



Gikera t/a Landluck Investment Limited v Ngugi & 4 others (Environment and Land Appeal E028 of 2022) [2023] KEELC 852 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEELC 852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E028 OF 2022
JG KEMEI, J
FEBRUARY 13, 2023**

BETWEEN

**AHMED CHEGE GIKERA T/A LANDLUCK INVESTMENT
LIMITED APPELLANT**

AND

**MARY NYAMBURA NGUGI 1ST RESPONDENT
STEPHEN WAKAHU GITHU 2ND RESPONDENT
LAWRENCE KIRURI MWATHE 3RD RESPONDENT
RUIRU LAND REGISTRAR 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

JUDGMENT

Introduction

1. The appeal arises from the decree and Judgement of Hon C K Kisiangani SRM in MELC 68 of 2020 – Ruiru delivered on the 10/3/2022.
2. In the trial Court, the Plaintiff who is now the Appellant claimed that at all material times to the suit he is the registered owner of parcel Nos Ruiru Kiu Block2/2351 and Ruiru Kiu Block2/2766 (the suit lands) having acquired them from the 1st Defendant by way of purchase. That the 1st Defendant has invaded the suit lands without any colour of right and constructed illegal structures on the land to his detriment as to his quiet use and possession of the said suit lands.
3. Consequently, he sought the following orders against the 1st Defendant;
 - a. A permanent injunction restraining the defendant from interfering with the Plaintiffs quiet use and possession of the suit lands.



- b. Eviction order do issue against the Defendant.
 - c. The OCS Ruiru to supervise the eviction and maintain law and order in the process.
 - d. Costs of the suit.
4. The 1st Defendant denied the Plaintiff's claim in her statement of defence filed on the 5/10/2020 and contended that she did not sell the suit lands and that the Plaintiff's registration of the suit lands can only have been procured through fraud, forgery and or misrepresentation and undertook to put the Plaintiff to strict proof. She contended that the subject matter of the sale dated the November 11, 2008 was in respect to ¼ acre land and not the suit lands. He contended that the Plaintiff remains a trespasser on the land given that he has not acquired any title therein.
5. In addition, the 1st Defendant filed a counterclaim in which the 2nd and 3rd Defendants respectively were enjoined into the suit as 2nd Plaintiff and 2nd Defendant respectively. In their Counterclaim the 1st Defendant (1st Respondent herein) stated that she held 200 shares in Githunguri Constituency Ranching Co. Limited which comprised of 2 residential plots of 1/8 each; 2 parcels measuring 1¹/₄ acres each – ballot No 2298 – LR 2766 and ballot No 2387 – LR No 2351 and finally two ¼ acre plots.
6. The 1st Defendant further averred that she entered into an agreement of sale dated the November 11, 2008 for the sale of two ¼ plots to the Plaintiff and not the suit lands. That around the same time she was requested to surrender all the plot documents which included share certificates, receipts, ballots pertaining to her entitlements to the Company for purposes of processing of the titles as was the norm by the company to attend to the processing of the titles for its members. That she thereafter followed up with the company which informed her that the process was ongoing. That she discovered in 2018 that the Plaintiff and the 3rd Defendant had illegally and fraudulently caused themselves to be registered as owners of her plots namely LR 2351 and 2766 respectively leading to the filing of a complaint with the Directorate of Criminal Investigations (DCI) who commenced investigations which led to the Plaintiff and the 3rd Defendant being charged with the offence of fraudulently obtaining titles. Particulars of fraud were pleaded under para 20 of the Counterclaim. She averred that she has since sold her shares in the company and the suit lands to the 2nd Plaintiff Stephen Wakahiu who has obtained titles and subdivided the suit lands into parcels 23789 -23800 (LR 2766) and 23801-23812 for parcel 2351.
7. The Plaintiffs in the Counterclaim sought the following orders;
- a. A declaration that the 2nd Plaintiff to the Counterclaim is the absolute owner of all that parcel No 2351 and 2766 and the attendant resultant subdivisions.
 - b. That the Land Registrar be ordered to forthwith cancel entries of the defendants to the CC in parcels 2351 and 2766.
 - c. That a permanent injunction be issued as against the 1st and 2nd Defendant to the CC from further trespass of the suit lands and its resultant subdivisions.
 - d. Costs of the Counterclaim.
8. The trial Court heard the matter and delivered its Judgement on the 10/3/2022 in the following terms;
- a. A declaration is hereby issued that the 2nd Plaintiffs in the counter claim is that the absolute owner of all that parcel of land previously denoted by ballot number 2351 previously known as Ruiru Kiu Block 2/2351 which has since been subdivided to Ruiru Kiu Block 2 (Githunguri) 23801 -28812 and also land held by ballot number 2258 previously known as Ruiru Kiu Block 2 (Githunguri) 23789 – 25800.



