



Waweru & 14 others v Kamau & 2 others; Chomba (Interested Party) (Environment & Land Case 853 of 2017) [2024] KEELC 13451 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 853 OF 2017**

**JG KEMEI, J
NOVEMBER 22, 2024**

BETWEEN

**JOB STEPHEN WAWERU 1ST PLAINTIFF
GERALD WANYOIKE 2ND PLAINTIFF
HANNAH WANJIRA KARAU 3RD PLAINTIFF
NELSON GANGA MWANGI 4TH PLAINTIFF
LYDIA NJERI NJOROGE 5TH PLAINTIFF
ALICE NYAGUTHII MICHIRI 6TH PLAINTIFF
JULIETA NYAMBURA 7TH PLAINTIFF
JOSEPH IRUNGU 8TH PLAINTIFF
PETER KAMAU GICHURE 9TH PLAINTIFF
EUNICE WANJIKU CHEGE 10TH PLAINTIFF
EUNICE WAITHERA MWANGI 11TH PLAINTIFF
JANE NJERI KAHUGU 12TH PLAINTIFF
JOYCE NJERI MURERA 13TH PLAINTIFF
ANASTACIA WAIRIMU 14TH PLAINTIFF
PETER MAKAO CHURU 15TH PLAINTIFF**

AND

**PETER MBURU KAMAU 1ST DEFENDANT
JOSPHAT NGIGE KANOGA 2ND DEFENDANT
GRACE WAMBOI GICHINGA 3RD DEFENDANT**



AND

JANE NYAMBURA CHOMBA INTERESTED PARTY

JUDGMENT

Pleadings

1. The Plaintiffs filed suit against the Defendants on 4/12/2017. The suit went through several amendments resting on the one amended on 25/4/2022 seeking the following Orders;
 - a. That the Plaintiffs have a right to plot No RUIRU EAST/JUJA EAST BLOCK2/4220 and RUIRU/RUIRU EAST BLOCK4/T.727 (suit lands) as per the sale agreement and the Plaintiffs be declared the legal registered owners of the suit land.
 - b. A permanent injunction restraining the Defendants from interfering with the suit lands. The two title deeds issued to the Defendants for the suit lands be and are hereby revoked and cancelled.
 - c. Interest and costs of the suit.
2. It is averred that both the Plaintiffs and the Defendants are members of the Kirigiro Self Help Group (the group). The group acquired the suit lands in 2008 from Mundia Women Group and took possession. That they discovered in 2015 that the Defendants had caused the titles to be registered in their own names without the consent of the group members instead of registering in the name of the group.
3. The Defendants denied the Plaintiffs' claim vide the Statement of Defence dated the 11/1/2018. They contend that they hold the titles as Trustees having been officials and members of the group and deny any alleged wrong doing. They also faulted the Plaintiff's suit as defective as it fell short of a representative suit and prayed that the same be struck out with costs.
4. The Interested Party having been enjoined to the suit vide the orders of the Court dated the 10/2/2018, averred in her pleadings dated the 11/6/2019 that she along with the Plaintiffs and the Defendants are members of the group. That in 2006 the group purchased the suit lands from Mundia Women Group using the members' contribution of Kshs 600/- each. That she purchased a share from a member namely Wadomu at the sum of Kshs 35,000/-. That it was resolved by the members that Kshs. 35,000/- would be utilized to refund the previous chairman Mr. Samuel Kahuhu who had resigned from the group. That thereafter she took possession of the plots and commenced developments and was issued with two Share Certificates for the plots Nos. 020 and 008. She averred that the suit lands are registered in the names of the Defendants to hold in trust for the group. In an apparent Counterclaim she sought the following orders;
 - a. A declaration that the Interested Party is a bonafide purchaser of the two shares in the suit lands.
 - b. That the Defendants be compelled to forthwith transfer to the Interested Party two plots in the suit lands.
 - c. That a permanent injunction be issued restraining the Plaintiffs and the Defendants by themselves their servants' agents and or whomsoever in any means howsoever from interfering with the Interested Party's two shares of plots in the suit lands respectively.



d. Costs of the suit

The evidence of the parties.

