



Mungai & another v Board of Governors Kamunyu Primary School & another (Environment & Land Case 35 of 2019) [2023] KEELC 16235 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEELC 16235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 35 OF 2019
BM EBOSO, J
FEBRUARY 13, 2023**

BETWEEN

JOSEPH KIBE MUNGAI 1ST PLAINTIFF

PAUL MUNGAI MUCHUCHA 2ND PLAINTIFF

AND

BOARD OF GOVERNORS KAMUNYU PRIMARY SCHOOL .. 1ST DEFENDANT

**ROSEBELL NJERI KAMAU (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF DOMINIC KAMAU KARIUKI) 2ND DEFENDANT**

JUDGMENT

Introduction

1. The dispute in this suit relates to land parcel number Ngenda/ Wamwangi /243 [hereinafter referred to as “parcel number 243”], measuring approximately 8.3 acres. The land is registered in the name of the late Thera Wambui Gichinga who died in August 2000 [hereinafter referred to as “the deceased”]. Kamunyu Primary School contends that prior to her death, the deceased sold to parents of Wamwangi Primary School, who were residents in Kamunyu, a portion of the land, measuring 5 ½ acres, for the purpose of establishing a public school in Kamunyu. They contend that the sale was transacted by Wamwangi Primary School because Kamunyu Primary School did not exist at the time. It is similarly contended by the estate of the late Dominic Kamau Kariuki [hereinafter referred to as “the late Kariuki”] that the deceased sold to the late Kariuki a portion of the land measuring 1½ acres in 1990.
2. The two plaintiffs are the joint administrators of the estate of the late Thera Wambui Gichinga. The 2nd plaintiff supports the respective cases of the two defendants and agrees with the defendants that, during her lifetime, the deceased sold to the School and to the late Kariuki 5½ and 1½ acres of land respectively. Indeed, the 2nd plaintiff gave evidence as a defence witness. He testified that the 1st plaintiff tricked him into signing a stand alone authority to plead which he [the 1st plaintiff]



subsequently used to bring the claim in this suit. On his part, the 1st plaintiff contends that the deceased did not sell land to the school and to the late Kariuki. It is his case that the school and the estate of the late Kariuki are trespassers on the suit property. The key question to be answered in this Judgment is whether the deceased sold part of the land as claimed.

Common Grounds

3. There is common ground that at one point, there was an error in the parcel register relating to the suit land, in that the suit land had erroneously been designated as parcel number Ngenda/ Wamwangi/303 [hereinafter referred to as “parcel number 303”] measuring 1.59 hectares yet on the ground it measured 8.3 acres. It did emerge during trial that the 8.3 acres, which on the ground was occupied by the deceased, had been registered in the name of her neighbour, one Magecha. The error was eventually resolved by the Land Disputes Tribunal and the two affected parcel registers were rectified by the Land Registrar. Through the rectification, the deceased was registered as proprietor of Ngenda/ Wamwangi/243, measuring 8.3 acres, while Mr Magecha was registered as proprietor of Ngenda/ Wamwangi/303. I will briefly outline the parties’ respective cases before disposing the key issues that fall for determination in the suit.

1st Plaintiff’s Case

4. As observed in the introductory part of this Judgment, the two plaintiffs who are the joint administrators of the estate of the late Thera Wambui Gichinga are not advancing a common case. The 2nd plaintiff supports the respective cases of the two defendants. Indeed, he testified as a defence witness.
5. The 1st plaintiff’s case is contained in the plaint dated February 12, 2019; his written witness statement dated February 12, 2019; his sworn evidence tendered during trial; and his written submissions dated October 24, 2022. Through the plaint dated February 12, 2019, he seeks: (i) an order that the suit property belongs to the plaintiffs absolutely by virtue of them being the joint administrators of the estate of the late Thera Wambui Gichinga; (ii) an eviction order against Kamunyu Primary School; (iii) a permanent injunction against the two defendants; and (iv) costs of the suit.
6. In summary, the 1st plaintiff’s case is that the deceased was and still is the registered proprietor of the suit property. During the deceased’s life time, she constructed a permanent residential house on the land, and upon her demise, the beneficiaries of her estate have continued to reside in the house. He contends that on “diverse dates and periods”, the 1st defendant constructed a primary school on the upper side of the suit property in “unclear and controversial circumstances.” It is his case that the school is separated from the deceased’s homestead by a barbed wire fence. He contends that the school has been operating on the land illegally ever since it was constructed. The 1st plaintiff further contends that in 1996, the time the deceased is alleged to have executed a sale agreement with the school, she was 96 years old, frail and senile due to advanced age “and was open to manipulation, duress and undue influence and had no capacity whatsoever to enter into the alleged contract of sale of land.”
7. During his evidence-in-chief, the 1st plaintiff reiterated his case as summarized above. He produced 8 exhibits. He stated that the school was established on the suit land seven months prior to the death of the deceased. During cross-examination, he stated that he did not have any medical evidence to demonstrate that the deceased was sick or incapacitated. He added that he was not aware that the school had an agreement with the deceased for purchase of 5½ acres when the deceased’s land was still designated as parcel number 303. He confirmed that there was rectification of the parcel registers to reflect the deceased as proprietor of parcel number 243 measuring 8.3 acres. He further stated that he was not aware that upon rectification of the parcel registers, the deceased signed a fresh agreement with



