



**Githinji v Waithima (Environment & Land Case 611 of 2014)
[2024] KEELC 13378 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 611 OF 2014
JO OLOLA, J
NOVEMBER 22, 2024**

BETWEEN

HANNAH WATETU GITHINJI PLAINTIFF

AND

HENSON WAITHAKA WAITHIMA DEFENDANT

JUDGMENT

Background

1. This suit was initially filed in the High Court as Nyeri HCCC No. 13 of 2012 on 23rd January 2012. It was transferred to this court and given its current reference on 26th November 2014.
2. By her Plaint dated 14th January 2011, Hannah Watetu Githinji (the Plaintiff) prays for Judgment against the Defendant for:
 - a). A declaration that all the proceedings and Judgment procured by the Defendant vide Nyeri PMCC 26 (B) of 1994 were fraudulent, illegal and unlawful and they be set aside.
 - b). An order for the cancellation of the subdivision of Mahiga/Kamoko/1052 and for the reversal thereof, with the said land reverting to the name of the deceased.
 - c). A permanent injunction directed against the person of the Defendant, his agents, servants or anybody claiming under him from working, committing acts of waste, interfering or in any way interfering with the Plaintiff's peaceable occupation of the land Mahiga/Kamoko/1052.
3. Those prayers arise from the Plaintiff's contention that one Peterson Githinji Gichohi (deceased) was the registered proprietor of the said Mahiga.Kamoko/1052. The Plaintiff avers that sometimes in the year 1994, the Defendant instituted Nyeri PMCC 26(B) seeking the recovery of land for a consideration passed as between the Defendant and the deceased.



4. The Plaintiff avers further that the Lower Court vide an order made on 4th April 1996 did transfer the matter to the Land Disputes Tribunal but before a determination could be made, the said Peterson Githinji Gichohi passed away and was buried on the suit land. It is the Plaintiff's case that she only came to learn of the proceedings in July 2011 when the Defendant entered the land and cut down 53 trees valued at Kshs. 100,000/=
5. But in his Statement of Defence and Counterclaim dated 10th July 2012, Henson Waithaka Wathima (the Defendant) avers that the court did not specify under which provision of the law it had transferred the suit to the Tribunal. He avers that the Plaintiff's husband died when the matter was pending determination but denies that the Plaintiff only came to learn about the case in the year 2011.
6. The Defendant avers that no fraud or illegality was committed in the entire process from substitution of the Plaintiff in place of her husband to obtaining the title to the land. It is further the Defendant's case that the suit as filed is statute-barred and it is neither an appeal nor a review of the previous case and hence the prayers sought are untenable.
7. By way of his Counterclaim the Defendant avers that the Plaintiff is in unlawful occupation of the parcel of land known as Mahiga/Kamoko/1052 and prays for the following.
 - a). The Plaintiff, her agents, servants or any person claiming interest under her be evicted from Parcel No. Mahiga/Kamoko/1052 and hand over vacant possession to him;
 - b). Damages for trespass;
 - c). Costs of the suit and Counterclaim;
 - d). Any better relief the Honourable Court may deem fit to grant.

The Plaintiff's Case.

8. The Plaintiff's suit was dismissed with costs for non- attendance on the dated fixed for trial.

The Defendant's Case

9. The Defendant testified as the sole witness in support of his case at the trial. Relying on his recorded statement dated 8th July 2022, the Defendant told the court that he was awarded ¼ acre of land in Nyeri CMCC No. 26 (B) of 1994 as the Plaintiff's husband was unable to pay him.
10. The Defendant told the court he got the title for the suit property in 1999 and that the documents for transfer were executed by the Executive Officer of the court.

Analysis And Determination.

11. I have carefully perused and considered the pleadings filed herein, the testimony of the Defendant as well as the evidence adduced at the trial. I have similarly perused and considered the submissions placed before the court by the Defendant. The Plaintiff did not testify and/or make any submissions in support of her case.
12. By her suit as filed herein, the Plaintiff had sought a declaration that all the proceedings and the Judgment procured by the Defendant in Nyeri PMCC No. 26 (B) of 1994 were fraudulent, illegal, unlawful and that the same ought to be set aside. The Plaintiff urged the court to issue an order cancelling the sub-division of the parcel of land known as Mahiga/Kamoko/1052 and to have the same reversed and registered in the name of her deceased husband Peterson Githinji Gichohi.



