



REPUBLIC OF KENYA



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Gitau v Trustees Caritas Mariana Holy Family Children’s Home Thika & 2 others (Environment & Land Case 43 of 2017) [2023] KEELC 777 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEELC 777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 43 OF 2017
JG KEMEI, J
FEBRUARY 13, 2023**

BETWEEN

JOHN MUIKAMBA GITAU PLAINTIFF

AND

**THE TRUSTEES CARITAS MARIANA HOLY FAMILY CHILDREN’S HOME
THIKA 1ST DEFENDANT**

REV. FR. BATHRANA NWACHUKWU 2ND DEFENDANT

SCHOLASTICA WANJIKU WAINAINA 3RD DEFENDANT

JUDGMENT

1. Vide an amended plaint dated February 28, 2022 the plaintiff filed suit against the defendants seeking the following;
 - a. A declaration do issue to the effect that land parcel number Thika municipality block 23/1108 situate within Thika municipality belongs and or is owned by the plaintiff absolutely and consequently entitled to vacant possession.
 - b. An eviction order to issue against the 1st and 2nd defendants to vacate the suit property known as Thika municipality block 23/1108.
 - c. An order do issue cancelling title deed in respect of Thika municipality block 23/1108 registered in the names of Scholastica Wanjiku Wainaina the 3rd defendant and an order be issued that the same be registered in the names of the plaintiff.
 - d. A permanent injunction do issue restraining the defendants, their servants and/or agents from trespassing on the suit property known as Thika municipality block 23/1108.
 - e. Mesne profits for utilization of the suit property.



- f. Costs of the suit and interests be provided for.
 - g. Any other reliefs as the honourable court may deem fit to grant.
2. It is the plaintiff's case that he purchased the suit land from Daniel Wainaina, deceased and the husband of the 3rd defendant in 2002, paid the full purchase price and took possession. That since he had no immediate need to utilize it, he allowed the 1st defendant in 2004 who was then in the process of acquiring parcels nos 1107 and 1109 to use the suit land in the interim. That soon thereafter, the 1st defendant without his consent began to develop illegal permanent structures on the land contrary to the licence forcing him to demand for vacant possession via the letter dated April 20, 2005. That the acts of the 1st and 2nd defendants are tantamount to trespass and unlawful usage of the land. Instead of vacating the land, the 1st and 2nd defendants are asserting that they have acquired the land through purchase from the 3rd defendant notwithstanding that the 3rd defendant knew that her late husband had sold the land to the plaintiff in 2002. That the registration of the title in the name of the 3rd defendant, the sale to the 1st and 2nd defendants was fraudulent, illegal null and void. See the particulars of fraud against the 3rd defendant pleaded in para 20 of the plaint. That the plaintiff's claim against the defendants is that he is a bonafide purchaser for value and legal owner of the land.
 3. The defendants denied the plaintiffs claim vide their defence dated the June 28, 2021 and amended on the June 28, 2022. The 1st and 2nd defendants contend that they acquired the land through purchase from the 3rd defendant, the legal administrator of the estate of the late Daniel Wainaina Kangonga. That the 3rd defendant sold them the land in 2005 and as such had the freedom to utilize it anyhow as to their wish as they were the owners of the land. That the 3rd defendant obtained leave of the High Court in 2011 to sell the land as an administrator of the estate of her late husband. Further that the 3rd defendant upon confirmation of the grant of probate registered the land in her name so as to enable her transfer the said land to the 1st and 2nd defendant, a step that is being hampered by this suit. The 3rd defendant contended that she had power under the grant to deal with the land as the legal administrator of the estate of Wainaina. Finally, they urged the court to dismiss the suit.
 4. PW1- John Muikamba Gitau testified and relied entirely on his witness statement dated the February 28, 2022 in his evidence in chief and produced documents marked as PEX 1-14. The witness reiterated the contents of the plaint and in addition stated that the 1st and 2nd defendants actions of fencing his property inside theirs denied him access to his land and that despite notice to vacate they refused to so vacate the land.
 5. In cross, the witness stated that he purchased the land from Daniel Wainaina Kangonga on the May 10, 2002 vide an agreement of sale and allowed the 1st and 2nd defendant to utilize the land in the interim. That Wainaina died on May 16, 2002. Shown the certificate of confirmation of grant the witness stated that he did not know that Wainaina was married and further denied that he ever met with the 3rd defendant at the police station. Shown the copy of title for the suit land, the witness stated that the same is registered in the name of the 3rd defendant as at October 1, 2018. Further he stated that the 1st and 2nd defendants had purchased parcels 1107 and 1109 and that his land being the suit land was in the middle. That there was an agreement to exchange the plots in future so that the 1st and 2nd defendant's plots would be adjacent to each other. That he learnt about the death of Wainaina later and the reason why he did not object to the succession proceedings was because he was not aware and, in any event, Wainaina had executed all transfer documents in his favour, the role of processing the title having been agreed to be his (PW1).



