



REPUBLIC OF KENYA



**Kabiri v Mukami, Registrar of Lands, Ruiru & 4 others (Environment and Land Appeal 15 of 2022) [2023] KEELC 16032 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16032 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 15 OF 2022**

**JG KEMEI, J**

**FEBRUARY 27, 2023**

**BETWEEN**

**KAREN KATHONI KABIRI ..... APPELLANT**

**AND**

**VINCENT KAMAU MUKAMI, REGISTRAR OF LANDS,  
RUIRU ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**MONICA NJERI MURUNDU ..... 3<sup>RD</sup> RESPONDENT**

**HELLEN KATUMBI MUIU ..... 4<sup>TH</sup> RESPONDENT**

**WILLY MWANGI MAINA ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal against the Judgement and decree delivered by  
Hon J A Agonda PM on the 2/2/2022 in SPMCC NO 91 OF 2020.)*

**JUDGMENT**

1. This appeal arises from the Judgement of the Hon Court in SPMCC ELC Case No 91 of 2020, the Judgment having been delivered on the February 2, 2022.
2. Before the trial Court the Appellant who was then the Plaintiff filed a suit against the Defendants claiming the suit land parcel Ruiru/Mugutha/Block1/T4819 (suit land). The Appellant's contention before the trial Court was that she was the rightful owner of the suit land having acquired it by way purchase from Nyakinyua Investments Limited through a Share Certificate on the June 10, 2011 after which she took possession. That one Peris Nyambura Wairimu fraudulently acquired a clearance certificate from Nyakinyua Investment and transferred the land to the 1<sup>st</sup> Defendant. That later and unknown to her the 2<sup>nd</sup> Defendant caused the registration of the suit land in to the names of the 3<sup>rd</sup> - 5<sup>th</sup>



- Appellants without considering her ownership status. That the 1<sup>st</sup>, 3<sup>rd</sup> - 5<sup>th</sup> Appellants have encroached onto the land and erected structures without her consent. That the subdivision that ensued thereafter was unjustifiable and in her view was intended to grab the suit land from her.
3. The 1<sup>st</sup> Respondent denied the Appellant's claim and contended that he is the registered owner of the suit land having purchased/exchanged it from/with one Peris Nyambura Wairimu. That the due diligence on the title disclosed no interest in the name of the Plaintiff whatsoever.
  4. The 2<sup>nd</sup> Respondent contended that the Appellant has never been a registered owner of the suit land and sought to put her on strict proof. That the registration, if any, of the 1<sup>st</sup> Defendant was purely based on the documents submitted before it upon which the 2<sup>nd</sup> Respondent registered in accordance with the provisions of the law.
  5. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents denied the claim of the Appellant and added that they acquired the suit lands lawfully after carrying out due diligence and that the same was registered in their names in conformity with the law and procedure.
  6. The 5<sup>th</sup> Respondent denied the Appellant's claim and just like the 3<sup>rd</sup> and 4<sup>th</sup> Respondents averred that he acquired the portion of the land being parcel 11058 lawfully from the 1<sup>st</sup> Respondent. That the subdivision and the registration of the said plot was lawful. Further he maintained that the Appellant's claim is unmerited on account that she has no documents in support of the claim.
  7. The Appellant had initially sued Nyakinyua Co. Investment Limited but on Application and leave of the Court given on April 16, 2021 removed the said company from the Proceedings. Before the said party was removed, it had filed pleadings on record which I shall refer to later in the Judgement.
  8. Upon hearing the parties, the trial magistrate dismissed the Appellant's suit on account that the Appellant had not proved her claim against the Respondents on a balance of probabilities. In holding that the Appellant was not entitled to the reliefs sought in the Plaint, the Court entered Judgement in favour of the 1<sup>st</sup> Respondent as follows;
    - a. A declaration that Vincent Kamau Mukami is the lawful proprietor of all that parcel of land known as L. R. No. Ruiru/Mugutha Block 1/T. 4819 and all the title deeds emanating from the subdivisions therefrom.
    - b. A permanent injunction restraining the Plaintiff by herself, her servants, agents or otherwise howsoever from trespassing, disposing, selling, constructing or in any other manner whatsoever interfering with the 1<sup>st</sup> Defendant's quiet possession of all that parcel of land known as L.R. No. Ruiru/Mugutha Block 1/T.4819 and all the title deeds emanating from the subdivisions therefrom.
    - c. The Plaintiff's suit is dismissed with costs to the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants and to be paid by the Plaintiff.
  9. Aggrieved by the dismissal of the suit by the trial Court, the Appellant lodged this appeal on the grounds set out as follows;
    - a. That the Learned Magistrate erred in law and in fact in including Nyakinyua Investment Limited as the 2nd Defendant in her Judgment whilst the company was not a Defendant in the suit but rather the Plaintiff's witness. The spiral effect of that error in a total mix up of the Defendants and the contents of the Judgment. There were five Defendants whilst the entire Judgment reads of six Defendants.



