



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 170 OF 2008

LAWRENCE MUKIRI MUNGAI.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

DAVID MWAURA KARANJA.....2ND DEFENDANT

BENJAMIN KANYINGI NDUNG’U.....3RD DEFENDANT

SIMON KIRUTHI NDUNG’U.....4TH DEFENDANT

MICHAEL MWAURA NDUNG’U.....5TH DEFENDANT

RUTH WANJIKU IHURURU.....6TH DEFENDANT

JUDGMENT

The plaintiff’s case:

The plaintiff brought this suit on 11th April, 2008 through a plaint dated 10th April, 2008. The plaint was amended on 27th May, 2008 and further amended on 8th December, 2008. In his amended amended plaint dated 3rd December, 2008, the plaintiff averred that at all material times to this suit he was the registered owner of all that parcel of land known as Ruiru/Ruiru East Block 7/11 measuring 0.4000 hectares (hereinafter referred to as “the suit property”). The plaintiff averred that on or about the month of May, 2007, the 2nd, 3rd, 4th, 5th and 6th defendants fraudulently conspired with Thika Land Registry and caused the suit property to be transferred to their names. The plaintiff averred that the 2nd, 3rd, 4th, 5th and 6th defendants subsequently subdivided the suit property into eight portions namely, Ruiru/Ruiru East Block 7/276, 277, 278, 279, 280, 281, 282 and 283 (hereinafter together referred to as the “the subdivisions of the suit property” where the context so admits). The plaintiff averred that the suit property was transferred to the 2nd, 3rd, 4th, 5th and 6th defendants without his consent. The plaintiff averred that when the suit property was transferred from his name to the 2nd defendant, he was in possession of the original title deed for the suit property. The plaintiff averred further that the suit property was subdivided contrary to the conditions under which the title of the property was held.

The plaintiff averred that the transfer of the suit property to the 2nd, 3rd, 4th, 5th and 6th defendants was fraudulent, null and void. The plaintiff averred that he had suffered and would continue to suffer loss and damage as a result of being deprived of the suit property. The plaintiff sought judgment against the defendants jointly and severally for:

- a) A declaration that the plaintiff is the legal registered owner of the parcel of land known as Ruiru/Ruiru East Block 7/11 which is now subdivided into L.R Nos. Ruiru/Ruiru East Block 7/276,277,278,279,280,281,282 and 283.
- b) Cancellation of the title document purportedly issued to the 3rd, 4th, 5th and 6th defendants and reinstating the plaintiff as the rightful legal owner of the suit property.
- c) Eviction of the 3rd, 4th, 5th and 6th defendants from the suit property.
- d) Mesne profit.
- e) Cost of the suit and interest.

The 1st defendant's case:

The 1st defendant filed its statement of defence dated 11th September, 2008 on 24th September, 2008. The 1st defendant averred that the plaintiff's suit was statute barred by virtue of section 3 of Public Authorities Limitation Act, Chapter 39 Laws of Kenya. The 1st defendant averred further that the plaintiff's suit was brought in contravention of section 13A of the Government Proceedings Act, Chapter 40 Laws of Kenya. The 1st defendant denied the allegations of fraud pleaded against it. The 1st defendant averred that it was not served with a notice of intention to sue and that the court lacked jurisdiction to determine the suit in view of the objections raised regarding the competency of the suit.

The 2nd defendant case:

The 2nd defendant did not enter appearance and as such did not defend the suit.

The 3rd, 4th, 5th and 6th defendants' case:

In their defence dated 27th July, 2010, the 3rd, 4th, 5th and 6th defendants (hereinafter referred to as "3rd to 6th defendants") admitted that the suit property was subdivided into eight portions namely, Ruiru/Ruiru East Block 7/276, 277, 278, 279, 280, 281, 282 and 283(the subdivisions of the suit property). The 3rd to 6th defendants denied that the suit property was at all material times registered in the name of the plaintiff. The 3rd to 6th defendants averred that after the subdivision of the suit property as aforesaid, the title for the suit property was closed on 5th January, 2007 and the subdivisions of the suit property registered in their names.

The 3rd to 6th defendants averred that according to the register of the suit property, the plaintiff ceased to be the owner of the suit property on 14th September, 1996 when the property was registered in the name of the 2nd defendant. The 3rd to 6th defendants denied that they acquired the suit property fraudulently. The 3rd to 6th defendants averred that they were registered as the owners of the suit property on 9th November, 2005 after acquiring the property from the 2nd defendant who was the then registered owner for valuable consideration. The 3rd to 6th defendants averred that they were bona fide purchasers of the suit property valuable consideration without notice of the plaintiff's claim if any.

The 3rd to 6th defendants averred that the titles which they held in respect of the subdivisions of the suit property could not be impeached in the circumstances. The 3rd to 6th defendants averred further that before purchasing the suit property from the 2nd defendant who had advertised it for sale, they carried out a search on the register of the suit property at Thika land office. The 3rd to 6th defendants averred that prior to the advertisement of the suit property for sale, they did not know the 2nd defendant. The 3rd to 6th defendants averred that in the circumstances, there was no way in which they could have colluded with the 2nd defendant to deprive the plaintiff of the suit property. The 3rd to 6th defendants averred that they acquired the suit property at a consideration of Kshs 600,000/= after the same was advertised for sale in the Standard Newspaper of 11th and 12th July, 2005. The 3rd and 6th defendants averred further that the plaintiff's suit against them had abated as they were served with summons to enter appearance on 2nd July, 2010. The 3rd to 6th defendants urged the court to strike out the suit with cost.

