



**Macharia v Mwangi (Environment & Land Case 801 of 2017)
[2023] KEELC 16731 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 801 OF 2017**

JG KEMEI, J

MARCH 29, 2023

BETWEEN

DIANA WANJIRU MACHARIA PLAINTIFF

AND

MARY WANGUI MWANGI DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a Plaint dated 16/10/2017. The gist of her case is that she is the registered owner of L.R No. Ruiru Kiu Block 10(Mahiira)/1266 (hereinafter the suit land) having bought it from David Kiungo Mbugua *vide* a sale agreement dated 15/10/2008. That on the same date she was issued with a Share Certificate No. 1172 by Mahiira Housing Company Ltd (hereinafter Mahiira Company) and duly paid for processing of the title deed. She accuses the Defendant of illegally constructing a toilet and building a permanent house on the suit land and prays for Judgment against the Defendant for;
 - a. A mandatory injunction restraining the Defendant from entering, remaining and/or interfering with land parcel no. L.R No. Ruiru Kiu Block 10(Mahiira)/1266.
 - b. Damages and costs of the suit.
2. In denying the claim of the Plaintiff, the Defendant through her statement of defence dated 18/12/2017 denied that the Plaintiff is the registered owner of the suit land and averred that she is the legal proprietor of the same having been so registered on 4/2/2013. She also refuted the claims of the alleged sale agreement between the Plaintiff and David Kiungo Mbugua terming it fraudulent if at all. The Defendant stated that she acquired legal interest in the suit land on 5/7/2006 when she purchased the suit land from Mahiira Company hence her occupation and developments on the suit land are legitimate.



The evidence

3. The Plaintiff, Diana Wanjiru Macharia testified solely as PW1 in support of her case. She relied on her witness statement dated 16/10/17, a replica of the averments in the plaint as her evidence in chief. She produced the documents marked as PEX. 1 – 4 namely copies of title deed, sale agreement dated 15/10/2008, Share Certificate of plot certificate No. 1172 and receipts of title deed processing fees.
4. In cross, PW1 stated that she bought the suit land from Mbugua whose plot certificate was not attached in PW1's documents. That she left it at the Company's office whose physical address she could not recall. That she paid processing fees of Kshs. 10,000/- as per PEX.4 and got the certificate on 15/10/2008 and the title deed on 7/8/2013. PW1 explained that the procedure for acquiring a title deed was to pay the title fees first before a title is issued. That her title deed fees amounted to Kshs. 30,000/- paid on 24/7/2014 thus she obtained her title deed before paying the said fees.
5. Further PW1 denied knowing the Defendant and on being shown the Defendant's title deed issued on 4/2/2013, she admitted it was issued earlier than hers. PW1 also conceded that the Defendant's Share Certificate was issued on 5/7/2006, before hers was issued and that both plots are described as Nos. 1172. That her parcel is LR 10901/36 while the Defendant's is LR 10901/37. PW1 stated that the seller (David Mbugua) was not a witness in her case and she had no evidence to demonstrate that David was a shareholder in Mahiira Company before he sold her the suit land.
6. The Defendant, Mary Wangui Mwangi took the stand as DW1. She adopted her witness statement dated 6/12/2017 as her evidence in chief. It was her testimony that she got interested in the suit land in 2006 and upon visiting Mahiira Company, she was shown plot no. 1172. That she paid Kshs. 300,000/- for it and a further Kshs. 20,000/- for title deed processing which title she obtained 7 years later. PW1 added that having perused the Plaintiff's documents, the same can only be termed as a fraudulent for purporting to purchase her property which she is legally developing. DW1 produced the documents marked as DEX.1 - 4 namely, transfer from Mahiira Company; receipts Nos. 7498 & 10142, certificate No. 1172 and title deed issued on 4/2/2013. Just like PW1, DW1 denied knowing the Plaintiff but stated that she spoke to PW1 on phone having obtained her husband's name and number from a neighbour.
7. In cross, DW1 told the Court she bought the land from the Company and had original documents in support. That she had not reported any complaint with the police and had neither cultivated nor resided on the land. That though she had raised the matter with the land buying Company, it was not a witness herein. She also did not have any search before Court but maintained she was given plot no. 1172.
8. The next witness was Robert Mugendi Mbuba, Land Registrar No. 327 stationed at Ruiru Land Registry. He testified that according to their records, the suit land has a duplication of two green cards showing that the register was opened on 4/2/2013 in the name of Mahiira Company, allocated to Mary Wangui Mwangi of ID No. XXX who was issued with a title deed on the same date. That the suit land falls within RIM No. 148/2/20 measuring 0.0375 Ha. The second green card was opened on 2/8/2013 in the name of the Mahiira Company, allocated to the Plaintiff of ID No. XXXX who was issued with a title deed on the same day.
9. Additionally, DW2 stated that on 17/7/2017, a caution was registered in favor of Washington Kingori Munyunga of ID No 20711789 claiming beneficial interest. That from the parcel file, DW2 found two transfer forms from Mahiira Company to both the Defendant and the Plaintiff supported by their ID cards collectively produced as Dexh. 5.



