



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Waiganjo & another (Both Suing as the Legal Representatives of the Estate of Joyce Wambui Macharia) v Waigwa & 8 others (Environment & Land Case 49 of 2014) [2025] KEELC 2943 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2943 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 49 OF 2014
JO OLOLA, J
MARCH 28, 2025

BETWEEN

MARY MUTHONI WAIGANJO 1ST PLAINTIFF
JOHN THIGIRA 2ND PLAINTIFF
BOTH SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF
JOYCE WAMBUI MACHARIA

AND

JOHN KARIUKI WAIGWA 1ST DEFENDANT
JEAN WANGECHI NJIMU 2ND DEFENDANT
MICHAEL MUREITHI WAMBUGU 3RD DEFENDANT
BRAVIN NATALE 4TH DEFENDANT
DOUGLAS MUYA GIKONYO 5TH DEFENDANT
PATRICK NDUNG'U KIARIE 6TH DEFENDANT
SAMSON KAMAU CHEGE 7TH DEFENDANT
PETER MWANGI NGUNJIRI 8TH DEFENDANT
NATOA COMPANY LIMITED 9TH DEFENDANT



JUDGMENT

Background

1. By a Plaint dated 19th March, 2014 as amended on 2nd June, 2022, the two (2) Plaintiffs suing as the legal representatives of the Estate of Joyce Wambui Macharia pray for Judgement against the nine (9) Defendants jointly and severally for orders framed as follows:
 - a) A declaration that the transfer of the parcels of land L.R Nos Mugunda /Nairutia/1244, 1245, 1339, 1359, 1366, 1367, 1368 and 1369 to the Defendant was fraudulent and illegal and consequent rectification of the registers by cancellation of the Defendants' names as proprietors thereof and registration of the deceased Plaintiff as the proprietor thereof;
 - b) General damages for conversion;
 - c) Costs and interest.
2. Those prayers arise from the Plaintiffs' contention that Joyce Wambui Macharia (the deceased) was the absolute registered owner of all that parcel of land known as LR. No. Mugunda/Nairutia/211 measuring 3.685 Ha or thereabouts. It is the Plaintiffs' case that in October 2011, the deceased engaged the 5th Defendant as a Surveyor to sub-divide the original parcel into eight (8) parcels of land and that the resultant parcels were registered in the name of the deceased.
3. The Plaintiffs further aver that subsequently, the deceased engaged the 5th Defendant to sub-divide one of the resultant parcels being LR. No. Mugunda/Nairutia/1250 measuring 2.763 Ha into nine (9) parcels. It is the Plaintiffs' case that instead of carrying out the instructions, the 5th Defendant sub-divided the said parcel of land and other parcels belonging to the deceased and transferred the same to himself and to the other Defendants without the deceased's authority.
4. Michael Mureithi Wambugu (the 3rd Defendant) is opposed to the suit. In his statement of Defence dated 15th February, 2016, the 3rd Defendant avers that he purchased all that piece of land known as L.R. No. Mugunda/Nairutia/1367 from the 1st Defendant after conducting due diligence and confirming that the said land was unencumbered and registered in the name of the 1st Defendant.
5. Bravin Natale (the 4th Defendant) and Natoa Company Ltd (the 9th Defendant) are equally opposed to the claim. In their joint Statement of Defence dated 15th March, 2016, the 4th and 9th Defendants aver that any dealings between the deceased and the 5th Defendant were above board and that proper and genuine land sale agreements were executed and the Plaintiffs are therefore estopped from denying the same.
6. The 4th and 9th Defendants deny that there was fraud on the part of the 1st Defendant and he subsequent transfers of the said parcels of land to themselves. It is their case that the 1st Defendant had a food title to the parcel of land known as L.R. No. Mugunda/Nairutia/1363 that gave rise to the two parcels of land presently registered in the 9th Defendant's name. It is further the 4th and 9th Defendants' case that it is the Plaintiffs herein who are perpetrating an illegality in order to benefit from the sale transaction.
7. Douglas Muya Gikonyo (the 5th Defendant) and Patrick Ndung'u Kiarie (the 6th Defendant) equally deny the Plaintiffs' claim. In their joint Statement of Defence dated 23rd April, 2014, they deny having been engaged by the Plaintiff to survey the said L.R. No. Mugunda/Nairutia/211 or any other parcel of land. The 5th Defendant further denies acting in complicity with the 1st Defendant in sub-dividing



L.R. No. Mugunda/Nairutia/1338. They deny acting fraudulently and/or illegally as particularized in the Complaint and asserts that they did lawfully purchase L.R. No. Mugunda/Nairutia/1339 from the 1st Defendant.