5. PW1 – Gerald Wanyoike Mungai adopted his witness statement filed the 4/12/2017 in chief and stated that members formed the group in 2005 and through savings purchased the suit lands in 2008. That the initial plan was to register the suit lands in the name of the group but the Defendants who were officials registered the suit lands in their names contrary to the wishes and approval of the members, in addition to issuing the members with fake land certificates. That they want the removal of the Trustees to pave way for the land to be subdivided amongst themselves. Showed the minutes suspending him from the group, the witness denied that he was ever suspended and stated that he was one of the founding members of the group. That none of the members contributed for the costs of transferring the land into that of the trustees. He added that his parcel is No 19 and that he has settled thereon without any evidence. He stated that he was issued with a fake Share Certificate. He also added that the formal subdivisions have not been done
6. PW2 - Nelson Mwangi Nganga adopted his witness statement filed on 4/12/2017 and reiterated the evidence as led by PW1. Though he got one plot No 11, he admitted that he did not contribute for the transfer fees of the suit lands. The reason being that the group had its own monies in its account and that there was no need for the members to contribute to the expenses with respect to transfer of the plot from the vendor to the Trustees. That their grievance is that they want the current trustees to be removed so that they can elect others.
7. PW3 - Job Stephen Waweru introduced himself as a member of the group and relied on his witness statement dated the 4/12/2017 in chief and the list of documents on page 14 marked as PEX No 1-31. He explained that the Plaintiffs have sued the Defendants because of fake Share Certificates; fraudulent registration of the suit lands in their names; held themselves out as owners of the land; misappropriated groups funds in the sum of Kshs 60,000/-; non adherence of the group rules; were not elected by members of the group; failure to comply with the provision in *the Constitution* which required that elections be held annually; misled members that the lands were subdivided and misappropriated monies disguised as survey fees
8. In cross he stated categorically that he had not tabled any evidence in support that members contributed Kshs. 324,000/- nor that they resolved to register the suit lands in the group's names. Shown the titles, he admitted that the same are registered in the names of the Defendants in trust for the group. He added that they got registered as trustees in 2015 when they were no longer the officials of the Company, their term having ended in 2009. With no evidence in support, he claimed that the Share Certificates were fake.
9. DW1 - Peter Mburu Kamau testified and relied on his witness statement dated the 11/1/2018 and produced documents marked as DEX1-19. He introduced himself as one of the former officials in whose names the suit lands were registered to hold in trust for the group. That the Interested Party has two shares in parcel 4220.
10. In cross he stated that the group is registered as a Community Based Organization (CBO) on 12/4/2006. The inaugural officials being Samwel Kahugu (Chairman), Josephat Kanoga and Grace Wamboi. That he took over as chair of the group on 17/11/2008 following the resignation of the previous chair. That the group has not held elections since 2008 despite the provisions of its Constitution that required that elections be held annually. That parcel Number 4220 was subdivided as seen by the survey receipts on pages 72 and 73 of the Plaintiffs trial bundle. That at the inception the membership was 24 but he was not sure what the current number was. That members got Share



- Certificates with plot Nos in the series 001 to accommodate more land that they planned to acquire as a group. That the transfer was attested by Nancy Nyawira who worked with the law firm of Gachoka & Co Advocates who were in conduct of the transaction and prepared the transfer documents and that she was neither a member nor held any plot in the suit lands. That the trustees are still holding the titles in trust for the group and not in their personal capacities.
11. DW2 – Jane Nyambura Chomba testified and relied on her witness statement dated the 11/6/2019 and produced documents marked as DEX 20-24 and stated that she is a member of the group. That the group purchased land from Mundia Women Investments in 2006. That she was allotted one share and acquired the 2nd share through Samuel Kahuhu, giving her two shares namely Nos. 8 and 20 for which she is claiming.
 12. The Plaintiffs submitted and reiterated the evidence led in the trial that the Defendants lacked the capacity to hold the land as trustees on behalf of the group and the act of so registering the suit lands in their names was fraudulent in the absence of minutes of the members authorizing them to do so. With respect to the Interested Party's claim, it was the Plaintiff's submissions that the Interested Party failed to lead evidence in support of the 2nd plot.
 13. As to whether the Plaintiffs have locus to file suit, Counsel for the Defendants submitted in the negative. That there was no official register of members in support and neither was there any cause of action against the Defendants. On the allegation of fraud, it was submitted that the same was not proven. That the suit land belongs to the group and the Defendants hold the same in trust for the said group. That the subdivision of the land was in progress before the Plaintiffs rushed to Court and halted the process in which each member of the group was going to own their own plots.
 14. The Interested Party submitted that she contributed Kshs 600/- which entitled her to one share/plot in the group and that she later paid the sum of Kshs 35,000/- to the then Chairman, Samuel Kahuhu for the purchase of one share from Hannah Wanjira who had defaulted in paying for her share. That she was issued with two Share Certificates, took possession of the plots and commenced developments thereto.
 15. Having considered the pleadings, the evidence led at the trial, the rival submissions, the key issues for determination are;
 - a. Whether the Plaintiffs have locus to file suit;
 - b. Whether the Plaintiffs have proven fraud on the part of the Defendants;
 - c. Whether the title in the name of the Defendants ought to be cancelled;
 - d. Whether a permanent injunction should be issued against the Defendants;
 - e. Whether the Interested Party has proven her claim;
 - f. Costs of the suit.
 16. The suit herein is brought by the Plaintiffs who claim to be members of Kirigiriro Self Help Group. The Plaintiffs case is that the Defendants caused the suit lands to be registered in their names without approval of the members of the group. The Defendants denied the claim of the Plaintiffs and asserted that they became registered as officials and they hold the titles in trust for the group. The Interested Party's case is that she is entitled to two shares for which she holds a certificate of shares.