6. PW2 – Kago Gachiri stated that he is an Advocate of the High Court of Kenya having practiced under the name and style of Kago Gachiri & Company Advocates and had conduct of the transaction and drew the agreement of sale between the plaintiff and the late Wainaina. He relied on his witness statement dated the October 11, 2022 as his evidence in chief. That currently he stopped practicing law but in 2002 he held a practicing certificate. That he is aware the purchase price was paid in full to Wainaina and the plaintiff was put in possession of the land awaiting the processing of the title in his name. That the said land was a subdivision of the larger land owned by Kagerema Investments Company Limited for which Wainaina was a member. That he acted for the said Investment Company and handled all the conveyancing between the company and its members. That Wainaina sold the land to the plaintiff in 2002 and that by then there was no title but the allottee of the land was Wainaina.
7. PW3- Stanislus Ngige Mwaura relied on his witness statement dated the September 9, 2022 as his evidence in chief. He informed the court that he was the company secretary of Kagerema Investment Company Limited where Wainaina was a member and an allottee of the suit land. That the suit land belonged to Wainaina.
8. DW1- Father Reverend Bernard Nwachukwu relied on his witness statement dated the February 14, 2022 in evidence in chief. He stated that he has worked for the 2nd defendant since 2003. That the 1st defendant owned two parcels (1107 and 1109) adjacent to the suit land and approached the 3rd defendant who agreed to sell them the land. He produced a copy of the agreement of sale dated the March 11, 2005. That at the time of the sale the 3rd defendant was the legal administrator of the estate of Wainaina and thus had the power to sell the land. That the 3rd defendant obtained leave of the court in 2011 to allow her sell the land to the 1st defendant 6 years after the transaction had taken place. Upon the purchase that they took possession and have developed the same. He stated that he paid the deposit in anticipation of the 3rd defendant transferring the land to the 1st defendant.
9. DW3 - Scholastica Wanjiru Wainaina relied on the witness statement dated the February 14, 2022 and stated that she is the widow and administrator of the estate of the late Wainaina and the registered owner of the land following a successful succession of his estate. That in 2011 leave was granted to her by the court to allow her sell the suit land to the 1st defendant as the legal administrator. That she sold the land to the 1st defendant in 2005. That in 2018 the title became registered in her name to hold on her behalf and in trust for her children. That though she has never lived on the land she was categorical that her late husband did not sell the land to the plaintiff. Further that she stated that she was not present during the transaction between her husband and the plaintiff. That she was paid a deposit by the 1st defendant awaiting the processing of the title in her name.
10. The parties elected to file written submissions however by the time I retired to write the judgment none had complied by close of business of the December 20, 2022 which was the deadline of filing of the said submissions.
11. Having considered the pleadings of the parties the evidence led on trial and all the material placed before me the issues that commend themselves for determination in my view are;
 - a. Whether the plaintiff acquired a valid interest in the suit land.
 - b. Whether the 3rd defendant acquired any valid interest in the suit land.
 - c. Whether the title of the 3rd defendant should be cancelled.
 - d. Whether the plaintiff is entitled to the orders of eviction.
 - e. Whether the claim for mesne profits is merited.



