



**Waira (Suing as a done of power of attorney of Wilson Njau Waira)  
v Mburu & another (Environment & Land Case E076 of 2022)  
[2024] KEELC 13564 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13564 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E076 OF 2022**

**JG KEMEI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**GEOFFREY NGANGA WAIRA (SUING AS A DONE OF POWER OF  
ATTORNEY OF WILSON NJAU WAIRA) ..... PLAINTIFF**

**AND**

**ERNEST MAINA MBURU ..... 1<sup>ST</sup> DEFENDANT  
THE HON ATTORNEY GENERAL (BEING SUED ON BEHALF OF THE LAND  
REGISTRAR) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff moved the Court vide the Plaint dated the 28/6/2022 seeking the following Orders;
  - a. An order of permanent injunction be issued against the 1<sup>st</sup> Defendant by themselves servants agents purchasers or anybody else claiming through them from trespassing disposing selling charging or in any other manner interfering with all that parcel of land namely Ruiru East Block1/381 from interfering with the Plaintiff's quite possession of the suit land.
  - b. That the 2<sup>nd</sup> Defendant be directed to cancel or annul the subdivisions namely Ruiru East Block1/381 and the Defendant's name be cancelled thereof and the same be issued in the names of the Plaintiff hereof.
  - c. That the Defendants do meet the costs of the suit.
  - d. Such other and/or further orders as this Honourable Court may deem fit and just.
2. The Plaintiff averred that at all material times to the suit he was the bonfide allottee of the suit land having acquired the same through allocation by Githunguri Constituency Ranching Company Limited (GCRL) and issued with a title on 2/4/2004 whereupon he took possession. That in 2018



he discovered some disturbance on the land and upon inquiry it emerged that the 1<sup>st</sup> Defendant had caused himself to be registered as owner of the suit land. That he quickly filed a complaint with the CID, Ruiru Police Station but the police have been reluctant to pursue the matter or make any conclusive investigations. That the 1<sup>st</sup> Defendant has illegally entered the suit land and attempted to commence developments on the basis of fraudulent ownership.

3. The Plaintiff averred that at no time did he sell and or transfer the suit land to anybody leave alone the 1<sup>st</sup> Defendant and that the registration of the suit land in the name of the 1<sup>st</sup> Defendant is fraudulent. The particulars of fraud against the 1<sup>st</sup> Defendant were itemised under para 11 of the Plaintiff.
4. The 1<sup>st</sup> Defendant failed to enter appearance nor defend the suit despite evidence of substituted service having been effected upon him.
5. The 2<sup>nd</sup> Defendant entered appearance on the 19/9/2022 but failed to file Defence.
6. The Plaintiff led evidence and relied on his witness statement dated the 28/6/24 as his evidence in chief and produced documents marked as PEX 1-7 in support of his case. He reiterated the contents of his pleadings and urged the Court to grant his prayers.
7. The Plaintiff filed written submissions which I have read and considered.
8. The key issue is whether the Plaintiff has proven his case.
9. The case of the Plaintiff is not controverted despite evidence of service having been effected on the Defendants. That being the case the Plaintiff is not exonerated from proving his case to the required standard. Section 107 of the [Evidence Act](#) clearly asserts that ;

“107. (1)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.  
(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

10. In this case notwithstanding the failure of the Defendants to contest the claim of the Plaintiff, the Plaintiff retains the onus to discharge the burden of proof. The Burden of proof does not shift even when the opposite party has not shown up for the contest.
11. In the case of *Kirugi & Another Vs. Kabiya & 3 Others* (1987) KLR 347 the Court held that;  
“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. Likewise, failure by the Defendant to contest the case does not absolve a Plaintiff of the duty to prove the case to the required standard.”
12. Similarly, 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 claimant 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.”
13. The case of the Plaintiff is anchored on fraud against the Defendants. It is the Plaintiffs case that the Defendants acted fraudulently and caused the suit land to be registered in the name of the 1<sup>st</sup> Defendant using forged documents, without the consent and knowledge of the Plaintiff, issuing a title to the 1<sup>st</sup> Defendant knowing too well that the 1<sup>st</sup> Defendant had no proprietary interests in the land and with clear intention to dispossess the Plaintiff of his parcel of land.



14. As regards standard of proof of fraud, the law is quite clear. In *R. G. Patel Vs. Lalji Makanji* [1957]EA 314, the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

15. Section 26 of the *Land Registration Act* provide two ways in which a title of the registered owner may be impugned. It states as follows;

“26. Certificate of title to be held as conclusive evidence of proprietorship

1. 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; or
  - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

16. PW1 led evidence that Wilson Njau Waira, his brother acquired the land through allocation of shares in GRCL. He adduced evidence in form of a ballot through which he was allocated the land. That he complied with all the procedures prescribed by the allocating company leading to the eventual possession and issuance of a title in 2004. He also added that he has neither sold the land to the 1<sup>st</sup> Defendant nor to any other party and that he holds a title for the suit land. This evidence was not controverted.

17. The attention of the Court has been drawn to the green card certified by the Land Registrar on 12/2/22 which indicates that the 1<sup>st</sup> Defendant was registered as owner of the suit land on 8/5/1997. Regrettably the 2<sup>nd</sup> Defendant failed to adduce evidence as to the circumstances that led to the entries. That said the Court has perused the certified copy of the title issued in the name of the Plaintiff and notes that the same was issued in 2004. In the face of the evidence led by the Plaintiff that he has never sold the land to the 1<sup>st</sup> Defendant nor to any other person, the Court finds that the Plaintiff has a better title than the 1<sup>st</sup> Defendant because this land was not available in 1997 having been acquired by the Plaintiff in the year 2004.

18. The law offers protections and privileges to a holder of title as can be seen in Section 24 the *Land Registration Act* which states as follows;

“24. Interest conferred by registration Subject to this Act—

- a. 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; and



- b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”
19. Further Section 26(1) of the *Land Registration Act* clearly provides that 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 persons 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 as provided for in law.
20. I find that the Plaintiff has proved that he is indeed the registered proprietor of the suit land and therefore the rightful owner having led unchallenged evidence in support that he acquired the land lawfully from GCRL
21. In the absence of evidence to the contrary, the Plaintiff has proven that indeed he is the registered proprietor of the suit land and therefore the rightful owner having acquired the same through lawful means.
22. Considering the totality of the evidence and applying the legal principles outlined above, and in the absence of evidence to the contrary, I am persuaded that the Plaintiff has proved his case on a balance of probabilities.
23. In the end I allow the claim in the following terms;
- a. An order of permanent injunction be and is hereby issued against the 1<sup>st</sup> Defendant by themselves, servants, agents, purchasers or anybody else claiming through them from trespassing, disposing, selling, charging or in any other manner interfering with all that parcel of land namely Ruiru East Block1/381 and or otherwise however from interfering with the Plaintiff’s quite possession of the suit land.
- b. That the 2<sup>nd</sup> Defendant is hereby ordered to cancel or annul any subdivisions if any on Ruiru East Block1/381 and the 1<sup>st</sup> Defendant’s names be cancelled thereof and the same be issued in the names of the Plaintiff hereof.
- c. The case was not defended and therefore I make no orders as to costs.
24. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Mr. Wachira for the Plaintiff

1<sup>st</sup> Defendant – Absent

2<sup>nd</sup> Defendant - Absent

Court Assistant – Phyllis