The plaintiff filed a reply to the 3rd to 6th defendants' statement of defence on 2nd August, 2018 in which he joined issue with the 3rd to 6th defendants in their statement of defence save where the same consisted only of admissions. The plaintiff averred that a search

conducted in October, 2004 showed that he was still the registered owner of the suit property as at that date. The plaintiff averred further that the 3rd to 6th defendants were the authors of their own misfortune by failing to conduct proper due diligence thereby falling into the hands of fraudsters.

At the trial, the plaintiff, Lawrence Mukiri Mungai (PW1) told the court that he was a retired advocate of the High Court of Kenya. He testified that towards the end of 1980, senior staff at Kenyatta University got together and bought a parcel of land near the university to develop an estate to be known as Varsity view. He stated that he was one of the staff who were involved in the project and he purchased the suit property among others. He testified that he had the original title deed for the suit property which contained terms under which the property was granted to him. He produced a copy of the said title deed as P-Exh.1. He stated that the said title deed was in his name. The plaintiff stated that in 2003/2004, he had planned to develop the suit property and towards this end, he approached a bank for a loan. He stated that the bank wanted a confirmation that the suit property belonged to him. He carried out a search on 22nd October, 2004 which confirmed that he was the registered owner of the suit property.

The plaintiff stated that the bank also required the suit property to be valued. He stated that he instructed a valuer who valued the suit property on 13th November, 2004 at Kshs. 800,000/= . He produced a copy of a certificate of official of search dated 22nd October, 2004 as PExh. 2. The plaintiff testified that he did not pursue his loan application as he got money from other sources in the course of his work as an advocate. The plaintiff stated that a client came to his office in early January 2007 who wanted him to act for him in a sale transaction involving a parcel of land known as Ruiru/Ruiru East/Block 7/12 which was adjacent to the suit property.

He stated that since he knew most of the owners of the plots in the area where the suit property is situated, he met the owner of the Plot No. Ruiru/Ruiru East/Block 7/12 and inquired from him whether he had sold his plot which he denied. He stated that he became alarmed because the client who had come to his office had told him that he had noticed some structures on the suit property. He told court that this prompted him to carry out a second search on the register of the suit property and also to apply for a copy of the register. He stated that he found out from a copy of the register that there were several entries in the register of the suit property dating back to 1996. He stated that entries 1 to 5 were made when he acquired the suit property and that questionable dealings started with entry number 6 with the purported transfer of the suit property to David Mwaura Karanja, the 2nd defendant herein.

He stated that entry number 8 in the register concerned a transfer of the suit property to the 3rd to 6th defendants on 9th November, 2005 and the last entry was made on 5th January, 2007 when the title for the suit property was closed on subdivision which gave rise to new parcels Ruiru/Ruiru East Block 7/276,277,278,279,280,281,282 and 283(subdivisions of the suit property). The plaintiff produced a certified extract of the register for the suit property as PExh. 6. The plaintiff stated that after noting the anomaly in the register of the suit property, he reported the matter to the Chief Land Registrar and when he did not get assistance, he lodged a complaint with the police and subsequently with the defunct Kenya Anti-Corruption Commission. The plaintiff testified that he had never undertaken any transaction in respect of the suit property and termed the dealings mentioned above as fraudulent. He stated that he still had an original title deed for the suit property. He stated that he never sold the property and that the 2nd defendant who purportedly transferred the suit property to the 3rd to 6th defendants was not known to him. He testified that he did not manage to trace the 2nd defendant against whom an interlocutory judgement had already been entered after he failed to enter appearance following substituted service.

In cross-examination by the 1st defendant's advocate, the plaintiff testified that he purchased the suit property in 1988/89 while he was an employee of Kenyatta University at a consideration of Kshs. 50,000/= inclusive of stamp duty. He stated that he took possession of the property and marked its boundaries but he did not develop it. He stated that he discovered in 2007 that 2nd defendant had fraudulently transferred the suit property to his name and subsequently to the other defendants. He stated that he did not know the circumstances under which the suit property was transferred to the 2nd defendant.

In cross-examination by the 3rd to 6th defendants advocate, the plaintiff denied that he ceased owning the suit property in 1996. He stated that the entries in PExh. 6 were backdated and that he reported the matter to the police and lodged a formal complaint. He told court that he tried to trace the 2nd defendant and in the process got a report that the 2nd defendant did not exist since the owner of the Identity Card number indicated in PExh. 6 turned out to be someone else. The plaintiff told the court that he came to know that the suit property had been transferred to the defendants in early 2007. He stated that he filed this suit in 2008 because he took some time conducting investigations. He stated that he was also waiting for a response from the land registrar and the police with regard to the complaints he had lodged with them. He stated that the land registrar told him that he could not do anything without a court order. He denied that the suit was filed after inordinate delay.