- f. Who bears costs of the suit?
12. It is not in dispute that the suit land emanated from Kagerema Investments Company Limited. It is also not in dispute that Wainaina was allocated the land pursuant to his membership in the company. See the shareholders register where he was member no 426 and allottee of parcel 1108. Pursuant to the subdivision scheme undertaken by the Investment Company, Wainaina was allocated plot no 1108 vide a subdivision scheme approval dated the March 24, 1997 with conditions, which conditions he accepted and paid vide letter dated the March 29, 2005 in the sum of Kshs 1530/- paid to the commissioner of lands *inter alia*. See the receipt of even date. Following the letter of acceptance, the commissioner of lands vide the letter dated the May 11, 2005 forwarded a lease to the chief land registrar in triplicate duly signed and stamped with registration fees having been paid vide receipt dated the March 29, 2005. The letter is copied to Daniel Wainaina Kangonga with instructions to appear before the land registrar for the execution of the lease.
13. It is the plaintiff's case that he entered into a sale agreement with Wainaina on the May 10, 2002 for the sale and purchase of the suit land for the consideration of Kshs 20,000/- which sums was acknowledged by the said seller as per clause 2 of the agreement of sale. It was a term of the agreement that the plaintiff would meet the costs relating to the transfer of the title and the plaintiff was given possession of the land immediately. It was a further term of the agreement that the vendor, Wainaina, was to execute all the documents necessary to effect the transfer of the land in the name of the Purchaser, the plaintiff herein.
14. The plaintiff led evidence that he was to meet the costs and undertake the task of processing the title in his name, evidence which the court found to be in agreement with the terms of the agreement of sale as set out above.
15. Section 3 (3) of the [Law Of Contract](#) states as follows;
- “No suit shall be brought upon a contract for the disposition of an interest in land unless-
- a. The contract upon which the suit is founded-
- i. is in writing;
- ii. is signed by all the parties thereto; and
- b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
- Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
16. I have perused the agreement of sale dated the May 11, 2002 and I find that it complies with the provisions of section 3 (3) of the law of contract as set out above in terms that it is in writing; it is duly signed by Wainaina and the plaintiff and that the signatures are attested by PW2 .
17. The defendants have not rebutted the existence of this agreement save the foible position taken by the 3rd defendant that her late husband did not sell the land to the plaintiff. *Inter alia*, she stated in evidence that she was not present when the transaction took place between Wainaina and the plaintiff. In the main the defendants posited that the land was lawfully sold by the 3rd defendant in her capacity as the legal administrator of the estate of Wainaina and further pursuant to leave of the probate court issued to her in 2011.