13. In addition, the Plaintiff had urged the court to issue an order of a permanent injunction restraining the Defendant, his agents and/or servants from dealing in any manner whatsoever with the said LR. No. Mahiga/Kamoko/1052.
14. The basis of those prayers by the Plaintiff was her contention that her husband Peterson Githinji Gichohi (deceased) was the registered proprietor of the said LR. No. Mahiga/Kamoko/1052. She accused the Defendant of orchestrating a fraudulent sub-division of the said parcel of land and thereafter acquiring title to a portion of the land through an illegal and unlawful court process.
15. The Defendant denied having orchestrated any fraudulent process. It was his case that he did lawfully purchase a portion of the said LR. No. Mahiga/Kamoko/1052 and that the sub-division that followed was lawful and done in accordance with the law.
16. By way of Counterclaim, the Defendant urged the court to direct the eviction of the Plaintiff from the said parcel of land and to order her to pay damages for trespass onto the land.
17. As it turned out, the Plaintiff did not attend court when the matter came for hearing and her suit was dismissed with costs.
18. In support of his Counterclaim, the Defendant testified that sometimes in 1991, he had purchased $\frac{1}{4}$ acre of LR. No. Mahiga/Kamoko/1052 from the Plaintiff's husband Peterson Githinji (now deceased). He told the court that when they went to the Land Control Board to obtain consent to sub-divide and transfer the land, the Plaintiff and her children objected to the same.
19. The Defendant told the court that he was then compelled to institute Nyeri PMCC No. 26(B) of 1994 against the deceased after the deceased failed to refund the purchase price. He further told the court that the said suit was referred by the court to the then Land Disputes Tribunal which resolved that the deceased ought to transfer 0.25 acres of the suit property to the Defendant.
20. It was further the Defendant's case that when the deceased and his family failed to execute the documents of transfer, he applied to the court and the documents necessary for transfer were executed by the Executive Officer of the court after which the land was subdivided.
21. From the material placed before the court, there was no dispute that the Defendant and the Plaintiff's late husband entered into a sale Agreement for the sale of a portion of LR. No. Mahiga/Kamoko/1052 measuring 0.25 acres. That Agreement was executed by the deceased on 6th June 1992 while the Defendant did so on 29th May 1992. The agreed purchase price was Kshs. 26,000/= . On the date he executed the Agreement, the deceased acknowledged receipt of Kshs. 17,293 and the balance was to be paid upon obtaining consent from the Land Control Board to transfer the portion.
22. It was apparent from the documents produced by the Defendant that the deceased thereafter reneged on the Agreement. Accordingly and by a Plaint dated and filed on 19th January 1994, the Defendant instituted the said Nyeri PMCC No. 26 (B) of 1994 seeking the following orders against the Defendant.
 - a). An order directing the defendant to sub-divide and transfer 0.25 acres from land parcel No. Mahiga/Kamoko/1052 to the Plaintiff.
 - b). In the alternative the defendant to refund a sum of Kshs. 19,000/= together with interest at 50% per the terms of the Agreement; and
 - c). An order for the defendant to sign the necessary documents to effect the sub-division and transfer of 0.25 acres from land parcel No. Mahiga/Kamoko/1052 to the Plaintiff and in default the Honourble Court do authorize the Executive Officer of this court to sign the



necessary documents to effect sub-division and transfer of 0.25 acres from land parcel Mahiga/Kamoko/1052 on behalf of the defendant.

23. In his statement of Defence dated 22nd May 1995, the deceased admitted the claim and undertook to transfer the land on condition that the Defendant herein paid the transfer fees. In spite of that admission it would appear that no transfer was effected and that for some reason, the suit was later transferred to the Land Disputes Tribunal for determination.
24. Having heard the dispute and in a determination made on 28th July 1997, the Tribunal directed that the 0.25 acres that was claimed by the Defendant be transferred to him. That award was subsequently adopted by the court.
25. As fate would have it, the Plaintiff's husband passed away on 31st December 1997 following which, by an order made in the said proceedings of the Lower Court on 22nd September 1998, the Plaintiff herein was substituted in his stead.
26. Again by an order made on 2nd February 1999, the Executive Officer of the Court was authorized to execute all necessary documents to give effect to the Judgment of the court. The said LR. No. Mahiga/Kamoko/1052 was subsequently sub-divided into LR. No. Mahiga/Kamoko/1244 and 1245. The Defendant was thereafter on 12th May 1999 issued with his title deed for the parcel of land now known as Mahiga/Kamoko/1244.
27. It follows therefore that the contention by the Plaintiff that the Defendant had fraudulently caused the sub-division and acquired a portion of the property illegally were completely baseless. The Defendant herein did acquire ownership of the said Mahiga/Kamoko/1244 following a transparent litigation process.
28. The Plaintiff's deceased husband was not only aware of the said litigation but did actively participate therein. While the Plaintiff herein purports that she was unaware of any litigation between her husband and the Defendant until the year 2011 when the Defendant went into the land and cut down some trees, it was clear to me that she was being very economical with the truth. The proceedings of the Tribunal on 19th March 1997 reveal that she attended the proceedings and applied for an adjournment informing the panel that her husband was unwell and had been referred to Nyeri Provincial Hospital. The Tribunal allowed her request and adjourned the proceedings to 4th April 1997.
29. In the premises I was persuaded that the Defendant had proved his Counterclaim to the required standards and that any occupation of any part of the parcel of land known as Mahiga/Kamoko/1244 by the Plaintiff was unlawful and without any basis.
30. Accordingly, I hereby enter Judgment for the defendant and make the following orders.
 - a). An order is hereby made directing the Plaintiff, her agents and servants or any person claiming under her to forthwith hand over vacant possession of LR. No. Mahiga/Kamoko/1244 to the Defendant herein. In default the Plaintiff shall forthwith be evicted therefrom.
 - b). The Defendant shall have the costs of both the Plaintiff's suit as well as the Counterclaim.
31. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 22ND DAY OF NOVEMBER, 2024.

J. O. OLOLA

JUDGE



In the presence of:

No appearance for the Plaintiff.

Mr. K. Wachira for the Defendant.

Court Assistant: Kendi