The 1st defendant closed its case without calling any witness. The 3rd defendant, Benjamin Kanyingi Ndungu (DW1) testified on his own behalf and on behalf of the 4th, 5th and 6th defendants. DW1 told the court that the 4th and 5th defendants were his brothers while the 6th defendant was his sister in law. He told the court that he had authority to give evidence on their behalf. DW1 adopted his witness statement filed in court on 26th February, 2013 as part of his evidence in chief. He produced the 3rd to 6th defendants' bundle of documents filed in court on 26th February, 2013 as DExh.1. He testified that in July 2005, he saw an advert in the Standard Newspaper for a one-acre parcel of land at Ruiru that was on sale. The advert appeared in the said newspaper twice; on 11th and 12th July, 2005(See pages 1 and 2 of DExh.1). He called the number that appeared on the advert and the call was answered by the 2nd defendant from whom he inquired about the property. The 2nd defendant told him that the property was located at Githunguri, Ruiru near Lewis Wellington Hospital. They agreed to meet at the gate of the hospital where he was to be shown the property. The 2nd defendant showed him the original title deed for the suit property and allowed him to take a copy.

The 2nd defendant also pointed out the property to him on the ground and he was able to identify its beacons. He had not met the 2nd defendant prior to that meeting. He thereafter carried out a search on the register of the suit property on 26th July, 2005. He was issued with a certificate of official search on 26th July, 2005(See page 3 of DExh.1). He paid Kshs. 100/= for the search and a receipt was issued in the name of the 2nd defendant as he was the registered owner of the suit property. The search confirmed that the 2nd defendant was the registered owner of the suit property. He thereafter negotiated with the 2nd defendant on the purchase price which was agreed at Kshs. 600,000/=. DW1 stated that he was not able to raise the purchase price alone. Before he committed himself, he inquired from the 2nd defendant whether his family had consented to the sale. The 2nd defendant informed him that his wife was deceased and that he had a daughter who was a minor. The 2nd defendant gave him copies of the death certificate and birth certificate for his deceased wife and minor daughter respectively (See pages 5 and 6 of DExh.1).

On 4th October 2005, they entered into an agreement for sale (See pages 7 and 8 of DExh.1). He thereafter bought a banker's cheque for Kshs. 590,000/= (See page 9 of DExh.1) which he gave to the 2nd defendant on account of the purchase price for the property. The balance in the sum of Kshs. 10,000/= was paid in cash. DW1 stated that they were represented in the transaction by an advocate. After the payment of the purchase price, they went to the Land Control Board (LCB) for consent. At the LCB, the 2nd defendant appeared with his minor daughter and they were given the consent. DW1 stated that he did not have the consent in his possession. He stated that some of the documents relating to the suit property were in the custody his brother one, John Karanja who was the 6th defendant's husband. The said John Karanja (DW2) was carjacked on 1st September, 2007 in the course of which he lost a number of documents. Among the documents his brother lost in the incident were the LCB consent to transfer the suit property from the 2nd defendant to the 3rd to 6th defendants, original agreement for sale between the 2nd defendant and the 3rd to 6th defendants and a copy of the title deed for the suit property that was given to them by the 2nd defendant. The carjacking and the loss of the said documents were reported to the police. Some of the documents that got lost were recorded in the report to the police. A copy of the Police Abstract issued in respect of the carjacking incident is at page 11 of the DExh.1.

DW1 stated that the 3rd to 6th defendants did not acquire the suit property fraudulently. He stated further that he had not met the 2nd defendant prior to the transaction and as such he could not have colluded with him to deprive the plaintiff of the property. He stated that when they bought the suit property the same was in the name of the 2nd defendant. He reiterated that the plaintiff ceased to be the owner of the suit property in 1996 when the property was registered in the name of the 2nd defendant. He urged court to dismiss the plaintiff suit.

In cross-examination by the 1st defendant's advocate, DW1 told court that initially he did not know the land that was the subject of the advert by the 2nd defendant. He stated that the instrument of transfer of the property from the 2nd defendant to the 3rd to 6th defendants and the Stamp Duty payment slip were among the documents that got lost during the carjacking incident although they were not mentioned in the Police Abstract. He stated that he obtained consent of the Land Control Board(LCB) to subdivide the suit property and that the said consent was among the documents that got lost during the carjacking incident. He stated that he made attempts to trace the 2nd defendant by doing a search at the Registrar of Persons. He stated that the particulars that he obtained matched that of the 2nd defendant.

In cross examination by the plaintiff's advocate, DW1 testified that he met the 2nd defendant for the first time when he called him after the advertisement of the suit property in the newspaper. He stated that he called the 2nd defendant a few days after the advert on the number that appeared in the advertisement. He stated that he did not know Mohamed Salat and that when he called the number given in the advert, it was the 2nd defendant who picked the call. He denied that he had picked a random advert to use for the purposes of covering his fraud. He testified that the 2nd defendant told him that he had purchased the suit property from the plaintiff but he did show him proof of purchase. He stated that he appeared before the LCB with the 2nd defendant, his minor daughter and the other defendants on 4th October, 2005. He stated that as at the time of the carjacking, the plaintiff had already visited the suit

property. He stated that he prepared the transfer and lodged the same for registration in person.