- b. That the Learned Magistrate erred in law and in fact in intentionally failing to consider the legal issues raised in pleadings, evidence adduced in Court and the submissions before her when delivering her Judgment.
  - c. That the Learned Magistrate erred in law and fact in failing to appreciate the proper effect and purport of the evidence adduced during the hearing and arriving at a decision which is not supported by the weight of the evidence.
  - d. That the Learned Magistrate erred in law and in fact in completely and intentionally ignoring and overlooking the evidence adduced by the Chairman of Nyakinyua Investment Company Limited whose Company being the original owners of the suit land disowned having the 1st Respondent or any other party associated with the 1st Respondent in their record.
  - e. That the Learned Magistrate erred in law and in fact in watering down the evidence by the Plaintiff and her witnesses and unnecessarily magnifying the evidence by the Respondents thus arriving at a lopsided Judgment.
  - f. That Learned Magistrate erred in law and in fact in failing to appreciate that Nyakinyua Investment Company Limited being the Original owner of the suit land would be in a better position to clarify to the Court who the genuine owners of the suit land would be. And even after that the clarification the Learned Magistrate ignore and/or disregarded that evidence.
  - g. That Learned Magistrate erred in law and in fact in finding that the Plaintiff did not produce a Clearance Certificate from Nyakinyua Investment Company Limited whilst the same was among the list of documents produced as exhibit before the Honourable Court as PEXH 13.
  - h. That the Learned Magistrate erred in law and in infact in being biased thus arriving at a lopsided Judgment.
  - i. That the Learned Magistrate erred in law and in fact in finding that the Appellant herein was not the rightful owner of the plot registration number Ruiru Mugutha Block 1/T4819.
10. The Appellant sought the following orders on appeal;
- a. That this appeal be allowed.
  - b. That the Judgment by Hon. J. A. Agonda (PM) in Ruiru ELC Case No. 91 of 2020 delivered on 2nd February 2022 be set aside and in its place Judgment be entered for the Appellant against the Respondents.
  - c. That the Respondents be condemned to pay the Appellants costs both in the lower Court and in this Court.
  - d. That such other and/or further order and relief that this Honourable Court may deem fit and just to grant.
11. At the hearing of the appeal, the parties elected to canvass the appeal by way of written submissions which submissions were to be filed on or before the January 9, 2023. By leave of this Court the written submissions were admitted. I have read and considered them and the salient issues are captured herebelow.

### **The Appellant's submissions**

12. The firm of Kaingati Kamonjo & Co. Advocates filed submissions dated January 9, 2023 highlighting each ground of appeal as contained in the Memorandum of Appeal. It was submitted that there was



an apparent confusion of description of the parties in the Judgment by the trial Court and ultimate award of costs to the Respondents. That the trial Court exhibited bias against the Appellant in favour of the Respondents. That the Court disregarded the Appellant's evidence on acquisition of the suit land in light of the Respondents' fraudulent activities tainted with forgeries on the root of the title.

### **The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' submissions**

13. Their submissions dated January 25, 2023 were filed by the firm of Ario & Co. Advocate under three thematic headings. Firstly, that Nyakinyua Investment Ltd was rightly sued as the 2<sup>nd</sup> Defendant per the Plaint dated August 17, 2020 before the Appellant applied for Nyakinyua Investment Ltd to be struck out from the suit. They defended the trial Court findings on this issue and pointed out that PW3 indeed testified without any roof as the Chairperson of Board of Nyakinyua Investment Ltd. That their defence as tendered in Court was solid far from the Appellant's allegation of fraud and forgery. That there was no bias on the part of the Court as submitted and the fact that the 5<sup>th</sup> Respondent being a member of judicial staff does not negate his right to a fair hearing.