10. In cross-examination by the Defendant's Counsel, DW2 said neither of the transfers from Mahiira Company to the parties was executed; the green cards were opened in a span of six months apart and the second title was registered despite the earlier registration.
11. Despite witness summons being issued to the chairman of Mahiira Company to testify in Court, s/he did not honor the said summons.

Written submissions

12. The Plaintiff through the firm of Mburu Machua & Co. Advocates filed submissions dated 16/12/2022 and highlighted the rival evidence adduced in Court. Three issues were drawn for determination; whether or not the Plaintiff is a bona fide purchaser for value of the suit land; whether she is entitled to the reliefs sought and who bears the costs of the suit.
13. On the first issue, the Plaintiff submitted that the Defendant had failed to adduce any evidence to prove any fraud on the Plaintiff's part in her acquisition of the title deed. That instead the Plaintiff had satisfied the conditions to demonstrate her lawful ownership of the suit land as set out in the case of *Joseph N.K Arap Ng'ok v Moiyo Ole Keiwua & 4 others* NBI C.A No 61 of 1997 (unreported).
14. Secondly that having established that the Plaintiff has proven her case against the Defendant, she is duly entitled to the reliefs sought in her plaint as well as an order for costs in her favor.
15. On the other hand, the firm of Waithira Mwangi & Co. Advocates filed submissions dated 20/12/2022 on behalf of the Defendant. It was submitted that the Plaintiff has failed to discharge the legal burden placed on her pursuant to Section 107 of the *Evidence Act*. That notably the Plaintiff produced a title deed that she obtained before paying for its processing fees, 11 months later on 24/7/2014. That the Plaintiff's title deed on 4/2/2013, six months after the Defendant was issued with her title deed which issuance could not defeat the Defendant's earlier title as was held in the cases of *M'Mukanga vs Mbijiwe* [1984] eKLR 761 and *Elijah Nduru v Timothy Githaiga Mwangi* [2016]eKLR. That the Plaintiff's failure to prove the root of her title was a fatal omission and the alleged purchase price of Kshs. 110,000/- in 2008 was not plausible since when there is evidence to show that the same Company had sold the same land in 2006 at Kshs. 300,000/-. The Defendant urged the Court to dismiss the Plaintiff's suit with costs.

Analysis & Determination

16. Having read and considered the pleadings, the evidence adduced during the hearing, the written submissions of the parties and all the material placed before the Court, I find the key issues for determination are; who between the Plaintiff and the Defendant is the lawful owner of the suit land; what orders should the Court issue and who meets the cost of the suit.
17. It is trite that he who alleges must prove. Sections 107 and 108 of the *Evidence Act* Cap 80 provide for burden and incidence of proof and who is to prove it that;

“

“ 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.”