In re-examination, DW1 stated that when the carjacking took place, this suit had not been filed and as such it was not stage managed. He added that the carjacking incident was reported on 1st September, 2007; the same day it happened.

The 3rd to 6th defendants' next witness was, John Karanja Ndung'u (DW2). DW2 told court that the 3rd to 5th defendants were his brothers while the 6th defendant was his wife. He stated that on 1st September, 2007, he was to accompany DW1 and his wife to a wedding in Nyahururu. They were to use his motor vehicle registration No. KAX 799M. When he went to DW1's house to pick them, they were not ready and he decided to go and fuel the car. After leaving DW1's home, he was accosted by a gang with guns who got into his car and took control of the same. He was pushed to the side and harassed as the gang ransacked the car. During the incident, he lost an envelope that had documents that he was taking to DW1 and his ATM card. The thugs dropped him at Kahawa Sukari and gave him back his car. He stated that he reported the incident to the police on the same day but collected the Police Abstract later when it was requested by the insurance. He stated that he lost various documents in the incident including copies of; a title deed, agreement for sale, LCB consent, application for the consent and receipts for payment made in respect thereof. He stated that all the documents that had been used during the subdivision of the suit property were in his custody and were in the envelope that got lost. He denied that he faked the carjacking to defeat the plaintiff claim. He stated that he obtained the abstract for insurance purposes as he had made a claim in respect of the phones that also got lost during the incident.

In cross examination by the 1st defendant's advocate, he stated that the envelope that got lost had many documents. He reiterated that the documents that got lost included; a title deed, receipts, application for titles, instrument of transfer and agreement for sale. He reiterated that he obtained the Police Abstract for the purposes of the insurance claim that he had made in respect of his phones.

In cross examination by the plaintiff advocate, he stated that he was an employee of the Kenyan Alliance Insurance Company Limited when he made the claim and was compensated. He denied that he manufactured the insurance documents in order to assist his wife in the suit.

The plaintiff's submissions:

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 29th October, 2018. The 1st defendant filed his submissions on 25th January, 2019 while the 3rd to 6th defendants filed their submissions on 15th January, 2019.

The plaintiff submitted that his title to the suit property was indefeasible. He relied on sections 27 and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) which have been modified and reproduced in section 26 of the Land Registration Act, 2012. The plaintiff submitted that a certificate of title is conclusive evidence of proprietorship and that he was entitled to protection of his title to the suit property as the indefeasible owner thereof.

The plaintiff submitted that he never entered into any transaction with the 2nd defendant. The plaintiff submitted that the mere entry of the name of the 2nd defendant in the register of the suit property as the owner thereof without any documentation to support the entry is not sufficient to rebut his claim of fraud and corruption on the part of the 2nd defendant. The plaintiff relied on the case of Samuel Muigai Kariuki (suing as the legal representative of the estate of the late David Kariuki Mungai v Francis Mwangi Muchoki [2018] eKLR where the court ordered the cancellation of registration in similar circumstances.

On whether the 3rd to 6th defendants were innocent purchasers for value without notice, the plaintiff relied on sections 109 and 112 of the Evidence Act, Chapter 80 Laws of Kenya and submitted that the burden was on the 3rd to 6th defendants to prove that they purchased the suit property in good faith without notice of the defect in the 2nd defendant's title. The plaintiff submitted that the 3rd to 6th defendants did not place before the court sufficient evidence on how they acquired the suit property. The plaintiff submitted that although the 3rd to 6th defendants claimed that the crucial documents got lost during the carjacking of DW2, the Police Abstract that was produced in evidence by the 3rd to 6th defendants regarding the documents that got lost during the incident did not mention these documents. The plaintiff submitted that no attempt was made by the 3rd to 6th defendants to obtain provisional copies of the documents that got lost from the land registry or from the advocate who was involved in the transaction. The plaintiff relied on the case of Arthi Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR in which the court restated the standard of proof of fraud and defined a bona fide purchaser. The plaintiff submitted that he had established that the 3rd to 6th defendants were not bona fide purchasers of the suit property for value without notice. The plaintiff relied on the case of Elijah

Makeri Nyangwara v Stephen Mungai Njunguna & Another [2013] eKLR in which the court held that under section 26(1)(b) of the Land Registration Act, 2012, where a certificate of title is acquired illegally, unprocedurally or through a corrupt scheme, it is not necessary that the title holder be a party to such illegality, impropriety or corrupt scheme before the title can be impeached. The plaintiff submitted that in the absence of evidence of how the title of the suit property passed from the plaintiff to the 2nd defendant and how the 3rd to 6th defendants acquired their title from the 2nd defendant and in view of the fact that the plaintiff still has in his possession the original title for the suit property, the only conclusion that can be drawn is that the 3rd to 6th defendants acquired their titles illegally and fraudulently.

The plaintiff submitted that under section 32(1) (i) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and section 30(2) (a) of the Land Registration Act, 2012 only one certificate of title or certificate of lease shall be issued in respect of one parcel of land. The plaintiff submitted that since his title was earlier in time, it must prevail over the titles held by 3rd to the 6th defendants. In support of this submission, the plaintiff relied on the cases of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR and Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General and 4 others [2017] eKLR.