### **The 2<sup>nd</sup> Respondents' submissions**

14. Submissions dated January 9, 2023 were filed by State Counsel Annette Nyakora on behalf of the Hon. Attorney General. Three issues were drawn for determination. On whether the Appellant proved any wrong doing on the Land registrar's part, it was submitted that no evidence of collusion between the Land Registrar and Respondents was proven by the Appellant. That accordingly, the Appellant failed to discharge the burden of proof placed on her. That having failed to prove her case on a balance of probabilities, the Appellant was not entitled to the reliefs sought in the trial Court and the instant appeal ought to be dismissed as well.

### **Analysis and Determination**

15. The duty of this Court is set out in Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court to include the re-evaluation, reassessment and re-analysis of the record and draw its own conclusions. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own conclusions from the analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. Besides, that duty has been affirmed in the case of *Selle & another vs. Associated Motor Boat Co. Ltd & others* [1968] EA 123, as thus:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

16. Bearing in mind the above I shall then proceed to determine the appeal before me.
17. The issues for determination are; Whether the Appellant proved her case, that is, whether the Appellant is the rightful owner of the suit land; What was the weight of the evidence tendered by Chairlady of Nyakinyua Investment Co. Limited; Whether the clearance letter dated July 25, 2019 was fraudulently procured by Peris Nyambura from Nyakinyua Investment Co. Limited and if yes what is the effect of the same; Whether the inclusion of Nyakinyua Investment Co. Limited in the Judgement



was fatal to the Appellant; Did the trial Court err in arriving at its conclusion?; What orders should the Court grant in the circumstances.

18. This is yet another case where two parties are contesting the ownership of a parcel of land with its origins in a land buying company, this time Nyakinyua Investment Co Limited (Nyakinyua).
19. It is the Appellants case that she acquired the land measuring  $\frac{1}{4}$  of an acre under ballot No. 4819 from Milka Nyambura Gathira who held Share Certificate No 0175 in Nyakinyua for the sum of Kshs 860,000/-. That she was issued with a certificate of ownership by the Directors of Nyakinyua on the June 10, 2011. That at the time of purchase the land was not titled. Milka in turn is said to have acquired the land from Njambi Waweru who is said to have been the original allottee of Nyakinyua. The Appellant led evidence as PW1 that she neither took possession of the land nor knew who was in possession until August 2020 when she visited and found the 3<sup>rd</sup> -5<sup>th</sup> Respondents had occupied the land and constructed structures thereon. It was her evidence that she did not carry out any search at the time of acquisition as the land was not titled. That though she purchased the land in 2011 she only got the clearance certificate in 2021 from Nyakinyua. In support of her claim she produced a plot ownership certificate No 0175 in the name of Milka, copy of ballot No 4819, clearance certificate dated the February 19, 2021 and two receipts issued in 2011 to PW1 and PW2 respectively.
20. PW2 – Milka Nyambura Gathira testified and stated that she sold the suit land then constituted in Share Certificate No 0175 on the April 23, 2017 to the Appellant. That she acquired the land from one Njambi Waweru who also held a land certificate for the suit land.
21. PW3 – Nduta Ndirangu Chege testified as PW3 and introduced herself as the Chairlady of Nyakinyua having been elected as such in 1999. She stated that according to the register of Nyakinyua the land ballot No 4819 belonged to Njambi Waweru who sold it to Milka Nyambura. Shown the clearance certificate issued by Nyakinyua denoting that Peris is the owner of the land, she stated that she does not know Peris and that she did not author the said letter. She however acknowledged the clearance letter of February 19, 2021 stating that the Appellant is the owner as genuine. She was categorical that the owner of the suit land is the Appellant.
22. DW1 – Vincent Kamau Mukami the 1<sup>st</sup> Respondent led evidence that he exchanged/purchased the suit land from Peris Nyambura after carrying out due diligence at Nyakinyua offices. That the land was registered in the name of Peris and later transferred to him when he obtained a title. That upon acquisition he proceeded to subdivide the land and sold the resultant subdivisions to the 3<sup>rd</sup> to 5<sup>th</sup> Respondents. He adduced an agreement of sale & exchange dated the July 5, 2017 between himself and Peris Nyambura Wairimu in which they agreed to sell/exchange the suit land with Ruiru East Block1/(Githunguri)6813 owned by the 1<sup>st</sup> Respondent; copy of title deed in the name of the 1<sup>st</sup> Respondent dated the February 7, 2020; copy of title deed for the suit land registered in the name of Peris Nyambura Wairimu on the September 16, 2019; land transfer for suit land dated the January 5, 2020 between Peris Nyambura and the 1<sup>st</sup> Respondent; copy of title for parcel East Block1/(Githunguri)6813 registered in the name of the 1<sup>st</sup> Respondent dated January 27, 2020; certificate of plot ownership No 1037 from Nyakinyua dated the July 19, 2016; ballot No 4819 ; certified copy of the extract of members register of Nyakinyua.
23. The 2<sup>nd</sup> Respondent led evidence through DW2 – Phylis Mukura, the Land Registrar Ruiru who adopted her witness statement dated the January 13, 2021. She informed the trial Court that according to the green card on record the land was first registered on the September 16, 2019 in the name of Nyakinyua and on even date in the name of Peris Nyambura Wairimu and a title deed issued. On the February 7, 2020 it was transferred to the 1<sup>st</sup> Respondent and on the June 16, 2020 the register was closed on subdivision of the land into parcels 11056-11058 which titles were sold to the 3<sup>rd</sup> -5<sup>th</sup>