8. Peter Mwangi Ngunjiri, the 8th Defendant equally denies the Plaintiffs' claim. In his undated Statement of Defence filed herein on 8th May, 2014, the 8th Defendant avers that he was unaware of any transactions prior to the transfer of L.R. No. Mugunda/Nairutia/1366 and 1245 to himself. The 8th Defendant asserts that he is a bona fide purchaser for value of the two parcels and denies knowledge of any fraud.

Analysis and Determination

9. In support of their case, the Plaintiffs called a total of three (3) witnesses at the trial. A total of five (5) witnesses testified in support of the Defence Case. As it turned out, the 1st Defendant neither entered appearance nor did he participate in these proceedings. The suit as against the 2nd and the 7th Defendants were withdrawn by the consent of the parties.
10. I have carefully perused and considered the pleadings filed herein, 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.
11. This suit was instituted by Joyce Wambui Macharia (now deceased) on 19th March, 2014. Following her demise on 19th September, 2021, Mary Muthoni Waiganjo and John Githira Gitei, the legal representatives of her estate were substituted as the Plaintiffs having been issued with a Limited Grant Ad litem on 22nd February, 2022.
12. By her suit as filed, the deceased sought for a declaration that the transfer of various parcels of land being sub-divisions of an original parcel of land known as Mugunda/Nairutia/211 to the nine (9) Defendants herein were fraudulent and illegal. The Plaintiffs urge the court to have the register of the said properties rectified by cancellation of the Defendants' name and to have the same registered in the name of the deceased. The Plaintiffs also pray for general damages for conversion as well as the costs of the suit.
13. It was the Plaintiffs' case that sometime in October 2011, the deceased engaged the 5th Defendant who is a Government Surveyor to carry out a survey and to have the said parcel of land sub-divided into eight (8) portions. They told the court that the resultant sub-division yielded L.R. Nos. Mugunda/Nairutia/1244, 1245, 1246, 1247, 1248, 1249, 1250 and 1251.
14. The Plaintiffs told the court that the deceased subsequently sold the other sub-divisions but retained L.R. Nos. Mugunda/Nairutia/ 1244, 1245 and 1250. Thereafter she again engaged the 5th Defendant to sub-divide L.R. No. Mugunda/Nairutia/1250 into eight (8) plots which she intended to sell. The Plaintiffs asserted that contrary to the given instructions, the 5th Defendant instead caused to be created a portion of land known as L.R. No. Mugunda/Nairutia/1338 and 1339.
15. It was the Plaintiff's case that the 5th Defendant thereafter proceeded to register L.R. No. Mugunda/Nairutia/1339 into his name and that of the 6th Defendant. At the same time, acting in concert with the 1st Defendant, the 5th Defendant caused the bigger L.R. No. Mugunda/Nairutia/1338 measuring 1.638 Ha (4.5 acres) to be registered in the name of the 1st Defendant. In furtherance of the said fraud, it was the Plaintiffs case that the 1st Defendant had thereafter proceeded to sub-divide L.R. No. Mugunda/Nairutia/1338 and had sold the resultant sub-divisions to the other Defendants herein.
16. On their part, the 5th and 6th Defendants vehemently denied being engaged as surveyors by the Plaintiffs or acting in complicity with the 1st Defendant in sub-dividing the said L.R. No. Mugunda/