The plaintiff submitted further that the title that he held carried with it possession and even though the 3rd defendant was occupying a portion of the suit property, such occupation amounted to trespass and he should be ordered to give vacant possession. In support of this submission, the plaintiff relied on the case of Gitwany Investments Limited v Tajmal Limited & 3 others (supra). In conclusion, the plaintiff submitted that he had proved fraud against the 2nd and the 3rd to 6th defendants. The plaintiff submitted further that he had demonstrated that the 3rd to 6th defendants were not innocent purchasers for value without notice and that their interest in the suit property was acquired illegally, unprocedurally or through a corrupt scheme and as such liable for cancellation. The plaintiff urged the court to grant the reliefs sought in the amended amended plaint dated 3rd December, 2008. On mesne profits, the plaintiff prayed for an award of Kshs. 5,000,000/= which he submitted was based on the current market rent for the property and the fact that the 3rd to 6th defendants had occupied the suit property since 2005.

The 1st defendant's submissions:

The 1st defendant's submissions revolved around four issues. On whether the suit property was fraudulently transferred from the plaintiff to the 2nd defendant, the 1st defendant submitted that the alleged transfer which was not supported by any document was unprocedural, fraudulent and ought to be cancelled. In support of this submission, the 1st defendant relied on sections 26(1) and 80(1) of the Land Registration Act, 2012. The 1st defendant submitted that if indeed the 2nd defendant acquired the suit property lawfully from the plaintiff, he would have defended the suit and placed evidence before the court in proof of the legality of his acquisition of the property. The 1st defendant submitted that the 3rd to 6th defendants failed to produce a copy of the title of the suit property in the name of the 2nd defendant and that in their names. The 1st defendant submitted that it was not clear from the evidence adduced by the 3rd to 6th defendants as to which of the titles got stolen during the carjacking; whether it was a copy of the title for the suit property in the name of the 2nd defendant that was surrendered to the land registry when the property was transferred to the 3rd to 6th defendants or a copy of the title for the suit property that was issued to the 3rd to 6th defendants when the property was registered in their names.

On whether the 3rd to 6th defendants were innocent purchasers for value without notice, the 1st defendant submitted that failure by the 3rd to 6th defendants to produce in evidence crucial documents to support the legality of the transfer of the suit property from the 2nd defendant to them raises eyebrows on the authenticity of the transfer and supports the plaintiff's contention that they either colluded with the 2nd defendant to defraud the plaintiff or were negligent in the manner they handled the transaction. The 1st defendant relied on the case of Esther Ndegi Njiru & Another v Leonard Gatei (2014) eKLR where it was held that a title obtained unprocedurally then transferred to an innocent purchaser for value is impeachable under section 26(1) (b) of the Land Registration Act, 2012 and that in this era of rampant cases of fraudulent land transactions, it was necessary for those involved in land transactions to carry out due diligence beyond conducting a search on the register of the property. The 1st defendant submitted that the 3rd to 6th defendants had failed to prove that they were innocent purchasers for value without notice of the defect in the 2nd defendant's title.

In conclusion, the 1st defendant submitted that the land registrar was not fraudulent in effecting the transfer of the suit property from the plaintiff to the 2nd defendant and subsequently from the 2nd defendant to the 3rd to 6th defendants. The 1st defendant submitted that the land registrar relied on the documents that were presented to him by the 2nd to 6th defendants and believing on their authenticity proceeded to register the transfers. The 1st defendant urged the court to dismiss the plaintiff's suit as against the 1st defendant and to allow the claim as against the other defendants.

The submissions by the 3rd to 6th defendants:

The 3rd to 6th defendants addressed five issues. On whether the plaintiff was the registered owner of the suit property as at 9th November 2005 when the property was transferred to the 3rd to 6th defendants, they submitted that the search that was carried out before the 3rd to 6th defendants purchased the suit property from the 2nd defendant showed that the 2nd defendant was the registered proprietor of the suit property. The 3rd to 6th defendants submitted that when the suit property was transferred to them, the plaintiff had ceased to be the registered proprietor of the suit property.

On the issue as to whether the 3rd to 6th defendants were bona fide purchasers for value without notice, the 3rd to 6th defendants cited sections 27(a) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) which has been reproduced in section 24(a) of Land Registration Act, 2012 and submitted that the registration of the suit property in the name of the 2nd defendant vested upon him the absolute ownership of the property. The 3rd to 6th defendants submitted that there was nothing in the register of the suit property to show that the title was under challenge or that it had been fraudulently acquired. The 3rd to 6th defendants also cited section 39(1) of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) which provides that that no person dealing or proposing to deal for valuable consideration with a proprietor shall be required in any way; to inquire or ascertain the circumstances or consideration for which that proprietor was registered; to see the application of any consideration or any part thereof or to search any other register apart from the Registered Land Act.