Respondents. That the registry relied on the clearance certificate issued by Nyakinyua dated July 25, 2019 issued to Peris Nyambura. In support of her defence she adduced the following documents; green card for the suit land; transfer from Nyakinyua to Peris Nyambura ; clearance letter from Nyakinyua dated the July 25, 2019; plot ownership certificate dated the March 19, 2016 issued to Peris Nyambura ; ballot No 4819; Land control board consent dated the October 13, 2017 from Nyakinyua to Peris Nyambura for the transfer of the land; Land control board Application duly executed by both Nyakinyua Directors and Peris ; PIN for Nyakinyua; PIN for Nduta Ndurangu Chege and Mburu Luciah Nyagaki , both Directors of Nyakinyua.

24. The 3<sup>rd</sup> – 5<sup>th</sup> Respondents case is that they purchased the resultant subdivisions from the 1<sup>st</sup> Defendant and urged the Court to dismiss the Appellants case for want of proof. They adduced agreements for sale, copies of the titles in the name of the 1<sup>st</sup> Respondent and those in the various names upon registration.

25. Sections 107, 108 and 109 of the *Evidence Act* Cap 80 provide for burden of proof and who has the onus of proof. It states as follows;

“

“ 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.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

26. The standard of proof is the degree to which a party must prove its case to succeed. The burden of proof also known as the “onus” is the requirement to satisfy that standard. In civil cases, the burden of proof is on the claimant, and the standard required of them is that they prove the case against the Defendant “on a balance of probabilities”. This is unofficially described as the 51% test. This means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not. See the case of *Miller Vs. Minister Of Pensions* [1947] 2 All ER 372 as affirmed by the Court of Appeal in the case of *Palace Investments Limited Vs Geoffrey Kariuki Mwenda & another* [2015] eKLR.

27. The burden of proving her case lay with the Appellant. To start with the Appellant urged the trial Court to find inter alia that the title held by the 1<sup>st</sup>, 3<sup>rd</sup> -5<sup>th</sup> Respondents should be cancelled. It was primarily her plea that the 2<sup>nd</sup> Respondent caused the registration of the land in the name of the 3<sup>rd</sup> -5<sup>th</sup> Respondents without considering her right of ownership. Inter alia that one Peris Nyambura Wairimu fraudulently acquired the clearance certificate from Nyakinyua and later transferred the land to the 1<sup>st</sup> Respondent thus depriving her of her right to ownership. Further she pleaded that the 1<sup>st</sup>, 3<sup>rd</sup> - 5<sup>th</sup> Respondents have encroached or trespassed onto her land without her consent and authority.



28. Order 2 Rule 4 of the *Civil Procedure Rules* speaks into the manner in which a party ought to plead in a civil case of this nature. It states as follows;

“ 4.