18. 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 means the Court must be satisfied that on the evidence, the occurrence of an event was more likely than not.
19. In the same vein, the Court of Appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2004] eKLR stated that the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in Sections 109 and 112 of the *Evidence Act*, thus:
- “ 109. 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.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
20. The Plaintiff’s case is that she is the registered proprietor of the suit land having bought it from David Kiundo Mbugua *vide* a sale agreement dated 15/10/2008. That on the same day she was issued with a Share Certificate no. 1172 by Mahiira Housing Co. Ltd. That later she paid the title deed processing fees and obtained Pex.1 - title deed for no. Ruiru Kiu Block 10 (Mahiira)/1266 in her name on 7/8/2013. To buttress her claim she produced P.ex 2 - copy of transfer of plot no 1172 from David Kiundo Mbugua who described himself as a member of Mahiira Company. The purchase price disclosed therein is Kshs. 110,000/- but no evidence of such payment was tendered in Court by way of receipts. PW1 further adduced a copy of plot certificate of even date and two receipt totaling Kshs. 40,000/- as title deed processing fees. The first receipt is dated 17/7/2013 barely a month before the title deed was issued and the amount of Kshs. 30,000/- paid over almost a year later on 24/7/2014 and after the title had been issued on the 7/8/2013.
21. By her own admission, PW1 in cross examination stated that the procedure was to pay for the processing fees before a title deed was issued. PW1 did not explain how she managed to obtain a title deed way before the payment of the bulk of the processing fees. PW1 also conceded that she did not have any evidence to demonstrate that David was a member of Mahiira Company nor did she call him to testify in support of her case. PW1 maintained that she did not have any claim against Mahiira Co and that’s why she had not sued them herein.
22. Denying the claim, the Defendant also claimed ownership of the suit land having bought it from Mahiira Company in the year 2006 at a consideration of Kshs. 300,000/- That she obtained her title deed, Dex.4 on 4/2/2013, six months before the issuance of PW1’s title deed.
23. The Land Registrar, DW2 testified that this was a case of duplication with the first register being opened in the Defendant’s favor and later in the Plaintiff’s name. He added that in such a scenario, it



is incumbent upon the allocating Company, in this case Mahiira Company, to clarify who the bona fide owner of the suit land is.

24. Having failed to call evidence from Mahiira Company or the alleged David to shed light into the root of her title, then the incidence of proof stated in Section 108 *Evidence Act* above operates against the Plaintiff's case.
25. The Defendant on the other hand led evidence that she purchased plot No 1172 from Mahira Company Limited vide the agreement of 5/7/2006 at the consideration of Kshs 300,000/-. In the said agreement she is described as a member of the Company. It was a term of the said sale that the Defendant was given possession of the land immediately. The Defendant confirmed this and led unchallenged evidence that she has allowed her neighbour to utilize the land and in addition she has constructed a toilet and a permanent structure.
26. Pursuant to the said purchase the Defendant paid the sum of Kshs 300,000/- on the 5/7/2006 as well as the sum of Kshs 20,000/- title processing fees. Equally she was issued with a plot certificate No 1172 dated the 5/7/2008 and a title issued on the 4/2/2013.
27. I have perused the plot Share Certificate of the parties and note that the Plaintiff's parcel is described as LR NO 10901/36 while of the Defendant is LR No 10901/37. In cross examination the Plaintiff explained that it could appear that the plots are different. There was no explanation rendered by the Plaintiff for this state of affairs. DW1 explained that the land reference numbers referred to the mother titles before subdivision of the land.
28. In the Court of Appeal case of *Munyu Maina v Hiram Gathiba Maina* Nyeri Civil Appeal No. 239 of 2009 [2013] eKLR the Learned Judges stated 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.
29. It is the finding of the Court that the Plaintiff failed to explain the root of her title.
30. This case presence a scenario where a parcel of land has two titles. It is trite that duplication of titles is illegal in Kenya for the reason that for a title to enjoy indefeasibility of title and the protection of the law it must be defined and ascertained a number that is specific to that parcel of land and the general registration area.
31. Section 25 of the *Land Registration Act* provides as follows-

“Rights of a proprietor-

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.



- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
32. In this case the title of the Defendant was registered first before that of the Defendant and in accordance with Section 25 the proprietor enjoys all the rights interests appurtenant to it subject to limitations provided for in the Act.
33. Section 26 of Land Registration Act provides as follows-
- “(1) The Certificate of Title issued by the Registrar upon registration ... 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... 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
34. In this case the Plaintiff has not challenged the title of the Defendant on any of the grounds enumerated above. The case of the Plaintiff is that the Defendant has illegally and without any colour of right constructed a toilet and a permanent building on the suit land and sought a permanent injunction against the Defendant. The Court having found that the Plaintiff has not proven an interest in title to the land, the issue of illegal trespass is untenable and unproved.
35. The Land Registrar led unchallenged evidence that there are two registers subsisting over one parcel of land. What should the Court do in the circumstances? In the case of Gitwany Investment & 3 others v Commissioner of Land HCC No 114 of 2002 the Court held as follows;
- “The first in time prevails so that in the event such as this one whereby a mistake that is admitted, the commissioner of lands issues two titles in respect of the same parcel of land then if both are apparently are and on the face of them issued regularly and procedurally without fraud save for the mistake then the first in time must prevail.”
36. The Land Registrar led evidence that in the event of title duplication as in such a case, the allocating Company should be able to tell who between the two hold a valid title. Witness summons were issued against the chairman of Mahira but the same were dishonoured. In the circumstances then the Court must apply the equitable principles of first in time prevails.
37. Borrowing from the wisdom of the learned judges in the case of Gitwany (supra), the case of Wreck Motors Enterprises v Commissioner of Lands [1997]; Faraj Maharus v JB Martin Glass Industries & 3 Others [2003] unreported, where the Court held that in the absence of any fraud, the first in time prevails because by the time the second title is issued the land is already alienated. The title that was issued in the first instance retains the sanctity of title and the latter having been a hollow title cannot be allowed to stand.



38. Similarly, in the case of *Elijah Wachiuri Nduru v Timothy Gitthaiga Mwangi* [2016] where the Court relying on the decision of *Edward Warutere & 5 Others* [2011] the Court held;

“... an allocation by a land buying Company in the absence of fraud is considered sacrosanct and the allottee is considered to have proprietary rights over the plot”

39. In conclusion and weighing the case on the balance of probability, I find that the Plaintiff has not proved that she purchased the land from a member of Mahira Company, the vendor was a member of the Mahira having failed to produce any documents in support, she was issued with a title before payment of the title processing fees, no evidence that she paid the purchase price, the Plaintiff failed to carry out due diligence from the Company as at 2008 the land had been allocated to the Defendant in 2006 therefore there was no land available to be allocated to her as it had already been alienated and fully paid by the Defendant in 2006, unlike the transfer of land from Mahiira to the Defendant, the one of the Plaintiff was not executed by the Mahira Company meaning that no interest was conveyed to the Plaintiff at all.

40. Given the overwhelming evidence impugning the title of the Plaintiff the title of the Plaintiff cannot be left standing. It is hereby ordered cancelled pursuant to Section 80 and 26(1) (b) of the *Land Registration Act*. This is to avoid the same being used on unwitting citizenry for ulterior motives.

41. Final orders for disposal

- a) The Plaintiff's suit is dismissed.
- b) The title held by the Plaintiff be and is hereby cancelled.
- c) The costs of the suit shall be in favour of the Defendant.

42. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF MARCH, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Ndavuta HB Mburu Machua for Plaintiff

Waithira Mwangi for Defendant

Court Assistant – Lilian