the school, bearing the new parcel number. He stated that he did not have a direct interest in the estate of the deceased.

8. It was the 1st plaintiff's further evidence that the 2nd plaintiff is a relative of the deceased and an immediate neighbour. He confirmed that during her lifetime, the deceased relied on the 2nd plaintiff a lot. He also confirmed that when the 2nd plaintiff initiated succession proceedings relating to the estate of the deceased, he listed the school and the 2nd defendant as beneficiaries but the status of the two defendants changed after he [the 1st plaintiff] joined the succession proceedings. He also stated that prior to the year 2000, the deceased ran a nursery school on the suit property.
9. The 1st plaintiff testified during cross-examination that he was not aware that prior to her death, the deceased had donated to the 2nd plaintiff together with the late Dominic Kamau Kariuki a power of attorney. It was his evidence that he did not know the late Dominic Kamau Kariuki purchased 1½ acres from the deceased. He reiterated that the 2nd plaintiff was the one who used to deal with the deceased during her lifetime. He added that he was not involved in the affairs of the deceased when she was alive.

2nd Plaintiff's Case

10. Essentially, the 2nd plaintiff disowned the claim that was brought in the joint names of the two plaintiffs on behalf of the estate of the late Thera Wambui Gichinga. He adopted his witness statement dated June 22, 2021. He stated at paragraph 16 of the witness statement thus:

“ 16. The 1st Plaintiff herein is a son of the eldest daughter of Thera Wambui and does not understand the history of the suit land. He mischievously made me a co-plaintiff against my wish which I hereby denounce. I associate myself with the truth and fully confirm that the defendants legally purchased their respective portions of land excised from LR No Ngenda/ Wamwangi/243”.

11. He added as follows in paragraph 19 of his witness statement:

“ 19. I confirm that all the documents alleged to have been signed by me against the defendants or purporting me to be a co-plaintiff in this suit against the defendants were based on misrepresentation of facts and misleading imaginations pioneered and perpetuated by the 1st plaintiff against my conscience.”

12. In summary, the 2nd plaintiff's evidence was that at the time of land demarcation, the late Gichinga Gitau [the deceased's husband to the late Thera Wambui Gichinga] sold to one Magecha Nginga a portion of his land. At the time of subdivision, the land that Gichinga Gitau had retained [parcel number 243] was erroneously registered in the name of Magecha, while the land that had been sold to Magecha [parcel number 303] was erroneously registered in Gichinga Gitau's name. On the ground, Gichinga Gitau [and subsequently his widow, Thera Wambui Gichinga] continued to occupy what had been surveyed as parcel number 243, not knowing that they were registered as proprietors of a much smaller parcel bearing survey number 303. The error was subsequently rectified after Gichinga Gitau had died.
13. The 2nd plaintiff further testified that the deceased first sold a total of 1½ acres to Dominic Kamau Kariuki. At the time of selling the land to Kariuki, she called her daughters and shared the purchase price with them. She subsequently donated to him a power of attorney to facilitate the processing of conveyance documents in favour of the 2nd defendant. The 2nd plaintiff stated that the late Kamau's family had been in possession of the 1 ½ acres for over 30 years. He urged the court to reject the claim



brought in their joint names. He testified that the deceased sold 5½ acres of land to Wamwangi Primary School to facilitate the established of Kamunyu Primary School. It was his evidence that there was no dispute about the land sold to the school and to the late Kariuki until the 1st plaintiff joined the succession proceedings.