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of Limitation or any fact showing illegality –
  - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
  - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
  - (c) which raised issues of fact not arising out of the preceding pleading
- (2) ...
- (3) ...”

29. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice.”

30. In the case of *Insurance Company of East Africa vs. The Attorney General & 3 Others* HCCC 135/1998 it was held that whether there was fraud is, however, a matter of evidence.

31. Having keenly perused the pleadings it is clear beyond per adventure that the Appellant did not particularise fraud to enable the Respondents rebut the particulars of fraud. Pleadings are also helpful for the Court to enable it frame the issues for determination. I find the sweeping allegation that a named person one Peris Nyambura fraudulently acquired a clearance certificate from Nyakinyua in the absence of particulars of fraud insufficient to anchor a claim based on fraud on the part of the



Respondents. More so when the said Peris Nyambura has not been enjoined as a party to the suit to enable her proffer a defence to the allegation.

32. In the case of *R.G. Patel Vs Lalji Makanji* (1957) EA 314 the Court was emphatic that fraud must be stated as follows:

“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.”

33. It is not in dispute that the suit land was registered in the name of Nyakinyua on September 16, 2019; Peris Nyambura Wairimu on the September 16, 2019; the 1<sup>st</sup> Respondent on the June 15, 2020; and resultant subdivisions in the names of the 3<sup>rd</sup> -5<sup>th</sup> Respondents on the August 27, 2020.

34. Section 26 of the *Land Registration Act, 2012* provides ways in which a title may be impeached. It states as follows;

“26.

(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.”

35. The Appellant’s case is predicated on unregistered land. Her case is based on a plot ownership certificate allegedly issued by Nyakinyua. While the 1<sup>st</sup>, 3<sup>rd</sup> - 5<sup>th</sup> Respondents’ defences are hinged on registered title. In the circumstances therefore the Court is being called upon to inquire into documentary evidence to find out whether the Appellant has established her case.

36. In the case of *Danson Kimani Gacina & Anor Vs Embakasi Ranching Company Limited* [2014]eKLR the Court in dismissing a claim on the grounds that the documentary evidence was weak to satisfy the Court on a balance of probabilities said this;

“The law on unregistered land unlike on registered land is slightly unclear. Proof of ownership is found in documentary evidence which lead to the root of title. There must be shown on unbroken chain of documents showing the true owner. There is no doubt that such proof will be on a balance of probabilities but the Court must be left in no doubt that the holder of the documents proved is the one entitled to the property.”

37. Bearing the dicta of the Court in mind, I shall now embark on analyzing the documentary evidence before the Court. As already mentioned the Appellant has relied on a plot ownership certificate issued in the name of Milka Nyambura Gathira who in turn is said to have acquired the land from Njambi



Waweru. Neither the Appellant nor PW2 - Nduta Ndungu, the Director of Nyakinyua adduced any evidence in form of members register to show that the said Njambi Waweru and Milka Nyambura were members of Nyakinyua and that they were the right allottees of the land. Though a ballot No 4819 was adduced it was not explained to the Court how Milka and or Njambi for that matter obtained the ballot. Inter alia no payment receipts were adduced to show that the original allottee, had paid for the land and incidental payment to be entitled to the ballot. The only receipts are the ones issued in 2011 to Milka and the Appellant which do not help in tracing the root of the land. In addition, the absence of a land transfer from Nyakinyua to Milka and thereafter to the Appellant or the Appellant makes the Appellants case weaker in my view.