Locus Standi

17. Locus standi is defined as the right to be heard. A person must demonstrate interest in a matter for him to have standing in a Court of law. It is not in dispute that all the parties in the case are members of the group. It is also not in dispute that the group is unincorporated. I have seen the certificate of registration dated 12/4/2006 in which the group incorporated themselves as a self-help group under the Ministry of Gender Children & Social Development as a self-help group. It is not uncommon to have persons incorporate themselves as a self-help group for the achievement of their objectives. These are informal structures encouraged by the local administration to help residents carry out beneficial projects in their localities such as water project, cattle dip construction etc.
18. The question is whether the Plaintiffs have locus to institute proceedings as members of the self-help group. The answer is found in the provisions of Article 22 of *the Constitution* of Kenya which provided as follows;

“Enforcement of Bill of Rights.

22. Every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (1) or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—
- a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
- (3) The Chief Justice shall make rules providing for the Court proceedings referred to in this Article, which shall satisfy the criteria that—
- a. the rights of standing provided for in clause (2) are fully facilitated;
 - b. formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation; (c) no fee may be charged for commencing the proceedings;
 - d. the Court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
 - e. an organisation or individual with particular expertise may, with the leave of the Court, appear as a friend of the Court.



- (4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence Court proceedings under this Article, and to have the matter heard and determined by a Court.”

19. Article 260 of *the Constitution* of Kenya inter alia provides as follows;

“person” includes a company, association or other body of persons whether incorporated or unincorporated.”

20. My reading of the two provisions shows that members of a group though not incorporated may bring an action in their own names. A few may also sue on behalf of others in which event it shall be a representative suit. Unincorporated entities have no capacity to file suit in the name of the entity.

21. In its first Constitution members resolved to achieve a noble objective of acquiring land and finding shelter for themselves. They came together with the objective of acquiring land as a group and later subdivide the same into plots, allocate members their shares and embark on developments therein.

22. So clear in their objective was the group that in their Constitution of March 2006, they resolved as follows;

“Kirigiriro is a group formed by its members due to help each other from the problems they are facing of shelter because they live in slums areas.

OUR OBJECTIVE

We members of the above mentioned group our aim contributing money each month so as to enable us to buy a land.

OUR PROPOSALS

Members of the above mentioned group proposal that when they will succeed to buy a land they will sub-divide into pieces so that enable each member to achieve his/her own plot according to the groups objection.

BENEFIT

All group members will be benefiting with achieving the plot and enables members to have a shelter.

BENEFICIALLY

Members of Kirigiriro Self Help Group will be the first beneficially from the group after buying the land. There will be continuous buying of land afterwards.”

23. The minutes of the group held on 19/3/2006 clearly authorized the incorporation of the group with the Ministry of Culture & Social Services leading to the registration of the group on 12/4/2006.

24. In this case it is commonly acknowledged by all the parties that the Plaintiffs on the overall have locus to file the suit before the Court. All the parties in the suit are beneficiaries of the self-help group. The Plaintiffs being members of the group are equally entitled as beneficiaries to enforce the terms of the trust.

25. From the above analysis the issue of locus standi is a non-issue.

Fraud

26. It is the Plaintiffs’ case that the Defendants caused the titles to be registered in their names without the consent and approval of the Plaintiffs and therefore acted fraudulently; they issued the Plaintiffs



with fake Share Certificates in the self-help group; misappropriated funds in the sum of Kshs. 60,000/- disguised as survey fees. The Defendants have denied the accusations and asserted that the self-help group being an unincorporated entity has no power in law to hold land and hence the registration of the same in their names to hold in trust for the membership. That they hold the land for the members and not in their private capacities and therefore are not guilty of any covert acts to claim the land or purport to hold it in their private capacities.

27. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. This burden is borne by he who asserts. Section 107 *Evidence Act* provides;

“107. Burden of proof

- (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.”

28. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, the Court stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

29. Moreover the standard of proof was settled by the Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR when it expressed itself as follows:-

“... It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....”....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

30. Following the registration of the group on 12/4/2006, members and its officials embarked on the search for the appropriate plot for acquisition. During the members meeting held on the 6/54/2008 Mr Kihuhu, the chairman informed the members that land of about three acres had been identified for purchase. Members being satisfied agreed and gave the officials the go ahead to buy the land on their behalf. On the 14/4/2008 the members authorized their then officials to withdraw Kshs 180,000/- from the bank accounts for purposes of purchasing the land. The agreement of sale dated the 15/4/2008 was entered between the sellers and the self-help group through its representatives being Samwel Kihuhu, Grace Wambui Gichinga and Josephat Ngigi Kanoga for the purchase of Kshs 265,000/- out of which Kshs 180,000/- was paid as a deposit leaving the balance of Kshs 85,000/-



payable on the 6/5/2008. The three officials executed the agreement as representatives of the self-help group.

