;

“Thereafter, both parties herein filed their respective submissions which I have considered. I find that ownership is not an issue for determination since there is no other evidence on



record to prove that the Plaintiff is the registered owner of the suit property. DW1 also confirmed that from their records, the Plaintiff is the registered owner of the property. I therefore allow prayer (a) of the amended Plaint as prayed.”

47. It would appear that as the case was raging in Court the administrator of the estate of Regina and the Plaintiff had other ideas as will be clear shortly.
48. Armed with Ruiru CMCC No 121 of 2019 orders, the 2nd Defendant moved the Land Registrar for execution only to be informed that the Plaintiff had been registered as owner of the land 5 days earlier on the 20/11/2020. On realising that there were two titles over the same land, (that of the 2nd Defendant and the one issued to the Plaintiff) the Land Registrar wrote to the Plaintiff on the 18/1/2021 demanding the return of the title within 90 days in default the title in her possession would stand cancelled.
49. The estate of Regina did not waste time after losing the case in CMCC No 121 of 2019, Gabriel quickly moved the Court seeking orders of stay of execution of the Judgment delivered on 25/11/2020 pending the hearing and determination of an intended appeal. In his sworn affidavit deponed on 29/1/2021 he stated inter alia that he was served with the letter by DW1 ordering him to return the title in the name of the Plaintiff. In addition, he annexed all the documents that the Plaintiff is relying in the case. The question is why would he be in possession of the letter dated the 18/1/2021 addressed to the Plaintiff. The only reason is that CMCC 121 of 2019 was indeed a surrogate suit filed through the Plaintiff in place of Gabriel Kamau.
50. It would appear that when Gabriel Kamau failed to secure the title through the Courts, another plot was hatched. This time through Nyakinyua where a Clearance Certificate issued in 2016 was used to register title in the name of the Plaintiff. I have already stated in the preceding paras that absent the members register, evidence of consideration inter alia the Court cannot hold that Regina had any valid title to the suit land; her purported Share Certificate was issued in 1991 way after the said land had been allotted to the 2nd Defendant in 1985. Put differently the Plaintiff acquired a title without a root. Equally the Plaintiff failed to adduce any evidence to support a gift *intervivos*.
51. The long and short of the evidence before Court is that the Plaintiff has not proven title in her name; no evidence that the suit land belonged to Regina; Nyakinyua having allotted the said land to the 2nd Defendant in 1985 there was no land to allot to Regina in 1991. In the overall, the Court finds that the Plaintiff has failed to impugn the title of the 2nd Defendant.
52. Section 79 of the *Land Registration Act* provides as follows;
 - “79 (e). Rectification by Registrar
 - (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
 - (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.
 - (3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.



(3A) A person aggrieved by the decision of the Registrar under this section may apply to the Court for any necessary orders.”

53. Unchallenged evidence was led by DW1 that he notified the Plaintiff to return the title vide the letter dated the 18/1/2021. The letter is reproduced as follows;

“RE: Ruiru/Mugutha Block 1/3847 18th January 2021

Angeline Wairimu Gitau

Re: Fraudulent Transfers Of Parcel No. Ruiru/mugutha Block 1/3847 – Complainant:

Patricia Wanjiru Kihura &

Gabriel Kamau Kariuki

Acc: Angeline Wairimu Gitau

This office has received a complaint from Patricia Wanjiru Kihura & Angeline Kamau Kariuki where it has been established that the parcel of land was originally allocated to them.

The complaints are the bonafide owner of the land parcel Ruiru/Mugutha Block 1/3847 having been allocated the same by Nyakinyua Investments Limited and therefore you are requested to submit the title to this office immediately.

Kindly take NOTICE that failure to return the said title deed in your name within the next 90 days of this letter thereof, this office shall proceed to cancel the same under Section 79 of the [Land Registration Act](#).”

54. The Court finds that the notice aforesaid when juxtaposed with the provisions of Section 79(2) of the [Land Registration Act](#), was validly issued and the 1st Defendant complied with the law. The Court was not given any sufficient evidence to impugn the actions of the 1st Defendant.

55. The 2nd Defendant asked the Court to determine the question as to whether the suit is resjudicata in view of the former suit namely CMCC No 121 of 2019. I have perused the proceedings and it is clear that the Preliminary Objection dated the 6/6/2022 was withdrawn on 8/1/2022, I therefore find no necessity to determine it.

56. Pursuant to Section 26 of the [Civil Procedure Act](#) it is trite that costs follow the event. I find no reason to deny the Defendants costs.

57. Final Orders for disposal:-

- a. The Plaintiff's suit is dismissed.
- b. Costs are in favour of Defendants.

58. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mariga for the Plaintiff



1st Defendant – Absent

Njugi for the 2nd Defendant

Court Assistants – Phyllis