- b. A permanent injunction is hereby issued against the 1st and 2nd Defendants to the counter claim from further trespass, interference of whatever nature with land parcel numbers over the initial land number Ruiru Kiu Block 2 (Githunguri) 23801 – 28812 and Ruiru Kiu Block 2 (Githunguri) 23789 -23800.
 - c. The 1st and 2nd Defendants will bear the costs of the counter claim.
 - d. Right of Appeal explained.
9. The above Judgement has provoked this appeal by the Appellant where he raised grounds of appeal set out as thus;
 - a. That the learned Magistrate erred in law and facts and misdirected herself in finding that the Second Respondent herein is the absolute owner of all that parcel of land previously denoted by ballot number 2387 previously Kiu Block2/2351 which has since been subdivided to Ruiru Kiu/block2 (githunguri)23801-288/2 and also land held by ballot number 2298 previously known as Ruiru Kiu Block 2 (githunguri) 23789-23800.
 - b. That the learned Magistrate erred in law and facts in imposing a permanent injunction against the 1st and 2nd Appellants to the extent that they should not further trespass interfere in whatever nature with land parcel number one inter, land parcel number Ruiru Kiu Block 2 (githunguri) 23781-23800.
 - c. That the learned Magistrate erred in law and facts in directing that the Appellants herein should bear the costs of the counterclaim.
 - d. That the learned Magistrate erred in law and facts in issuing an order R/A explained, which cannot be understood.
 - e. That the learned Magistrate erred in law and facts in not finding that the Appellants herein is the bonafide owner of all that parcel of land known as Ruiru Kiu Block2/2351 and Ruiru Block 2/2766.
10. The Appellant is desirous of the orders that;
 - a. The appeal be allowed.
 - b. The Judgement delivered on the 10/3/2022 be wholly overturned.
 - c. The Respondents to bear the costs of appeal.
11. When the matter came for directions on the November 14, 2022 in the presence of the Appellants counsel and in the absence of the Respondent's counsel (the date of November 14, 2022 was taken in the presence of both counsels for the Appellant and the 1st and 2nd Respondents), parties elected to dispose the appeal by way of written submissions. The Court directed the parties to file written submissions by the 18/1/2023 and reserved the date for Judgement on the 9/2/2023. By the time of writing this Judgement none of the parties had complied with the orders of the Court.
12. What should the Court do in the circumstances? The Court shall proceed to prepare the Judgement based on the material placed before it. It is the duty of the Court being the first appeal to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.



13. In the case of *Gitobu Imanyara & 2 Others Vs Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High 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 allowances in this respect.”

14. The powers of Appellate Court are set out in Section 78 of the *Civil Procedure Act* as follows;

- “(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-
- a. To determine a case finally;
 - b. To remand a case;
 - c. To frame issues and refer them for trial;
 - d. To take additional evidence or to require the evidence to be taken;
 - e. To order a new trial.
- (2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”

15. In the circumstances the issues arising therefrom and that fall for determination are set out below;

- a. Who is the registered owner of the suit lands?
- b. Did the Appellant proof trespass on the part of the 1st and 2nd Respondents?
- c. Whether the Hon Magistrate erred in allowing costs of the CC in favour of the 1st and 2nd Respondent
- d. What is the meaning of prayer tubbed “R/A explained”?
- e. What orders should the Court issue?

16. Under the above duty I have perused the proceedings of the trial Court and the record of appeal and the claim of the Appellant is that he is the registered owner of suit lands and that the 1st Respondent has trespassed onto the same, consequently he sought eviction orders inter alia. The 1st Respondent’s case is that she did not sell the suit lands to the Appellant but sold two ¼ acre plots different from the suit lands and that the Appellant and the 3rd Respondent procured ownership of the suit lands through an illegality forgery and fraud; Further that the 1st Respondent informed the Court that she sold her shares in Githunguri Ranching Co. which comprised the suit lands to the 2nd Respondent who has acquired titles and even subdivided the suit lands into several sub plots, a position that was supported by the 2nd Respondent. The 3rd Respondent did not defend the suit and therefore the 1st Respondents claim against him is uncontroverted. The Land Registrar on behalf of the 4th and 5th Respondents informed the Court that the titles to the suit lands were cancelled pursuant to the Land Registrars powers donated under Section 79 of the *Land Registration Act*.



17. It is not in dispute that the suit lands are traceable to Githunguri Constituency Ranching Co Limited (Githunguri).
18. This case presents the scenario of two competing interests of double titling of land where more than one title is issued with respect to the same land. The Appellant claims to hold a title over the suit lands while the 2nd Respondent also lays claim to the same land. In a scenario like this I will adopt the guidance in the persuasive decision of the Court in the case of *Hubert L Martin & 2 others Vs Margaret Kamar & 5 Others* (2016) eKLR the Court stated as follows;

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.” (emphasis is mine).
19. Land acquisition in Kenya is a question of law. Section 7 of the *Land Act* provides several ways in which a land owner may acquire land. It states as follows;

“Title to land may be acquired through-

 - a. Allocation;
 - b. Land adjudication process;
 - c. Compulsory acquisition;
 - d. Prescription;
 - e. Settlement programs;
 - f. Transmissions;
 - g. Transfers;
 - h. Long term leases exceeding twenty-one years created out of private land; or
 - i. Any other manner prescribed in an Act of Parliament.”
20. It is trite that the *Constitution of Kenya* under Article 40 (6) does not protect title that has been obtained through illegal means. The law requires that the title be taken through the due process of the law to determine whether or not the title is indeed tainted or not.
21. Section 26 of the *Land Registration Act* provides two ways/grounds in which a title may be impugned;
 - 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.