The 3rd to 6th defendants submitted that notwithstanding the provisions of section 39(1) of the Registered Land Act aforesaid, the 3rd defendant (DW1) conducted adequate due diligence on the suit property before the same was purchased by the 3rd to 6th defendants. The 3rd to 6th defendants submitted that they paid Kshs. 600,000/= for the suit property and that the plaintiff's contention that conducting an official search alone was not sufficient had no basis. The 3rd to 6th defendants submitted that they purchased the suit property in good faith without notice of fraud. The plaintiff relied on the case of Katende v Haridas and Company Ltd. [2008] 2 E.A. 173 for the definition of a bona fide purchaser and the instances when a purchaser can successfully rely on the *bona fide* doctrine. The 3rd to 6th defendants submitted that they were bona fide purchasers of the suit property.

On whether the 3rd to 6th defendants acquired an indefeasible title over the suit property, the 3rd to 6th defendants relied on section 28 of Registered Land Act, Chapter 300 Laws of Kenya (now repealed) (hereinafter referred to only as "the RLA") now reproduced in section 25 of the Land Registration Act, 2012 and submitted that their titles were protected by law and that the same could only be cancelled in accordance with the provisions of section 143 of the RLA now reproduced in section 80 of the Land Registration Act, 2012.

The 3rd to 6th defendants submitted that they had indefeasible titles and that the same were conclusive evidence of ownership of the suit properties as provided for under section 26 of the Land Registration Act, 2012. In support of this submission, the 3rd to 6th defendants cited the Court of Appeal case of Charles Karathe Kiarie & 2 Others v the Administrators of the estate of John Wallace Mathare (deceased) & 5 others [2013] eKLR where the court expounded on the Torren system of land registration. The 3rd to 6th defendants submitted that this decision was in accord with section 39(1) RLA.

On whether the plaintiff was entitled to the reliefs sought, the 3rd to 6th defendants submitted that the plaintiff had failed to prove that they participated in the alleged fraud by the 2nd defendant and that, since their title over the suit property was protected by the law, the plaintiff was not entitled to the reliefs sought. In support of this submission, the 3rd to 6th defendants relied on the cases of David Peter Kiengo & 2 Others v Kariuki Thuo [2012] eKLR; Zebak Limited v Nadem Enterprises Limited [2016] eKLR; Charles Karathe & 2 Others v the Administrators of the estate of John Wallace Mathare (deceased) & 5 others (supra) and Denis Noel Mukhulo and Another v Elizabeth Murungari Njoroge & Another [2018] eKLR.

On the issue of costs, the 3rd to 6th defendants submitted that the plaintiff should bear the cost of the suit as he had failed to prove his claim. On the authorities cited by the plaintiff, the 3rd and 6th defendants distinguished the same and submitted that the same were not relevant to the issues at hand. They urged the court to dismiss the plaintiff's suit.

Determination:

The parties did not agree on the issues to be determined by the court. In their submissions, each party framed its own issues. From the pleadings, I am of the view that the following are the main issues that arise for determination in this suit:

1. Whether the 2nd defendant acquired the parcel of land known as L.R No. Ruiru/Ruiru East Block 7/11 (“the suit property”) from the plaintiff lawfully and as such was the lawful registered owner thereof at all material times.
2. Whether the 3rd to 6th defendants acquired a valid title over the suit property from the 2nd defendant.
3. Whether the 3rd to 6th defendants are trespassers on the suit property.
4. Whether the plaintiff is entitled to the reliefs sought in the amended amended plaint.
5. Who is liable for the costs of the suit"

Whether the 2nd defendant acquired the parcel of land known as L.R No. Ruiru/Ruiru East Block 7/11 (“the suit property”) from the plaintiff lawfully and as such was the lawful registered owner of the property at all material times.

The plaintiff had contended that the 2nd defendant acquired the suit property fraudulently in that the plaintiff neither sold nor transferred the suit property to the 2nd defendant neither did he receive any payment from him. The plaintiff contended that he still held the original title deed for the suit property in his name.

In Black’s Law Dictionary 9th Edition at page 731 fraud is defined as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

In the case of Railal Gordhanbhai Patel v Lalji Makanji [1957] E.A 314, the court held that allegations of fraud must be strictly proved to a standard which is more than a balance of probabilities but not beyond any reasonable doubt. The court stated as follows at page 317:

“Allegation 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.”

From the evidence adduced by the plaintiff, I am satisfied that the plaintiff has established that the 2nd defendant acquired the suit property fraudulently. No evidence was placed before the court as to how the suit property came to be registered in the name of the 2nd defendant on 14th October, 1996. Apart from the entry of the name of the 2nd defendant in the register of the suit property, no other evidence was placed before the court linking the 2nd defendant to the suit property. No sale agreement was produced between the plaintiff and the 2nd defendant in relation to the suit property. There was also no evidence that the suit property was transferred by the plaintiff to the 2nd defendant or of the title deed that was issued to the 2nd defendant after it was registered as the owner of the suit property. The 3rd to 6th defendants led evidence that they had in their possession a copy of the title deed for the suit property that was issued to the 2nd defendant but the same got lost when DW2 was carjacked on 1st September, 2007. That may be so. However, when the 2nd defendant transferred the suit property to the 3rd to 6th defendants, he ought to have surrendered the original title deed to the land registrar for cancellation. I am in agreement with the plaintiff’s submission that if at all such title deed existed, the 3rd to 6th defendants should have endeavored to obtain a copy thereof from the land registry. It is also questionable how the 2nd defendant could have been registered as the proprietor of the suit property on 14th October, 1996. A search conducted on the register of the suit property on 22nd October, 2004 that was produced in evidence by the plaintiff as exhibit 2 showed that the plaintiff was the registered proprietor of the suit property as at that date. The plaintiff’s claim that the registration of the 2nd defendant as the owner of the suit property on 14th October, 1996 was backdated to cover the 2nd defendant’s fraud is not far-fetched. The land registry at Thika must no doubt have been involved in this act of fraud.