18. In conclusion I find that the agreement of sale has not been successfully impugned by any of the parties in the suit.
19. It is the plaintiff's evidence that he was put in possession of the land immediately and since he was not going to utilize it immediately he entered into a licence agreement with the 1st defendant allowing the 1st defendant to use the land. See the agreement dated the August 29, 2004. The said agreement is executed by both parties. The 1st defendant sought to distance himself from the agreement by stating in evidence that he did not know Ms Notburger Fellner who signed the agreement on behalf of the 1st defendant. The court noted that the 2nd defendant did not refute the existence of the agreement which remains unchallenged.
20. It was the plaintiff's case that shortly afterwards he noted that the 1st and 2nd defendants started constructing permanent buildings on the land without his consent and permit and demanded through his lawyers vide the letter dated April 20, 2009 that the 1st defendant vacates the suit land. The plaintiff led evidence that the 1st and 2nd defendants ignored the notice and refused to vacate the suit land. There was a hiatus of no action until another notice dated the May 3, 2016 to the defendants seeking vacant possession. It would appear that this notice too did not elicit any action from the defendants hence the filing of the suit in 2016. It was his unchallenged evidence that the 1st and 2nd defendants fenced off his land together with their plots Nos 1107 and 1109 thus blocking him from accessing his land.
21. The plaintiff led evidence that Wainaina left with him all the documents necessary for the registration of the transfer in his name. He produced a duly executed transfer and associated documents by Wainaina and himself attested by PW2 who was the advocate for both parties. By this time Wainaina was to proceed to the land registrar's office for execution of the lease after which the same would be registered. It would appear that Wainaina died before completing the administrative act of executing the lease in his name seeing that he died on the May 16, 2002 according to the grant of letters of administration on record.
22. By the time Wainaina died he had acquired an interest in the suit land and what was pending was the registration of the title in his name. This explains why the first interest in the register is in the name of Wainaina. It is also the finding of the court that by the time of his death Wainaina had ceded his interest in the suit land to the plaintiff and what was pending was the registration of the transfer in the name of the plaintiff. The interest of Wainaina had been fully divested to the plaintiff vide the agreement. The plaintiff having paid the full purchase price, been put into possession and even been given the documents of transfer to attend to the registration of the transfer. PW2 gave account of this in his firm and unchallenged evidence in favour of the plaintiff.
23. The court is therefore persuaded that the plaintiff acquired a valid title in the suit land from Wainaina who sold and transferred the land in his lifetime.
24. Unknown to the plaintiff the inaction on the part of the defendants in refusing to vacate the suit land is traced to the agreement of sale dated the March 11, 2005 between the 3rd defendant and the 1st defendant wherein the parties agreed to sell and to purchase the suit land.
25. DW3 led evidence that she was appointed as the legal administrator of the estate of Wainaina on the December 15, 2005. The confirmation of grant of letters of administration only took place on the November 26, 2007. Her action of therefore purporting to sell the suit land to the 1st and 2nd defendants on the March 11, 2005 was unlawful null and void and was tantamount to intermeddling. See section 45 of the *Law of Succession Act* which states as follows;

“No intermeddling with property of deceased person-



1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
2. Any person who contravenes the provisions of this section shall-
 - a. Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
26. The 3rd defendant stated that she obtained leave of the court to sell the suit land on the February 22, 2011, 6 years after she had purportedly sold the land in 2005. The 3rd defendant must have concealed material facts from the court given that she was seeking leave of the court after the fact. Had the court been given the facts, the court would not have given orders in vain.
27. It is on record that the plaintiff obtained a title in 2018 pursuant to the confirmed grant of letters of administration issued to her in 2005 and confirmed in 2007. By this time the interest in the suit land had been divested to the plaintiff by her late husband sometime in 2002. The 3rd defendant therefore held the title in trust for the plaintiff
28. The plaintiffs case against the 3rd defendant is anchored on fraud as set out in para 20 of the plaint as follows;

“The plaintiff avers that the transfer and registration in favour of the 3rd defendant and the subsequent issuance of title in the names of the 3rd defendant respectively was fraudulent, illegal, and hence null and void ab initio.”
29. Fraud is a serious allegation which must not only be pleaded but proved on a high standard higher than that of standard of probabilities in civil cases but lower than beyond reasonable doubt required in criminal cases. The former Court of Appeal for *Eastern Africa in RG Patel v Lalji Makanji* (1957) EA 314 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.”
30. I have considered the particulars of fraud and am satisfied that the plaintiff has proved fraud.
31. With respect to eviction orders it is clear that the 1st and 2nd defendants were put in possession by the plaintiff. Having held that the plaintiff is the lawful owner of the land, and the defendants having not presented a valid and justifiable reason for their continued occupation of the land, I find that the plaintiff is entitled to the orders.
32. With respect to mesne profits the plaintiff failed to table any evidence in support of this prayer and it is hereby declined.



33. Final orders and disposition.

- a. I find for the plaintiff and grant the following orders.
- b. Enter judgment in favour of the plaintiff against the defendants in terms of prayers a, b, c, d and f of the amended plaint.

34. 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;

Masinde for plaintiff

Dr. Kanyariri for 1st defendant

2nd and 3rd defendant – Absent

Court Assistant – Esther / Kevin