1st Defendant's Case**

14. The 1st defendant filed a statement of defence dated November 20, 2020 and counterclaim of even date and a witness statement by John Macharia Muiruri dated November 20, 2020. They filed written submissions dated October 21, 2022 through the Attorney General. Their case was that Kamunyu Primary School was started in January 2000. The school was developed on 5½ acres forming part of land parcel number Ngenda/Wamwangi/243. They contended that parents of Wamwangi Primary School who resided in Kamunyu, through the head teacher of Wamwangi Primary School, purchased the 5½ acres from the deceased. The said parents subsequently built Kamunyu Primary School on the 5½ acres when the deceased was still alive. Knowing that she had sold the land to the school, the deceased never complained about the school's occupation of the 5 ½ acres.
15. By way of counterclaim, the 1st defendant sought; (i) a declaration that the deceased sold 5½ acres out of land parcel number Ngenda/Wamwangi/243 to the school; (ii) an order compelling the estate of the deceased to convey the 5½ acres to the school; and a permanent injunctive order.
16. At the hearing, the 1st defendant led evidence by John Macharia Muiruri who testified as DW4. He reiterated the 1st defendant's case as summarized above. His evidence was that on August 8, 1995, the deceased entered into a sale agreement with the Head Teacher of Wamwangi Primary School over land parcel number Ngenda/Wamwangi/303 pursuant to which the deceased agreed to sale to the school 5½ acres out of the said parcel at a purchase price of Kshs 440,000. On the date of signing the sale agreement the school paid to the deceased Kshs 20,000. Having noticed an error on the title deed, the deceased and the school entered into a fresh agreement dated April 22, 1996 pursuant to which the deceased sold to the school 5½ acres out of land parcel number Ngenda/Wamwangi/243. It was a term of the agreement that the deceased would give the school vacant possession of the 5½ acres. The school paid to the deceased the agreed purchase price in full. Parties subsequently obtained consent of the Land Control Board. Kamunyu Primary School was subsequently developed on the land and has been in occupation of the land since then.
17. DW4 testified that when the estate of the deceased applied for a grant of letters of administration, the school's land was erroneously included as forming part of the estate of the deceased yet the land had been sold to the school. He added that during her lifetime, the deceased never raised any issue about the school's occupation of the land because she had sold the land to the school. He urged the court to grant the 1st defendant the reliefs sought in its counterclaim.

2nd Defendant's Case

18. The 2nd defendant filed a statement of defence and counterclaim dated June 22, 2021. The 2nd defendant's case was that in 1990, the deceased sold 1½ acres to the late Dominic Kamau Kariuki and the deceased was paid purchase price in full. The 2nd defendant contended that the deceased gave the late Kariuki vacant possession of the 1½ acres. It was the 2nd defendant's case that conveyance of the 1½ acres was not finalized because there was a "mix up of titles" relating to the deceased's land and Magecha's land.
19. By way of counterclaim, the 2nd defendant sought among other reliefs: (i) a declaration that the estate of the late Kariuki is entitled to 1½ acres out of the suit property; (ii) an order compelling the estate



of the deceased to convey the 1½ acres to the estate of the late Kariuki; and (iii) permanent injunction against the estate of the deceased.

20. At the hearing, the 2nd defendant testified as DW2 and also led evidence by Paul Mungai Muchucha [the 2nd plaintiff] who testified as DW1. Her evidence was that her late husband [Dominic Kamau Kariuki] initially purchased from the deceased one acre out of land parcel number 243 at Kshs 50,000 in 1990. Subsequently, the deceased sold to her late husband ½ of an acre, making a total of 1½ acres. Part of the consideration was that her late husband was to construct for the deceased a permanent house on the remaining portion of the land. She stated that, indeed, her late husband constructed for the deceased a permanent house on the remaining portion of the land. She contended that the consideration for the land was paid in full and the deceased gave vacant possession of the land to her late husband. She added that all the transactions were carried out in the presence of the deceased's daughters and were recorded in an exercise book. She further testified that conveyance was delayed by the mix up that existed in the land registers relating to the deceased's land. She urged the court to grant the reliefs sought in her counterclaim.
21. Paul Mungai Muchucha testified as DW1. He adopted his witness statement dated June 22, 2021. A summary of his evidence is as outlined above under the subtitle "2nd plaintiff's Case." It was his evidence that the deceased was his aunt, in that her late husband, Johana Gichinga Gitau, was a biological brother to his father. He confirmed that he was a joint administrator of the estate of the deceased. It was his further evidence that the suit property had been taken by Magecha Nginga. His late uncle and the deceased pleaded with him to assist them recover the land. He dealt with the land when his late uncle and his late aunt were still alive. He added that although he was named a plaintiff in this suit, he never instructed the 1st plaintiff's advocate to include his name as a plaintiff. It was his case that no resolution was made by the joint administrators of the estate of the late Thera Wambui Gichinga to file the suit. He explained that titles were not promptly processed in the names of the two purchasers [the school and the late Kariuki] because of the errors that existed in the land registers and the case that was pending in the Tribunal relating to the errors. He added that as soon as the errors were rectified, the deceased died.