38. I will now juxtapose the evidence of the Appellant and the 1<sup>st</sup> Respondent read together with that of the 2<sup>nd</sup> Respondent. In summary according to the members register the land ballot no 4819 was allotted to one Ann Mukami who later transferred to Peris Nyambura Wairimu. The register was opened on September 16, 2019 in the name of Nyakinyua and a transfer was registered in the name of Peris on even date. On the February 7, 2020 the land was transferred to the 1<sup>st</sup> Respondent who subdivided into parcels No 11056-11058 and transferred to the 3<sup>rd</sup> -5<sup>th</sup> Respondents. The transfer is executed by Nduta Ndirangu and Lucia Nyagaki as Directors of Nyakinyua as well as Peris as the buyer. The transfer is supported by a clearance certificate dated the July 25, 2019 signed by Nduta Ndirangu on behalf of Nyakinyua. A certificate in the name of Peris together with the ballot No. 4819 are annexed in support of land ownership. The Land Control Board Application and consent was obtained and duly executed by the Directors of Nyakinyua; PINs for the company as well as the Directors were presented in evidence. The Land Registrar led evidence that these are the documents that were relied on to register the land as per the green card on record.
39. The evidence of the PW3 – Nduta Ndirangu denouncing the clearance in favour of Peris in 2019 is perplexing because no evidence was presented to show that the said clearance is a forgery or was fraudulently obtained. The witness did not table evidence to show that she reported the matter to the police and whether the said Peris was charged with an offence of forgery or uttering a false document. In any event the said witness did not contest the transfer to Peris, the Land Control Board Application, plot ownership certificate, the consent and the PINs. To say the least she executed the said documents with her co Director Lucia Nyagaki. I find that the evidence of PW3 is an afterthought, weak and conjured. More so in the face of her sworn statement on record dated the October 17, 2020 where she stated as follows;
- a. That I am one of the Directors and the current Chairlady of the 2<sup>nd</sup> Defendant’s Board of Directors hence competent to make this statement.
  - b. That at the onset I wish to adopt all the averments contained in the 1<sup>st</sup> Defendant’s statement of defence filed herewith as if the same were repeated and reproduced hereof verbatim for purposes of this witness statement.
  - c. That as per our records the suit property belongs Peris Nyambura Wairimu being a transfer from Ann Mukami who was the original allottee.
  - d. As such it is our position that Plaintiff and the 1<sup>st</sup> Defendant’s claim to any right to the suit property is misguided as neither of them appear on our records in relation to the suit property.
  - e. The 2<sup>nd</sup> Defendant has no interest in the suit property having allocated the same to members and as such the suit does not lie against it.

That is all I wish to state.



40. I note that the Appellant withdrew the case against Nyakinyua on the June 8, 2021 however by then the said PW3 had filed a statement under oath which was not expunged from the record. I warn myself on the probative value of the said document but it lends credence to the fact that PW3 is not a reliable witness. The change of heart is testament to the untruthfulness of the evidence of PW3.
41. In sum I find that the evidence of PW3 is of no probative value and only served to weaken the case of the Appellant.
42. I also find that the Appellant has not proven her case. To the contrary the documentary evidence in favour of the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> - 5<sup>th</sup> Respondents remain solid given the unbroken chain in the documents adduced. The Appellant failed to establish the root of her ownership claim nor that she has any ownership rights on the suit land.
43. As to whether the clearance letter dated July 25, 2019 was fraudulently procured by Peris Nyambura from Nyakinyua Investment Co. Limited and if yes what is the effect of the same, I have already found that no particulars of fraud were pleaded and no proof of fraud was shown by either Nyakinyua, the Chair lady of Nyakinyua or the Appellant. This issue is determined in the negative.
44. As earlier alluded the Appellant removed Nyakinyua from the suit however the Judgement of the trial Court contained the said company in its jurat. I have perused the Judgement and I find no prejudice on the part of the Appellant and none has been shown. The error manifest on the face of the Judgment in my view is not fatal.
45. Having made a finding that the Appellant failed to proof ownership in the suit land, the claim of trespass fails as well. Equally in the absence of proof of ownership, there will be no basis for the grant of orders of mandatory injunction as pleaded by the Appellant.
46. Before I pen off I wish to address the final prayers issued by the trial Court. In the absence of a counterclaim on the part of any of the Respondents I find the prayers are unsupported by pleadings and I shall make the final orders in that respect in the end.
47. In the upshot the appeal is unmerited. It fails.
48. Final orders and disposal
  - a. The appeal fails.
  - b. The Appellant's suit in the trial Court is dismissed.
  - c. The costs of the suit in the lower Court and this appeal shall be met by the Appellant.
49. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Mbugua HB Kamonjo for Appellant

Atanda HB Ario for 1<sup>st</sup> Respondent

Attorney General for 2<sup>nd</sup> Respondent – Absent



Mr. Atanda HB Mr. Ario for 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents

Court Assistants – Esther / Kevin