The 2nd defendant was served with summons to enter appearance but failed to do so. Interlocutory judgment was entered against him on 21st December, 2009. The averments in the amended amended plaint made against the 2nd defendant were not controverted. The same applies to the evidence that was tendered by the plaintiff as against him. From the totality of the evidence before the court, I am satisfied that the plaintiff has discharged the burden of proof of fraud against the 2nd defendant. It is my finding therefore that the 2nd defendant acquired the suit property fraudulently.

Whether the 3rd to 6th defendants acquired a valid title over the suit property from the 2nd defendant.

I have already held that the 2nd defendant acquired the suit property from the plaintiff fraudulently. The effect of that finding is that the 2nd defendant did not hold a valid title to the suit property that he could pass to the 3rd to 6th defendants or to any other person. I am in agreement with the 3rd to 6th defendants that there may have been no direct evidence tendered by the plaintiff linking them to the fraudulent acquisition of the suit property by the 2nd defendant who ultimately sold the property to them. However, lack of documentation on how the suit property was transferred and registered at the land registry in favour of the 3rd to 6th defendants leaves a lot of questions in the mind of the court regarding the innocence of the 3rd to 6th defendants in the transaction. The 3rd to 6th defendants did not give convincing explanation on the absence of the said crucial documents. The Police Abstract that they relied on was not of much assistance as it did not have all the documents which the 3rd to 6th defendants claimed to have been stolen during DW2's carjacking. I have also noted from the evidence on record that DW2 obtained the abstract after a dispute had arisen between the plaintiff and the 3rd to 6th defendants.

The foregoing notwithstanding, the 2nd defendant having acquired the suit property fraudulently and illegally, his title was null and void. A null and void title cannot confer valid interest in land. The 2nd defendant did not therefore have a valid title over the suit property that he could convey to the 3rd to 6th defendants. The title that was transferred by the 2nd defendant to the 3rd to 6th defendants was equally invalid, null and void with the result that the 3rd to 6th defendants acquired no interest in the suit property. I am supported in this finding by the decision in the case of West End Butchery Ltd. v Arthi Highway Developers Ltd. & 6 others [2012] eKLR that was confirmed by the Court of Appeal in Arthi Highway Developers Ltd. v West End Butchery Ltd. & 6 others [2015] eKLR, where the court (Nyamweya J.) stated as follows:

“It is in my view unjust and inequitable that an innocent proprietor can be dispossessed of his or her legal title to land through the acts of a fraudster, and this cannot have been the intention of section 23 of the Registration of Titles Act. I am persuaded by the statements made in Alberta Mae Gacie V Attorney General & 4 Others (2006) eKLR where this court (Hon. Justice Onyancha) stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

Likewise, in the case of Iqbal Singh Rai vs Mark Lecchini and the Registrar of Titles, Civil Case No 1054 of 2001, this court (Hon. Justice Muchelule) held as follows:

“At the time when the 1st Defendant sought to buy the land in dispute the registered proprietor was the Plaintiff. There is no dispute that he never dealt with the Plaintiff in the transaction that followed. The person with whom he dealt was not the registered proprietor of the land in dispute. The person was a fraud who had no claim whatsoever to the land. The consequence is that the 1st Defendant was a purchaser who did not deal with the registered proprietor of the land. Section 23(1) protects ‘title issued to a purchaser upon the transfer or transmission by the proprietor thereof’. The 1st Defendant did not obtain a transfer from the Plaintiff who was the registered proprietor. He obtained a transfer from a fraudulent person who had no claim to the land. He cannot I find invoke the provisions of section 23(1) to say he obtained an indefeasible title.”

It is thus my finding that similarly, in this case the 1st Defendant did not obtain a transfer from the registered proprietor, but from fraudulent persons namely the 2nd and 3rd Defendants who had no claim to the suit property. The 1st Defendant cannot therefore invoke indefeasibility of title and the transfer to him by the 2nd and 3rd Defendants was null and void”.

The 3rd to 6th defendants had contended that their title was issued under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) (the RLA) as such the cases that I have cited above do not apply to them. The 3rd to 6th defendants contended that the title that they acquired from the 2nd defendant was protected by section 39 (1) of the RLA. The 3rd to 6th defendants argued that since they were dealing with registered land, they were required to do no more than carry out a search on the register of the suit property. I am not in agreement with this argument. In my view, section 39(1) of the RLA only protects persons dealing with proprietors of registered land. In this case, the 2nd defendant was not the proprietor of the suit property. He was a fraudster who held no valid title

over the suit property. The lawful proprietor of the suit property was the plaintiff who held original valid title deed in respect of the property. A person dealing with a fraudster with a fraudulent title cannot enjoy the protection accorded by section 39 of the RLA.