22. Having perused the pleadings of the parties, the evidence adduced at the hearing, the written submissions and the material placed before me I make the following findings;
23. The 1st Respondent was allocated 200 shares which comprised of two 1/8 acres, two ¼ acres and two 1¹/₄ acres. She sold two plots each measuring ¼ of an acre to the Appellant. This evidence was led by the 1st Respondent and is supported by the share certificates ballots and the evidence of DW5, the Chairman of Githunguri.
24. DW3 led unchallenged evidence that the agreement of sale dated the November 11, 2008 was a forgery as the signatures differed with that of the 1st Respondent. The witness who is a professional documents examiner concluded that the 1st Respondent could not have signed the agreement of sale averred by the Appellant. This evidence was cogent solid and believable and strongly supported the 1st Respondents' case that what she sold to the Appellant was 2¼ acres and not the suit lands. Further evidence led by DW3 showed that the signatures of Jane Maina, deceased former Land Registrar at Ruiru, Irene Njambi, Land Registrar and Lucy Wanjiru Wangombe were all suspect and in his opinion were not signed by the named persons. The said Land Registrars were said to have registered the titles to the suit lands. DW4 the current Land Registrar Ruiru put the nail on the head when he stated that there is no register existing for the suit lands. This evidence was not challenged by the Appellant. This left the title of the Appellant literally floating in the air!
25. The long and short of this is that the 1st Respondent sold two parcels of land measuring ¼ acres to the Appellant but the two one and quarter acres found themselves in the agreement. The 1st Respondent led unchallenged evidence that her bag containing the agreement she had executed with the Appellant was snatched at the door of the bank and that explains why she does not have a copy but was very clear in the evidence in chief that she never sold the suit lands to the Appellant. This evidence is supported by the members' Register which showed that the 1st Respondent was the allottee of the two suit lands. The Appellant failed to lead evidence that showed that his transfer of shares was recorded in the members register.
26. More fundamentally important is the evidence of DW4, the Land Registrar who explained to the Court that following the complaints by Githunguri on the alleged fraudulent acquisition of the suit lands by the Appellant, the titles were cancelled by the Land Register pursuant to the powers under Section 79 of the *Land Registration Act*.
27. The Appellant admitted that he is battling a criminal case where he was charged with forgery and fraud in the lower Court. There was no evidence that this case has been heard and determined.
28. That said on evaluation of the evidence led by the 1st Respondent and her witnesses I am satisfied that she has proved fraud and illegality on the part of the Appellant in the manner that he acquired the suit lands.
29. It therefore follows that the titles held by the Appellant to the suit lands stand cancelled.
30. Evidence was led by the 1st and 2nd Respondents that the suit lands are now registered in the name of the 2nd Respondent who has since subdivided the same into several plots. This evidence was supported by DW3 who showed the Court the transfers recorded in the members register. The suit of the Appellant therefore against the 1st Appellant with respect to Land already divested was a non starter from the beginning.



31. Borrowing from the case in *Munyu Maina Vs Hiram Gathiba Maina* [2013] eKLR, the Court held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

This Court is satisfied that the Appellant failed to lead evidence to support the root of his titles and consequently going by the evidence on record I am satisfied that the suit lands currently belong to the 2nd Appellant and that the Hon Magistrate did not fall in error when she arrived at the decision in the Judgement.

32. Having held that the Appellant did not proof title to the suit land nor evidence of a lease on the land, I hold that the Appellant has failed to proof trespass by the 1st Respondent and I find that the Hon Learned Magistrate did not err at all in reaching the conclusion that she did.

33. It is trite that a Judgement need to be self-explanatory. The Appellant has pleaded that the Hon Court made an order that is not understandable. By “Right of Appeal” the Hon Magistrate simply was saying the Appellant had his right of appeal explained at the time the Judgement was delivered. I find that nothing turns on this one.

34. Section 27 of the *Civil Procedure Act* states as follows;

“(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.”

35. In this case the 1st and 2nd Respondents emerged victors in their Counterclaim and I find no ground to fault the Hon Court in awarding them costs of the suit.

36. Final orders and disposal

- a. The appeal has not merit.
- b. It is dismissed with costs in favour of the 1st and 2nd Respondents.

37. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;



Appellant - Absent

Ms Muchemi HB Kanyi for 1st and 2nd Respondents

3rd, 4th and 5th Respondents – Absent

Court Assistant – Esther / Kevin