- Nairutia/1338. The two Defendants asserted that they had lawfully purchased L.R. No. Mugunda/Nairutia/1339.
17. As it turned out, all the other Defendants, the 3rd, 4th, 8th and 9th Defendants traced their respective acquisition of the properties in dispute to the 1st Defendant – John Kariuki Waigwa. They all exhibited separate sale agreements executed with the 1st Defendant on separate occasions. The Defendants asserted that prior to their purchase of the suit properties, they did due diligence and were convinced that the 1st Defendant was the proprietor thereof and was possessed with the legal capacity to sell and transfer the same.
18. At Paragraph 7 of the Further Re-Amended Plaint dated 2nd June, 2022, the Plaintiffs accuse the 1st Defendant of fraud in acquisition and sale of the parcels of land in dispute. The particulars of fraud are particularized as follows:
- a. Forging land sale agreements at the offices of M/S Ann Thungu & Co. Advocates, Nyeri;
 - b. Purporting to have paid the deceased Plaintiff consideration for the alleged sale of land whereas none was paid and whereas no sale had taken place;
 - c. Purporting to have exchanged the land with a motor vehicle Reg. NO. KAK 374R, said to be an Isuzu Truck, whereas no such motor vehicle existed, and whereas the alleged motor vehicle turned out to be a Mitsubishi Station Wagon vehicle;
 - d. Sub-dividing the land without the consent, knowledge or authority of the Plaintiff.
 - e. Using forged documents to transfer the land.
 - f. Transferring the land whereas the Plaintiff had not applied for or obtained Land Control Board (Consent) for the subdivision or transfer, and if the same was obtained, the deceased was not a party to the same.
 - g. Purporting to have acquired the land without any consideration.
19. Before her demise the deceased recorded a statement dated 8th August, 2021 which she wished to rely on at the trial. That statement was adopted by John Githura Gitei (PW1). In that statement the deceased acknowledged that the only transaction she had entered into pertaining to her original parcel of land were the sale agreements dated 7th September, 2012 and the other one dated 13th November, 2012. The deceased stated that the other agreements were unknown to her and that the 1st Defendant had forged her signatures before fraudulently transferring L.R. Nos. Mugunda/Nairutia/1338, 1244 and 1245. It was the deceased's position that upon realizing what had happened she had reported the same to the Directorate of Criminal Investigations (DCI) for appropriate action.
20. In support of that position, the Plaintiffs called Senior Sergeant Zablon Wambari (PW2) a Police Officer who had been in-charge of the investigation following the complaint made by the deceased. They also called Jacob Oduor, a Forensic Document Examiner who was then attached to the DCI Headquarters in Nairobi.
21. From the evidence of the two witnesses it was apparent that the deceased did not execute the sale agreements and the transfers for the property in contention. As a result of the investigations, the 1st Defendant herein was charged with 10 counts of cheating, forgery and obtaining land registration by false pretenses. PW2 testified that the matter has however never proceeded as the 1st Defendant absconded thereafter and has never been traced to date.



22. It was telling that even upon service of the suit papers herein, the 1st Defendant neither appeared nor did he file a defence. While the other Defendants asserted that the 1st Defendant had a good title and that they acquired their respective titles rightfully from the 1st Defendant, it was evident that the root of that title was questionable and that the 1st Defendant ought to have shed some light as to how he acquired the same.
23. As the Court of Appeal stated in *Munyu Maina –vs- Hiram Gathiba Maina, Civil Appeal No. 239 of 2009*:
- “... when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
24. Having come to the conclusion that the registration of the 1st Defendant was procured by fraud, he did not acquire any title that was capable of being passed to the 3rd, 4th, 5th, 6th, 8th and 9th Defendants herein.
25. Considering a similar matter in *Dina Management –vs- County Government of Mombasa & 5 Others (2023) KESC 30 (KLR)* the Supreme Court of Kenya held as follows:
- “(110) Indeed, the title or lease is an end product of a process. If the process that was followed prior to the issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.
- (111) Article 40 of the *constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the first registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the *constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.
- (112) We therefore agree with the appellate court that the appellant’s title is not protected under Article 40 of the *constitution* and the land automatically vests to the 1st respondent pursuant to Article 62(2) of the *constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.”
26. Arising from the foregoing, it was clear to me that once the registration of a proprietor is held to be unlawful, it is not protected under Article 40 of the *constitution* and any subsequent purchaser thereafter is equally not entitled to such protection. That being the case, the 3rd, 4th, 5th, 6th, 8th and 9th Defendants herein cannot rely on the doctrine of bona fide purchaser as a defence to the Plaintiffs’ claim.



27. In the premises, I am satisfied that the Plaintiffs have proved their case to the required standards. Accordingly, judgment is hereby entered for the Plaintiffs in terms of Prayer No. (a) of the Plaint.

28. In the circumstances herein, each party shall bear their own costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 28TH DAY OF MARCH, 2025

.....

J.O. OLOLA

JUDGE

In the presence of:

a. Ms. Firdaus Court Assistant.

b. No appearance for the Plaintiffs

c. Mr. Ntwiga holding brief for Machama for the 4th and 9th Defendants

d. Mr. Nderi for the 8th Defendant

e. Ms. Machanja holding brief for Ms. Mwai for the 5th and 6th Defendants