The 3rd to 6th defendants had also contended that they were innocent purchasers of the suit property for value and as such their title over the suit property was indefeasible. In the case of Arthi Highway Developers Ltd. v West End Butchery & 6 others [2015]eKLR (supra), the court stated as follows:

“ 67.

Furthermore, the protection accorded by law in the event of fraud, is to a “bona fide purchaser without notice” and even then, only against equitable interests. We have seen the definition of “bona fide purchaser” from Black’s Law Dictionary and from the Katende case (supra). The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell’s Principles of Equity (supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.

The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B’s right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser’s conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails.

It is also stated therein that “the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests”. So that, even if the issue of bonafide purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.”

The plaintiff held a legal title over the suit property. It follows therefore that even if the 3rd to 6th defendants were innocent purchasers of the suit property for value without notice of the defect in the 2nd defendant’s title as alleged, the 3rd to 6th defendant’s right over the suit property cannot have priority over the plaintiff’s right to the same property which was first in time.

In the premises, it is my finding that the 3rd to 6th defendants did not acquire a valid title over the suit property from the 2nd defendant. The 2nd defendant had no valid title and as such had none that he could convey to the 3rd to 6th defendants.

Whether the 3rd to 6th defendants are trespassers on the suit property.

Trespass is defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page. 923, paragraph. 18-01. From what I have held above, the plaintiff is the lawful proprietor of the suit property. As was held in the case of Gitwany Investment Limited v Tajmal Limited (supra) that was cited by the plaintiff in his submissions, the title held by the plaintiff carries with it legal possession of the suit property. It does not matter therefore that the plaintiff is not in actual possession of the property. He can still maintain an action for trespass. Having found that the 3rd to 6th defendants have no valid title over the suit property, it follows that they also have no right to enter and remain on the property. The 3rd to 6th defendants’ occupation of the suit property is therefore unjustified in law. Since they are in occupation of the suit property without any lawful justification, they are trespassers on the property.

Whether the plaintiff is entitled to the reliefs sought in the amended amended plaint.

I am satisfied that the plaintiff has proved his claim against the defendants on a balance of probabilities and that he is entitled to the reliefs sought in the amended amended plaint dated 3rd December, 2008. The 3rd to 6th defendants had contended that the plaintiff is not entitled to the rectification of the register of the suit property since such rectification can only be done under section 143 of the

RLA which they claimed the plaintiff had not satisfied. I am of the view that the plaintiff has satisfied the conditions for rectification of the register of the suit property. The plaintiff has established that the registration of the 2nd defendant as the owner of the suit property was obtained by fraud. The registration of the 3rd to 6th defendants as proprietors of the suit property was also tainted with fraud as they acquired a fraudulent title from the 2nd defendant. In my view, section 143 (2) of the RLA does not apply to the 3rd to 6th defendants. As I have stated earlier, the 3rd to 6th defendants did not acquire any title over the suit property as the 2nd defendant who purported to sell the property to them had no legal or equitable interest in the property. In any event, I am not satisfied that the 3rd to 6th defendants conducted adequate due diligence before purchasing the suit property from the 2nd defendant and as such through their negligence they aided the 2nd defendant in perpetuating the fraud against the plaintiff. On the plaintiff's claim for mesne profits, the plaintiff had submitted that it was entitled to a sum of Kshs. 5,000,000/=. The plaintiff submitted that the said amount was based on the current rent for the suit property and the fact that the 3rd to 6th defendants had been in occupation of the suit property from the year 2005. I agree that the plaintiff has not used the suit property for several years and that the 3rd to 6th defendants have been deriving economic benefit therefrom. The plaintiff is in the circumstances entitled to compensation for loss of use of his land. The plaintiff did not however place any material before the court on how the said sum of Kshs. 5,000,000/= claimed was arrived at. I will award the plaintiff what I consider to be reasonable compensation in the circumstances.

Who is liable for the costs of the suit"

Costs is at the discretion of the court. As a general rule, costs follow the event unless ordered otherwise by the court for good reason. In this case, the plaintiff has proved his claim against the defendants. The plaintiff is therefore entitled to the costs of the suit. In conclusion, I hereby make the following orders;

1. Judgment is entered for the plaintiff against the defendants jointly and severally in terms of prayers (a), (b), and (c) of the amended amended plaint dated 3th December, 2008.
2. I award the plaintiff mesne profits as against the 2nd to 6th defendants in the sum of Kshs. 500,000/= together with interest from the date hereof until payment in full.
3. The 3rd to 6th defendants shall vacate and hand over possession of the suit property and its subdivisions to the plaintiff within 120 days from the date hereof in default of which the plaintiff shall be at liberty to apply for warrants for their forceful eviction from the properties.
4. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 19th day of December 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Kabuthi h/b for Mr. Mureithi for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Ms. Maina h/b for Mr. Kimondo for the 3rd to 6th Defendants

Ms. C. Nyokabi-Court Assistant



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