31. Upon the resignation of Samwel Kihuhu as Chair of the group on 17/11/2008, Peter Mburu Kamani, the 1st Defendant was appointed vide the minutes of the meeting held even date. I have perused several minutes of the members meetings held to discuss among other things the viewing and the subdivision of the land. One thing that has caught the attention of the Court was the complaints against one of the members, first for non-payment of members' dues and the apparent wrangles that were beginning to rock the self-help group that characterized the suspensions of certain members and removal of officials from office.
32. I have perused the transfers dated the 1/3/2010 executed by the Defendants as trustees of the self-help group leading to the issuance of titles on the 22/15. DW1 explained that the self-help group having not been incorporated in law could not hold land and therefore the land was registered in the names of the Defendants as trustees for the group.
33. Section 26 of the Registered Land Act (Repealed) the applicable law then provided as follows;

“ 26.

- (1) The Registrar may, on the application of the proprietors of contiguous parcels who are desirous of changing the layout of their parcels, and with the consent in writing of all other persons in whose names any right or interest in the parcels is registered and of any cautioner, cancel the registers relating to those parcels and prepare new registers in accordance with the revised layout:

Provided that, where in the opinion of the Registrar a proposed reparation involves substantial changes of ownership which should be effected by transfers without invoking this section, he may in his discretion refuse to effect the reparation.

- (2) Upon any such reparation, the new parcels shall, notwithstanding section 38, vest in the persons in whose names they are registered.”

34. The Court finds that the Defendants had the blessing of the members to so act flowing from the minutes of 6/4/2008. In the absence of any evidence to the contrary and in the absence of a plea of particulars of fraud and proof of the same, the Court finds that the allegations of fraud were neither pleaded nor proved in evidence.
35. In the end the Court finds no evidence of fraud and the issue is determined in the negative. The Defendants have not denied trust and in the circumstances, I find that they are validly holding the titles as at the time they were appointed as trustees when they held office as officials of the group.

Cancellation of Title

36. Section 80 of the Land Registration Act provides as follows;

“ 80. Rectification by order of Court

1. Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or



amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

37. Having found no grounds of fraud and or any breaches of trust on the part of the Defendants, I find no reasons whatsoever adduced by the Plaintiffs to warrant cancellation of the title of the group held on their behalf by the trustees.

Permanent Injunction

38. Unchallenged evidence was led that most of the Plaintiffs have taken possession of their plots and that the original titles are in the custody of the current officials. That the subdivision was interrupted by the filing of the suit. That being the case I find no grounds to warrant an order for permanent injunction for the interference of the plots especially where the Defendants have no dispute in transferring the properties to the beneficial members.

39. I understand the Interested Party’s claim to be revolving on the 2nd share that she paid the previous chairman. The Interested Party failed to present evidence in support of the payment. Had the Plaintiffs presented a clear members register together with the member entitlements the Court would have been enlightened on whether or not the Interested Party acquired an additional share. In the circumstances the Court is unable to agree or disagree with the claim of the Interested Party. In my view the claim is not yet ripe for determination given that the subdivision of the lands has not been carried out.

40. I have anxiously considered the issues in the suit and I find that they emanate from a desire to determine the trust to allow each member to hold their plots in their own names. If that be the case, the Defendants who happen to be members of the group along with the current officials should consider ways to embark on the subdivision and allocation of the land to its beneficial members. I will make the necessary orders in the ends of justice.

41. Final orders for disposal:-

- a. The Plaintiffs, the Defendants and the Interested Party all being members of the Kirigiro Self-help Group are beneficial owners of the suit lands.
- b. Prayer (b) has neither been particularized nor proved. It is dismissed.
- c. The Interested Party’s claim for the second share is not ripe. It is struck out.
- d. The Defendants being trustees with the cooperation of the current officials and the members do consider the subdivision, allocation and transfers of the plots to the persons beneficially entitled.
- e. To encourage mutuality and cooperation, the parties being members of a Self-Help Group formed for common purposes, I order each to meet their own costs.

42. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22ND DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.



J G KEMEI

JUDGE

Delivered online in the presence of;

Job Stephen Waweru representing the 16 Plaintiffs

Wachira for 1st, 2nd and 3rd Defendants

Ms. Nderitu for Interested Party

Court Assistant – Phyllis