Submissions

22. The firm of Norman Otieno & Co Advocates filed written submissions dated October 24, 2022 on behalf of the plaintiffs. Ms Mwihaki Ndundu, Senior State Counsel, filed written submissions dated October 21, 2022 on behalf of the Attorney General who represented the 1st defendant. The firm of Maina Makome & Company Advocates filed written submissions dated October 28, 2022 on behalf of the 2nd defendant. I have read all the above submissions. I will not rehash them. I will only refer to those points that I consider to be critical to the determination of the key issues in the suit.

Analysis and Determination

23. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. The following are the five issues that fall for determination in this suit: (i) Whether Kamunyu Primary School is a trespasser on the 5½ acres that it occupies, being a portion of land parcel number Ngenda/Wamwangi/243; (ii) Whether Kamunyu Primary School merits the reliefs sought in the counterclaim against the estate of the late Thera Wambui Gichinga; (iii) Whether the estate of the late Dominic Kamau Kariuki is a trespasser on the 1½ acres that it occupies, being a portion of land parcel number Ngenda/Wamwangi/243; (iv) Whether the estate of the late Dominic Kamau Kariuki merits the reliefs sought in its counterclaim against the estate of Thera Wambui Gichinga; (v) What order should be made in relation to costs of this suit. I will dispose the five issues sequentially in the above order.



24. The first and second issues are intertwined. They will be disposed simultaneously. The 5½ acres are part of land parcel number Ngenda/Wamwangi/242. The two plaintiffs brought this suit in their capacity as the joint administrators of the estate of the late Thera Wambui Gichinga. An authority to plead was exhibited showing that the 2nd plaintiff authorized the 1st plaintiff to appear, plead and/or act on his behalf. The authority reads as follows:
- “I Paul Mungai Muchucha the undersigned do hereby authorize Joseph Kibe Mungai to appear, plead and/or act on his behalf and on my behalf in these proceedings.”
25. During trial, the 2nd plaintiff categorically disowned the authority. He also disowned the primary claim in this suit and tendered evidence confirming that the deceased sold to parents of Wamwangi Primary School the 5½ acres on which Kamunyu Primary School was established. The 2nd plaintiff asserted that the deceased received full purchase price from the school and gave the school vacant possession of the 5½ acres for establishment of Kamunyu Primary School.
26. It does therefore emerge that there is doubt in relation to the bonafides of the claim that the 1st plaintiff brought and prosecuted before this court on behalf of the estate of the deceased. The joint administrators represent the same estate. They are supposed to present a common case. The fact that they have presented sharply contradictory cases totally defeats the case of the estate. Secondly, the evidence of Paul Mungai Muchucha dealt the estate’s supposed case a devastating blow in relation to the allegations that the school and the estate of the late Kariuki were trespassers on the suit land. That is not all. His evidence was a corroboration of the defences and counterclaims presented by the two defendants in this suit. He corroborated the defendants’ cases in terms of sale of the respective portions to the defendants; payment of full purchase price by the defendants; and delivery of vacant possession of the respective portions to the defendants by the deceased. Counsel who represented the two joint administrators did not address the court on the legal ramifications of the contradictory cases that the joint administrators of the estate of the deceased presented. The position I take is that, in the present circumstances, the cases of the defendants are fully corroborated by one of the joint administrators.
27. Counsel for the plaintiffs contended that Kamunyu Primary School are trespassers on the 5½ acres because the agreement exhibited was between Wamwangi Primary School and the deceased. It was the position of counsel that there was no agreement between the deceased and Kamunyu Primary School. The court does not agree with the contention. From the evidence on record, the defence explained that the land was purchased by parents of Wamwangi Primary School who were residents of Kamunyu, for the purpose of starting a new school at Kamunyu. It was further explained that at the time of purchasing the land, Kamunyu Primary School did not exist. The contributing parents and the targeted pupils were parents and pupils of Wamwangi Primary School, who were residents in Kamunyu. It was explained that it was for the above reason that the designated purchaser of the land in the sale agreements was Wamwangi Primary School. This explanation made sense and was not controverted through evidence. The 2nd plaintiff corroborated this evidence.
28. Counsel for the plaintiffs also contended that the deceased held the suit property as a trustee. No evidence was tendered to prove trusteeship. No beneficiary of the alleged trust stepped forward to give evidence on the alleged trust.
29. Similarly, the allegations that the deceased suffered medical incapacity at the time of the alleged sales was not supported by evidence. Counsel for the plaintiffs further argued that only Kshs 378,200 out of Kshs 540,000 was paid by the School. However the 2nd plaintiff confirmed that the deceased was paid purchase price in full. He also confirmed that the deceased together with her children did not have



- any dispute with the school in relation to the sales. Indeed, none of the deceased's children stepped forward to support the 1st plaintiff's case.
30. Counsel for the plaintiffs contended that the sale of land to the school was null and void due to lack of the consent of the land control board. This contention is not correct because the 1st defendant tendered minutes of the board showing that consent was applied for and granted by the Land Control Board.
 31. The totality of the foregoing is that the allegations of trespass against the 1st defendant were not proved. On its part, Kamunyu Primary School proved that parents of its mother school, Wamwangi Primary School, legally purchased the 5½ acres from the deceased and the deceased put the school in possession of the land. The school proved that it was established on the land during the lifetime of the deceased and there was no dispute between the school and the deceased during her lifetime.
 32. For the above reasons, it is the finding of this court that Kamunyu Primary School is not a trespasser on the 5½ acres that the school occupies, being a portion of land parcel number Ngenda/Wamwangi/243. Further, it is the finding of this court that parents of Kamunyu Primary School, through its mother school, Wamwangi Primary School, purchased the 5½ acres from Thera Wambui Gichinga and the school is therefore entitled to the reliefs sought in its the counterclaim.
 33. The third issue relates to the question as to whether the estate of the late Dominic Kamau Kariuki is a trespasser on the 1½ acres. The fourth issue relates to the question as to whether the estate of the late Dominic Kamau Kariuki is entitled to the reliefs sought in the counterclaim by the 2nd defendant. The two issues are intertwined and will therefore be disposed simultaneously.
 34. The 1st plaintiff testified during cross-examination that he did not know whether or not the late Dominic Kamau Kariuki purchased land from the deceased. He also testified that he was not involved in the affairs of the deceased when she was alive. He added that Paul Mungai Muchucha [the 2nd plaintiff - who testified in support of the defendants] was the one who dealt with the deceased when she was alive. He further confirmed that Paul Mungai Muchucha was the one who invited him to be a co-administrator of the estate of the deceased.
 35. Given the above evidence by the 1st plaintiff and given the evidence of Paul Mungai Muchucha, it is clear that the evidence of Paul Mungai Muchucha is more credible. He is the one who dealt with the deceased. He was an immediate neighbour and a nephew of the deceased. None of the deceased's daughters came to court to challenge his testimony. His testimony to the effect that the deceased sold 1½ acres to the late Dominic Kamau Kariuki and gave him possession in the early 90s is a clear corroboration of the case of the 2nd defendant. Consequently, the court is satisfied that the 2nd defendant has proved to the required standard that the late Dominic Kamau Kariuki purchased the 1½ acres from the deceased and that the estate of Kariuki is not a trespasser on the 1½ acres that it occupies. That is the finding of this court on the third issue.
 36. Having made the above finding on the third issue, it follows that the estate of the late Dominic Kamau Kariuki is entitled to the reliefs sought in the counterclaim.
 37. Consequently, it is my finding that the estate of the late Dominic Kamau Kariuki is not a trespasser on the 1½ acre land that it occupies, being a portion of land parcel Ngenda/ Wamwangi/243. It is also my finding that the estate of Dominic Kamau Kariuki is entitled to the reliefs sought in the counterclaim by the said estate.
 38. On costs, this unfortunate litigation would perhaps not have happened if the mix up in the Lands Registry had not happened. The mix up contributed to the deceased's failure to complete the sales promptly during her lifetime. I will, for this reason, not make any award in relation to costs of this suit.



Disposal Orders

39. In the end, the primary suit and the respective counterclaims by the two defendants are disposed as follows:

- a. The suit by the estate of the late Thera Wambui Gichinga, brought through the plaintiffs, is dismissed for lack of merit.
- b. The counterclaim by the 1st defendant is allowed in terms of prayers 1, 2, 3 and 4 of the counterclaim.
- c. The counterclaim by the 2nd defendant is allowed in terms of prayers (i), (ii), (iii) and (iv).
- d. Parties to bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF FEBRUARY 2023

B M EBOSO

JUDGE

Mr Otieno for the Plaintiffs

Ms Nyawira for the 1st Defendant

Mr Karoki for the 2nd Defendant

Court Assistant: Hinga

